



Webinar

Employer Considerations for the COVID-19 Vaccination

February 25, 2021



Agenda

10am-11am

Epidemiology, Vaccines and Variants

- Update on Coronavirus epidemiology and clinical implications: current and future state
- The latest on approved vaccines
- When, where and how people will access vaccinations, and the changing rules around prioritization and tiers
- The cost of vaccination and who pays for it

11am-12pm

Legal Considerations

- Your role as an employer
 - State and federal developments regarding mandatory vaccination programs
 - Considerations for requiring vaccination as a condition of returning to work
 - Accommodation process
 - Employer leave obligations related to vaccinations
 - Legal ramifications of an incentive program
- Your potential risks and liabilities as an employer



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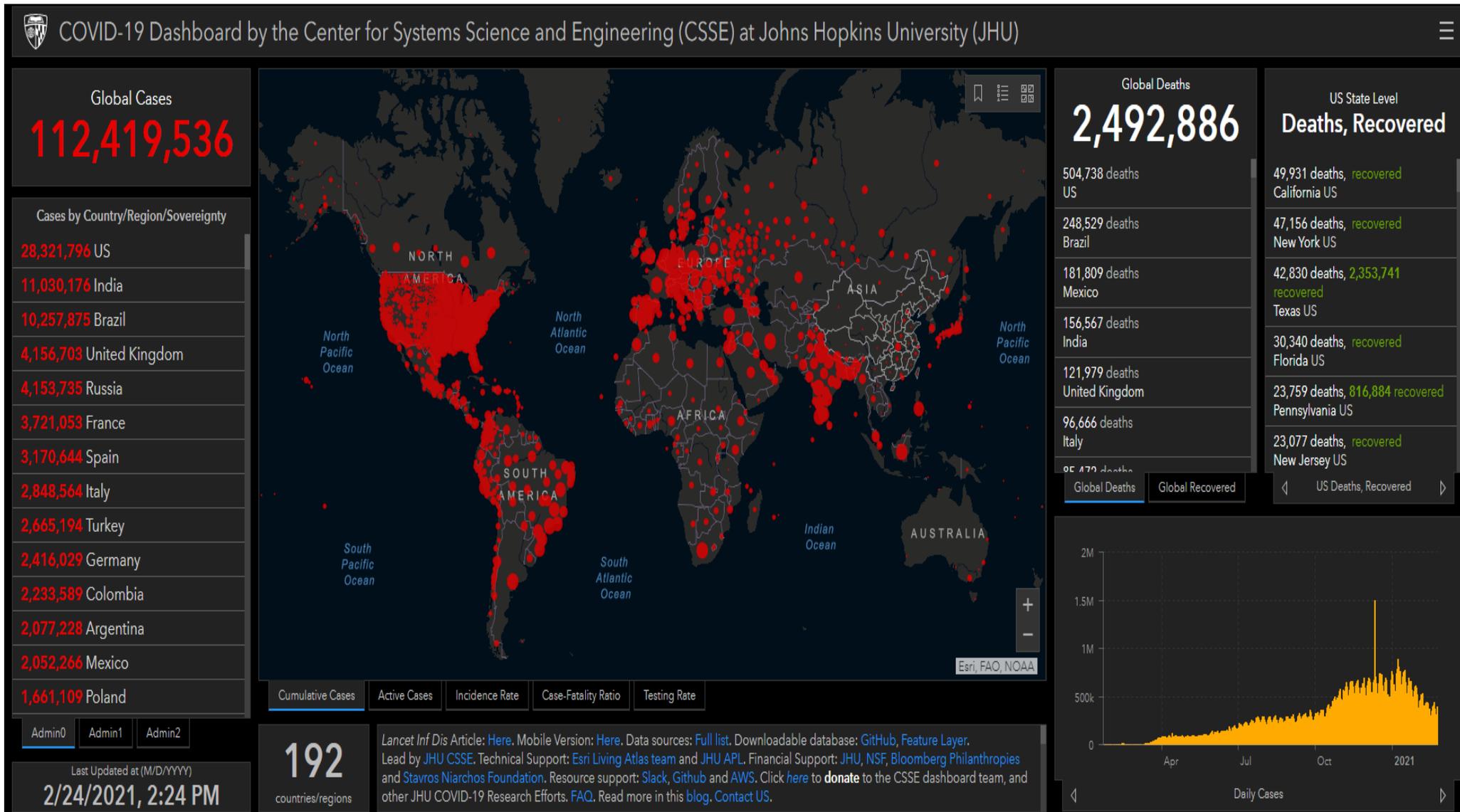
Coronavirus: Epidemiology, Vaccines and Variants

Together, all the way.®

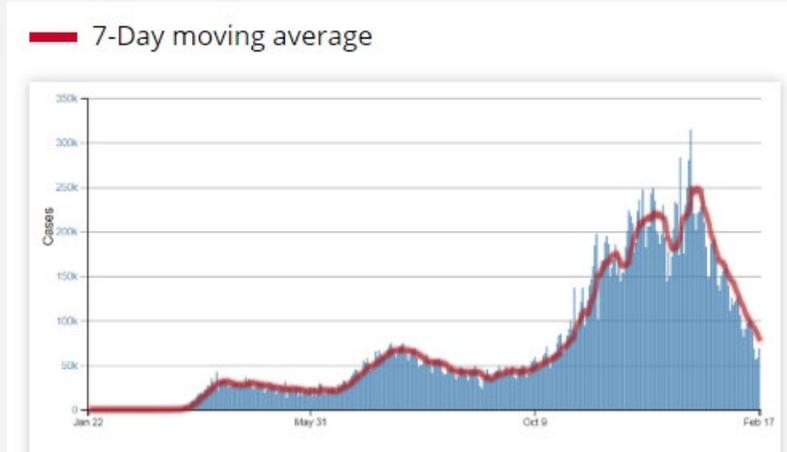
Offered by Cigna Health and Life Insurance Company or its affiliates



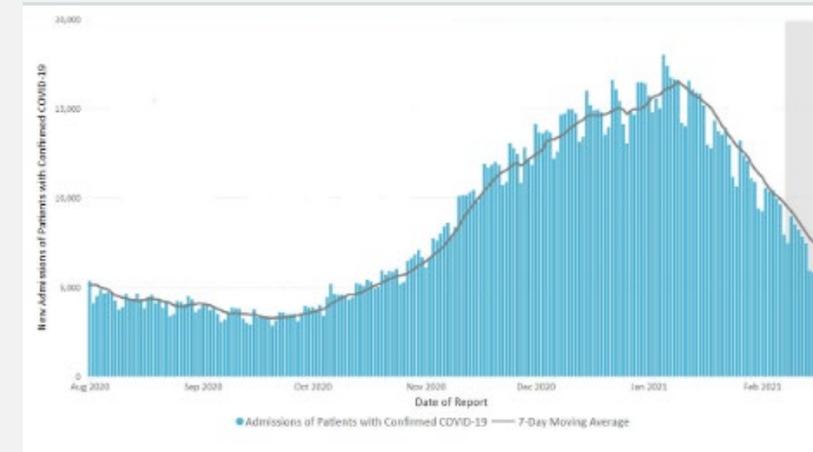
- 1 Coronavirus Trends Update
- 2 Epidemiology
- 3 Vaccine Overview
- 4 Where We Are Headed
- 5 Staying Well



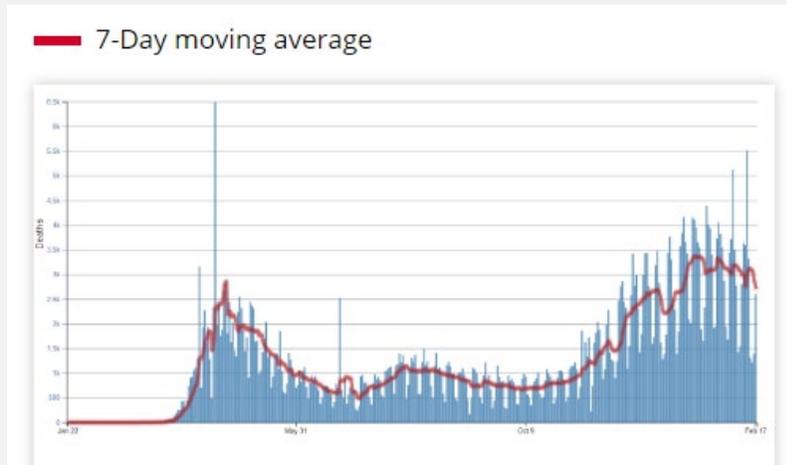
Daily Trends in COVID-19 Cases in the United States Reported to CDC



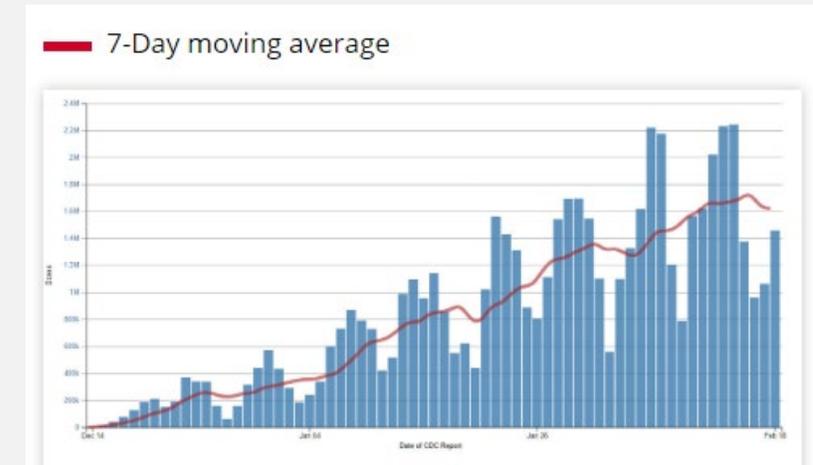
Daily Trends in Number of New COVID-19 Hospital Admissions in the United States Reported to CDC



Daily Trends in Number of COVID-19 Deaths in the United States Reported to CDC



Daily Change in Number of COVID-19 Vaccinations in the United States Reported to CDC



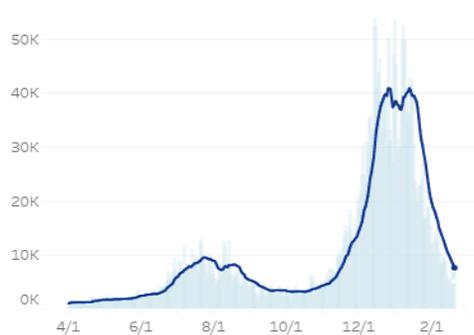
<https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>

Daily Cases and Deaths

California has 3,441,946 confirmed cases of COVID-19, resulting in 49,105 deaths.

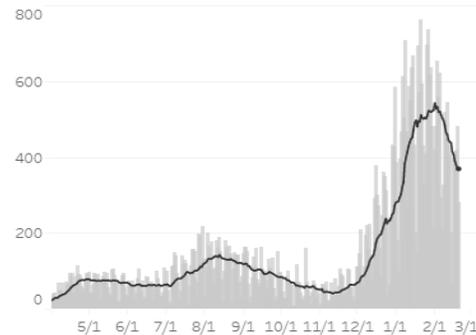
Total cases in California

3,441,946 positive cases
 6,760 new cases
 0.2% increase from prior day total



Total deaths in California

49,105 total deaths
 280 new deaths
 0.6% increase from prior day total



<https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>

Impact on Hospitals and ICUs

The number of hospitalizations due to confirmed and suspected COVID-19 cases in California reached a total of 7,313, a decrease of 434 from the prior day total. The number of ICU patients due to confirmed and suspected COVID-19 cases in California reached a total of 2,073, a decrease of 95 from the prior day total.

COVID-19 hospitalized patients in California

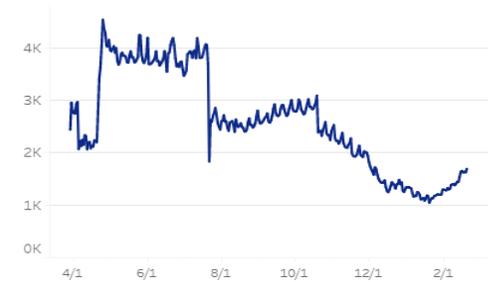
Hospitalized ICU

7,313 COVID-19 hospitalized patients
 -434 patients
 5.9% decrease from prior day

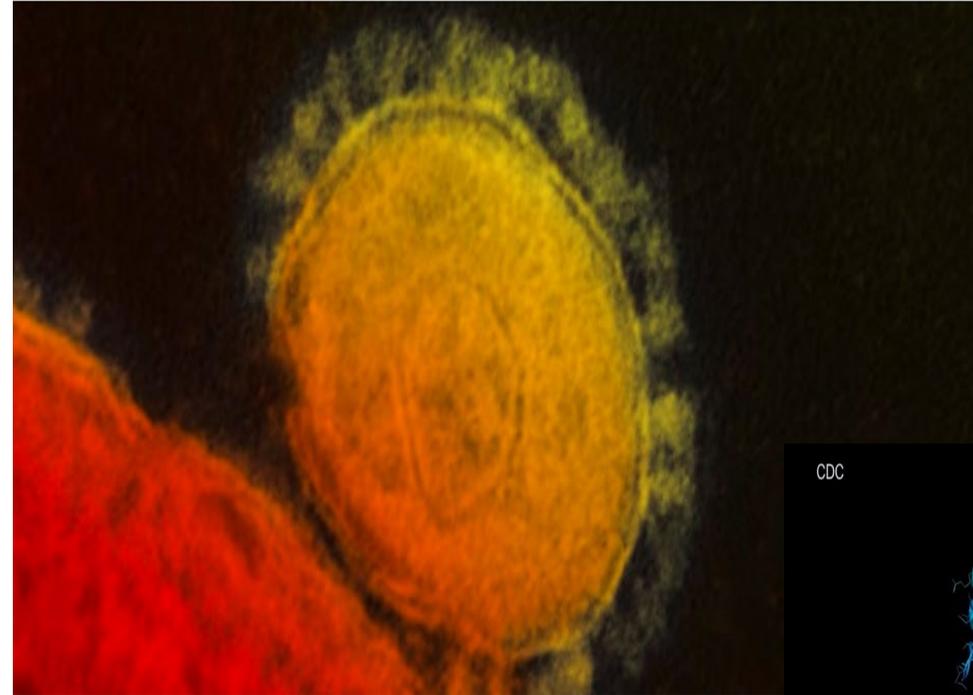


ICU beds in California

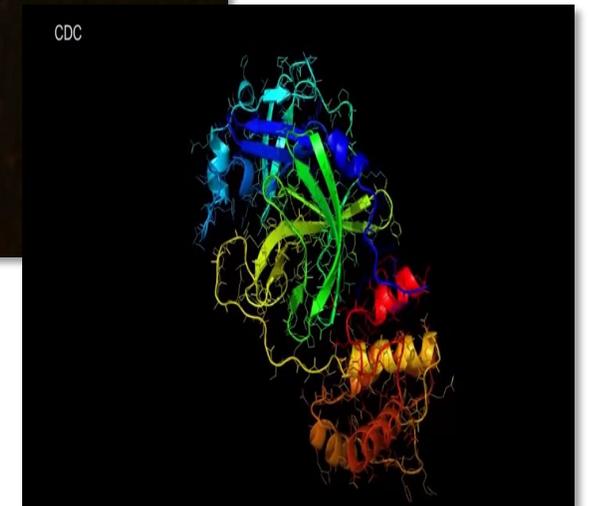
1,682 ICU beds available
 72 increase from prior day

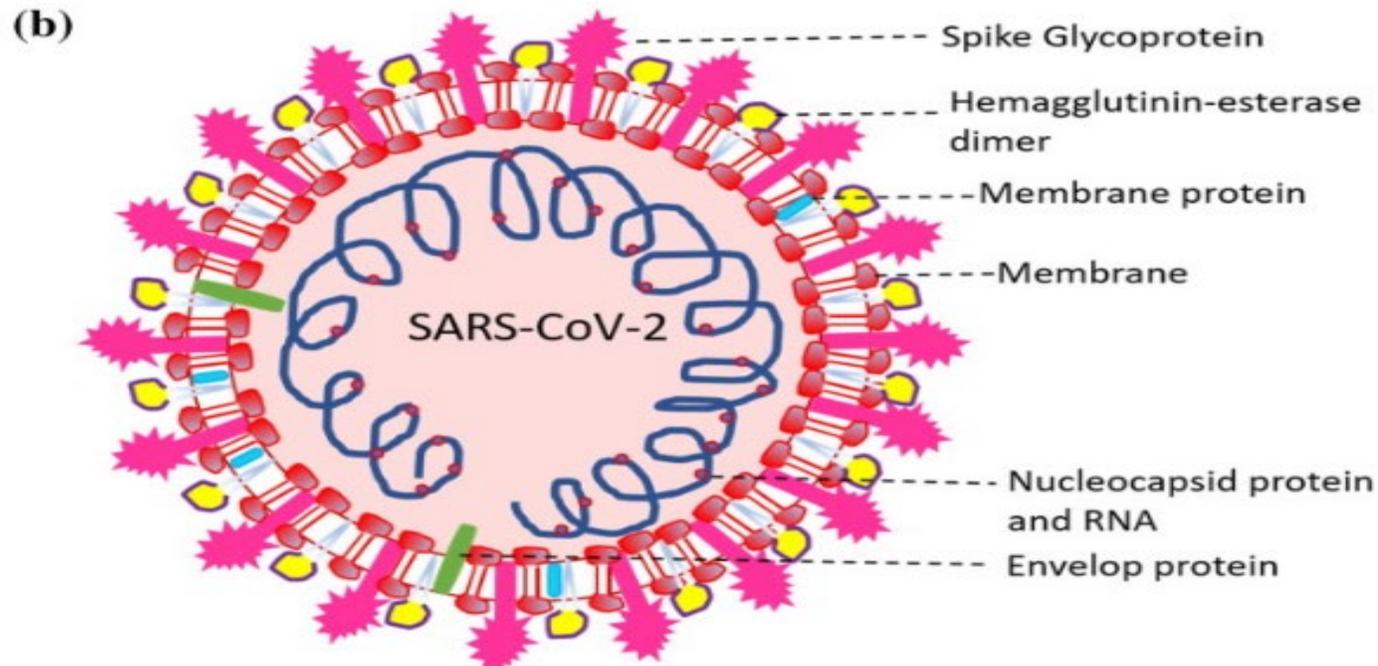
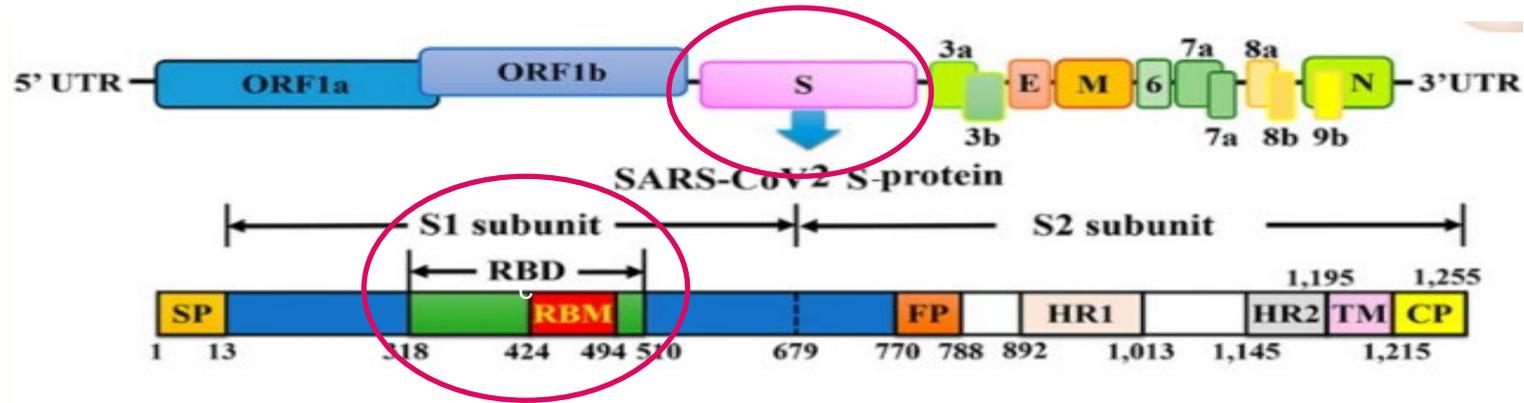


- Coronavirus Facts
- Transmission
- Why is it so Dangerous
- How it Harms our Bodies
- Impact on Populations

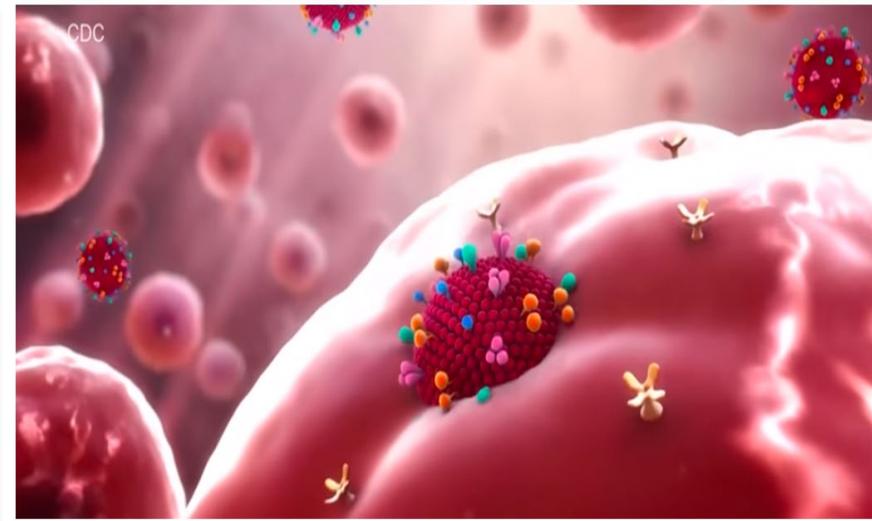
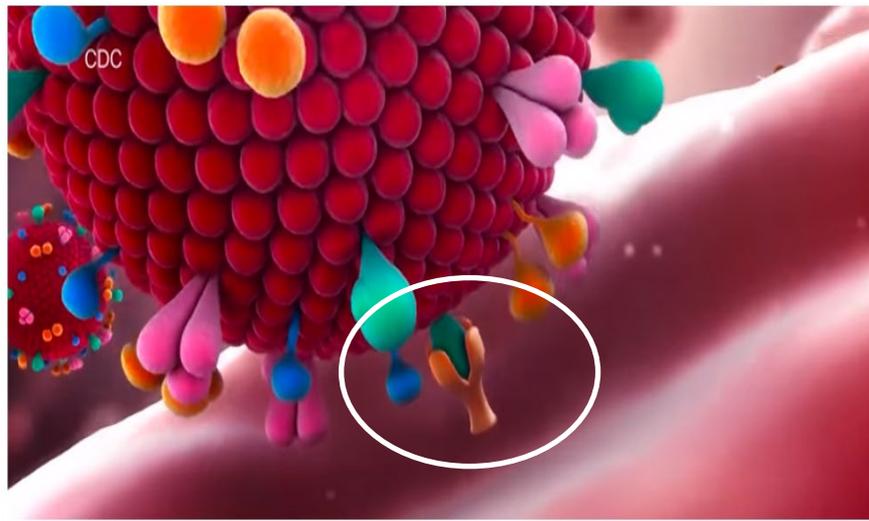
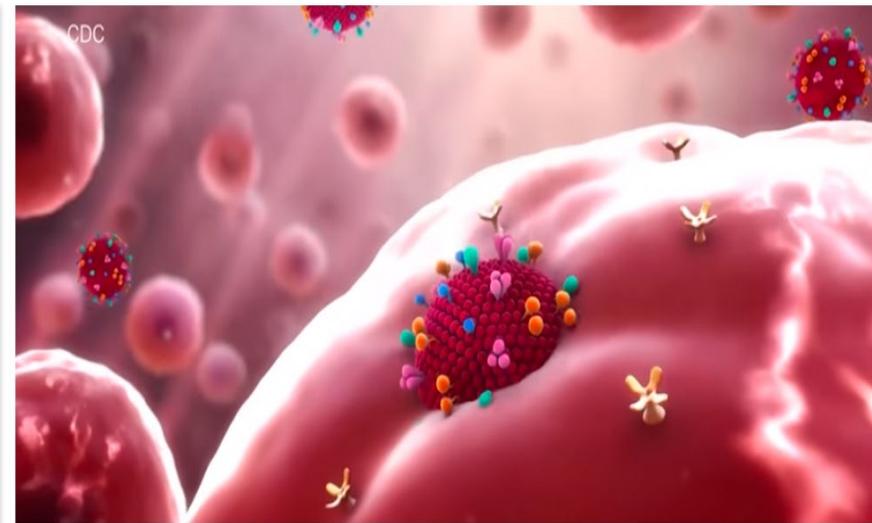
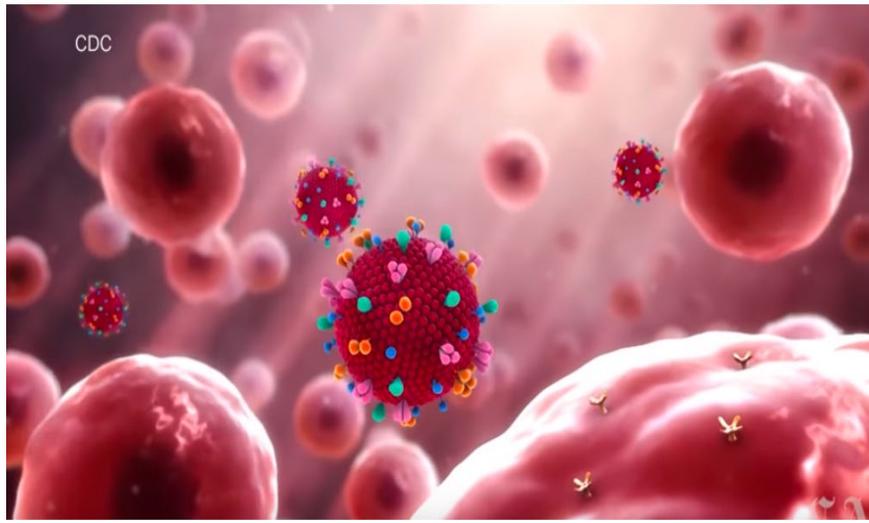


An image of SARS-CoV-2 virus particles from a transmission electron microscope. (National Institute of Allergy and Infectious Diseases)

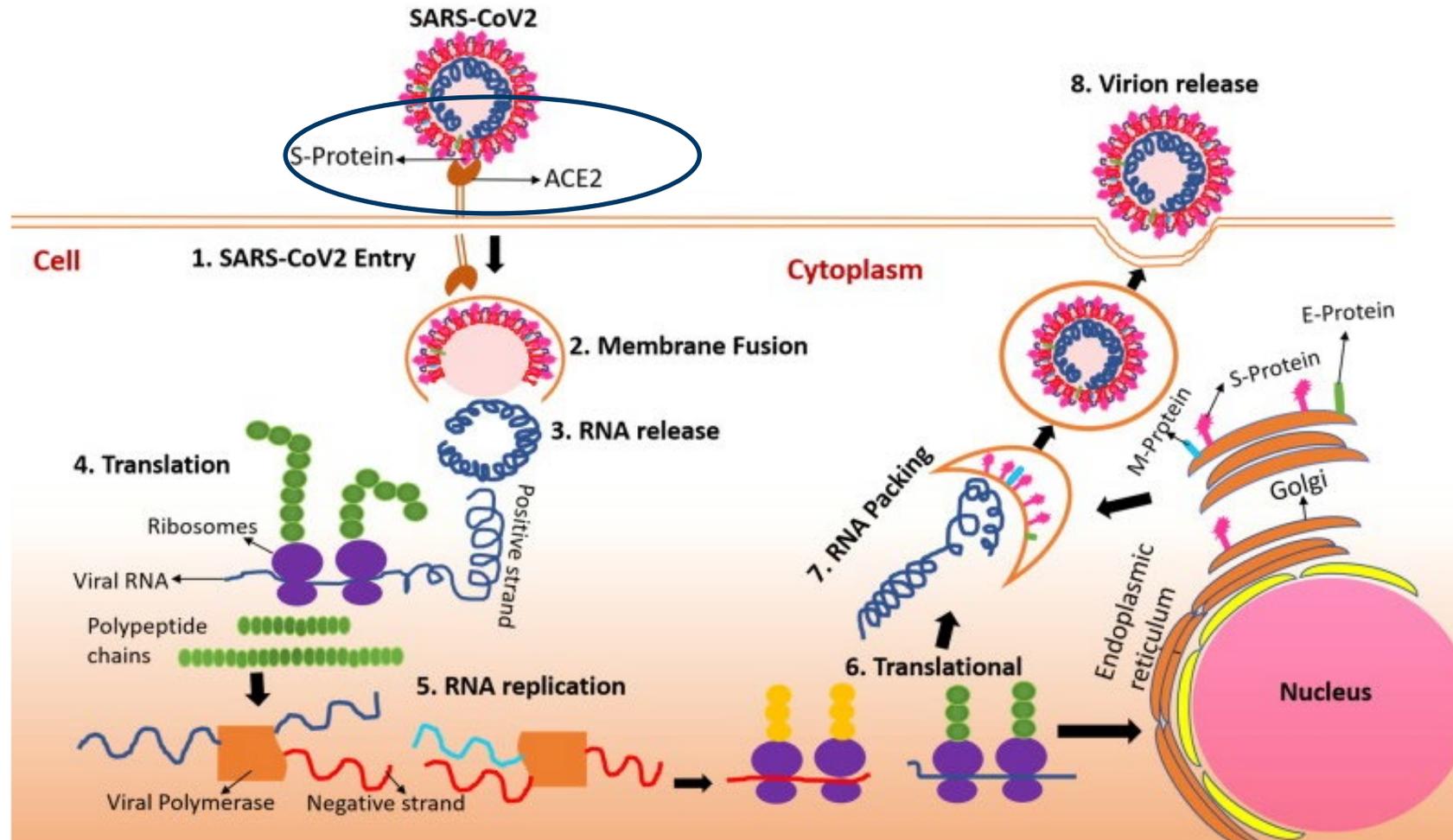




<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7196923/figure/F0002/?report=objectonly>



The schematic diagram of the mechanism of COVID-19 entry and viral replication and viral RNA packing in the human cell.



<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7196923/figure/F0002/?report=objectonly>

Those who are @ increased risk

- Age >65
- Cancer
- Chronic kidney disease
- COPD (chronic obstructive pulmonary disease)
- Down Syndrome
- Heart conditions
- Immunocompromised state (weakened immune system)
- Obesity
- Pregnancy
- Sickle cell disease
- Smoking
- Type 2 diabetes mellitus

Those who might be @ increased risk

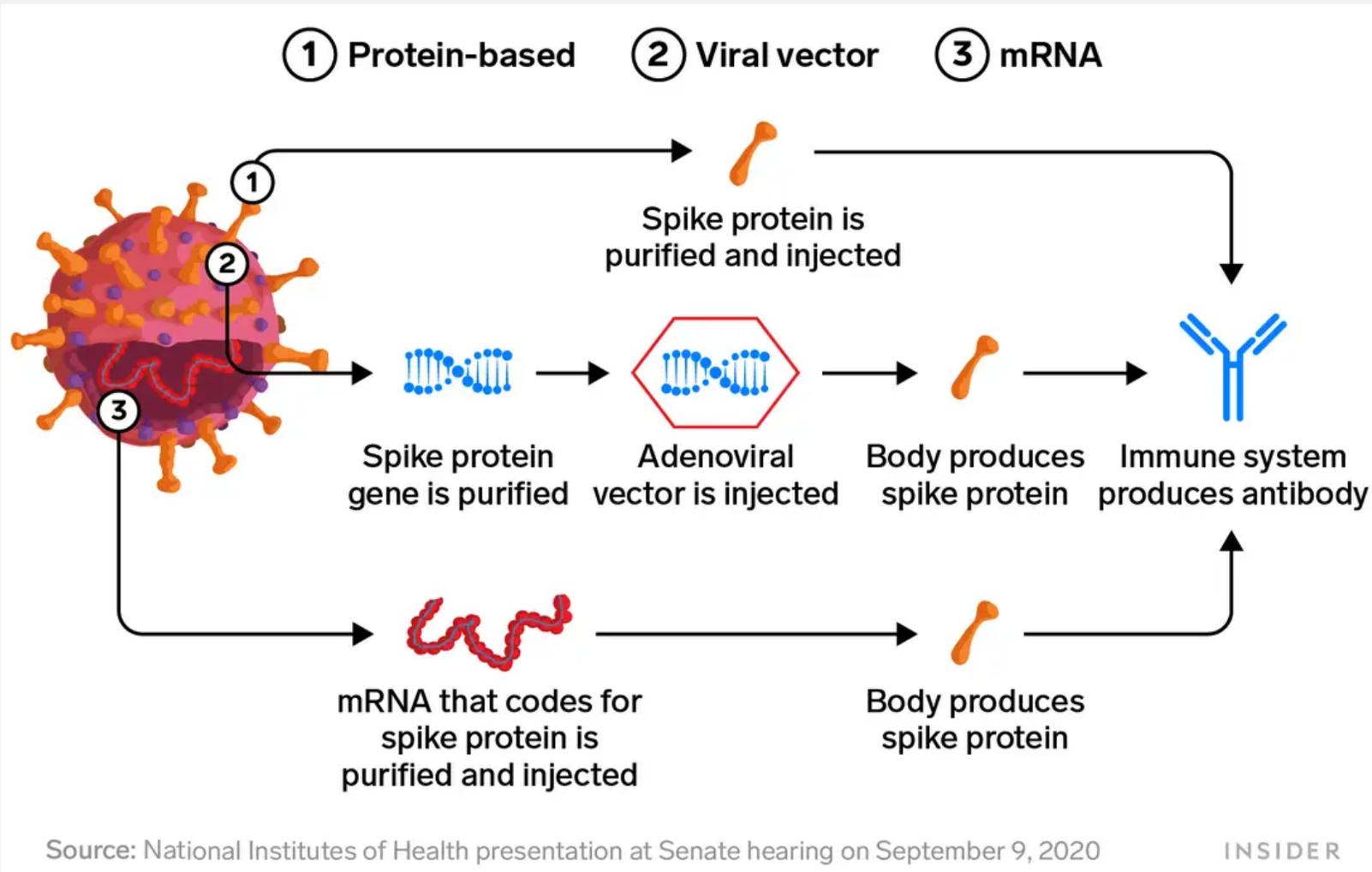
- Asthma (moderate-to-severe)
- Cerebrovascular disease (affects blood vessels and blood supply to the brain)
- Cystic fibrosis
- Hypertension or high blood pressure
- Neurologic conditions, such as dementia
- Liver disease
- Overweight (BMI > 25 kg/m², but < 30 kg/m²)
- Pulmonary fibrosis (having damaged or scarred lung tissues)
- Thalassemia (a type of blood disorder)
- Type 1 diabetes mellitus

This list of underlying medical conditions is not exhaustive and only includes conditions with sufficient evidence to draw conclusions

CDC.GOV

COVID-19 Vaccine Overview

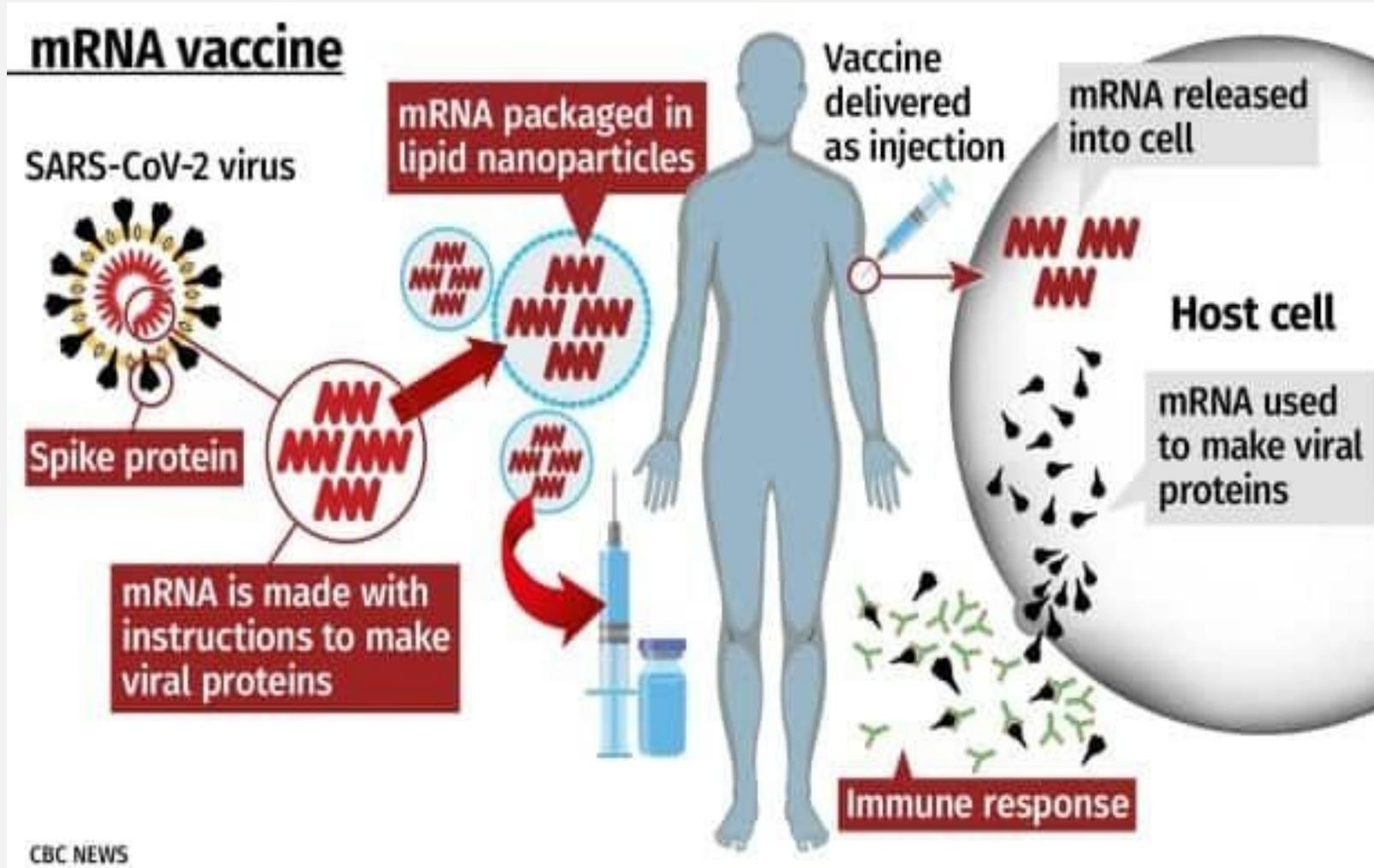




- 1. Novavax
- 2. Johnson & Johnson
- 3. Pfizer Moderna



How Pfizer's mRNA coronavirus vaccine compares to other US candidates - Business Insider.

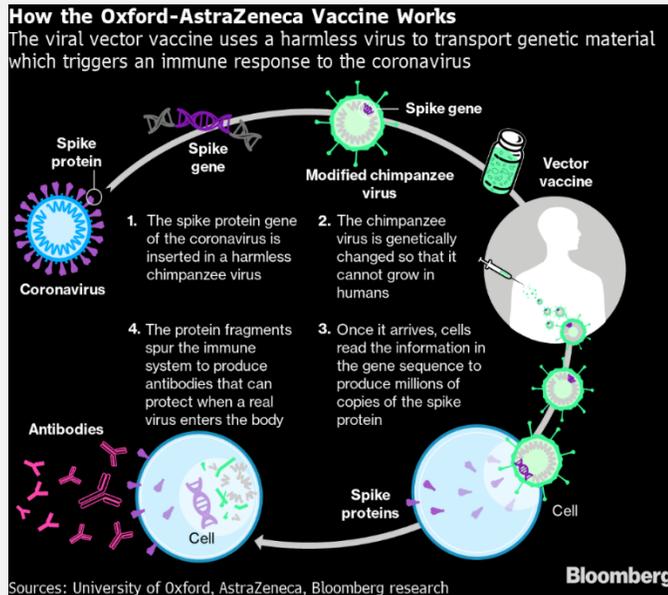


 About Moderna COVID-19 Vaccine (EUA) | Vaccination Providers ([modernatx.com](https://www.modernatx.com))

CONCERN FACTS

<p>1 <i>“The COVID-19 vaccines are unsafe because they were developed so quickly!”</i></p>	<p>The vaccines are proven safe and effective and they were developed quickly because of the worldwide effort. Although developed in record time, they have gone through the same rigorous Food and Drug Administration process as every other vaccine, meeting all safety standards. No steps were skipped. The clinical trials and safety reviews actually took about the same amount of time as other vaccines.</p>
<p>2 <i>“mRNA vaccines change your DNA!”</i></p>	<p>mRNA is simply a message that the body reads. It cannot change your DNA or modify your genes.</p>
<p>3 <i>“mRNA vaccines have dangerous ingredients!”</i></p>	<p>mRNA vaccines are free of preservatives and only contain the mRNA, a fatty coating layer to protect the mRNA, PEG (polyethylene glycol), and a combination of salts, sugar and water. There are no blood products or fetal cells.</p>
<p>4 <i>“It’s not safe until we get more long-term data.”</i></p>	<p>Millions have been vaccinated. Vaccine side effects occur within 6 weeks. After that, the vaccine is gone and so is your initial immune system response. Clinical trials have shown us the vaccines are safe, and now, we are seeking long-term data to learn how long the vaccine remains effective.</p>

Sources: University of Waterloo, School of Pharmacy and UC Davis Health, *real facts about common COVID-19 vaccine myths*.



Viral Vector mechanism used by J&J and Oxford/AstraZeneca for their COVID Vaccines



Types of SARS-CoV-2 vaccines for COVID-19

Protein vaccines

British Society for immunology
www.immunology.org

Contain **proteins** from the SARS-CoV-2 virus, which are recognised by the immune system to trigger a response.

Can be whole proteins, protein fragments, or many protein molecules packed into nanoparticles.

This response builds immune memory, so your body can fight off SARS-CoV-2 in future.

Considerations

- Have good previous safety records.
- Usually administered with an adjuvant to boost immune response.

Examples in human use

Hepatitis B vaccine

In clinical trials for COVID-19

Novavax, Sanofi/GSK

Protein Vaccine mechanism used by Novavax

MANUFACTURER	TRIAL DETAILS			MECHANISM	STORAGE DETAILS	EFFICACY	STATUS
	# of volunteers	# of injections	Duration between doses				
Pfizer	44,000	2	21 days	mRNA	Dry ice freezing	95%	FDA Emergency Authorization granted Dec. 11, 2020
Moderna	25,000 – 30,000	2	4 weeks	mRNA	Refrigerator 30 days	94.5%	FDA Emergency Authorization granted Dec. 18, 2020
AstraZeneca-proven effective against South African variant	30,000	2	4 weeks	Vector	Simple refrigeration	82%	FDA Emergency Authorization granted Feb 15, 2021
Janssen/Johnson & Johnson	45,000	1	n/a	Vector	Simple refrigeration	72% in US	EUA meeting is Feb 26, 2021
Novavax	30,000	2	21 days	Protein subunit	Simple refrigeration	89.3% in UK	Still in Phase 3 trials in US

*Zimmer, Carl, et al. "Coronavirus Vaccine Tracker." The New York Times. Last updated 19 Jan. 2021.

Common:

(Simply a sign the vaccine is stimulating your immune system)

- Soreness at injection site
- Fatigue
- Headache
- Muscle aches
- Chills
- Joint pain
- Fever (approximately 15% of people report this)



Rare:

- Anaphylaxis: 2 cases per million for Moderna
 6 cases per million for Pfizer

If you experience side effects that last beyond 48 hours, you should contact medical provider for advice

Prioritization & Allocation

The approach to distribution and vaccination



November 30, 2020 local Centers for Disease Control and Prevention (CDC) guidance meeting



Societal impact of job

examples include:

- Necessary for survival/daily living basics/safety
- Scarcity of workers
- Parents losing jobs because no school/limited childcare (women disproportionately affected)
- Stability of safe functioning of communities
- Education of next generation
- Caring for people who cannot care for themselves



Equity including

examples include:

- Economic necessity
- Disproportional impact on already disadvantaged communities
- Increased pressure on racial and ethnic communities
- Deepening health and educational disparities



Impact on economy

examples include:

- Scarcity of workers
- Wage and price stability
- Indirect support of economy, i.e., schools, childcare, families



Occupational exposure

examples include:

- Those unable to work from home
- Interaction with public
- Impact on other essential workers
- Risk of severe disease/death
- Likelihood to spread disease due to having to work
- Shared congregate workplace housing



*Advisory Committee on Immunization Practices (ACIP) Interim Recommendation on COVID-19 Vaccine Allocation. Phased Allocation of COVID-19 Vaccines. ACIP COVID-19 Vaccines Work Group, Kathleen Dooling, MD, MPH, December 20, 2020.

This information is subject to change based on CDC updates. While each stage of the vaccine rollout is being guided by the federal government, states can and are devising their own distribution plans that may deviate slightly from the federal recommendations.

Where we are



Allocation and Prioritization

- CDC
- State Departments of Health



Shipment and Storage

- Tracking
- Security
- Cold chain
- Freezers



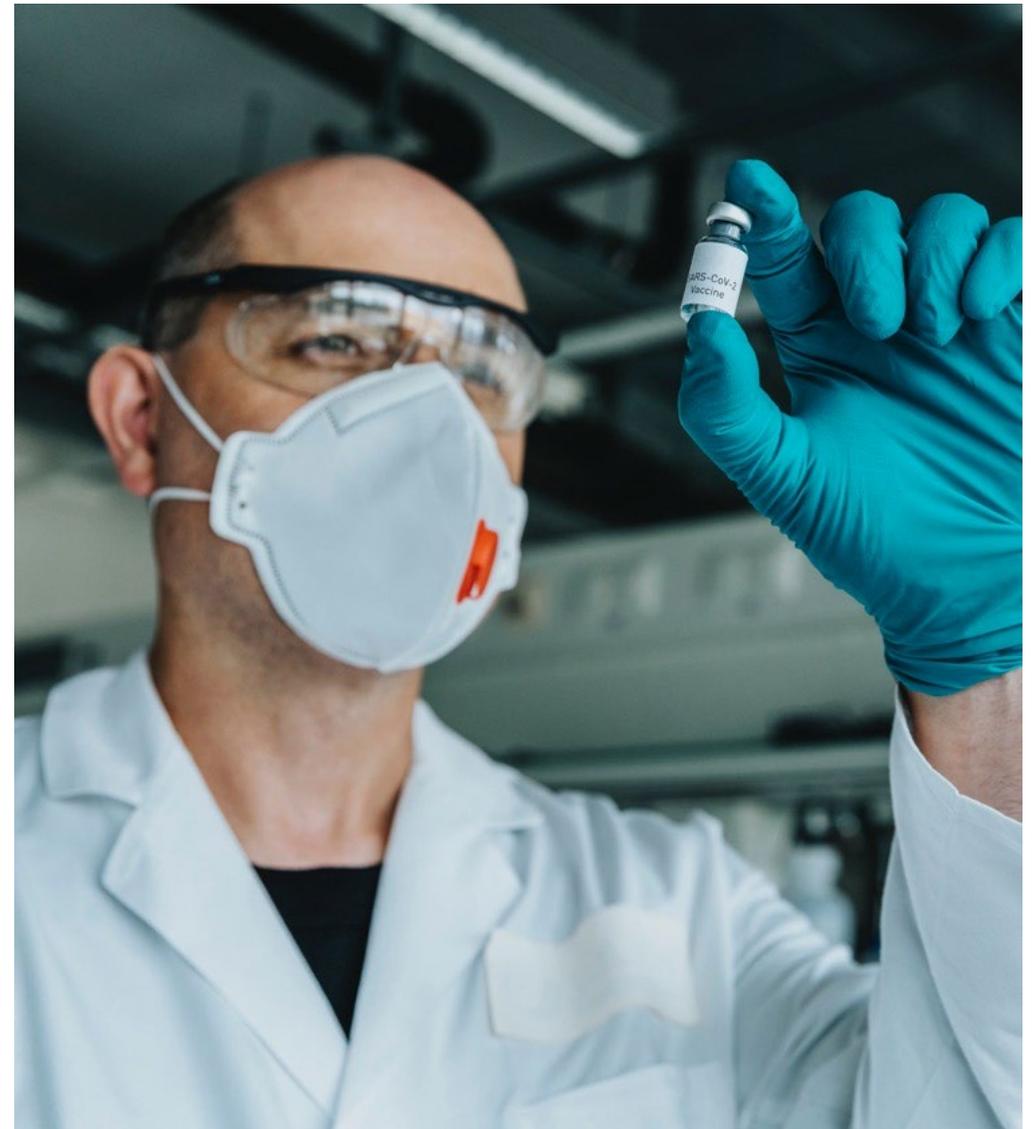
Administration

- Freeze-thaw-reconstitute
- Supplies
- Diluents
- Recalls for second doses



Communication

- Targeted recipients
- Trusted sources



The screenshot shows the top navigation bar of the COVID19.CA.GOV website. It includes the 'CALIFORNIA ALL' logo with the tagline 'Your Actions Save Lives', a search bar with the text 'SEARCH Search this site', a language selection dropdown, and a menu icon. The main header features the word 'Vaccines' in large white text, with a sub-header 'Last updated February 19, 2021 at 11:33 AM'. Below the header is a white content box with the heading 'Sign up for COVID-19 vaccination'. The text in this box explains that vaccinations are in high demand and provides instructions on how to sign up at myturn.ca.gov or call (833) 422-4255. A blue 'Sign up now' button is positioned below the text. To the right of the text is the 'Vaccinate ALL 58' logo, which consists of a stylized graphic of horizontal bars in orange, yellow, and blue, with the text 'Vaccinate ALL 58' and the tagline 'Together we can end the pandemic.' below it.

COVID-19 vaccination is one of the most important tools to end the COVID-19 pandemic. The State will equitably distribute a safe and effective vaccine to everyone in California who wants it. We expect to have enough supplies to vaccinate most Californians by summer 2021.

On this page you will find:

- [When you can get vaccinated](#)
- [How to get vaccinated](#)
- [How vaccines work](#)
- [Vaccination progress dashboards](#)
- [What to expect after vaccination](#)
- [Spread the news about the vaccines](#)
- [Questions and answers](#)

We are just getting started

- Supply Dependent
- Healthcare Systems
- On Site for Long Term Care facilities
- Mass Inoculation Sites(Public)
- Pharmacies
- Pop Up Clinics
- Private/Government Joint Ventures
 - Able to add logistics and delivery
 - Honeywell, Amazon, Costco, Starbucks, Microsoft
- Mobile Vaccine Clinics
- Work Place Clinics
- More ideas will be generated as supplies increase

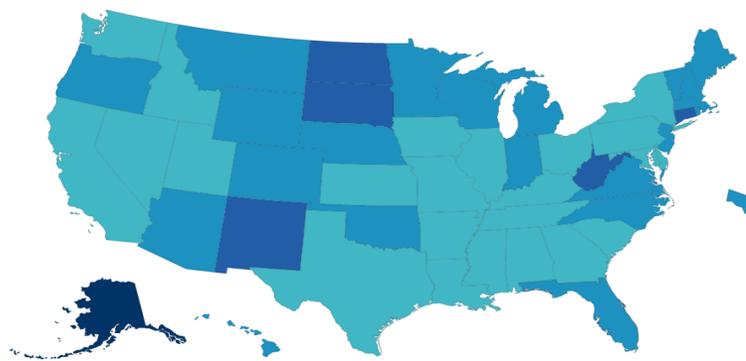
COVID-19 Vaccinations in the United States

Overall US COVID-19 Vaccine | Deliveries and Administration; Maps, charts, and data provided by the CDC, updated daily by 8 pm ET[†]

Represents all vaccine partners including jurisdictional partner clinics, retail pharmacies, long-term care facilities, Federal Emergency Management Agency and Health Resources and Services Administration partner sites, and federal entity facilities.

Total Vaccine Doses		People Vaccinated	
Delivered	88,669,035	Receiving 1 or More Doses	45,237,143
Administered	66,464,947	Receiving 2 Doses	20,607,261
Learn more about the distribution of vaccines.		% of Total Population	13.6%
		Population ≥ 18 Years of Age	44,116,020
		% of Population ≥ 18 Years of Age	17.3%
			20,132,153
			7.9%
		Read more about how these data are reported.	

CDC | Data as of: Feb 24 2021 6:00am ET | Posted: Feb 24 2021 2:44PM ET



Territories
 GU AS RP FM MP PR AH HI VI

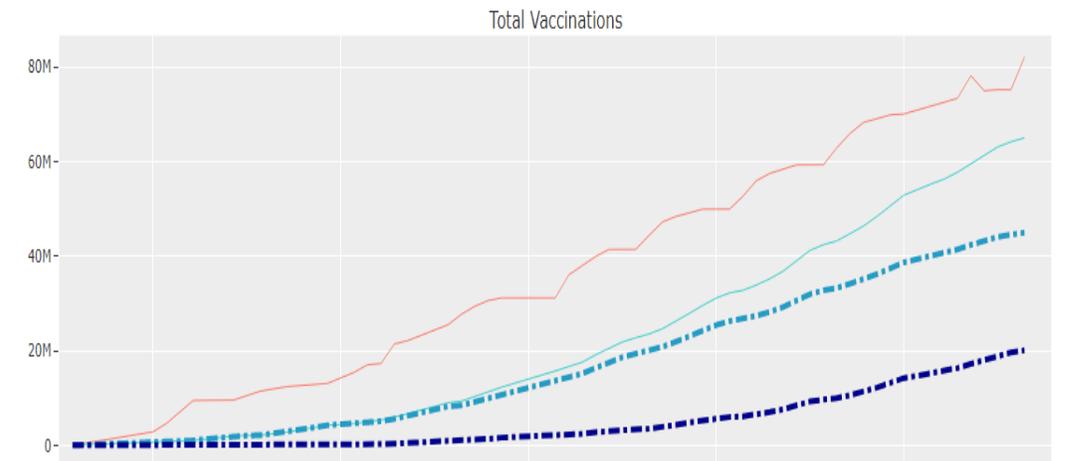
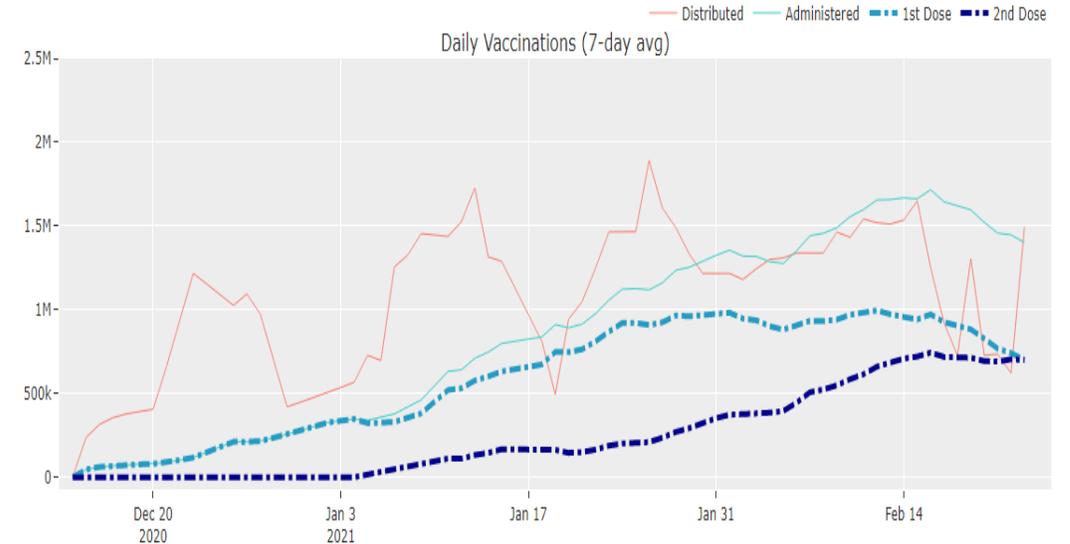
Federal Entities
 BAP O&D IHS VHA

[†] Data for Federal Entities are presented here and are also incorporated into the respective jurisdictional totals

Total Doses Administered per 100,000
 ○ No Data ○ 0 ● 1 - 15,000 ● 15,001 - 20,000 ● 20,001 - 25,000 ● 25,001 - 30,000 ● 30,001+



Vaccination Progress (CDC)



Why is this so difficult?

- This is **THE LARGEST** simultaneous global public-health initiative ever undertaken
- Vaccines still in production
- Mass inoculation
 - Distribution logistics
 - Staffing of vaccine clinics
 - health care personnel already stretched thin
- Lack of a national health system, disparate state approaches
- Disbelievers
 - In Pandemic
 - In Vaccine
- Public Trust
 - Vaccines were quick to market
 - Racial inequities and historical health care disparities and mistrust
- 2 doses are required, follow-up concerns

- Masks (now double masking is recommended by CDC!)
- Limit gatherings, especially indoors
- Maintain social distancing to 6+ feet
- Regular hand washing
- Respect your neighbor and fellow citizens
 - ✓ Wear a mask around people you don't live with (even close friends and family).
 - ✓ Stay home as much as possible.
 - ✓ Quarantine and get tested at the first sign of illness or known exposure

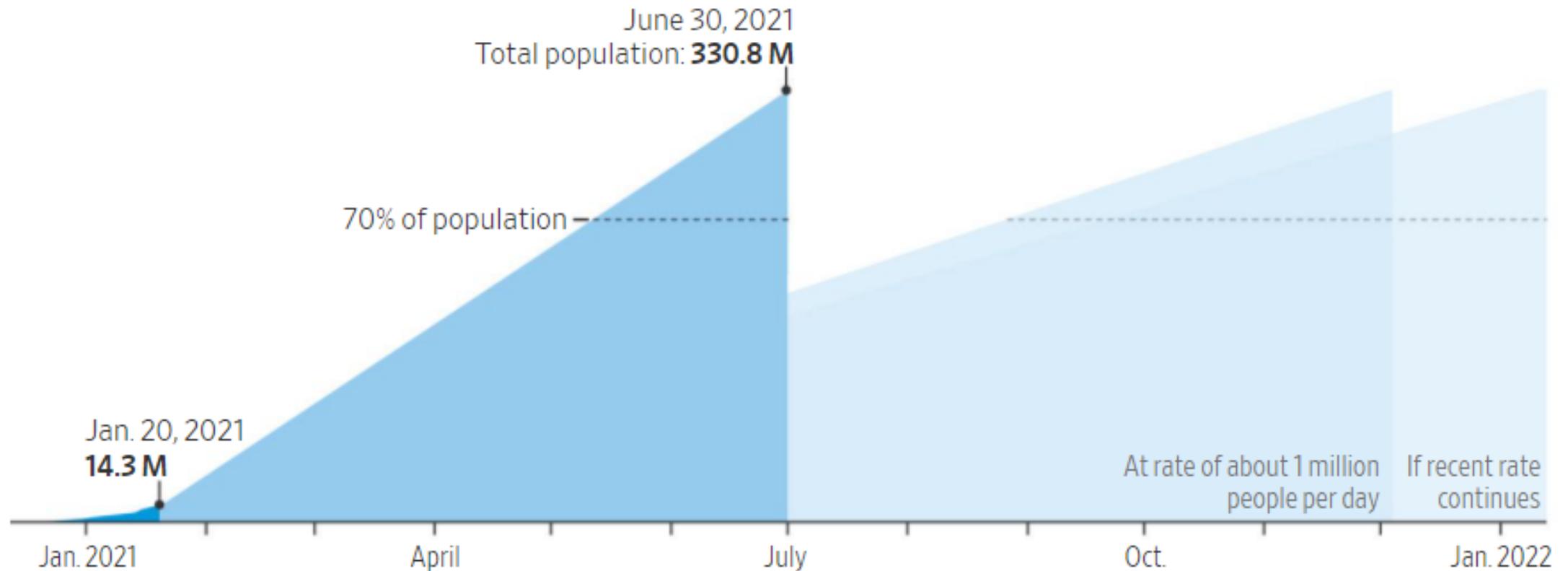
Vaccinations alone are not enough

Where we are headed?



How much time it might take if everyone received at least one shot

At rate of about 1.96 million people a day



www.WSJ.com

How Escape Mutant Variants Develop

- As infections increase, a virus's genetic diversity increases leading to Variants
- The virus is so widespread that rare mutation occurrences are happening
- As the virus has been copying itself over and over for more than a year now, it's had many chances to mutate
- The virus could be responding to increased human immunity
- Some treatments for COVID-19 may have led to some mutations

Variants of Concern (VOC)

Variant	UNITED KINGDOM B.1.17 STRAIN (in US 2 mos)	SOUTH AFRICAN B.1.351 STRAIN (in US 3 wks)	BRAZIL P.3 (in US 3 wks)	CALIFORNIA (Homegrown) B.1.429 STRAIN (in CA 2 mos?)
Prevalence	45 states (30%) Expected to be dominant strain by March	Minimal Identified in 14 states	Minimal Identified in 4 states	50% CA samples in January Dominant strain 40% or greater
Infectivity Increase	30-50%	30%	30%	Patients carry 2x the viral load
Virulence Increase (Severity/Harmfulness)	13%	UNK	Potential	Likely- more severe oxygen requiring illness
Vaccine Effectiveness	10% less effective	33% less effective	Less effective	Potentially less effective
MAb Effectiveness	decreased	decreased	UNK	UNK

1. [Notes from the Field: First identified cases of SARS-CoV-2 variant B.1.1.7 in Minnesota — December 2020–January 2021](#)

2. [Detection of B.1.351 SARS-CoV-2 Variant Strain — Zambia, December 2020](#)

3. [SARS-CoV-2 Variants of Concern in the United States: Challenges and Opportunities](#)external icon

4. [Horby P, Huntley C, Davies N, et al. NERVTAG note on B.1.1.7 severity. SAGE meeting report. January 21, 2021 pdf icon\[81 KB, 9 Pages\]](#)external icon.

5. [Emergence of SARS-CoV-2 B.1.1.7 Lineage — United States, December 29, 2020–January 12, 2021](#)

As reports of long-term COVID-19 symptoms emerged, the need for scientific research about long COVID has intensified.

Newsweek

'I Got COVID 9 Months Ago and Still Have Symptoms'

60 MINUTES

PUZZLING, OFTEN DEBILITATING AFTER-EFFECTS PLAGUING COVID-19 "LONG-HAULERS"

Doctors are still searching for answers to why a portion of people who were diagnosed with COVID-19 are still suffering symptoms months later. Anderson Cooper reports.

SCIENTIFIC AMERICAN

LOCAL // HEATHER KNIGHT

S.F. Millennial was fit and healthy before COVID-19. He's a disabled 'long-hauler' now

 Heather Knight | Jan. 9, 2021 | Updated Jan. 10, 2021 4:30p.m.

The New York Times

For Long-Haulers, Covid-19 Takes a Toll on Mind as Well as Body

"It makes you depressed, anxious that it's never going to go away."



Coronavirus survivors plagued by long-term ailments

Symptoms include losing sense of smell, dry cough, fever and chronic fatigue

npr

SHORT WAVE

What's It Like To Be A COVID-19 'Long Hauler'

November 9, 2020 - 4:00 AM ET

San Francisco Chronicle

PUBLIC HEALTH | OPINION

The Problem of 'Long Haul' COVID

More and more patients are dealing with major symptoms that linger for months

By Carolyn Barber on December 29, 2020

Vox

The many strange long-term symptoms of Covid-19, explained

Long Covid "is a phenomenon that is really quite real and quite extensive," Anthony Fauci said.

By Lois Parsley | Dec 15, 2020, 4:20pm EST

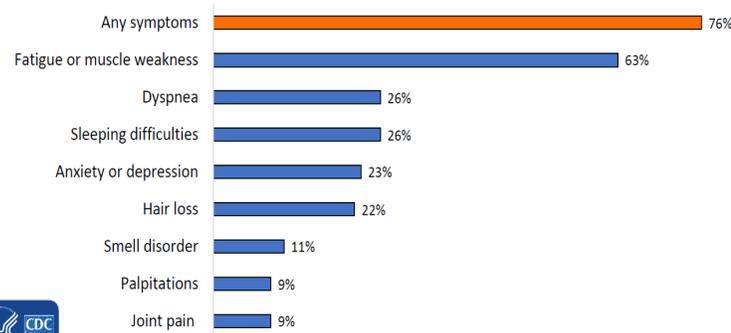
BBC

Long Covid: 'I thought I'd get over this no problem'

By Claire Smyth
BBC News 14

Three quarters of patients hospitalized with COVID-19 had **at least one ongoing symptom** 6 months after their acute illness.

Symptoms among 1,733 patients after hospitalization for COVID-19, China



Huang et al., Lancet. 2021

Prolonged symptoms are common among patients with mild COVID-19 disease **not requiring hospitalization.**

- Survey of patients in a post-COVID 19 clinic in France¹ and telephone surveys in the Faroe islands² and Switzerland³
 - 35-54% of patients with mild acute COVID-19 had **persistent symptoms after 2-4 months**
 - 50-76% of patients **reported new symptoms** not present in their acute COVID-19 illness **or symptoms that resolved and reappeared**¹
 - 9% reported prolonged symptoms as **severe**²

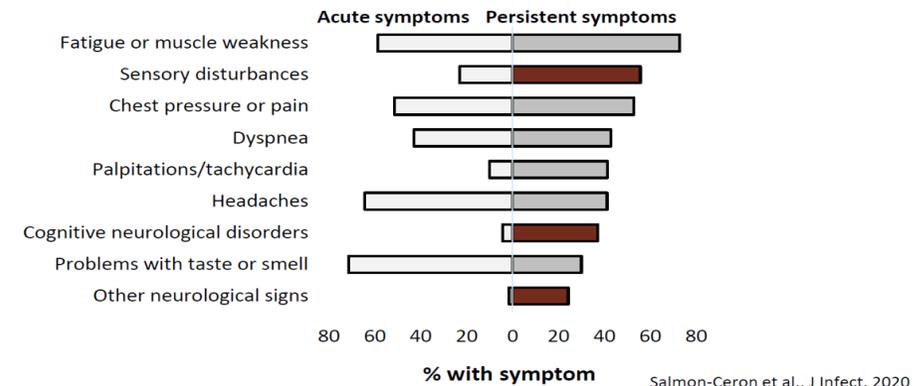


- Salmon-Ceron et al., J Infect. 2020
- Petersen et al., Clin Infect Dis. 2020
- Nehme et al., Ann Intern Med. 2020



More than one quarter of patients **developed new neurological symptoms** after their acute COVID-19 illness.

COVID-19 symptoms among 70 non-hospitalized patients, France



Salmon-Ceron et al., J Infect. 2020

Long COVID often presents as reported **persistent severe fatigue, headaches, and brain fog (mild subjective cognitive impairment) >4 weeks** after acute illness and may be **independent of acute illness severity.**

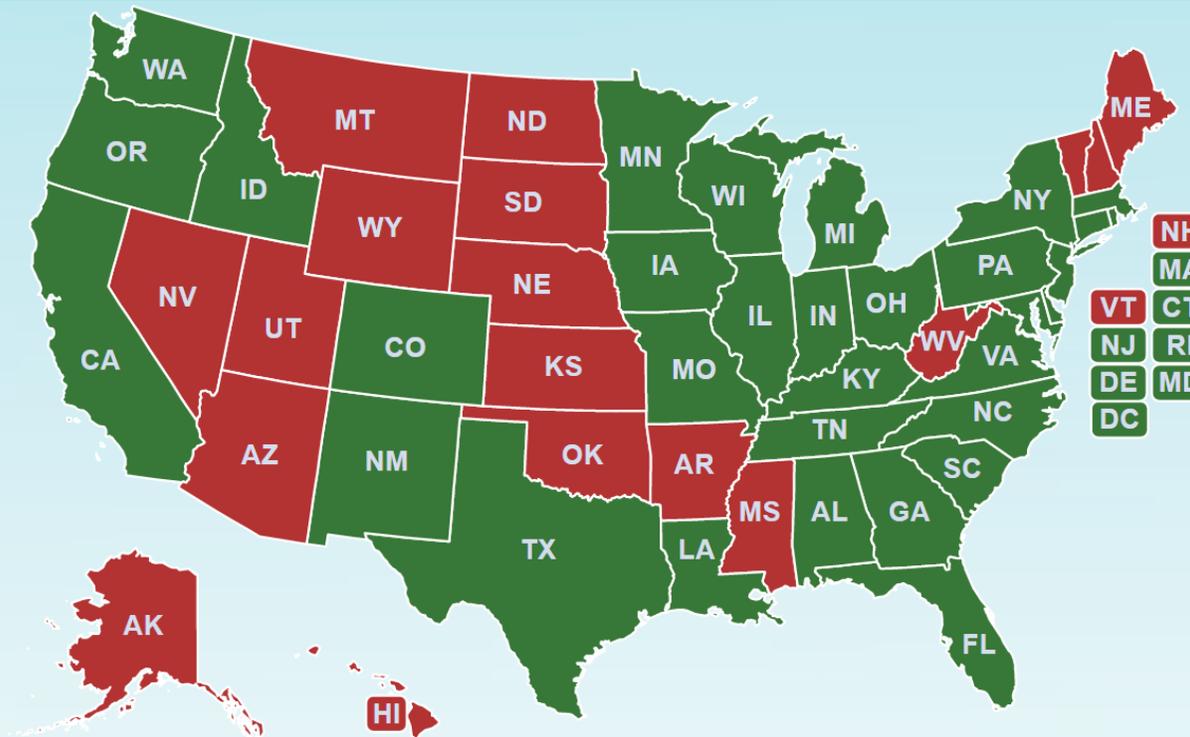


Greenhalgh et al., BMJ. 2020



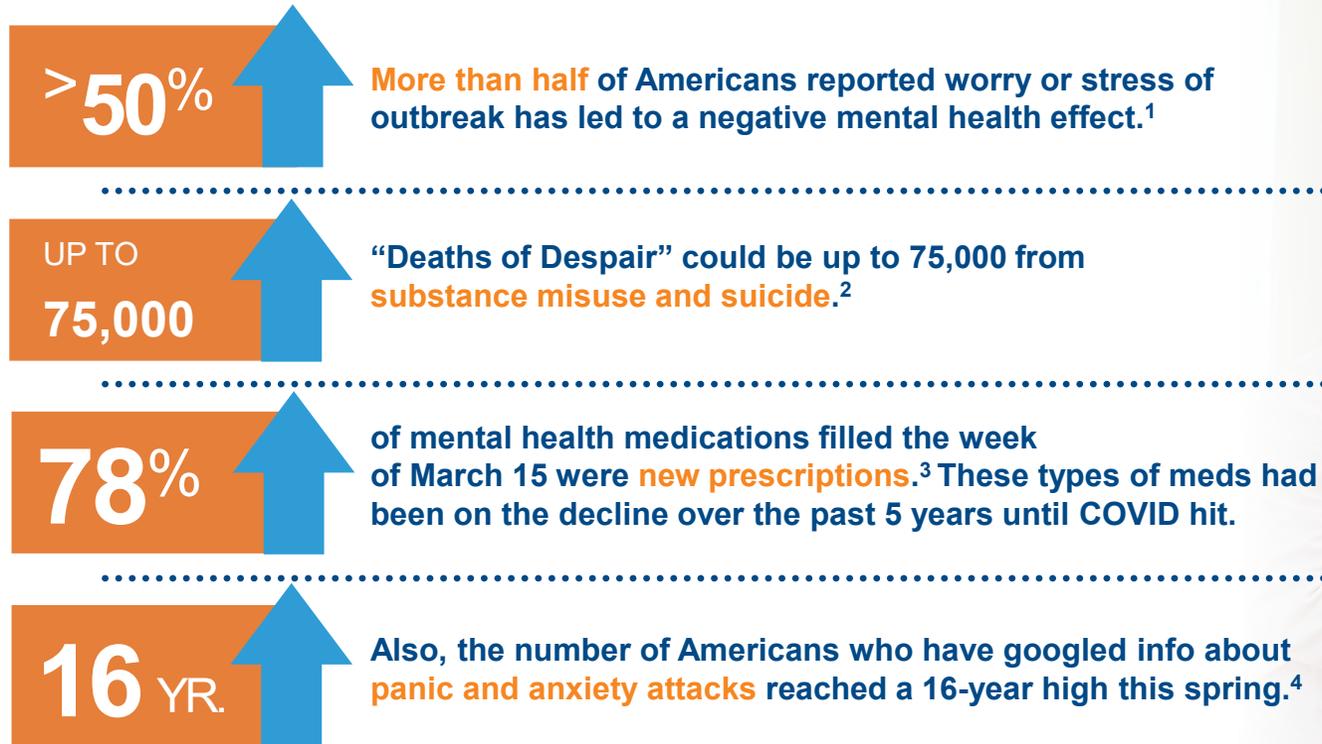
POST COVID CARE CENTERS (PCCC)

Recovery from COVID-19 is posing a new set of challenges for patients and physicians alike. There is so much we don't know, with the lingering and 'long hauler' symptoms emerging as an ongoing battle. Post COVID Care Centers [PCCC] are expanding across the country - bringing together multidisciplinary teams from across a broad range of specialties - to address the issues of COVID-19 aftercare - with comprehensive and coordinated treatment pathways.



<https://www.survivorcorps.com/pccc>

Effects on America's well-being



Sources: 1. Kaiser Family Foundation, August 2021. 2. Well Being Trust, May 2021. 3. Express Scripts “America’s State of Mind Report”, April 2021. 4. Qualcomm Institute’s Center for Data Drive Health at the University of California San Diego, published in the Journal of the American Medical Association, August 2021.

1 in 5 full-time workers are seeking support for a mental health issue in the last 6 months alone.

COVID-19

- **34%** of full-time workers are feeling pessimistic about their company's ability to endure COVID-19
- **41%** state that the mental health of their company's employees has been negatively impacted by COVID-19

Economic Uncertainty

- **3 in 4** full-and part-time workers are stressed by the current economic uncertainty
- **70%** of full-time workers say the economic impact of COVID-19 will be worse than the virus itself

Systemic Racism

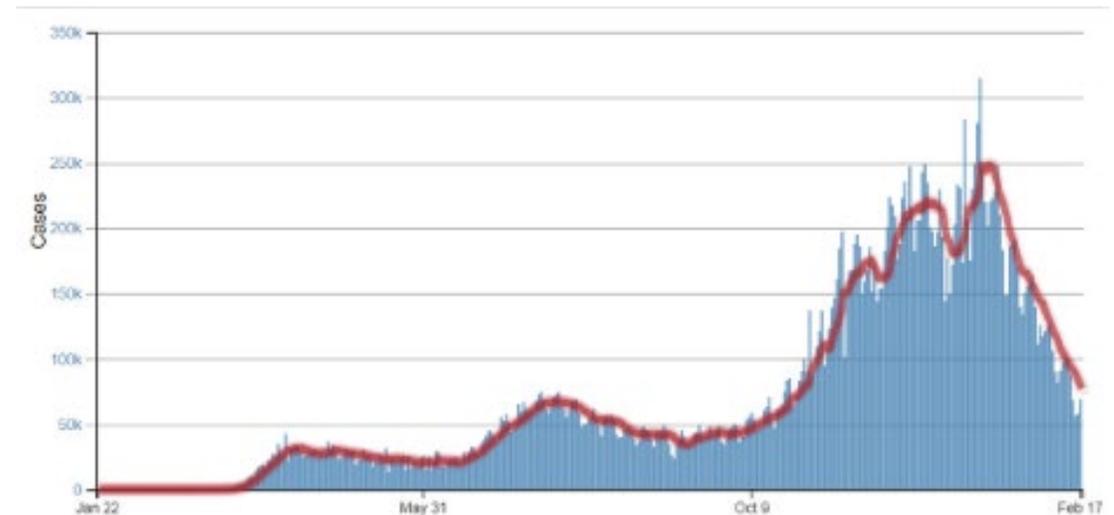
- **84%** of Black full-time workers are experiencing stress and anxiety about the recent deaths of Black Americans like George Floyd compared to 66% Hispanic, 64% White, and 54% Asian workers

Source: Cigna Resilience Index: 2021 U.S. Report.

- Stay Active: Outdoor Activities, Exercise Regularly
- Make time to unwind
- Avoid Excess alcohol, tobacco and substance use
- Adequate Sleep
- Self Care: Meditation Relaxation Quality time with family
- Stay Connected while social distancing
- Coping with Stress
- Continue with routine preventive measures (cancer screenings, etc.)
- Get Vaccinated for COVID



- Vaccinations
- Less testing
- Behavior and policy change
- Seasonality
- Herd immunity
- The known unknowns



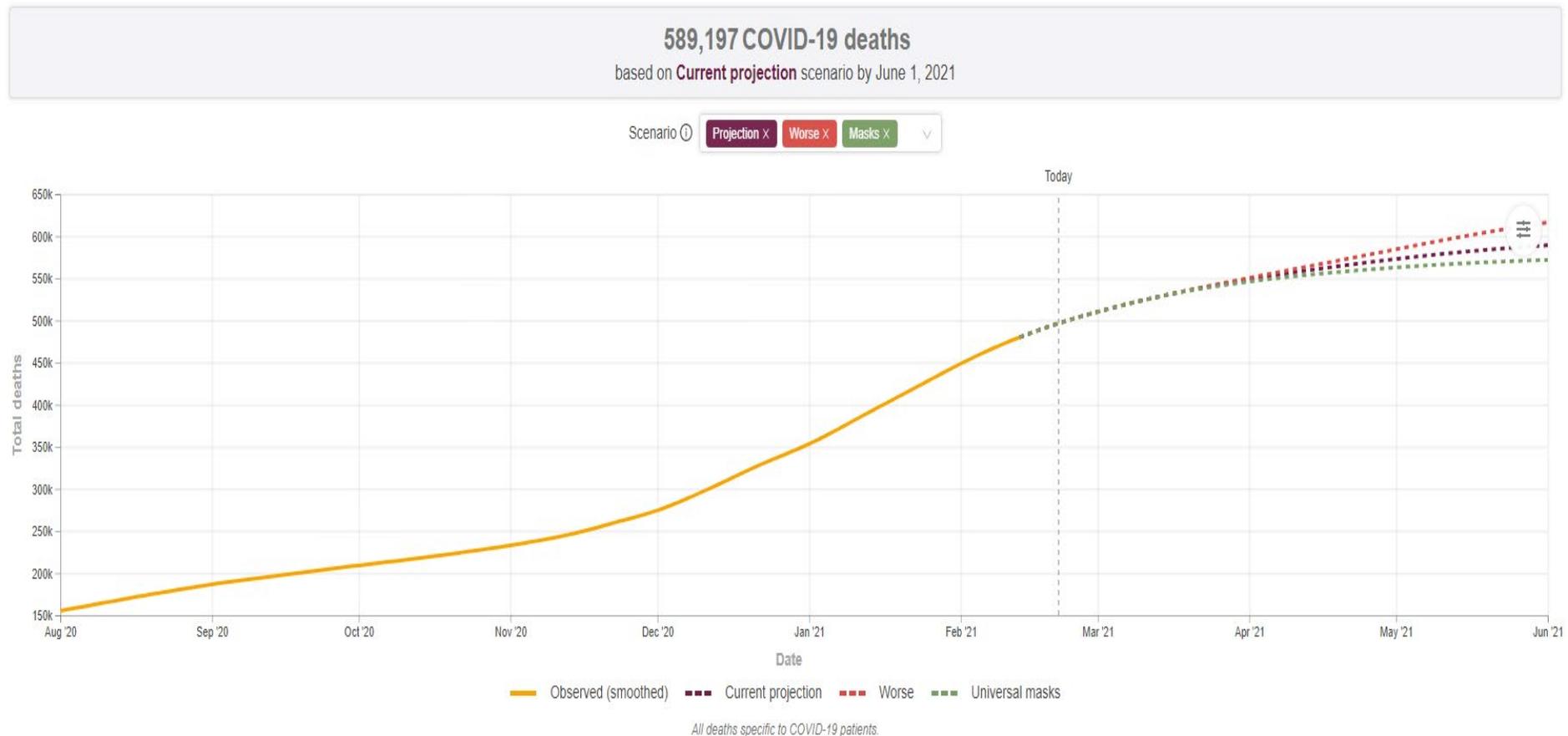
Review



- The Vaccines are safe and well tested, millions of doses have been administered
- All COVID-19 vaccines available in the US have been shown to be highly effective
- **It doesn't matter which one—Just get the vaccination and the second shot!!!**
- *There is no cost for the vaccine itself*
- *There is an administration fee that insurers are covering in full*
- **Continue to Mask, even if you have had the COVID illness or the vaccine**
- Each state is setting vaccine administration guidelines slightly differently.
 - **Sign up and get it when its your turn!**
- Getting a vaccine may keep you from getting seriously ill even if you do become infected
- Get the vaccine even if you have had COVID
- Getting vaccinated will help protect the people around you

- Hand Washing, Isolation, Masks (now double masking!)
- Limit gatherings, especially indoors
- Maintain social distancing to 6+ feet
- Respect your neighbor and fellow citizens
 - ✓ Wear a mask around people you don't live with (even close friends and family).
 - ✓ Stay home as much as possible.
 - ✓ Quarantine and get tested at the first sign of illness or known exposure

**US Total COVID Deaths Projected by IHME for Jun 1 2021 → 616K – not 75% masks;
589K - no change; 571K 75% with Masks. For Today Feb 25, projection is 503,674
(Institute for Health Metrics and Evaluation)**



Thank you for your attention!

BE SAFE and GET VACCINATED!

Questions?





Legal Considerations



Direct Threat & the ADA

EEOC has said COVID-19 = Direct Threat

There is a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

The EEOC's December 16, 2020 Guidance

The EEOC says Yes – *with exceptions*

- Medical/disability
- Religious belief
- CBA

Employer needs to provide accommodation unless doing so would result in an “undue hardship”

- Medical/disability - ADA
- Religious belief - Title VII

Also, watch for state and local laws restricting employers' ability to require vaccination.

- FL, KY, LA, MN, MO, NJ, NY, OR, SC, TN, VA, WA, others??

EEOC's Explanation

- Vaccination itself is not a medical exam
- Medical screening questions may be problematic
 - By an employer or third party contracted by employer
 - medical exam: job-related and consistent with business necessity
 - By third party not contracted by employer (e.g. pharmacy, health care provider, etc.)
 - not medical exam: does not need to be job-related and consistent with business necessity
- May request proof of vaccination (BEWARE: asking “why” vaccine not received may = medical inquiry)

Unvaccinated Employees Must Pose a Direct Threat

Individualized assessment of whether a direct threat exists:

- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur; and
- The imminence of the potential harm

If employee poses a direct threat - cannot be excluded from workplace unless no reasonable accommodation or undue hardship

Is there a way to accommodate an exempt/unvaccinated employee and reduce the direct threat?

Should a COVID-19 Vaccination be Required?

Legal Considerations

- Exemptions & CBAs
- State and local laws
- Type of work performed
- Does an unvaccinated person pose direct threat
- Wage and hour issues
- Discrimination, retaliation
- Worker's Comp – side effects of vaccine
- Privacy/confidentiality re: records

Practical Considerations

- Is the vaccine available
- Where/when will vaccination occur
- Are employees working in the workplace
- Morale / Employee concerns
- Options if employees refuse vaccination
- Related expenses

Incentives

- Many employers are considering incentive programs to encourage employee vaccinations- some are providing financial incentives; additional hours of vacation or PTO; extra pay
- **Law is unsettled in this area and raises two primary issues:**
 - Whether the incentive is deemed so enticing as to be “coercive” thereby violating anti-discrimination laws;
 - Whether providing a bonus or incentive is a form of discrimination against employees who can’t get vaccinated for medical or religious reasons.

Incentives and Wellness Programs

- ADA applies to employer-sponsored “wellness programs”
 - Wellness program is a “program of health promotion or disease prevention that includes disability-related inquiries or medical examinations.”
- The ADA generally allows employers to make medical exams or medical inquiries in connection with a wellness program, but **ONLY** if the program is **voluntary**
- Allowing too rich an incentive to encourage participation in a wellness program may make employees feel coerced to disclose protected medical information in order to get the incentive, and therefore the program would no longer be considered “voluntary” (and in violation of wellness program rules/regulations)
- EEOC rules related to wellness programs also provide that the program must offer reasonable accommodations to people who can’t participate in the program due to medical reasons
 - If an employee can’t participate in the program and earn the incentive due to a medical reason, and accommodation and opportunity to earn the incentive by other means must be provided

Applying wellness program restrictions to vaccine programs

- The administration of a COVID vaccine is not a medical exam, BUT
- The pre-administration questions (i.e., to elicit information about allergies, etc.) could constitute disability-related inquiries and therefore subject to the ADA regulations if the information is solicited by the employer (or third party contracted by employer)
- Vaccines administered as part of an employer wellness program, or administered by a third party contracted by the employer, are likely subject to the ADA/EEOC wellness program rules – **including limitations on incentives**
 - Providing more than *de minimis* incentives to get the vaccine, via an employer-sponsored wellness program, could raise ADA violations
- What is de minimis? Examples given – water bottle, nominal gift card
 - Large cash payments, extra time off, extra pay, likely violate de minimis rule
- Wellness program restrictions are avoided if employee gets vaccinated by unrelated third-party provider (pharmacy, doctor's office). Employer could then require proof of vaccination/vaccine status, which is not a medical exam or medical/disability inquiry under the ADA

Employer Liability for vaccine side effects

- Primary question is whether an employer can be liable for an employee's severe/adverse reaction to the COVID vaccine
- Unlikely that the employer itself will administer the vaccine, so even if the employee could prove that the harm was caused by the vaccine, it would be difficult to hold the employer liable on a negligence claim
- If the employer mandates the vaccine, it would be considered part of “work” and an adverse reaction would likely be covered under a state's worker's compensation program
- If the employer encourages but doesn't require the vaccine, adverse reactions/injuries likely fall outside of worker's compensation coverage
 - To hold employer liable, the employee would have to prove employer was negligent and if FDA-approved vaccine is being administered by 3rd party, it would be difficult to make that legal link

FFCRA LEAVE BASICS

- Emergency Paid Sick Leave (EPSL) and Expanded FMLA (EFMLA) are the two leave provisions of FFCRA
 - Leave provisions were mandatory for covered employers UNTIL 12/31/20
 - As of 1/1/21, employers may continue to offer one of both forms of FCRA leave and receive tax credit through March 31, 2021
- The FFCRA leave provisions apply to employers with fewer than 500 employees (measured at time employee requests leave)
- Emergency Paid Sick Leave (EPSL) provides 2/3 compensation to full compensation (up to specified limits) for up to 80 hours of leave if the employee is unable to work or telework due to a qualifying reason
- Emergency FMLA (EFMLA) provides up to 12 weeks of leave for employee whose child's school or daycare is closed or regular care provider unavailable due to COVID 19
 - First 2 weeks unpaid; remaining 10 weeks paid at 2/3 regular rate (up to specified limits)

Qualifying Reasons for EPSL Leave

Employee is unable to work or telework for one of the following reasons:

1

Employee is subject to a gvt. quarantine or isolation order related to COVID19, including shelter in place orders

2

Employee is advised by health care provider to self-quarantine due to COVID19 concerns

3

Employee is experiencing symptoms of COVID 19 (dry cough, fever, SOB, loss of taste or smell) AND is seeking medical diagnosis

4

Employee is caring for an individual who is 1) subject to quarantine/isolation order/shelter in place order; or 2) has been advised by HCP to self quarantine due to concerns related to COVID 19

5

Employee needs to care for son or daughter because school or place of care is closed, or the childcare provider is unavailable due to COVID 19-related reasons

Qualifying Reason for EFMLA Leave

- Employee may take up to 12 weeks of leave (1st 2 weeks unpaid; following 10 weeks paid at 2/3rds comp) if the employee is unable to work or telework due to the need to care for employee's son or daughter under age 18 whose school or place of care has been closed or the childcare provider of such son or daughter is unavailable, due to COVID 19.
- EFMLA doesn't provide additional weeks of FMLA leave– it only expands the FMLA-qualifying events to include leave for school/daycare closures
 - If employee as already used some or all of their FMLA leave for a “classic” FMLA qualifying event, employee will only have any remaining FMLA leave to use for the EFMLA purpose
 - There is some question as to whether an employee may be entitled to a new “bucket” of leave, available to use for EFMLA, if the employer uses the calendar year method to calculate FMLA leave (If the FMLA leave bank replenishes on January 1st – employee may be able to use that newly refreshed bank for EFMLA purposes)
- EFMLA leave may overlap with EPSL reason #5

FFCRA Leaves are now optional for employers

- Pandemic Relief Package signed into law on 12/27/20 did not extend the FFCRA leave provisions
 - Mandatory FFCRA leave (EPSL and EFMLA) ended on 12/31/20
 - Enforcement efforts for violations before 1/1/21 will continue
- Relief package did extend the FFCRA tax credit which reimburses employers who voluntarily choose to offer FFCRA leave
 - Covered employers who voluntarily extend FFCRA leave may claim the tax credit to cover the cost of providing those benefits
- Tax credit for voluntary FFCRA leave will end on March 31, 2021
- The relief package does not change the qualifying reasons for leave, the caps on pay limits, the required documentation required by the IRS to support the tax credit

FFCRA Leaves are now optional for employers

- Relief package did not provide a new bucket of leave for the employees
- EPSL: Employees entitled to one-time allotment of up to 80 hours of leave for a qualifying reason. Employees may only use any EPSL leave they had remaining at the end of 2020 – they aren't entitled to an additional 80 hours in 2021.
- EFMLA: Employees entitled to 12 weeks of expanded FMLA leave for school/daycare closure. If they used the leave in 2020, they are generally not entitled to second bucket of expanded FMLA leave in 2021. There is some question as to whether employer who uses “calendar year” method of granting FMLA leave, however, may take a tax credit if they allow employee to use FMLA leave for school closures Jan-March 2021. Stay tuned!
- Unclear whether an employer could take a tax credit for FFCRA leave provided to employees hired after 12/31/20.

Managing Optional FFCRA Leave

- Since leave is now voluntary, employer may choose to offer one type of leave but not the other
 - *Example* – employer allows employees to use remaining EPSL leave (and takes the tax credit), but does not permit the use of EFMLA for school/daycare closure needs (or vice versa)
- Employer must be consistent in allowing (or not allowing) leave to avoid discrimination claims
- If employer intends to take the tax credit to cover the cost of any optional FFCRA leave provided, the same rules apply – IRS documentation requirements, qualifying reasons for leave, etc.

FMLA Leave

- FMLA provides up to 12 weeks unpaid, job protected leave, with continued health benefits for certain qualifying events (29 CFR Part 825)
- Applies to employers with **50 or more employees**
- Employee with a qualifying event may be eligible for FMLA if he/she:
 - has worked for the employer for at least 12 months (not necessarily consecutive months),
 - has worked at least 1250 hours during the 12-month period immediately preceding leave, and
 - is employed within 75 miles of worksite with 50 other employees
- **Qualifying events include:**
 - **Employee's own serious health condition**
 - **Care for serious health condition of immediate family member**
- **Employee who has COVID, a reaction to COVID vaccine, or caring for family member with such issues may have leave coverage under FMLA**

State Leave Provisions

- Many states, counties and cities have their own leave provisions that may provide coverage to employees who need to be out of the workplace for COVID-19 related reasons (such as employee's own illness, vaccine reaction, or caring for ill family members).
- **At least 13 states and Washington D.C. provide paid sick leave**
 - AZ, CA, CO, CT, MD, MA, ME, NV, NJ, OR, RI, VT, WA
 - <https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx>
- **Some states have expanded their paid sick leave provisions in response to COVID-19 to provide more generous/expanded benefits**
 - CO, NY, NC
 - California: Many cities have expanded COVID related leave benefits:
<https://www.natlawreview.com/article/california-covid-19-supplemental-paid-sick-leave-2021>
- Washington State: employers need to consider Paid Family and Medical Leave (PFML) and the Washington Family Care Act provisions as well

Leave under the proposed American Rescue Plan:

- **Covered employers expanded:** Employers with fewer than 500 employees would again be required to provide leave under FFCRA; employers with 500+ employees would also be covered; no exemptions for employers with fewer than 50 employees
- **Eligible employees expanded:** Loophole which previously excluded first responders would be eliminated, and these employees would now be covered
- **Amount of leave increased:** Employees would be eligible for “over 14 weeks of emergency paid sick and family and medical leave....”
- **Federal employees covered:** Federal employees would now be entitled to paid EFMLA
- **Benefits increased:** Weekly benefit would be increased up to \$1,400 per week
- **Tax Credits:** Small employers (500 or fewer) would continue to be eligible for tax credits; large employers (500+) would not be eligible
- **State and local governments reimbursed:** These entities would be eligible for reimbursement for cost of leave, where they previously were not
- **Leave extended to September 30, 2021**

Questions?



Recommended Resources

- **CDC Facts about COVID-19 Vaccine:** <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/facts.html>
- **CDC COVID-19 Vaccine Q&A :** <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>
- **CDC COVID-19 Special Populations Data (Age, Race and Ethnicity, Pregnancy):** <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/special-populations/index.html>
- **CDC Ensuring the Safety of COVID-19 Vaccines in the USA:** <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety.html>
- **FDA COVID-19 Vaccines:** <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-vaccines>
- **AAFP state-by-state distribution plans:** https://www.aafp.org/dam/AAFP/documents/patient_care/public_health/State-COVID19-Vaccine-Distribution-Plans.pdf
- **Johns Hopkins Coronavirus Resource Center:** <https://coronavirus.jhu.edu/>
- **California Department of Public Health: Vaccine Sign up and Information** <https://covid19.ca.gov/vaccines/#California's-vaccination-plan>
- **EEOC Guidance related to vaccinations:** <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (Section K)
- **Job Accommodation Network (COVID-19):** <https://askjan.org/topics/COVID-19.cfm>

Thank
You!



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