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San
Diego

**Regional
Chamber**

150 YEARS

Guidance for **RETURNING TO WORK**





Beyond the Blueprint & Guidance for San Diego Businesses Returning to Work

The prospect of returning to our businesses to resume in-person work is exciting, but comes with significant questions from both the employer and employee. At the San Diego Regional Chamber of Commerce, we know that our members are doing everything they can to help keep our region safe, including trying to stay up to speed on the changing information and guidelines that come from the county, state, and federal levels.

We hope the information included here can answer some of your questions. But if you need more support in thinking about your reopening, feel free to contact a member of the Chamber team.

RETURNING TO THE OFFICE

Returning to the normalcy of an office setting will come with new features as a result of COVID. Guidance still requires masks and social distancing, which until June 15 are still required in the state of California.

As you think about when to have staff return, a decision to do so may be met with mixed emotions. An employer *can* require their staff to return to the office, but there are some key things to keep in mind which we will cover below. The guidance that employers will receive and need to respond to is almost guaranteed to change (due to both regulations and lawsuits), so be sure to check in frequently. Some rules are also temporary by design, meaning that we expect relaxing or reverting to pre-pandemic rules soon. For example, the ability to screen the temperatures of employees is generally prohibited because it's technically a medical exam, but due to COVID and its more common symptoms, screening is currently commonplace.

CONSIDERATION POINTS: Requiring the vaccine

An employer can require their employees to receive a COVID-19 vaccine, which many have opted to do, citing the safety of their workforce and customers. The [EEOC offers some updated guidance](#) for employers requiring vaccinations while navigating protections under the ADA, GINA, and Title VII. However, some are opting to wait until the FDA provides general approval instead of the emergency use authorization (EUA) currently in place. Examples of employers that are requiring the vaccine (that are not healthcare providers, which are generally in a different category), include the Cal State and UC systems, Harvard University and others.

Before you require vaccines, you will need to determine whether vaccination is necessary for employment broadly, or if it will only be required for those returning to office or worksites. Your next steps should be to work with your legal counsel and HR team to create a clear letter/email/memo communicating the new vaccine policy, and create the policy itself.



Beyond the Blueprint & Guidance for San Diego Businesses Returning to Work

- You can find a “model mandatory vaccine policy” [here](#) or [here](#).
- Information about communicating the importance of the vaccine, provided by the CDC, is [here](#)

If you decide to mandate the vaccine, you’ll want to be careful about how you communicate that. First, any required testing or vaccination will require the employee to be compensated for their time doing so according to California’s [Department of Industrial Relations](#). Secondly, it’s recommended that you only ask if they’ve been vaccinated and/or ask them to provide proof. If they provide proof, the employer needs to treat documentation like a medical document, meaning being very careful about the security of the information. An employer should also be clear that no *additional* information should be volunteered. This could make an employer liable for asking for medical information, which is not allowed. If an employer wanted to streamline the process for giving proof, some companies have created trackers that are similar to what is being used for airline travel. If this is of interest to you, the Chamber team recommends you contact CLEAR*, who can help you explore such a program. The EEOC recommends that employers are mindful that some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccine. Employers may need to respond to concerns that a vaccine requirement may have a disproportionate impact on, or excludes, employees based on their race, color, religion, sex or national origin under Title VII.

If an employee refuses the vaccine, the guidance has only recently been updated. The EEOC offers some [updated guidance on what an employer should do](#) if an employee refuses the vaccine. An employee *can* refuse a vaccine if they do so because of medical or religious reasons, including pregnancy. Employers should refrain from asking “why” or other probing questions, as again it could stray into legal concerns that are protected by the Americans with Disabilities Act. Instead, lay out clearly when you outline a vaccine requirement that those exemptions do exist. Should someone claim either exemption, an employer has the option of asking for further documentation (i.e. a doctor’s note or further discussion about the religious complications), or simply accepting that. Note that an individual requesting an accommodation does not need to specifically cite the ADA or use the phrase “reasonable accommodation.” This can get very murky very quickly, and any employer who finds them self in this situation should consult counsel.

Because the vaccine is still in the EUA period, there are legal questions about mandates, since the EUA period does allow for individuals to refuse the vaccine. However, the Equal Employment Opportunity Commission, EEOC, has provided early indication that employer-required mandates are acceptable. (There are only two current cases pending regarding an employer-required vaccine. One from New Mexico, and one from educators in California, which cite the EUA issue).



Beyond the Blueprint & Guidance for San Diego Businesses Returning to Work

Another way to approach this would be to consider “**strongly encouraging**” vaccines. This comes with significantly less assurances, but also may provide relief to an employer who is concerned about the legal complications at hand. Remember, should you choose to require people to return to the office, at this point there is no legal justification for an employee citing coworkers’ vaccination status as a reason to, or not to, return.

There are a number of programs for employers that are proactively supporting employees being vaccinated. The Chamber’s own [Time To Vaccinate](#) campaign would love to highlight you, and you may be able to receive up to \$500 in tax credits per employee for giving paid leave to get vaccinated. The IRS fact sheet on that program is [here](#). If you’re unsure what an incentive might look like for your employees to get vaccinated, some employers have created programs to give their staff additional paid time off, or cash rewards of \$100, just to give you some examples.

And finally, you can work with the County of San Diego to [host a vaccination](#) event at your worksite to help encourage vaccinations for your team.

PHYSICAL RETURN TO THE OFFICE OR WORKPLACE

A successful return to the office will depend on transparency with your team, frequent check-ins to the county, state and federal guidelines, and above all, flexibility.

As stated above, **employers can require that their staff return to the office**. Many companies are opting for hybrid models with some expanded telework options while others are providing some voluntary return programs; meaning that only those that wish to return will, while those that prefer telework will be able to do so. There is no one-size-fits-all solution for the business community, but there are some practical points for employers at this time.

When determining a return to work strategy, note that there are those people who have high-risk conditions for whom telework or even a leave of absence may be necessary. The CDC defines people who are at high-risk of getting COVID to be those with cancer, chronic kidney disease, COPD, Down syndrome, heart conditions, obesity, pregnancy, Sickle cell disease, and Type-2 diabetes. This population cannot be excluded from returning due to these medical reasons, but may be more likely to request a “reasonable accommodation” like continued telework. Simply being afraid of contracting COVID is not a sufficient reason for someone to request not to return to the office. Determining what a reasonable accommodation would be is a two-way street, meaning that the employer is not required to simply accept an employee working from home, and should work with that employee to determine the best course. However, when an employer grants such requests, they would be wise to be consistent in applying that decision making rationale across the board.



Beyond the Blueprint & Guidance for San Diego Businesses Returning to Work

Before you determine you're going back to the office, and your announcement has been made to staff the employer must create a [safe reopening plan](#), as required by the County of San Diego. A prevention program, as required by CalOSHA's emergency standards is also required, but you can find a model program that simply requires editing included in this [fact sheet](#).

You'll also need to purchase the appropriate PPE for staff, as you are responsible for providing that to your team (more on that below). In addition, you must train your team on limiting the spread of COVID.

Upon returning, employers will likely have decisions to make about screening protocol, physical office space, scheduling, and other complicated points.

Physical distancing of six feet between individuals (customers and employees) is still determined to be best practice, however that will not always be possible. In those cases, OSHA recommends reviewing the [hierarchy of controls](#), to determine how to proceed. Employers should think about redesigning the workspaces, providing physical barriers, and assessing their ventilation systems to ensure that precautions are taken where possible. In narrow walkways, identifying one-way paths may help. Physical markers on the floor of commonly used areas (such as the copy machine or kitchen), can assist individuals in remembering to provide space to their colleagues. According to the updated Cal/OSHA ETS effective June 13, employees must wear masks and maintain social distancing unless *all* individuals in a room are fully vaccinated.

Before you invest in ventilation systems or filters, visit the [CDC's recommendations](#) about minimum standards to achieve air improvement.

When you consider the transition back, remember that not all of your peer organizations, customers, and vendors are on the same timeline. While not a legal requirement, we recommend thinking about your employee workstations (do their computers have the ability to teleconference?), and your meeting spaces (what types of technology or programs might be critical now that weren't necessary before?). Contact Chamber staff if you need a referral to a company to help you navigate such questions.

In addition to distance, providing **staggered schedules**, breaks, or meal times can help alleviate congested areas or too many people congregating in common areas. Although employers are only required to provide information (not necessarily to provide tests) to employees on how to get tested for COVID-19, organizations can partner with the State of California to [hold a testing site in your community](#).



Beyond the Blueprint & Guidance for San Diego Businesses Returning to Work

Employers can require testing of their employees, including regular screens with questions regarding symptoms such as fever, sore throat, and coughing. Any information from these screens or temperature checks, however, must be confidential.

If you pursue screening as a part of the entry process for employers before reporting to work each day or each shift, note that the California's Division of Labor Standards and Enforcement has clarified that the time waiting to be screened and being screened is compensable. This means the employer must pay that time.

Should an employee show up to work, and demonstrate signs of illness such as high temperature and as a result get sent home, note that California law does require payment for that missed shift. (This is more commonly referred to as the [California Minimum Wage Order](#)).

Whether or not employees are vaccinated, **masks are still required** in the workplace. Equally as important, employers are required to pay for and provide necessary PPE. [Per state guidance](#), employees must be masked when: interacting with the public; in a space that the public may enter; in common areas or walkways; or in any room where other people are and they cannot physically distance. So when do your employees *not* need to wear a mask? When eating or drinking; in an office or room alone; and driving alone.

HELPFUL RESOURCES

Federal:

Centers for Disease Control: [Toolkit for Employers](#) communicating about vaccine (*March 22, 2021*)

Centers for Disease Control: [Guidance and FAQ's About Air Filtration and Ventilation](#) (*March 23, 2021*)

IRS: [Fact Sheet for Employer Tax Credits for Employee Time of to Vaccinate](#) (*April 2021*)

US Department of Labor: [The Employer's Road Map to the FMLA](#)

US Department of Labor: [Families First Coronavirus Response Act: Questions and Answers](#)

US Chamber: [Ready to Reopen Playbook for Small Business](#)

Beyond the Blueprint & Guidance for San Diego Businesses Returning to Work

California:

US Equal Employment Opportunity Commission: [What You Should Know About COVID-19 and ADA, the Rehabilitation Act, and Other Laws](#)

Department of Industrial Relations: [COVID Testing and Vaccination FAQs](#) (March, 2021)

Department of Industrial Relations: [Office Workplace Guidance](#) (July 29, 2020)

Department of Public Health: [Face Covering Guidance](#) (November 2020)

Department of Fair Employment and Housing: [Employment Information](#) on COVID-19 - employer vaccine guidance (March 4, 2021)

California COVID Testing Taskforce: [Start a Testing Site in Your Community](#)

Cal/OSHA Emergency Temporary Standards (Effective June 13, 2021): [General Industry Safety Orders – COVID-19 Prevention](#)

County:

County of San Diego: [Support for Businesses and Employers](#)

County of San Diego: [Personalized Support for the Business Community](#)

County of San Diego: [COVID-19 Notification Form](#)

County of San Diego: [Host a Vaccination Event at Your Site](#)

FAQs:

Q: What does “fully vaccinated” mean?

A: The CDC defines fully vaccinated as anyone two weeks after they have received the second dose of the Moderna or Pfizer vaccines, and/or someone two weeks after their single Johnson & Johnson shot.



Beyond the Blueprint & Guidance for San Diego Businesses Returning to Work

Q: If an employee is vaccinated are they exempt from safety precautions?

A: No. The CDC and California Department of Public Health have determined that an employer can still require fully vaccinated employees to follow any safety protocols or measures including wearing masks and socially distancing.

Q: Can I require an employee to return to the office/workplace before they are fully vaccinated?

A: Yes, an employer can require their staff to work in their offices, as long as there is no shelter in place guidelines. However, the employer has a responsibility to provide a workplace that takes appropriate measures and precautions to keep your employees safe. If an employee does not feel safe (i.e. if you are actively advocating against basic safety precautions), they could file a complaint with CalOSHA, which would trigger an investigation. A simple way to protect your workplace from such complaints is to follow the [Reopening Plan](#) required by the County and proactively, and routinely, educate your employees and customers about it.

Q: Can an employer require employees to be vaccinated against COVID-19?

A: Yes, so long as the employer does not discriminate or harass employees on the basis of a protected characteristic.

- According to the [Department of Fair Employment and Housing](#), “Under the FEHA, an employer may require employees to receive an FDA-approved vaccination against COVID-19 infection so long as the employer does not discriminate against or harass employees or job applicants on the basis of a protected characteristic, provides reasonable accommodations related to disability or sincerely-held religious beliefs or practices, and does not retaliate against anyone for engaging in a protected activity (such as requesting a reasonable accommodation).”
- Under the ADA, an employer can require COVID-19 vaccinations to meet a qualification standard that is job-related and consistent with business necessity, such as a safety standard. If an employee requests an exemption due to a disability under the ADA, the employer cannot require the employee to get a vaccine unless it can prove that individual would pose a “direct threat” to the health or safety of others in the workplace. A direct threat is defined as “a significant risk of substantial harm” that cannot be resolved by reasonable accommodations, like social distancing, flexible work arrangements, etc.

Q: How can an employer accommodate employees who object to vaccination on the basis of disability or sincerely-held religious beliefs?



Beyond the Blueprint & Guidance for San Diego Businesses Returning to Work

A: A reasonable accommodation “eliminates the conflict between the religious belief or practice and the vaccination requirement,” which can include job reassignment or modification of work practices.

Q: Can I require proof of vaccination before returning to the workplace?

A: Yes. Reasons for vaccination may or may not be related to disability or religious creed, so asking for proof of vaccination is not considered a disability related inquiry, religious creed related inquiry or medical examination. Employers are advised to instruct employees to withhold any medical information from vaccination documentation. Any proof of vaccination obtained by an employer must be maintained as a confidential medical record.¹ Employers should also avoid follow-up questions about why someone may not be vaccinated, as that can lead to complicated interactions that could trigger other legal issues.

Q: What are examples of a reasonable accommodation for an employee who does not get vaccinated due to disability; religious beliefs, practices, or observances; or pregnancy? ²

A: Individuals who choose not to get a vaccine for a reason protected by the ADA or Title VII can be entitled to an accommodation, proven it does not cause an unreasonable hardship for the employer. This can include wearing face masks in the workplace, social distancing, alternative schedules or remote work arrangements, regular COVID-19 testing, or accept a reassignment.

Q: How can an employer recognize an accommodation request from an employee with a disability?

A: The individual must let their employer know they need an adjustment related to a medical condition. They do not need to mention the ADA or use the phrase “reasonable accommodation.”³

Q: Do employers have to provide testing for their employees?

A: Not necessarily. Employers must provide information, not actual tests. An employer is required to inform all employees on how they can obtain testing. This could be through the employer, local health department, a health plan, or at a community testing center. The only obligation to all employees is to provide information.

¹ https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf#page=7

² <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D>

³ <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting>



Beyond the Blueprint & Guidance for San Diego Businesses Returning to Work

- Offer testing to an employee at no cost and during working hours in the event of a potential COVID-19 work-related exposure.
- Provide periodic (at least weekly or twice per week depending on the magnitude of the outbreak) COVID-19 testing to all employees in an "exposed workplace" during an outbreak.
- Testing must be provided in a manner that ensures employee confidentiality.

Q: What do I need to provide employees returning to the workplace?

A: Per a California Supreme Court ruling from 1979, employers are required to cover the cost of PPE or provide PPE to their employees. You'll also want to make sure your employees have been provided, and given ample time to review, your reopening document that was filed with the County. The CDC recommends identifying a "workplace coordinator" who will be responsible for "COVID-19 issues and their impact at the workplace."

Key terms you should know:

The Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations to qualified individuals *unless* it would cause an undue hardship.

[Title VII of the Civil Rights Act of 1964](#) prohibits employers with at least 15 employees, as well as employment agencies and unions, from discriminating in employment based on race, color, religion, sex and national origin. It also protects from retaliation against persons who complain of discrimination or participate in an EEO investigation.

Leave requirements

Family and Medical Leave Act (FMLA) provides eligible employees 12 weeks of unpaid, job-productive leave for certain family and medical conditions. Under the FMLA, employers *cannot* claim that the accommodation would cause undue hardship. For example, some employees may be concerned to return to the office due to a family member at high risk for COVID-19. Employers should review the FMLA employer's guide and consult counsel to determine if the employee requires leave.

The [Families First Coronavirus Response Act](#) (FFCRA) required covered employers to provide paid sick leave or expanded family and medical leave for reasons related to COVID-19 through December 31, 2020. Employers who provided leave were eligible for tax credits. After the

Beyond the Blueprint & Guidance for San Diego Businesses Returning to Work

FFCRA mandate expired, the Consolidated Appropriations Act of 2021 provided payroll tax credits for employers that *voluntarily provide* extended paid sick leave or extended family and medical leave. This also [expanded the reasons](#) an employer can claim tax credits for providing employees leave: to receive a COVID-19 vaccine, recover from any illness related to the COVID-19 vaccine and waiting for COVID-19 test results. Employers should consult with their tax professional to review eligibility to claim these tax credits.

	Employers CAN	Employers are ENCOURAGED	Employers CANNOT
Returning to the Office	<p>Require employees to return to the physical workplace. Employers must create a safe reopening plan per County of San Diego requirements.</p> <p>Require employees to screen (questionnaire/temperature check/etc.) before coming in to the office.</p> <p>Send home any employee who is visibly ill.</p>	<p>To work with employees who are at high risk to contract COVID to determine the best course of action.</p> <p>Create a task force or other small group who can help handle logistics, scheduling, and other information sharing processes.</p>	<p>Exclude high risk populations from returning due to medical reasons.</p> <p>Share information from screening (temperature checks, etc.) as this is protected medical information.</p>
Vaccinations	<p>Require employees to be vaccinated and provide proof of vaccination, except those citing an ADA or religious exemption.</p>	<p>To determine whether vaccination is necessary for all employment, or only for those returning to the physical worksite. Employers are also encouraged to clearly create and communicate the new vaccine policy.</p>	<p>Ask for further medical information.</p> <p>Employers can only ask for proof whether or not an employee has been vaccinated</p> <p>Share information about vaccination status.</p>

Beyond the Blueprint & Guidance for San Diego Businesses Returning to Work

			Disclose that an employee is receiving a reasonable accommodation or retaliate against employees requesting accommodation.
Testing	Inform employees on how they can obtain testing, not provide actual tests.		Require or request antibody testing.
Reporting	Record and report all COVID cases to OSHA (if hospitalized, reported within 24 hours. If fatality, within 8 hours) Report all COVID cases to the County of San Diego using the online COVID-19 Notification Form		Refuse to collect information
General		Periodically consult legal counsel to stay up to date with frequently updated state and federal regulations.	

****Are you a Chamber member who has a product or service that you think can help the transition back to the workplace? Let us know and we'll include you in our guidance documents!****