

2025-1363

**United States Court of Appeals
for the Federal Circuit**

CHRIS J. KROENUNG,

Petitioner

v.

DEPARTMENT OF DEFENSE,

Respondent

Petition for Review from the Merit Systems Protection Board
in CH-0752-23-0234-I-1

**SECOND CORRECTED OPENING BRIEF OF
PETITIONER CHRIS J. KROENUNG**

ERIN D. KNESE
GORDON REES SCULLY MANSUKHANI
211 N. Broadway, Suite 2150
St. Louis, MO 63102
(205) 336-2383
eknese@grsm.com

Counsel for Petitioner

July 28, 2025

FORM 9. Certificate of Interest

Form 9 (p. 1)
March 2023

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2025-1363

Short Case Caption Kroenung v. Defense

Filing Party/Entity Chris J. Kroenung

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Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☒ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☒ None/Not Applicable
Christopher J. Kroenung		

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March 2023

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable

☐ Additional pages attached

Edward Scott Lloyd

Lloyd Law Group, PLLC

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

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☒ None/Not Applicable

☐ Additional pages attached

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STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. Rule 47.5(a), counsel is aware of no other appeals in or from the same civil action or proceeding before this or any other appellate court.

Pursuant to Fed. Cir. Rule 47.5(b), counsel is aware of no other case which will be directly affected by the Court's decision in this case

STATEMENT OF JURISDICTION

This appeal arises from the November 12, 2024 order of the Merit Systems Protection Board (“Board”), which adopted the initial decision of the administrative judge (“AJ”) sustaining Mr. Kroenung’s removal for conduct unbecoming of a federal employee. Pursuant to 5 U.S.C. § 7703(b)(1)(A), Mr. Kroenung timely filed a petition for review on January 13, 2025, which this Court docketed on January 14, 2025. This Court has jurisdiction under 28 U.S.C. § 1295(a)(9).

STATEMENT OF THE ISSUES

1. a. For a charge of conduct unbecoming based on failure to follow an agency policy: Whether the policy's legality or legal status must be an element proved by the agency, in order to sustain the charge?;

b. Whether lawfulness of an agency policy need not be considered among factors relevant to the exercise of discretion in setting penalty? (*Watson* rule)

c. Whether the rescission or end of a policy must be considered among factors relevant to the exercise of discretion in setting penalty?

d. Whether the Board may disregard an uncontested witness stipulation setting forth relevant information about a comparator, or whether it raises a burden agency must meet?

2. a. Whether Executive Order 14043 was lawful, and whether initial punishment based on refusal to comply with the Order is permissible as a significant basis for subsequent progressive discipline and removal from federal service?

b. Whether the President and his Safer Federal Workforce Task Force, created by Executive Order 13991, exceeded legitimate authority by mandating the agencies implement a screening testing program for the unvaccinated, and how to weigh the fact the mandate required use of a "medical countermeasure" authorized only for emergency-use?

3. Whether the agency's implementation of a weekly testing requirement for employees that did not attest to being vaccinated was a lawful basis for the progressive

discipline applied and enforced here; and, whether it depends on the level of the authority requiring employees submit to the test; and, whether a federal civilian employee's compliance can be conditioned on his use of a non-FDA-approved medical technology, regardless of the level of issuing authority?

4. What is the procedure for this Court to resolve a constitutional claim that requires the development of facts that the Federal Circuit *may* judicially notice, and more urgently how is an improper burden-shift prevented where Appellant/Petitioner is expected to bring all claims in Opening Brief, but where agency-employer has failed to narrow the issues by failing to respond at all to the constitutional challenges; and what is the 'pleading' standard to bring or prove the facts underlying the constitutional claim?

STATEMENT OF THE CASE

Mr. Chris Kroenung (“Kroenung”) was removed from his job on March 4, 2023, for conduct unbecoming of a federal employee after his agency-employer instituted progressive punishment based on his refusal to take a weekly COVID-19 “self-test.” The requirement arose from his agency’s COVID-19 testing policy, set by Department of Defense (“DOD”).

The President issued Executive Order 14043 on September 9, 2021 to require vaccination for COVID-19 from all federal employees. The Order directed his Task Force, assigned with overseeing the federal workforce response to the pandemic, to issue guidance to the agencies for implementation. DOD’s testing policy followed and was set in adherence to the Task Force guidelines.

Kroenung had not attested to his vaccination status¹ and so under the policy he was required to test before coming on-site to work each week. Kroenung believed the requirements imposed on him were illegal and challenged the authority for them. The types of tests demanded of Kroenung were only on the market under an emergency-use authorization and all liability had been waived. Testing asymptomatic individuals, like the unvaccinated being required to use them, was not an authorized use and had already been demonstrated to be ineffective. Kroenung challenged the legality of his agency’s demand that he take the tests throughout his period of discipline and on appeal

¹ See Appx120 (DD Form 3175); Appx108 ¶ 2(c) (requiring form to verify vaccination).

to the Board. His concerns about legality went unanswered – until now, as this case finally brings him the opportunity for judicial review.²

A. Kroenung’s Background and Employment

Kroenung is a veteran who worked at the National Geospatial-Intelligence Agency (“NGA” or “agency-employer”), a combat support agency of the Department of Defense (“DOD”), in St. Louis, Missouri, for over 18 years with a pristine performance record and no disciplinary actions against him prior to the events described herein. Appx2, Appx64. Kroenung worked in a branch called TERPS beginning in 2015. In 2018 J. Nahlik (“Acting Official” or “Nahlik”) became his supervisor in the branch. In TERPS Kroenung “worked on developing flight approach and landing procedures.” *Id.* Prior to TERPS Kroenung worked in the “Geo-Areas” branch from 2008-2015. The administrative judge (“AJ”) at MSPB hearing found his job responsibilities were similar at both positions, and they “included aggregating aeronautical data from his assigned host countries and transferring the collected data to an agency database.” *Id.*

B. Vaccine, Testing Mandates

² Kroenung concurrently (within the week) submits a Motion for Judicial Notice (“MJN”) requesting the Court take judicial notice of public record documents that bear on the legality of the actions taken by executive branch officials detailed in this brief. Citations herein to SAppx refer to the MJN attachments, which have been designated in a Supplemental Appendix (pending the MJN ruling).

Following full market approval by the Food and Drug Administration (“FDA”) of the Pfizer vaccine on August 23, 2021, the Biden Administration put out multiple mandates requiring vaccination and testing in various contexts. The one at issue here is Executive Order 14,043, “Requiring [COVID]-19 Vaccination for Federal Employees.” 86 Fed. Reg. 50,989 (Sept. 14, 2021) (the “EO”). The EO purported to draw from the President’s powers under Article II and under three statutes that provide him authority to prescribe rules governing federal service employees.³ The EO directed that “[e]ach agency shall implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees.” The EO directed the Safer Federal Workforce Task Force (“SFWTF” or “Task Force”) to publish guidance for implementing the mandate within seven days. *Id.* at 50,990.

One of Biden’s first actions as President had been the creation of SFWTF. *See* Exec. Order 13,991, 86 Fed. Reg. 7045 (Jan. 25, 2021), issued January 20, 2021. SFWTF’s obligations included that it “shall provide ongoing guidance to heads of agencies on the operation of the Federal Government...[which] shall be based on public health best practices as determined by CDC and other public health experts, and shall address, at a minimum, the following subjects as they relate to the Federal workforce: (i) testing methodologies and protocols[.]” *Id.* at 7046-47, § 4. Thus, testing

³ 5 U.S.C. §§ 3301 (applicants) and 3302 (competitive service) do not apply here because Kroenung is in the excepted service. Kroenung is a preference eligible veteran, which gave him the right to appeal the removal decision even though he is an employee in the excepted service. Appx59 ¶ 5.

was **first** on the list of the task force’s subjects. Other items included occupancy standards, equipment needs, telework options, and coordination with the States. Members of SFWTF included the Directors of the Office of Business Management (“OBM”), Centers for Disease Control and Prevention (“CDC”), and the Administrator of General Services, among others.

C. The New Approach Departs Sharply from Established Norms

The only non-website guidance SFWTF directed specifically to testing stated: “Employees [] should receive clear information...Individuals tested are required to receive patient fact sheets as part of the test’s emergency use authorization...Workplace-based testing should not be conducted without the employee’s consent.” April 7, 2021, **Appx296**. The guidance comports with the duties that Congress put on the Secretary of Health and Human Services (S/“HHS”) when it gave him the awesome authority to allow medical technologies (e.g. drugs, products) to be sold to the general public despite not yet meeting FDA’s standard for full or regular market-approval. *See* § IV.A. Thus the agencies were in agreement that an employer should not mandate COVID-19 testing (“testing”), nor vaccines, as none of the tests that worked quickly enough to give useful information for the workplace were FDA-approved, and neither were the COVID-19 vaccines yet. *See, e.g.,* **SAppx1834** (1/21/21 CDC: “workplace testing should **not** be conducted without the employee’s consent”) (emphasis in original); **SAppx1834** (3/17/21 CDC, same); **SAppx8050**, 86 Fed. Reg. 3276 (OSHA major COVID-19-related regulatory actions without any vaccine mandate). In June 2021, even

asking employees for their vaccination status was off-limits. *See* **SAppx1220** (OMB Memo 6/10/2021 to the Heads of Executive Departments and Agencies (employees “may voluntarily share information about their vaccination status, but agencies should not require [them] to disclose such information.”))).

President Biden consistently said he would not impose vaccine mandates. Even after being elected, in December 2020, he said, “No I do not think [vaccines] should be mandatory.” *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep’t of Lab.*, 17 F.4th 604, 614 n.17 (5th Cir. 2021) (citation omitted), *aff’d* NFIB. On July 23, 2021, the White House Press Secretary still maintained that mandating vaccines is “not the role of the federal government.” *See* SAppx2368 (The White House, *Press Briefing by Press Secretary Jen Psaki*, July 23, 2021). By July 29, everything changed.

On July 6, 2021, a Memorandum Opinion from DOJ’s Office of Legal Counsel solved the problem and reported that the EUA statute did not, after all, prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an EUA. *See* SAppx1174-1175 (“7/6 OLC Report”). It reasoned that the EUA statute’s option to refuse did not *actually* require an unqualified right to refuse, but rather was something HHS could satisfy by informing potential users that if they refuse the use then their standard of medical care would not change. *Id.* at SAppx1174.

The President announced his mandates in a major speech, saying they were intended to increase the number of vaccinated Americans by any available means. *See* SAppx6368.

D. New Testing Requirement Following EO Implementation

The EO-mandated SFWTF guidance issued on September 13, 2021. SAppx2-9 (Agency Model Safety Principles (revision 2), “9/13/21 Principles”). It stated: “Agencies may establish a program to test Federal employees who are not fully vaccinated for COVID-19.” *Id.* It directed the Office of Personnel Management (“OPM”) to follow with more guidance, which came out on October 1, 2021.⁴ *See* SAppx14-21

SFWTF also operated a series of website FAQs. *See* SAppx2305-2359.⁵ Unlike the guidance that would issue as a document, usually once every few months, the websites were *frequently* updated. *See* MJN § II.G.3.

DOD released its guidance implementing the EO and the 9/13/21 Principles on January 10, 2022: “Supplemental Guidance for Implementing Mandatory Vaccination Verification of DOD Civilian Employees for the DOD Fourth Estate—Revision 3” (DOD’s Health-Protection Policy or “**DHP**”). Appx101-140. Most of the testing policy comes from a section of DHP released December 20, 2021 within DHP (Tab 1). Appx103-131.⁶

⁴ The guidance was not submitted to Congress nor for notice and comment, which the executive branch later justified as permissible under a rule exception.

⁵ At this point, procedural/evidentiary issues are too difficult to ignore. Petitioner is filing this within a Motion for Leave to attempt to address same. Unfortunately, the websites of these agencies are an important component of the story, because they were the only place where many rules and decisions were released.

⁶ Tab 2 of the DHP is screening guidance, Tab 3 contains exemption guidance, and Tab 4 contains a statement of DOD OGC Coordination. Appx132, Appx135, Appx139,

The testing rule is in § 1(b): “Weekly COVID-19 testing is required for those DoD civilian employees who are not fully vaccinated, including those who have medical or religious exemptions.” Appx107. Agencies were directed to ban the unvaccinated from entering DOD buildings unless they showed proof of a negative result from a “self-test” for coronavirus at the beginning of the week from the prior three days. Appx127-129. **The AJ held NGA’s “policy was implemented in accordance with [DHP].” Appx8; Appx2-3.** Sourced by DHP, NGA demanded that Kroenung test weekly with a self-test, which will be referred to as the agency’s testing policy (i.e., “Policy” or “testing policy”) herein.

Like most Covid tests, the self-test employees were to use was only on the market under an Emergency-Use Authorization (“EUA”) until well into 2023, and had an endless liability shield under the PREP act. *See infra*, § IV.A. The self-test was demonstrably inaccurate, especially when used to test asymptomatic individuals. *See infra*, § IV.A(g).

E. Initial Refusal, Nationwide Injunction, and (General) Testing Pause

On January 3, 2022, Kroenung came to work but was sent home after refusing to produce a negative COVID test result in accordance with the Policy. Appx100, Appx244 ¶ 6, Appx282 ¶ 7. He was put on administrative leave from that day until March 7, 2022. Appx282 ¶¶ 8-9. On January 11, 2022, J. Nahlik (“Nahlik” or “Acting

respectively. Tab 1 of the DHP is the Dec. 20 Force Health Protection Supplement 23, Rev 3, which contains most of the guidelines for testing.

Official”), Kroenung’s Branch Chief at the time, filed a Memorandum for Record stating that when Kroenung was informed “testing for unvaccinated personnel is a requirement, he [] refused...he did not plan to get COVID tested because he thinks it’s an illegal order.” Appx100.⁷

On January 21, 2022, the U.S. District Court for Southern District of Texas ruled the EO was likely illegal and issued a nationwide preliminary injunction enjoining its enforcement. *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826 (S.D. Tex.), *vacated and remanded*, 30 F.4th 503 (5th Cir. 2022), *reh'g en banc granted, opinion vacated*, 37 F.4th 1093 (5th Cir. 2022), *on reh'g en banc, aff'd*, 63 F.4th 366 (5th Cir. 2023), *cert. granted, judgment vacated*, 144 S. Ct. 480 (2023) [hereinafter ***SDTX-PI***]. The court concluded the mandate likely exceeded the President’s Article II and statutory powers.

While *SDTX-PI* did not *expressly* include a testing requirement in its order enjoining the EO, testing was implicitly covered. The decision relied on the Supreme Court’s reasoning in another vaccine mandate case that had just been decided. *See Nat’l Fed’n Indep. Bus. v. OSHA*, 595 U.S. 109 (2022) (upholding PI for mandate issued as an OSHA rule with “vaccine mandate” that included a testing option) [hereinafter *NFIB*].

⁷ Kroenung raised his belief that the Policy was illegal throughout his disciplinary proceedings. *See, e.g.*, Appx31 ¶¶ 3-4; SAppx6000/Appx72 ¶¶ 3, 5; Appx85 ¶¶ 3, 5; Appx100; Appx232 ¶¶ 3, 4; Appx237, Williams ¶ 1, Nahlik ¶ 1; Appx268 ¶ 4, Appx283 (Issues), Appx285-319 (Kroenung’s Pre-hearing Exhibits); Appx361 100:6-10. The AJ denied Kroenung’s request to brief the issue of legality, noting that “[if] that, ultimately, ends up being an issue at some future point, I’m sure [] there will be perhaps avenues to address it”). Appx367.

F. First Penalty – A Significant Basis for All Remaining Punishment

Without any acknowledgment of the injunction, on February 19, 2022, the first step in the three-step progressive punishment enforced here was formalized. Appx95-98 (Letter of Reprimand (“LOR”)); Appx100. The charge was “Conduct Unbecoming a Federal Employee (6a.^{8,9}) (1 Specification).” Appx95. The Specification read: “On or about 3 January 2022, you reported to your worksite without documentation of a negative COVID-19 test as required by NGA's testing program in accordance with the DoD Force Health Protection Guidance (reference f.). When [] McLaughlin directed you to get a test and return, you refused, which amounts to your failure to follow agency policies and procedures.” Appx96 ¶ 2. Consistent with the Board’s finding, the LOR was “[p]ursuant to references f. and g” – i.e. the DHP. *Id.* ¶ 3. *See also* Appx41-42 (NGA maintaining authority under the DHP for the LOR). The nationwide injunction on DHP’s references (b) and (c) – the 9/13/21 Principles and the EO – is never mentioned anywhere.

The January 3 refusal resulted in Kroenung being put on administrative leave (Appx282 ¶¶ 7-9), prohibition on promotions for two years (Appx97 ¶ 6). According

⁸ (6a.) is a sub-category of Conduct Unbecoming in NGA’s penalty tables, where the Nature of the Offense is “a. Failure to follow agency policies and procedures, e.g., time and attendance.” Appx199. The penalty range for the third offense is 5-day suspension up to removal. *Id.*

⁹ The three-step approach is in DHP, Appx109. The third and final enforcement action is removal “for failing to follow a direct order.” *Id.* The DO testified that removal was her only option on the third offense. Appx354 (Tr 72:3-4).

to the agency's three officials,¹⁰ it was a significant factor in the subsequent discipline. *See* Testimony of: Acting Official, when asked about the role of prior penalties including the LOR: "I think they're huge." Appx343 (Tr. at 25:6-12); Proposing Official, Deputy to Head of Human Resources, J. Adkins: "significant" Appx349 (Tr. at 51:16-23); Deciding Official ("DO"); Head of Human Resources, Vietta Williams, Appx354 (Tr. 69:1-7), Appx354 (Tr. 70:21-24, 72:2-4).

G. Continued Progressive Punishment and Chain of Command Change

The agency proposed a 10-day suspension for conduct unbecoming with three specifications dated February 24, March 1, and March 7, 2022. for "fail[ing] to comply with the agency's COVID-19 testing program." Appx89.

Kroenung returned to work on March 8, 2022¹¹ and continued to go to work until May 26, 2022. Appx 282 ¶¶ 11-12; Appx359 (Kroenung testimony at 90:19-91:3). Upon returning, Kroenung spoke with Nahlik and others in his chain of command, and three weeks later he was reassigned, to a new division (his old one) called "Geo-Areas" in "FID" where his new supervisor (i.e. Branch Chief) was G. Gavin. Appx330 ¶¶ 1-2;

¹⁰ The documents also show the significance of the January 3 refusal. *See* Appx89 ¶ 2, Appx76 ¶ 3 (subsequent punishment citing January 3 refusal); Appx62 ¶ 1, Appx63 ¶3, Appx66 ¶7, Appx67 ¶¶ 9, 10, Appx68 ¶ 12 (Douglas Factor analysis holding earlier refusals elevated the factor to "aggravating" on over **six** of them).

¹¹ The Board erroneously stated that on "March 7, 2022, the appellant failed to *inform* his supervisor that he did not plan to come to work" which is likely a typo. Appx4. The finding is not supported by substantial evidence. *See* Appx89 ("failed to comply"); Appx43; Appx245 ¶ 9 ("notified his supervisor"); Appx339 (Tr. 12:20-13:4). Kroenung returned to work the week of March 7 when community levels were back to low. Appx282 ¶ 11; Appx359 (Tr. 90:17-21).

Appx359 at 91:13-92:9; Appx345 at 35:4-7, 36:16-19. Despite moving physically to Geo-Areas, Kroenung was never moved in NGA's personnel management system, thus on paper Nahlik remained as his supervisor in the system. Appx330 ¶ 2.

H. Subsequent CDC and FDA Guidance; Third Offense

On August 11, 2022 CDC announced that it no longer recommended weekly screening testing the unvaccinated. SAppx104-105 (excerpt at Appx293) (“In support of this update...screening testing of asymptomatic people without known exposures will no longer be recommended in most community settings.”). Kroenung followed the FAQ on the Equal Employment Opportunity Commission's (“EEOC”) website where the “business necessity” standard employers must meet to legally mandate testing under the ADA had been drifting, and particularly on the aspect of “accuracy and reliability” EEOC stated a test would meet the standard if aligned with CDC guidance. EEOC did require alignment to **current** CDC guidance. SAppx2288 (just above ¶ A.1) (EEOC FAQ on 7/12/2022 noting frequency with which CDC updates guidance and stating the “‘business necessity’ standard requires that employers utilize the most **current** medical and public health information to determine what inquiries/medical examinations are appropriate”) (emphasis added); *see also* SAppx1834 (CDC Website on 3/17/2021 stating “EEOC notes that testing administered by employers that is consistent with **current** CDC guidance will meet the ADA's business necessity standard.” (emphasis added)); MJN § II.G.4. Thus Kroenung notified Nahlik, including in an email on August 15, 2022. Appx268 ¶ 4 (“I have noticed that the CDC has changed

their policy as far as testing vaccinated individuals. Please let me know of my status and if policy has changed.”). Nevertheless, on October 24, 2022, NGA issued the notice proposing removal (NPR), with specifications dated August 8 and August 15, 2022. Appx76.¹²

NGA and the Board never acknowledged the CDC update on August 11, 2022 to halt the vaccinate-or-test programs. More about the reason for the change and what it meant for “self-tests” is discussed below in § IV.A(e). SFWTF directed agencies to stop testing **no later than August 17, 2022**. SAppx7043-44. *See also* SAppx116.

I. Proposed Removal

Kroenung submitted his written reply on November 4, 2022. SAppx6000/Appx72.¹³ The record indicates NGA did not consider his reply. See Appx246 ¶ 19 (reply “consisted of a copy of the same email he submitted in June 2022”); Appx5 (characterizing same).¹⁴

¹² The removal notice cited a new DOD guidance document: “Consolidated [DOD] Coronavirus Disease Force Health Protection Guidance – Revision 2” issued on August 8, 2022, the same day Specification #1. *See* Appx75 (NPR reference (d)). It is produced at SAppx46-102 (MJN Exhibit 6), and NGA’s Pre-hearing exhibits contain an excerpt at Appx252-256. The Board found only DHP was in effect, so this document may not be relevant but is included for potential use in reply. Both policies required screening testing utilize “self-collection kits or self-tests.” SAppx75 ¶ 4.1(a).

¹³ The MSPB record contains Kroenung’s June 6, 2022 reply to the suspension notice, which is duplicated in lieu of his November 4, 2022 reply. The parties stipulate that his the actual reply is the one at SAppx6000; see also MJN § III.

¹⁴ Some points are the same and others have substantive changes. A critical difference between the two replies is that the later one specifically requested a response to each of his points. SAppx6000 ¶ 10. Testimony showed neither the PO nor DO ever actually met Kroenung, though each thought the other had. Kroenung never received any form

When Nahlik told Kroenung on August 7, 2022 that he would no longer be permitted to take leave to avoid testing, thereby forming the basis of his first specification, Kroenung had over 120 hours of annual leave and 100 hours of sick leave remaining. Appx283 ¶ 18; Appx360 (Tr. at 96:10-11). Kroenung testified and the record shows he offered to take sick leave, annual leave, and leave without pay, rather than be forced to comply with instructions he felt were illegal and violated his rights. *See, e.g.*, Appx31 ¶¶ 3-4; Appx72/SAppx6000 ¶¶ 3, 5; Appx85 ¶¶ 3, 5; Appx232 ¶¶ 3, 4; Appx237, Williams ¶ 1, Nahlik ¶ 1; Appx361 100:6-10. Kroenung also testified that he would have been able to accomplish his work on nights or weekends. Appx360 at 94:15-24. The Board credited these facts but held that Kroenung was “in the midst of training for an assignment within Geo-Areas...[that] required engagement and oversight that could only be conducted in the office.” Appx13. NGA did not make any showing, and the Board did not address, whether Kroenung could have been reassigned to another area. *See* Appx355, Tr. at 76:3-8, and at 76:19-21.

J. Official End of DOD Vaccinate-Or-Test Policy, EO Recission

On January 30, 2023, DOD released “Consolidated [DOD] Coronavirus Disease Force Health Protection Guidance – Revision 4” and no longer authorized a vaccinate-

of response to the points of illegality he raised in his reply. *See Stone v. F.D.I.C.*, 179 F.3d 1368 (Fed. Cir. 1999) (“the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect”) (citing *Loudermill*, 470 U.S. at 543).

or-test program. SAppx136 (Memorandum at SAppx169, full document at SAppx107-167).

On May 9, 2023, the President issued Executive Order 14,099 rescinding the EO for federal employees. 88 Fed. Reg. 30,891 (May 15, 2023).¹⁵ The rescission followed an en banc affirmation of *SDTX-PI*. 63 F.4th 366 (5th Cir. 2023).¹⁶ In his order rescinding the EO, the President stated that “Agency policies adopted to implement [the EO], to the extent such policies are premised on those orders, no longer may be enforced and shall be rescinded consistent with applicable law.” 88 Fed. Reg. at 30,981 § 2.

Six weeks after the EO’s rescission, DOJ Petitioned the Supreme Court to grant, vacate, and remand (“GVR”) the Fifth Circuit’s en banc decision. DOJ obtained an extension to file the Petition, during which Kroenung’s MSPB proceeding was stayed for settlement negotiations (Appx214-228). The Supreme Court granted certiorari on December 11, 2023, vacated and remanded the case. *Biden v. Feds for Medical Freedom*, 144 S. Ct. 480 (2023). In petitioning for GVR, DOJ explained that “[a] case becomes

¹⁵ President Trump has also issued two Executive Orders regarding the EO. An order on January 20, 2025 revoked Executive Order 14,099 (which had rescinded the EO), then another order on January 21, 2025 formally revoked the EO. *See* Exec. Order No. 14,148, 90 Fed. Reg. 8237, 8239 §fff (Jan. 28, 2025); Exec. Order No. 14,174, 90 Fed. Reg. 8637 (Jan. 31, 2025) (see Addendum). The earlier order’s stated purpose included that “the previous administration has embedded deeply unpopular, inflationary, **illegal**, and radical practices within every agency and office of the Federal Government.” 90 Fed. Reg. at 8237(emphasis added).

¹⁶ Following the en banc decision, Feds for Medical Freedom moved to reopen the litigation and for entry of summary judgment and a permanent injunction, *see* D. Ct. Doc. 49, at 1 (May 12, 2023) (S.D. Tex. No. 21-cv-356), which the district court had not yet acted on when DOJ filed its Petition.

moot ‘when the issues presented are no longer ‘live’”) SAppx367 (citation omitted). DOJ explained that *SDTX-PI* “became moot when the President revoked EO 14,043 and eliminated the basis for any agency policies premised on EO 14,043, such as the [SFWTF]’s guidance.” *Id.* DOJ explained that GVR was warranted because “[a]t this time, no reasonable prospect exists that the government will resume enforcing the same policy challenged here.” SAppx370. In its reply brief in support of the Petition, DOJ also stated that none of the plaintiffs/federal employees in the case faced “collateral legal consequences” because none had shown “for example...any ‘discipline’ or ‘warning letters’ received...before EO 14,043 was enjoined [on January 21, 2022].” SAppx553.

K. Removal, the Hearing and MSPB’s Decision

One month after DOD officially ended its vaccinate-or-test policy (*supra* § K), and over six months after CDC no longer recommended vaccinate-or-test policies (SAppx105), on February 28, 2023, the DO issued Kroenung’s Notice of Removal, to take effect on March 4, 2023.

Kroenung timely filed an appeal with MSPB on March 22, 2023. Appx27-35. A period of mediation and settlement negotiations followed. Appx214-228. Kroenung’s requested hearing was held January 17, 2023. Appx334-367. NGA put on all of its proposed witnesses: the Acting Official (Nahlik), Proposing Official (Adkins), and DO (V. Williams). Appx248-249. Kroenung was denied the opportunity to present his other witnesses. *Compare* Appx237-238, Appx284 (proposing 4 witnesses in addition to

Nahlik and Williams) *with* Appx321-322 (requiring Kroenung to submit stipulations *agreed-upon by the parties* as to 3 of the witnesses). As to the fourth proposed witness, the judge sustained NGA's objection that its own witnesses were competent to cover relevant testimony. *See also* Appx237 (e.g. seeking to question the fourth witness about FDA approvals for vaccines and tests). At the hearing, none of NGA's three witnesses were prepared to answer questions about NGA's authority to mandate the tests or the approval status of the tests.

Kroenung raised his belief that the Policy was illegal throughout his proceedings. *See* n.7. At the hearing, when Kroenung's counsel raised the issue specifically, the AJ denied his request to brief the issue of "legality of the policy" and noted "[i]f that, ultimately, ends up being an issue at some future point, I'm sure [] there will be perhaps avenues to address it"). Appx367.

The AJ issued the initial decision on October 8, 2024, which became final on November 12, 2024 ("Decision").

L. Motion for Judicial Notice

Petitioner is aware he cannot raise issues here that he could have, but did not, raise before the Board. *Holmes v. United States Postal Serv.*, 987 F.3d 1042, 1047 (Fed. Cir. 2021) ("Our precedent clearly establishes the impropriety of seeking a reversal of the board's decision on the basis of assertions never presented to the presiding official or to the board." (citations omitted)).

The legal issues at the heart of this case and that require review all directly relate to one of three that were raised below: legal authority for the testing requirement; ADA application in this context (employer-mandated medical tests); and the EUA or other market-review-status by the FDA of the tests.

Kroenung raised the issue of the Policy's legality, and requested briefing on the issue. *See supra*, § K, n.7, n.14. The AJ denied his request to brief the issue, but then in the Decision says Kroenung "present[ed] no evidence in support of his contentions" that the testing mandate was unlawful. Appx8. One purpose of the requested briefing would be to present evidence, but the AJ denied it, trending with NGA's approach to ignore Kroenung's requests for a response and refuse engage on the merits. The agency's approach leaves the record devoid of substance on the legal issues now brought to this Court.

The AJ excluded all four of Kroenung's witnesses; while stipulations were submitted as to three of them, nothing was permitted from the fourth, which is who Kroenung sought to ask "if there was ever a vaccine or test for covid that was FDA approved." Appx237 (B. Markem, ¶ 1). The answer to this question for the at-home tests at the time is "no" as should be readily discernable from public record documents given the EUA notice requirements.

However the propriety of documents and what standard must be met to establish the fact seem to be live issues and have delayed completion of this opening brief. Thus Counsel for Petitioner is in a procedural predicament. The issue and the delay it caused

are the subject a Motion for Leave to file this Opening Brief out of time. Pray the Court grants relief.

SUMMARY OF ARGUMENT

The agency's testing policy was unlawful, but the case proceeded without the agency ever having to engage with that question on the merits. A 'double-presumption' usually reserved for sexual and other egregious misconduct was applied wherein the agency only had to prove acts in the specification occurred, i.e. that Kroenung refused to test on certain dates, and benefitted from a presumptive nexus for failure to follow instructions. The presumptions themselves are legal error, as is the fact Kroenung was not given an opportunity to rebut them.

With respect to penalty, it appears to be an open question whether legality of an order must be considered during the Douglas factor analysis. This case is an example of why it should. If the legality of the order was not established or considered in the first two showings (charge, nexus), then it must be considered at this stage, to comport with due process and general principles of fairness, the right to defend oneself and to be free from excessive fines or cruel and unusual punishment. The issue was reached in *Watson v. DOT* and decided the other way, but this case's outcome is different because the EO and testing mandate actually are and were illegal. There is also a liberty right at stake as defined below and inherently protected by the EUA statute.

The agency also failed to compare similarly situated employees, which the AJ passed through by improperly discrediting a stipulated uncontested fact. The agency and the AJ failed to consider or abide by the *SDTX-PI* injunction, failed to follow the August 11, 2022 CDC guidance ending recommendations for screening testing, failed to consider that testing was over the time Kroenung was removed, and failed to present witnesses who could answer questions regarding whether the testing policy met ADA standards. If the agency is not required to prove legality in the first instance, nor respond to any of these contentions, then the unproven nature of the instruction must be considered when determining penalty. In this case, it was not a factor there either.

This case arose from constitutional and statutory violations by the President and his Task Force that mandated the agencies set up screening testing for unvaccinated workers as part of Biden's program to get everyone vaccinated. DOD and the agency perpetuated the President's unlawful seizure of power when it adopted the Task Force guidance, issued and began enforcing DHP, again when it failed to pause the testing program following enjoinderment of the EO, and again when it failed to stop the testing program after the CDC update.

The EO and all "health protection" guidance issued by the Task Force on testing exceeded the President's inherent and statutory authority to regulate the "conduct" of civilian service employees. Alternatively, construing the President's authority to cover "conduct" required by the Policy violates Major Questions, the non-delegation doctrine and the Tenth Amendment. Moreover, the mandated tests were EUA, and the

President is only permitted to waive the “option to refuse” requirement of those products if he wants to mandate their usage by servicemembers. More broadly, our constitution protects the liberty of individuals to be free to refuse any engagement with experimental or investigational medical technologies. Thus DOD and the agency also violated Kroenung’s rights by force, or coercing him to the point of job loss, to take these EUA tests. It also violated his rights, as defined in § IV.C.1, in violation of the Constitution.

For any one of these reasons, Kroenung’s removal should be reversed, or at a minimum remanded for penalty mitigation or further fact-finding.

ARGUMENT

I. STANDARD OF REVIEW

When this Court reviews a Final Decision from the Board, it must affirm unless it finds any agency action, findings, or conclusions were (1) arbitrary or capricious, abuse of discretion, or otherwise not in accordance with law, (2) obtained without procedure required by law, rule, or regulation having been followed, or (3) unsupported by substantial evidence. 5 U.S.C.A. § 7703(c); *see also Bannister v. Dep't of Veterans Affs.*, 26 F.4th 1340, 1342 (Fed. Cir. 2022). The Board's legal determinations are reviewed de novo. *Id.* (citation omitted). The Court is bound by the Board's factual determinations unless those findings are not supported by substantial evidence. *Id.* "Substantial evidence is evidence that a reasonable mind may take as sufficient to establish a conclusion." *Grover v. Office of Pers. Mgmt.*, 828 F.3d 1378, 1383 (Fed. Cir. 2016) (citation omitted).

The Court "must reverse a decision of the Board if it...is not in accordance with the requirements of the Due Process Clause of the Fifth Amendment or any other constitutional provision." *Ward v. U.S. Postal Serv.*, 634 F.3d 1274, 1278 (Fed. Cir. 2011) (citation omitted).

II. THE BOARD'S AFFIRMANCE IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND OTHERWISE ARBITRARY AND CAPRICIOUS OR NOT IN ACCORDANCE WITH LAW

An agency must establish three things when it takes an adverse action against an employee: (1) that, by a preponderance of the evidence, the charged conduct occurred; (2) that there is a nexus between the conduct and efficiency of the service; and (3) that

the penalty imposed was reasonable. *Bryant v. Nat'l Sci. Found.*, 105 F.3d 1414, 1416 (Fed. Cir. 1997). “Under the Board's settled procedures, this requires proving not only that the misconduct actually occurred, but also that the penalty assessed was reasonable in relation to it.” *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 5 (2001) (citing *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981)).

II.A. The Board erroneously sustained the charge.

II.A.1. Absent further treatment in subsequent steps, the Board's threshold evaluation of the policy is legal error.

An “agency must prove all the essential elements of its charge.” *Crouse v. Dep't of the Treasury*, 75 M.S.P.R. 57 (1997). “Nothing in law or regulation requires that an agency affix a label to a charge of misconduct. If it so chooses, it may simply describe actions that constitute misbehavior in a narrative form, and have its discipline sustained if the efficiency of the service suffers because of the misconduct.” *Otero v. U.S. Postal Serv.*, No. AT-0752-95-0922-I-1, 1997 WL 58642, 202 (M.S.P.B. Feb. 6, 1997) (citation omitted). “If an agency chooses to label an act of misconduct, then it is bound to prove the elements that make up the legal definition of that charge, if there are any.” *Id.* (citations omitted).

Here the AJ essentially let the agency establish its charge under a presumption – i.e. if it proved the acts in the specification then it proved conduct unbecoming. *See, e.g., Pope v. U.S. Postal Servs.*, 114 F.3d 1144 (Fed. Cir. 1997). The AJ made cursory findings that repeat what NGA alleged about the seriousness of the disease but neither

set forth any facts or basis specific to NGA, such as high density worksite or low vaccinate rate, and they did not hear or set forth findings regarding Kroenung's contrary evidence and contentions.

At NGA the charge of “conduct unbecoming” encompasses a handful of “Nature[s] of the Offense.” Appx199 (penalty table). The one the agency chose here was (a) failure to follow agency policies and procedures. *See also* Appx4 (Decision on “Removal for Conduct Unbecoming *Based on Failure to Follow COVID-19 Testing Policy*”) (emphasis added); Appx33 (SF-50 reason for removal: “CUFE – Failure to Follow Procedures”); *see also* Appx96 (LOR Specification). There is no dispute that Kroenung refused to take a Covid test before coming into work each week that the agency ordered him to.

Whether ‘failure to follow’ has elements that apply here is less clear. A line of cases requires submission to a rule even when its suspected unlawful. (*Blevins, Sweeney, Newsome*) (“BSN-line”). However, in 1994 the Board expressly overruled a case *BSN* relied on. *See Fleckenstein v. Dep't of Army*, 63 MSPR 470 (July 5, 1994) (insubordination charge, which requires agency show its “order entitled to be obeyed”). In footnote 3 the Board overrules *Gragg v. U.S. Air Force*, 11 MSPB 546 (1982), *dismissed*, 717 F.2d 1343 (Fed. Cir. 1983) (“the Board concluded in *Gragg* that the employee could be disciplined for his failure to obey an order even though the order was based on a policy that later was found to be improper...To the extent that *Gragg* can be interpreted as indicating that an employee can be disciplined for a refusal to obey an order that the

agency is not entitled to have obeyed, we hereby overrule that decision”). *Id.* This indicates that there must be some showing as to propriety of the order.

Another line of cases is consistent with the *Gragg* overruling and requires agency showing against a standard, for example, “proper.” In *Smith v. Gen. Servs. Admin.*, the Court found a decision to sustain the charge of “failure to comply with IT policy” lacked substantial evidence support. 930 F.3d 1359, 1368 (Fed. Cir. 2019). In ruling, the Court noted that “[p]roof of a failure to follow instructions charge **requires** the agency to show that an employee failed to follow a **proper** instruction.” *Id.* (emphasis added). The meaning of proper may need development.

Here, the AJ found the “policy was implemented in accordance with [DHP] and that NGA employees were notified of the requirements in advance.” Appx8. It could be that notice¹⁷ and implementation of Executive Department (DOD), and in this case Presidential, directives meets the ‘proper’ standard, given that the agencies and MSPB are not equipped to draw legal conclusions on this. For now, it does not need to be drawn out because the agency’s testing policy falls into an exception.¹⁸

¹⁷ See §§ II.C.3, D, Douglas analysis on reasons notice was insufficient with respect to policy’s legality.

¹⁸ The ‘proper’ analysis would not be included if this case was at a stage where Petitioner was fairly on notice of the agency’s basis for asserting the DHP and its testing policy were lawful. See also Motion for Leave and MJN. Petitioner should not be obligated to provide all possible responses to all anticipated bases for what the agency may argue as a defense to their policy’s’ legality. Petitioner expressly reserves the right to present arguments in response to Respondent’s brief even if they were not asserted in the Opening Brief, on issues where the burden of first showing is more fairly on Respondent.

II.A.2. As a matter of law, the agency’s testing policy violated a duly-issued ruling enjoining the EO.

The EO was clearly unlawful by ‘street-standards.’ Its likely illegality became one the agencies would have to recognize when *SDTX-PI* enjoined the EO. *See supra* SOC E; MJN. The Secretary of Defense (S/DOD) was a named defendant, and the order enjoined S/DOD’s enforcement. DHP, and thereby the agency’s testing Policy, implements the EO and therefore it became enjoined on January 21, 2022.

The agency policy here required testers to use an EUA product. It is unknown if these products are safe and effective. *See infra*, § IV.A. Because of EUA status, and under long-standing, traditional, fundamental values and principles, one person cannot impose a penalty on another for that other’s refusal to take or use an EUA product. *Id.* Congress protected the interest by codifying an “option to refuse” in the EUA statutes. *Id.* As presented below, that option is also protected by our Constitution. On this ground, Kroenung was not obliged to obey and the charge cannot be sustained.

The BSN-line was signed onto in *Watson v. Dep’t of Transp.*, 983 F.2d 1088 (Fed. Cir. 1992). The agency’s policy here is a “clearly unlawful” order after that time. Alternatively or additionally, the injunction became a ‘duly issued ruling’ that must be repected. In *Watson*, a situation arose with President Reagan’s drug testing. *Watson* applies *Walker v. City of Birmingham*, 388 U.S. 307 (1967), with the panel majority led by Judge Rich finding *Walker* stands “for the proposition that ‘individuals do not have the unfettered right to disregard a law, rule or regulation merely because substantial reason

exists regarding the constitutionality or validity of that law, rule or regulation.”” *Watson*, 983 F.2d at 1088 (quoting *Gragg*, 13 M.S.P.R. at 299). *Walker* held that a court-issued injunction must be respected, and Judge Newman in dissent in *Watson* read the case to “provide[] solid support for Watson's actions. Both Watson and the agency were obliged to respect a duly issued ruling of the Ninth Circuit.” *Id.* (Newman, J., dissenting). Here the Policy was enjoined, and under *Walker* the dissent, and likely both sides, would agree NGA was obliged to halt enforcement, which it did not do. In *Watson*, unlike here, the mandated test was a drug test and thus more closely related to workplace conduct. Judge Michel’s concurrence provides a narrow path that could be relevant to this case. *See* II.C.

II.A.3. The charge is unsupported by substantial evidence because the agency failed to show that compliance required testing.

Kroenung’s refusal was a **refusal to test** (using an EUA “self-test”) and that is a distinct refusal from a **refusal to comply** with the testing requirement. One example that demonstrates the difference is, later in 2022 when the agency’s testing requirement became tied to community levels, Kroenung did not have to submit a test if levels were low. On weeks when the level was low, Kroenung was not disobedient to the Policy because he did not need to test, and no refusal needed to be made. A second example is telework: Kroenung was in compliance during the weeks NGA permitted him to telework.

II.B. Removal Here Does Not Promote Efficiency of the Service

An issue in this case is whether an agency policy’s legality needs to be addressed, and if it does, where in the analysis it goes. Arguably with charge (*supra* II.A.1-2), most likely with penalty. But nexus is also suitable and may permit easy resolution in this case: *See SDTX-PI*, 581 F. Supp. 3d at 836 (noting, though in context other than for nexus here, “the government has no legitimate interest in enforcing ‘an unlawful’ mandate”) (citation omitted).

The nexus-tests are not generally exclusive, but it may be the rule that where a government or agency policy, order, or instruction are ruled to be illegal, then that cuts off even a possibility for the nexus showing. The trickier issue would be around political policies or orders (which the one here is except that it goes beyond them all for being manifestly illegal due to the EUA-refusal-rights violation). Thus a rule that could put the policy in a holding may be appropriate in rare cases.

Here the government cannot have a *legitimate* interest in enforcing an unlawful policy. *See also Doe v. Dep’t of Justice*, 565 F.3d 1375, 1380-81 (Fed. Cir. 2009) (“proof of the required nexus between off-duty [misconduct] and efficiency” requires a “predetermined standard”).

II.B.1 If a presumption of nexus applies, Kroenung must be able to rebut it.

The Board foreclosed nexus, finding failure to follow instruction gives a presumption. Appx_ Cases have applied the presumption in failure to follow (*Blevins*), but it was inappropriate here where the AJ arguably gave the agency a presumption on charge. The agency did not listen to Kroenung’s points to rebut charge, nor did they

for nexus. But Kroenung must be permitted to rebut at least one if not both presumptions, and the agency must respond to the points he offers in support. Those points are now the subject of an appeal and we have no record from below because this was allowed.

To preserve the point, the conduct here is “off-duty.” *SDTX-PI* is persuasive; in determining whether CSRA barred the court’s jurisdiction for certain challenges to EO, the Fifth Circuit “look[ed] to the *specific underlying conduct being challenged* to determine whether that conduct is an employment action covered by the statute” and found that it was not. *SDTX*, 63 F.4th at 378.

II.B.2 The Board erred as a matter of law because it did not correctly test the relationship between the relevant facts.

Judge Linn presents the four traditional “avenues to nexus” and applied each in *Brown v. Navy*, 229 F.3d 1356, 1364-68 (2000) (Linn, J., dissenting).

The Board does not make a clear distinction in ‘conduct’ versus ‘misconduct’ versus ‘consequences of the misconduct’ (i.e. consequences from his failure to follow NGA’s instruction to test, like being absent from work.). *See also* § II.A.3. With respect to the latter, the consequences are not fairly brought into nor flow with the misconduct *unless* the agency demonstrates legality of the policy (at least). Once again, a showing on legality by NGA and/or an evaluation of it by the Court is warranted.

The performance issues here do not arise directly from the misconduct, the agency Policy is a superseding or prevailing cause. The only performance issues arise

solely from Kroenung's absence from the office, not from any merits issue. *See* Appx62-63, Explanation for Douglas Factors 4 and 5. 'Misconduct' has not been clearly framed, and further evaluation depends on whether absence from the office is fairly a component of the misconduct when testing for nexus. Absent a showing of the instruction's legality, it should not be.

The agency made no showings on its mission, and therefore it must show a direct impact on Kroenung's job performance. The Douglas Factor worksheet is clear that there was no impact:

Mr Kroenung has performed at the successful level of performance over the last DCIPS rating cycle. Management has reported that, **when Mr. Kroenung is able to accomplish** the mission-essential requirements of his position, his current performance **remains at the successful level**.

Appx64 (Factor 4 Explanation) (emphasis added). Factor 5 analysis confirms what *when* means:

Failure to test [] **necessitates being barred from entering** NGA's facilities. Because Mr. Kroenung is subject to the testing program, **his refusal prohibited him from entering NGA's facility, and thus he was unable to perform the mission-essential requirements of his organization and position**.

Appx65. Kroenung absences were what had the impact on him being able to accomplish mission-essential requirements. To the extent the absences are permitted to flow with the misconduct of refusing to test, and since here the absences are what cause the impact, then some showing must be made as to legality of the test mandate. See also Appx (Tr. 69:18-19) (DO, forced absences rather than conduct on-site impacted his ability to do his job).

Likewise the Board's test for a trust and confidence nexus was misstated and the application is an error of law. "[A] trust and confidence nexus must contain a connection to the employee's actual job responsibilities and performance." *See Brown*, 229 F.3d at 1368 (Linn, J., dissenting). As with factors 4 and 5, Kroenung's absences are **the** reason performance is being negatively impacted, and the absences are distinct from, or at least require special treatment in the analysis of, misconduct.

Of the four avenues in Judge Linn's dissent, the only one possibly met on these facts relates to the strain on mission as others have had to do his job. *See, e.g., Hatfield, Doe*. But again it is the absences and those are only occurring because of the testing program.

The relevant inquiry will always tie back to whether the adverse action (removal here) serves efficiency of the service under Chapter 75. There is no showing under the established tests for nexus here, and the Board's approaches are not probative of whether Kroenung's removal promotes efficiency unless the absences are fairly tied to the refusal, which should only be done if the testing policy is legal.

II.B.3 Even if nexus exists, the agency has not made the requisite showings as to why he could not be reassigned to telework.

A relevant inquiry from Judge Nies's dissent in *Allred* is whether there were other positions at the agency where Kroenung could have been reassigned. Though the Board finds Kroenung was "required to perform his job duties at his worksite and also because the appellant was in the midst of training for an assignment" there is nothing

to indicate Kroenung must stay with that assignment. *See also* § SOC, I; § II.A.3.

II.C. If the agency's first two showings are upheld, the penalty must be reversed or mitigated.

With the exception of *Watson*, in cases that avoid resolving the legality issue like *BSN*, and where nexus for failure to follow is presumptive (which was applied here by the AJ), comporting with due process will, in general, require that either (i) legality is decided and the consequences flow, or (2) the penalty must be mitigated to 30-day suspension or less.

“[T]he Due Process Clause may also cut deeper into the government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is increasingly if indistinctly recognized as a foundation of several specific constitutional protections.” *Doe*, 565 F.3d at 1381, n.2 (citation omitted).

Removal for failure to comply with an agency policy at a time when that policy was enjoined inflicts a capricious penalty and it should be reversed here for any of the reasons below.

II.C.1 The agency failed to consider relevant mitigating factors and was not owed deference.

The agency failed to consider a significant mitigating circumstance. In *Allred*, penalty determination was given deference because employee did not “attack the validity of those regulation” nor mention reasonableness-of-penalty. *Allred*, 786 F.2d at 1133. In this case we have done both, so the agency's burden requires more than what was allowed to pass here.

The Board found the DO considered all mitigating factors, deferred to the *Douglas* factors analysis, and affirmed the penalty of removal was “within the tolerable bounds of reasonableness.” Appx12-14.

II.C.1(a) There was a similarly situated comparator.

The existence of a “comparator who committed the same or similar misconduct [but had a less severe penalty imposed] should be considered in favor of mitigating the penalty in a given case.” *Singh v. United States Postal Serv.*, No. SF-0752-15-0014-I-1, 2022 WL 1772249, ¶ 18 (M.S.P.B. May 31, 2022) (emphasis added). Here, the Board found all employees identified by Kroenung as comparators “had distinguishing characteristics” like religious accommodations. Appx13-14. The finding is rebutted by clear and uncontroverted evidence in the Witness Stipulations at Appx331, ¶ 17.

Mr. Katze is aware that his colleague, [] Atkinson, never tested but was allowed on at least two occasions to come in person to work for meetings that management asked for him to attend in person.

NGA’s attorney argued that this testimony was irrelevant under *Fox v. Department of the Army*, 2014 MSPB 6 (Jan. 29, 2014), *but see Singh*, 2022 MSPB 15 at ¶¶ 10-12 (same supervisor was rule for “decades” but through “a series of cases issued in 2010, however, the Board changed its approach” and explaining impact of *Williams*).

“A stipulation is sufficient to prove the fact alleged. 5 C.F.R. § 1201.63. *Williams*, *Macaulay v. Dep’t of Com.*, No. DC-0752-17-0595-I-1, 2018 WL 1243527 (Mar. 9, 2018) (citations omitted). The AJ excluded Kroenung’s witnesses and made him submit agreed-upon stipulations in their stead. The AJ discredited the stipulation as

“anecdotal.” Appx13. The stipulated fact shows a similarly situated employee who was potentially treated less harshly, therefore the burden shifts to the agency to “prove a legitimate reason for the differing treatment.” *Miskill v. Soc. Sec. Admin.*, 863 F.3d 1379, 1385, n.2 (Fed. Cir. 2017).

The AJ saw first-hand the agency’s failure to do *any* of the investigations it was more suited to do than Kroenung (such as here with identifying potential comparators) even when it had the burden. *See also* Appx190-193; Appx177 (PEB Duties for each official).¹⁹ Instead of acknowledging its PEB failures or meeting its burden, the agency doubles down with tricks. *See, e.g.,* Appx363 (Tr. 105:10-11, arguing comparators **must** have same supervisor under old law); Appx365 (Tr. 113:20-24). The Board aligned with one of them finding the statement was second-hand and not owed weight, contrary to *Williams v. Soc. Sec. Admin.* 586 F.3d 1365 (Fed. Cir. 2009). The question is whether credibility deference applies when the fact is a stipulated one made by a witness to the thing of relevance. Taking *Williams* with the general rule (5 C.F.R. § 1201.63), and the fact Kroenung’s witnesses were excluded, the answer is none owed here.

The Board’s treatment hints that credulity is appropriate if the statement wasn’t made by the comparator himself. But that requires too much. Considering the practical

¹⁹ In closing the attorney for NGA argued about what was “conceivable.” Appx365 (Tr. 113:15-24). To permit NGA to come to the hearing, knowing in advance that Atkinson would be an issue and was a comparator, and not only *not* have the obvious, relevant evidence, but to shift the burden like this with pure speculation, it is improper and strongly cuts against leniency here.

side: a proposed comparator should not be expected to testify in a case where he has ‘gotten off’ and that fact is needed to help lower his comparator/coworker’s punishment. Employees who have not been punished for an action will be understandably hesitant to say anything on record in that situation. If person A and person B are doing something against agency policy, but only person A gets in trouble for it, B’s first-hand testimony to defend A should not be expected.

Under *Singh*, Atkinson and Kroenung are comparators because their misconduct is the same (refusing to test before on-site work). The penalties are fully disparate - no punishment versus removal. Atkinson was also a supervisor, in general his punishment should be harsher. Under *Singh*, the existence of Atkinson **must be considered in favor of mitigation** of the penalty, even if the officials find it does not change the balance. Their failure to consider him is reversible error.

Williams is enlightening if not dispositive on this issue. Williams worked at SSA and stole identities, the nexus showing was very strong. Moreover, the misconduct was “capable of repetition” making rehabilitation a significant factor, and it went clearly to the agency mission and job responsibilities, where the mission of SSA in the use and safeguarding of SSNs, and identity theft was one of their biggest problems (unlike here where the requirement to test was already over and there were no mission or job related responsibilities that bore on isolated misconduct of refusing to test). In *Williams*, a member of the panel learned of the AJ’s cursory treatment of the witness’s relevant fact, and remanded to the Board for further factual development. A key point from

Williams is in looking for comparators, consider why the “different chains of command would justify different treatment.” *Williams*, 586 F.3d at 1368. That observation applies here especially well because many at the agency were being asked to test, and it was an order coming from higher up than even D/NGA.

Under *Williams* and *Singh*, any NGA employee who needed to enter the building but who refused to test is a potential comparator. In *Williams* the nexus showing was very strong, here it is not. NGA failed to come to the hearing prepared, then once again improperly shifted its burden to Kroenung. At a minimum, remand for further develop of the record is warranted.

II.C.1(b) The Board’s legal errors led it to amplify the seriousness of the offense.

The Board ‘concured’ with the agency “that the sustained charge is extremely serious and outweighs any mitigating factors.” Appx14. The concurrence is improper and both the Board and agency failed to consider any of the following dispositive aspects of the situation, which are also the subjects of “counts” (i) – (vii) in § II.D. During the course of his punishment proceedings, these different events altered the nature of the requirements imposed on him. For example, the fact the agency’s testing policy was no longer in force is a relevant mitigating circumstance and impacts other factors, for example, it alleviates the relevance of rehabilitation (factor 10) and adequacy of alternative sanctions to deter future conduct (factor 12). Moreover, enjoinder of DHP, the only authority offered by the DO for the agency’s authority during the initial punishment phase, is mitigating but went completely unconsidered.

II.C.2 Additional errors at MSPB

Additional grounds of error include that there is no need for rehabilitation and adequacy to deter is moot given rescission of the policy. Regarding employee levels, this treatment is clear error, because Kroenung was not a supervisor and yet the factor is held to be aggravating because “employees are expected to demonstrate professional behavior at all times” (Appx63), which applies to any person at NGA at all times. On “effect on Agency reputation” the officials stated general public health concerns, and found the factor aggravating due to Covid and because “it would *likely* reflect poorly on the Agency *when/if this* offense becomes known to the public.” (Appx66). But there is no indication Kroenung will become a public figure, nor is future speculation a proper basis on which to aggravate the factor.

Douglas factor 7 considers the “consistency of the penalty” with NGA’s table. *See* n.8,9; Appx199; Appx354 at 72:2-4. Like with 6 of the other factors, the agency found this one to be “aggravating” based merely on the fact it was the third offense. Legal error should arise by this point when the fact-of a third offense is used so heavily. The penalty ranges get harsher as the number of offenses go up, and that is where the fact-of earlier offenses is taken into account. DO’s use of it amounts to a ‘double-counting’ of past misconduct.

II.D. The testing policy was illegal, and its illegality should be resolved and considered in the analysis.

Petitioner should not be limited on the grounds he can now raise to challenge the testing policy's legality, because any attempt he made to raise them below was and would have been futile. The grounds for the legal issues now requiring review must be built, and so some are not set forth at this time, with proposals below regarding who has initial burden. Kroenung expressly attempted raise the issues, on the record. See § SOC L. The fact issues holding up a decision are minimal, but there is no way around that a few do exist. The burden-shifting issues are Petitioner's primary concern.

The policy mandated weekly screening testing for the unvaccinated with a self-test, and the grounds on which it was illegal (i-iv) and/or illegally enforced against Kroenung (v-vii) are:

- (i) the test is illegal under the ADA, which provides that employers "shall not require a medical examination...unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S. Code § 12112(d)(4)(A). This includes a claim against EEOC for APA violations, and their shift from April 23 to May 5, 2020 whereby employees were to review "information" on websites to determine what was safe and accurate, and what an employer may mandate. [Respondent goes first, we raised many times below]
- (ii) the test is illegal under the EUA statutes, which preserve an individual's right to refuse use of an EUA-product. This includes a claim against HHS for dereliction of its duties to inform individuals of their 'right to refuse' under the statute, and a non-delegation argument because as exercised by HHS during Covid, Congress cannot delegate that power and may not even hold it itself. [We are first, can only go after Elgin/MJN ruling]
- (iii) the test was experimental, non-FDA-approved, investigational, mandated for a non-intended use, and/or inaccurate, and its coerced use violates a Constitutional liberty right. [We are first, can go once MJN decided]

(iv) the test is illegal because it was mandated by the President and Task Force in an illegal overreach of the powers invested in them, both statutorily and under Article II. [We are first, can go once MJN decided]

(v) the test is illegal as enforced by NGA on January 3, 2022, as well as on all other dates, for all the reasons above. [Postpone until after Elgin/MJN ruling]

(vi) the test is illegal as enforced by NGA subsequent to January 21, 2022 because it was enjoined by SDTX-PI. [Respondent goes first]

(vii) the test is illegal as enforced by NGA subsequent to August 11, 2022 because by then CDC released guidance calling for an immediate stop to the testing programs. [Respondent goes first]

It would be unjust to expect Petitioner to anticipate *and counter* all of the government's defenses within the page limit of this Opening Brief, though that was our initial approach and is the reason for the delay filing. The Court may not need to address these issues, because for the other reasons above (II.A-C) the Court can reverse on the current record alone, *but see infra* § III.A.2; *Noel Canning*.

III. EXECUTIVE AUTHORITY WAS UNLAWFULLY EXTENDED, THE ISSUE IS NOT MOOT, THIS COURT HAS JURISDICTION, AND THIS COURT SHOULD REACH THE LEGAL QUESTIONS

Constitutional violations occurred all along the line of authority tracing back to the President, starting at the agency. Resolution of the constitutional issues here resolves the status of the agency instruction's legality. Resolution also serves to recognize and address the overreach that occurred, thereby helping maintain our nation's delicate power balance and making it clear that the new, tyranny-leaning tactics attempted with these mandates are not permitted under our Constitution.

A. The President Exceeded His Authority Issuing and Enforcing the EO, Including Through His Task Force.

“The Constitution’s core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights.” *Nat’l Labor Relations Bd. v. Noel Canning*, 573 U.S. 513, 570-71 (2014) (Scalia, J., concurring in judgment, joined by Roberts, C.J., and Thomas and Alito, JJ.). Policing the “enduring structure” of constitutional government when the political branches fail to do so is “one of the most vital functions of this Court.” *Public Citizen v. Dep’t of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment, joined by Rehnquist, C.J., and O’Connor, J.).

The wisdom of the Founders in creating a system of checks and balances and the separation of power principles underlying *Youngstown* should guide the Court in considering the legality of the instruction here. President Biden and his executive agencies, HHS and DOD in particular, exerted radical powers---greatly exceeding what our Constitution permits. With respect to mandated testing, the power grab seems to have gone largely unnoticed.²⁰ *See also* § SOC, C.

The government had *SDTX-PI* vacated and avoided a ruling by the Supreme Court on the EO’s (likely) illegality, but its enforcement in this case brings the EO’s legality

²⁰ The difficulty of the websites where guidance was being released probably plays a role. The vaccine EUAs also received much more attention than the tests. But the public documents do show that the self-test was only available under EUA during 2022, therefore it requiring use of the self-test was illegal. *See* § IV.

back before the courts. The EO purported to regulate “conduct” in a manner that Kroenung believed violates his rights, and the affirmance of Kroenung’s removal brings the EO’s legality back to the courts. For the reasons below, the EO was illegal.

A.1. The agency’s testing policy was enforced against Kroenung pursuant to Presidential orders.

[withheld pending *Elgin*/MJN/procedural order]

A.2. This Court has jurisdiction and should reach the constitutional issues within this case.

The EO is not self-executing; it involves a substantial number of officials and entities within the executive apparatus that are subject to this Court’s equitable jurisdiction. Thus, the claims herein implicate presidential action and raise questions regarding presidential authority does not preclude judicial review. *See Chamber of Com. v. Reich*, 74 F.3d at 1326; *see also* Kevin M. Stack, *The Statutory President*, 90 Iowa L. Rev. 539, 555–56 (2005). This mode of review has a long history: it was the basis for review of the validity of executive action in...*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *and Dames & Moore v. Regan*, 453 U.S. 654 (1981). The Court has jurisdiction to resolve Kroenung’s claims challenging the EO and any other Presidential action that brought about the Policy. As a general matter, presidential action is not “agency action.” *See Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992); *but cf.* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2350–51 (2001).

The Court’s review of “any agency action, findings, or conclusions found to be... not in accordance with law” reaches the issue here. DOD’s promulgation of the

presidential authority, including that exercised through SFWTF, through DHP effected constitutional and statutory violations that make the promulgation illegal. Courts conduct “judicial review of presidential orders implemented through the actions of other federal officials.” *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017), *rev’d and remanded on other grounds*, 585 U.S. 667 (2018). Generally, a cause of action allows courts to review *ultra vires* actions by the President that go beyond the scope of the President's statutory authority.” *Id.*; see also generally Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1614 (1997). Non-statutory review of the claims is appropriate here because the President, in promulgating the EO, acted beyond his statutory authority. “When questions involving the Constitution’s government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch ‘to say what the law is.’” *Noel Canning*, 573 U.S. at 571 (citations omitted).

Courts, exercising their role in our Constitutional order, have “not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.” *Mistretta v. United States*, 488 U.S. 361, 382 (1989). They have done so recognizing that “[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.” *Public Citizen*, 491 U.S. at 468 (Kennedy, J., concurring in judgment, joined

by Rehnquist, C.J., and O'Connor, J.) (quoting *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring)).

The President was in excess of his Article II powers, and in excess of the statutory grant from Congress to regulate the “conduct” of federal employees, when he issued the EO and other orders leading to the Policy. The agency’s adherence to unlawful presidential actions are not in accordance with law, but first a determination that the presidential actions were unlawful must be made.

A.3 Procedural irregularities from bringing a constitutional claim within the CSRA framework are being realized with this case and should not prejudice Petitioner.

The procedural history of cases attempting to challenge this EO weighs in favor of this Court exercising jurisdiction and reaching a decision on the legality of the presidential action, the liberty rights at stake, or both. Prior to *SDTX-PI*, at least a dozen district courts denied requests to enjoin the EO. *See* SAppx285 (government’s brief challenging *SDTX-PI* at the Fifth Circuit, filed Feb. 14, 2022) (listing cases at n.1). That is because the Civil Service Reform Act (“CSRA”)²¹ requires that covered employees seek administrative review of qualifying disciplinary actions from the MSPB, even with respect to facial constitutional claims; then, if necessary, they may seek judicial review in this Court. *See Elgin v. Department of the Treasury*, 567 U.S. 1, 5-6 (2012). District courts across

²¹ CSRA prescribes the avenue for covered federal employees to challenge adverse personnel action they may suffer, including (as all district courts except *SDTX-PI* held) as a result of an Executive Order.

the nation denied injunctions against the EO under the assumption that, if judicial review became necessary, the issue would eventually come before this Court.

The procedural framework for presenting this issue to the Court has been difficult. However, the difficulty was essentially contemplated and endorsed by the Supreme Court. The context is that MSPB “itself admits that it is completely powerless to consider the merits of petitioners’ arguments [challenging the constitutionality of a statute].” *Id.* Here, the same reasoning applies but the challenge is to presidential and other non-employer-agency action (including action by agencies other than the agency-employer, i.e. other than the “agency” in § 7703(c)).

...[withheld pending *Elgin*/MJN/procedural order]...

There are avenues to reversal on the record as-is that need not consider the EO’s or testing Policy’s legality *See supra*, §§ II.A, B, C. Absent a ground of reversal or mitigation there, the EO’s legality should be reached. The legality of authority exercised here can be resolved with reference to government documents that are all public. If the Court takes judicial notice of the websites, including on different dates, then this public record evidence establishes the relevant facts needed to decide the legal issues.

This case is beyond garden-variety personnel measures, and the procedural issues were beyond garden-variety difficult. They are worth figuring out. Here, the Policy required civilians to partake in an executive branch overreach that subjected them to coercion and unlawfully infringed deeply-held and deeply-rooted liberty rights.

B. The EO exceeds the President’s statutory powers to regulate conduct of the workforce.

[withheld pending *Elgin*/MJN/procedural order]

C. The exercise of Article II power attempted here is prohibited by the Constitution.

[withheld pending *Elgin*/MJN/procedural order]

IV. COERCION OR MANDATES FOR USE OF AN UNLICENSED MEDICAL PRODUCT ARE ILLEGAL.

To be licensed and sold on the U.S. market, the FDA must find that a medical product is “safe for use and...effective in use.” 21 U.S.C. § 355(b)(1)(A)(i) (an application for licensure requires “full reports of investigations which have been made to show that such drug is safe for use and whether such drug is effective in use”). Section 564 of the Food, Drug, and Cosmetic Act (“FDCA”), codified at 21 U.S.C. § 360bbb-3 (“Section 564”), permits FDA to issue an EUA for a medical product prior to licensure. Until licensed, a medical product or drug remains investigational or experimental, even after issuance of an EUA.

An individual must voluntarily agree, free from any undue influence, to accept unlicensed, and hence experimental, medical products. This principle is incorporated into the United States Code, the Code of Federal Regulations, and guidance from federal health agencies. *See e.g.*, 21 U.S.C. § 360bbb-0a (even for patients with a life-threatening condition, an unlicensed medical product cannot be coerced, rather requires “written informed consent.”); 42 U.S.C. § 9501 (Same for mental health patients); 45 C.F.R. § 46.116 (for unlicensed medical products, “Basic elements of informed consent” include

that “participation is voluntary,” “refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled” and that consent be obtained without “coercion or undue influence.”). Examples in the legislative history to confirm this abound.

IV.A. Emergency-Use Authorization

The history and traditional application of the EUA statutes is well traced out in the case law, and recently courts have seen a renaissance of claims related to it, usually in the context of vaccines. *See, e.g., Harkins v. United States*, 174 Fed. Cl. 592, 602 (2025), as corrected (Feb. 7, 2025); *Navy Seal 1 v. Biden*, 574 F. Supp. 3d 1124, 1144 (M.D. Fla. 2021). Kroenung’s removal followed from illegal acts from multiple corners of the Executive Branch. On the basis of any one of them, the Board’s affirmance of his removal is not in accordance with law.

Congress authorized the FDA to short-circuit the standard health and safety review and approval processes for “medical countermeasures,” including the COVID-19 tests at issue here, during duly designated emergency situations.” *Harkins*, 174 Fed. Cl. at 601. “The temporary bypass of formal regulatory review allows the FDA to quickly authorize unapproved medical products or unapproved uses of approved medical products to diagnose, treat, and prevent serious or life-threatening diseases.” Importantly, Congress imposed public safeguards: § 564(e) specifies the information individuals being administered EUA products should receive, including:

- (I) that the Secretary [of Health and Human Services (HHS)] has authorized the emergency use of the product;
- (II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and
- (III) of *the option to accept or refuse administration of the product*, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

21 U.S.C. § 360bbb-3(e)(1)(A)(ii) (emphasis added).

Congress passed the EUA statute to authorize medical products for use during emergencies, even before they are proven to be safe and effective under ordinary FDA review. *See, e.g.*, H.R. 2122, 108th Cong. § 4 (2003). Prior to EUA, the only alternative to ordinary FDA approval was for drugs “intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety and effectiveness of drugs.” 21 U.S.C. § 355(i).

It passed at the urging of President Bush, during a time of heightened concern for national security in the wake of 9/11. It authorizes the HHS Secretary to authorize the introduction into commerce of a drug, device or biological product intended for use in an actual or potential emergency even if the item has not yet been approved as safe and effective for its intended use. *See* SAppx1176 (7/6 OLC Report). In essence, it took the investigational new drug process, which does not allow widespread dissemination to the general public, nationwide to consumers.

IV.A.2 HHS Use of Its EUA Authority during the Covid Emergency

[withheld all fact/background sections - pending *Elgin*/MJN/procedural order]

IV.B.2 The agency required civilians use tests only available under EUA, therefore the mandate is unlawful.

Congress has authorized the President to force members of the armed forces to use an EUA product if he himself so orders in writing. 10 U.S.C. § 1107(a). Under standard canons of statutory construction, the exception proves the rule – had Congress intended the President – or anyone else – to be able to waive informed consent for civilians, there would be no reason to include this separate provision.

In the case of the military, a presidential waiver in writing *can* waive this liberty right. But here, with Kroenung, or with any civilian federal employee, he cannot. Because the self-test mandated by the Policy had not been deemed “reasonably safe and effective” and was only available under EUA, the agency’s testing mandate is illegal.

IV.C The right-to-refuse statute codifies Constitutional rights

1. The right to be free from uninformed, unwanted, unconsented-to, or unaccountable investigatory medicine or science

Substantive due process analysis begins with “a careful, specific description of the right at issue.” *McDonald v. City of Chicago*, 561 U.S. 742, 797 (2010) (Scalia, J., concurring); *see also, e.g., Raich v. Gonzales*, 500 F.3d 850, 863 (9th Cir. 2007) (court must “adopt a narrow definition of the interest at stake”); *Hawkins v. Freeman*, 195 F.3d 732, 739 (4th Cir. 1999) (cautioning against “analyzing the claimed right at too general a level”). The Court then determines whether the asserted *right*--“*thus narrowly defined*,” *McDonald*, 561 U.S. at 797--is “deeply rooted in this Nation's history and tradition” and “implicit in the concept of ordered liberty,” *i.e.*, “fundamental,” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotations omitted). If the challenged government action infringes

upon a fundamental right, it receives heightened judicial scrutiny; if not, it receives rational basis review. *See, e.g., Cantu-Delgadillo v. Holder*, 584 F.3d 682, 687 (5th Cir. 2009).

The carefully-defined asserted right here is: “the right to be free from uninformed, unwanted, unconsented-to, or unaccountable investigatory medicine or science.” This is a conscientious choice. Each of the four modifiers of “investigatory medicine or science” can stand alone – i.e., any one of: uninformed, unwanted, unconsented-to, or unaccountable – are sufficient to trigger the right. But because in this case all four situations were met, the Court could narrow the right to require all four. In so describing the right, courts should adopt a “narrow definition of the interest at stake,” *Raich v. Gonzales*, 500 F.3d 850, 863 (9th Cir. 2007), “because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” *Glucksberg*, 521 U.S. at 720 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125, (1992)).

As applied here:

- The mandated use was **uninformed** use because it was difficult to understand what the review-status of the tests were, FDA lowered the EUA standard and then didn’t require data for asymptomatic users or in the use case that Kroenung was mandated to undertake, and CDC actively withheld data, enhancing the degree.
- The mandated use was **unwanted** use because Kroenung did not want take a test that was not effective, and potentially unsafe. Appx85 ¶ 4 (test swabs tainted with ethylene oxide, a known carcinogen); *see also* SAppx5440 (FDA Report at end of 2020 noting 18,000 customer complaints, including 10 that resulted in follow-up investigation and safety violations); Appx306 (millions of the tests were the subject of recalls); SAppx633 (AAR).

- The mandated use would have been unconsented-to use because Kroenung did not agree to take the test and did not give his consent to be tested. The penalty he received for refusing to give his consent is unfair where there should be no penalty for refusing to partake in investigational medicine.
- The mandated use was unaccountable use because the PREP Act had been triggered by HHS and no one at all could be held liable for any harm resulting from use of the EUA authorized products, which by definition have not been shown to be reasonably safe.

ii. The Right Is Fundamental

Once the claimed right has been carefully defined, the Court determines whether the right is “fundamental” in the sense that it is “deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty.” *Id.* at 720–21, 117 S.Ct. 2258 (citations omitted). *See, e.g.*, IV.Intro Paragraphs. The Court of Claims also recently considered history and tradition in this context:

The government's misguided effort to conflate the biosimilarity of the EUA and FDA-approved vaccines with the informed consent legal requirements of § 1107a merit a final note of historical reflection. Throughout the twentieth century, the federal government did not always adhere to the highest ethical standards and transparency in conducting medical studies. Most famous, of course, is the Tuskegee (Alabama) Syphilis Study, wherein the U.S. Public Health Service and the U.S. Centers for Disease Control and Prevention (CDC) conducted a forty-year study (1932 to 1972) of 600 Black men and the impact of untreated syphilis on their community without informed consent. Operation Whitecoat, in turn, was a twenty-year biodefense medical research project (1954 to 1973), wherein service members were infected with bacteria considered likely to be used in a biological attack in order to develop potential vaccines. The Army reportedly targeted conscientious objectors—particularly, Seventh-day Adventists—to secure the roughly 2,300 “volunteers” in exchange for avoiding a combat deployment during Vietnam.³⁵ The Army conducted a similar chemical warfare medical study between 1955 and 1975, known as the Edgewood/Aberdeen Experiments. Over the course of this twenty-year study, nearly 7,000 service members were injected with over 250 chemicals in order to test protective clothing, evaluate the human

body's response, and develop potential vaccines. The nature and extent of the information disclosed by the government in securing the soldiers' participation in the study is unclear.³⁶ It is against this backdrop of human experimentation—rather than the altruistic effort to prevent the spread of a global pandemic—that exacting laws of informed consent must be evaluated.

Harkins, 174 Fed. Cl. at 605-606 (citations omitted). *See also Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 217 (2022) (“By the time the Fourteenth Amendment was adopted, three-quarters of the States had made abortion a crime at any stage of pregnancy.”) The fully opposite reaction to any human experimentation, to immediately cast out anyone who condones a violation of it, counsels toward the enlightened and right answer here – this freedom is fundamental and implicit in the concept of ordered liberty.

iii. Substantive Due Process forbids the infringement of the right.

If the court determines that the right is fundamental, “substantive due process forbids the infringement of that right ‘at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” *Witt v. Dep’t of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008) (quoting *Reno v. Flores*, 507 U.S. 292, 301-02 (1993)). *See also Does v. Munoz*, 507 F.3d 961, 964 (2007) (“Government actions that burden the exercise of those fundamental rights or liberty interests [life, liberty, property] are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest.”).

2. The agency’s testing mandate infringes the right.

NGA implicated a fundamental right, through coercion and threat of job loss – and, in Mr. Kroenung’s case, actual deprivation of his job – if its workers did not take an

experimental test, as if in ritual, at least once a week. A federal employee, as defined in 5 U.S.C. § 7501 (1994), “has a property right in his continued employment.” *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996). Through coercion, and enforcement including depriving Kroenung of his property right, the agency testing Policy implicated the right. The agency is unlikely to show its testing mandate furthered a compelling government interest, nor that it was narrowly tailored to meet it. The same is true for the President and his Task Force.

The testing mandate violated Mr. Kroenung’s fundamental right to be free from uninformed, unwanted, unconsented-to, or unaccountable investigatory medicine or science. Absent further showings by the NGA, its testing policy is an illegal policy and NGA is not entitled to have its unconstitutional orders obeyed.

IV. THE AGENCIES’ IMPLEMENTATION AND ENFORCEMENT OF EO 14043 AND OF BROAD EXECUTIVE TESTING POLICIES WAS NOT IN ACCORDANCE WITH LAW.

[withheld pending *Elgin*/MJN/procedural order]

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The agency’s testing Policy was unlawful, its unlawfulness was known because it was enjoined, and the policy had come to an end at the time of Kroenung’s removal. Removal here was legal error and does not promote efficiency of the service and we respectfully request reversal, and any other relief the Court deems proper, including but not limited to reinstatement, backpay, attorneys’ fees, expenses and interest.

Respectfully submitted,

Date: July 28, 2025

/s/ Erin D. Knese

Erin D. Knese, Esq.

GORDON REES SCULLY MANSUKHANI

211 N. Broadway, Suite 2150

St. Louis, MO 63102

(205) 336-2383

eknese@grsm.com

Counsel for Petitioner, Mr. Chris Kroenung

CERTIFICATE OF COMPLIANCE

The foregoing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets the following:

1. The brief contains 13,965 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally-spaced typeface using Microsoft® Office Word 2016 in fourteen-point Garamond font.

By counsel,

/s/ Erin D. Knese

Erin D. Knese, Esq.
GORDON REES SCULLY MANSUKHANI
211 N. Broadway, Suite 2150
St. Louis, MO 63102
(205) 336-2383
eknese@grsm.com
Counsel for Petitioner

STATEMENT REGARDING ORAL ARGUMENT

Per Fed. Cir. R. 34(a)(1), Petitioner respectfully requests oral argument be set in this case in order to provide Petitioner with an opportunity to further clarify the issues and support for his argument.

By counsel,

/s/ Erin D. Knese

Erin D. Knese, Esq.

GORDON REES SCULLY MANSUKHANI

211 N. Broadway, Suite 2150

St. Louis, MO 63102

(205) 336-2383

eknese@grsm.com

Counsel for Petitioner

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**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE**

CHRIS J. KROENUNG,
Appellant,

DOCKET NUMBER
CH-0752-23-0234-I-1

v.

DEPARTMENT OF DEFENSE,
Agency.

DATE: October 8, 2024

Edward Scott Lloyd, Front Royal, Virginia, for the appellant.

Jack W Rickert, Springfield, Virginia, for the agency.

Mary Clements McKenney, Springfield, Virginia, for the agency.

Doretha Stephenson, Springfield, Virginia, for the agency.

Dennis Dailey, Arnold, Missouri, for the agency.

BEFORE

David R Lidow
Administrative Judge

INITIAL DECISION

INTRODUCTION

On March 20, 2023, the appellant, Christopher J. Kroenung, filed an appeal with the Board challenging his removal from his position as an Aeronautical Analyst with the Department of Defense, National Geospatial-Intelligence Agency (NGA or agency), for conduct unbecoming based on his continuing refusal to comply with the agency's mandated COVID-19 testing policy in 2022. Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over this appeal. *See* 5 U.S.C. §§ 7501-7503. The appellant's requested hearing was held on January 17, 2024. IAF, Tab 33.

For the reasons discussed below, the agency's decision to remove the appellant from federal service is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant began his employment with the agency in 2004 as an Aeronautical Analyst with the NGA stationed in Springfield, Virginia. IAF, Tab 5; *see also* Hearing Recording (HR) (Kroenung Testimony), Tab 33. In roughly 2008, the appellant was assigned to a unit referred to as "Geo-areas," where his responsibilities included aggregating aeronautical data from his assigned host countries and transferring the collected data to an agency database. HR, Tab 33. In 2015, the appellant was assigned to the Terminal En-route Procedures Branch, (TERPS), with similar job responsibilities, where he worked on developing flight approach and landing procedures. *Id.* In 2018, Justin Nahlik, TERPS Branch Chief, became the appellant's first-line supervisor. *Id.*; *see also* HR, Tab 33 (Nahlik Testimony).

Agency's COVID-19 Testing Policy

In December 2021, while working in TERPS under Nahlik's supervision, the agency adopted national guidance and workplace safety protocols regarding COVID-19 testing procedures known as "Force Health Protection Guidance (Supplement 23) Revision 3—Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation, Screening Testing, and Vaccination Verification, 20 December 2021" and "Supplemental Guidance for Implementing Mandatory COVID-19 Vaccination Attestation, Screening Testing, and Vaccination Verification of DoD Civilian Employees for the DoD Fourth Estate—Revision 3, 10 January 2022." IAF, Tab 5, Subtabs 4k and 4l. Together, the policy guidance mandated that all subject federal employees, including NGA employees, who were not fully vaccinated for COVID-19, would be required to

provide documentation of a negative COVID-19 test on a weekly basis when reporting to their worksite. *Id.*; *see also* HR, Tab 33 (Nahlik and Kroenung Testimony).

Appellant's Willful Refusal to Abide by COVID-19 Testing Policy and Progressive Discipline

On January 3, 2022, the appellant, who had not provided proof of vaccination status, reported to work without documentation of a negative COVID-19 test as required by NGA's testing program in accordance with the DoD guidance noted above. HR, Tab 33 (Nahlik and Kroenung Testimony). The appellant was directed by his Division Chief to obtain a COVID-19 test and provide proof of the negative test before he would be permitted to enter the worksite. *Id.* The appellant failed to comply with the directive and refused to obtain a COVID-19 test. *Id.*

As a result, on February 17, 2022, Nahlik issued the appellant a written reprimand for conduct unbecoming a federal employee, in which he further informed the appellant, "it is my hope that this Letter of Reprimand will serve as a corrective measure and convey to you the importance of following Agency directives in order to comply with COVID-19 safety and force health protection measures." IAF, Tab 5, Subtab 4i. The appellant was given seven calendar days to comply with the agency's COVID-19 testing policy and was further informed that continued non-compliance would result in more severe disciplinary action, up to and including removal from his position. *Id.* The agency also advised the appellant that he could seek a reasonable accommodation based on a sincerely held religious belief or medical disability. *Id.* The appellant did not pursue any accommodation on medical or religious grounds, later acknowledging that neither exception pertained to him. HR, Tab 33 (Kroenung testimony).

In the weeks that followed, the appellant continued to refuse to abide by the agency COVID-19 testing directive. *Id.* (Nahlik Testimony). Subsequently,

on March 1, 2022, the appellant notified his supervisor that he did not plan to come to work that week to avoid the testing requirement. *Id.*; *see also* IAF, Tab 5, Subtab 4h. The following week, March 7, 2022, the appellant failed to inform his supervisor that he did not plan to come to work that week based on the COVID-19 testing requirement. *Id.* Consequently, the agency proposed that the appellant receive a 10-day suspension without pay for conduct unbecoming based on his refusal to follow agency policy requiring submission of a negative test result before entering the worksite. *Id.* In his June 6, 2022, written response to the notice of suspension, the appellant argued that the COVID-19 testing requirement was unlawful, discriminatory, and ineffective. *Id.*, Subtab 4g. On July 8, 2022, Vietta Williams, Director of NGA's Human Development Directorate who served as the deciding official, affirmed the 10-day suspension after considering the appellant's written reply. *Id.*, Subtab 4f; HR, Tab 33 (Williams Testimony).

Appellant's Removal for Conduct Unbecoming Based on Failure to Follow COVID-19 Testing Policy

After serving the 10-day suspension from July 18-27, 2022, the appellant continued to refuse to comply with the agency's COVID-19 testing requirement IAF, Tab 5, Subtab 4e. The appellant informed Nahlik that he would not submit to testing, but asked if he could utilize accrued leave after the end of his suspension. HR, Tab 33 (Kroenung Testimony). Nahlik denied the request citing the fact that the appellant was receiving in-office training during this period, and that his absence would cause the agency to suffer mission degradation due to the appellant's workload at the time. *Id.* (Nahlik Testimony).

On August 8, 2022, when the CDC community level measuring the prevalence of COVID-19 in the local area was reported as high, the appellant informed Nahlik that he would not be submitting to COVID-19 testing and, therefore, he was not allowed to return to the worksite. *Id.* (Kroenung and Nahlik

Testimony). The following week on August 15, 2022, when the CDC community level was reported as medium, the appellant again refused to comply with the agency's COVID-19 testing program and notified Nahlik that he would not submit to COVID testing. *Id.*

Given the agency had previously issued the appellant a written reprimand and 10-day suspension based on his prior refusal to comply with the agency's policy directives, on October 24, 2022, the agency proposed the appellant's removal for conduct unbecoming a federal employee based on his continuing failure to comply with the agency's COVID-19 testing requirements, citing the weeks of August 8 and 15, 2022, as two separate specifications for the underlying misconduct. IAF, Tab 5, Subtab 4e. On November 4, 2022, the appellant submitted his written response, which repeated the same objections as his earlier reply to the 10-day suspension. *Id.*, Subtab 4d. The agency's deciding official, Director Williams, considered the appellant's written response and the relevant Douglas factors. *Id.*, Subtabs 4b and 4c; *see also* HR, Tab 33 (Williams Testimony). Director Williams determined that the agency's progressive discipline had been ineffective in deterring the appellant's misconduct, and that the appellant's persistent refusal to abide by agency policy rendered him unable to perform his job duties. *Id.* Director Williams concluded that the appellant's misconduct undermined the agency's confidence and trust in his ability to do his job. *Id.* Accordingly, on February 28, 2023, Director Williams upheld the appellant's removal with an effective date of March 4, 2023. IAF, Tab 5., Subtab 4b. On March 22, 2023, the appellant timely filed an appeal with the Board. IAF, Tab 1. The appellant's requested hearing was held on January 17, 2023. *Id.*, Tab 33.

Applicable Law and Burden of Proof

To sustain an adverse action before the Board, the agency must prove by a preponderance of the evidence the factual basis for the misconduct charged, and

establish that disciplinary action, based on the proven misconduct, promotes the efficiency of the service. *See* 5 U.S.C. §§ 7513(a) and 7701(c)(1)(B); 5 C.F.R. § 1201.56(b)(1). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

The “efficiency of the service” requirement includes a showing that some disciplinary action is warranted (the “nexus” requirement) and that the particular penalty imposed by the agency is within the tolerable limits of reasonableness. Thus, three distinct elements must be proven by the agency in any adverse action. *Pope v. U.S. Postal Service*, 114 F.3d 1144, 1147 (Fed. Cir. 1997); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302-303 n.67, 307- 308 (1981).

When an agency supports a charge by more than one specification, proof of one or more of the supporting specifications is sufficient to sustain the charge. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (1990) (discussing that where more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge); *Christopher v. Department of the Army*, 107 M.S.P.R. 580, 590 (2007). A charge must be viewed in light of the accompanying specifications and should not be technically construed. *Otero*, 73 M.S.P.R. at 202.

The Agency Proved the Charge of Conduct Unbecoming Based on the Appellant’s Repeated Refusal to Follow Agency COVID-19 Testing Policy

As noted above, the agency charged the appellant with conduct unbecoming based on two supporting specifications, which set forth, in pertinent part:

Specification #1: On or about 8 August 2022, when the CDC Community Level at NCW was HIGH, you failed to comply with the agency’s COVID-19 testing program when you notified your supervisor that you are refusing to test.

Specification #2: On or about 15 August 2022, when the CDC Community Level at NCW was MEDIUM, you failed to comply with the agency's COVID-19 testing program when you notified your supervisor that you are refusing to test.

IAF, Tab 5, Subtab 4e. The proposed removal specifically referred to the fact that the appellant had been disciplined on two prior occasions for similar misconduct, having received a written reprimand on February 17, 2022, and 10-day suspension on July 8, 2022, and in both instances the appellant was warned that continued non-compliance would result in more severe disciplinary action, up to and including removal. *Id.*

It is well-established that an agency is permitted to bring a general charge in the form of conduct unbecoming, so long as the charge and supporting specifications describe in narrative form the actions that constitute misbehavior. *Colbert v. United States Postal Service*, 93 M.S.P.R. 467, ¶ 12 (2003) (citing *Cross v. Department of the Army*, 89 M.S.P.R. 62, ¶ 9 (2001)). To prove a generically labeled charge, such as conduct unbecoming or unacceptable conduct, the agency must prove the appellant committed the acts alleged in support of this broad label. *See Canada v. Department of Homeland Security*, 113 M.S.P.R. 509, ¶ 9 (2010) (citations omitted). Unless specified in the charge, the agency is not required to show intent or that the conduct in question actually embarrassed the agency. *See Crouse v. Department of the Treasury*, 75 M.S.P.R. 57, 63 (1997), rev'd on other grounds and remanded sub nom. *Lachance v. Merit Systems Protection Board*, 147 F.3d 1367, 1371-72 (Fed. Cir. 1998).

Here, it is undisputed and acknowledged by the appellant that in December 2021, the agency adopted and implemented DoD guidance requiring NGA employees to show proof of COVID-19 vaccination status or, alternatively, to submit a negative test result on a weekly basis before gaining access to agency facilities. IAF, Tab 5, Subtabs 4k and 4l; *see also* HR, Tab 33 (Kroenung

Testimony). I find the agency provided unrefuted and credible evidence that the policy was implemented in accordance with the cited DoD guidance, and that NGA employees were notified of the requirements in advance. *Id.*; *see also* HR, Tab 33 (Williams and Nahlik Testimony). The appellant does not dispute having been aware of the policy and receiving notification in advance of its implementation. *Id.* He also acknowledged having been previously disciplined for his refusal to abide by the agency's COVID-19 testing policy and that he informed his supervisor Nahlik of his intention not to comply with the policy in the future, notwithstanding the prior disciplinary action. *Id.* The appellant admitted that he did not follow the agency's COVID-19 testing policy on August 8 and 15, 2022, the time period cited in the specifications pertaining to his proposed removal, and he acknowledged that he did not pursue any exception based on religious or disability accommodation because he did not believe he was entitled to one. *Id.* At hearing, the appellant reiterated his objections to the testing mandate, arguing that the policy is ineffective and unlawful. HR, Tab 33 (Kroenung Testimony). However, he presents no evidence in support of his contentions, apart from his own personal beliefs as to the validity of the testing mandate, which, as discussed above, I find was lawfully adopted per DoD guidance and provided to employees in advance for purposes of compliance.

Therefore, based on the foregoing and my review of the record evidence, I find that the agency has proven by preponderant evidence that the appellant engaged in conduct unbecoming by failing to provide a negative COVID-19 test result for the weeks of August 8 and 15, 2022, in violation of the agency's then-current COVID-19 screening testing protocols. The charge is SUSTAINED.

The Agency Has Proven Nexus and Impact on Efficiency of Service Based on the Appellant's Misconduct

An agency may take action against an employee under 5 U.S.C. Chapter 75 only for such cause as will promote the efficiency of the service. *See, e.g., Hatfield v. Department of the Interior*, 28 M.S.P.R. 673, 675 (1985). To prove that its action promotes the efficiency of the service, “the agency must show by preponderant evidence that there is a nexus between the misconduct and the work of the agency.” *Brown v. Department of the Navy*, 229 F.3d 1356, 1358 (Fed. Cir. 2000). *See also Winlock v. Department of Homeland Security*, 110 M.S.P.R. 521, 531 (2009) (noting that “the nexus requirement, for purposes of whether an agency has shown that its action promotes the efficiency of the service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee’s ability to accomplish his or her duties satisfactorily or some other legitimate government interest”).

An agency may establish nexus by showing that the employee’s conduct (1) affected his or his coworkers’ job performance; (2) affected management’s trust and confidence in the employee’s job performance; or (3) interfered with or adversely affected the agency’s mission. *Canada v. Dept. of Homeland Security*, 113 M.S.P.R. 509, 514 (2010). Here, I find the appellant’s failure to comply with the agency’s COVID-19 testing policy adversely impacted the agency’s ability to ensure the health and safety of its workforce and impeded the agency’s ability to conduct its operations with full staffing due to the appellant being unable to report to work resulting from his refusal to follow agency policy. I credit testimony from agency management officials noting the mission degradation that had occurred and would continue due to the appellant’s inability to report to duty onsite, and the impact on other staff members having to redistribute the appellant’s job duties. HR, Tab 33 (Nahlik and Williams Testimony). In addition, I find the appellant’s failure to comply with the agency’s testing policy adversely affected the agency’s trust and confidence in his ability to follow

instructions. *Id.* Accordingly, I find that the agency has established a nexus between its sustained charge and the efficiency of the service.

The Agency's Penalty Selection of Removal Was Within Tolerable Limits of Reasonableness

Where, as here, the Board sustains an agency's charge, it will defer to the agency's penalty determination unless the penalty exceeds the range of allowable punishment specified by statute or regulation, or unless the penalty is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion. *Batara v. Department of the Navy*, 123 M.S.P.R. 278, ¶ 5 (2016); *Saiz v. Department of the Navy*, 122 M.S.P.R. 521, ¶ 5 (2015). That is because the employing agency, not the Board, has primary discretion in maintaining employee discipline and efficiency. *Saiz*, 122 M.S.P.R. 521, ¶ 5. The Board will not displace management's responsibility, but instead will ensure that managerial judgment has been properly exercised. *Id.*; see also *Guise v. Department of Justice*, 330 F.3d 1376, 1382 (Fed. Cir. 2003) ("The choice of penalty is committed to the sound discretion of the employing agency and will not be overturned unless the agency's choice of penalty is wholly unwarranted in light of all the relevant factors.").

Mitigation of an agency-imposed penalty is appropriate only where the agency failed to weigh the relevant factors or where the agency's judgment clearly exceeds the limits of reasonableness. *Batara*, 123 M.S.P.R. 278, ¶ 5; *Saiz*, 122 M.S.P.R. 521, ¶ 5. The deciding official need not show she considered all the mitigating factors, and the Board will independently weigh the relevant factors only if the deciding official failed to demonstrate that she considered any specific, relevant mitigating factors before deciding on a penalty. *Saiz*, 122 M.S.P.R. 521, ¶ 5; see also *Chin v. Department of Defense*, 2022 MSPB 34, ¶¶ 24-25. Finally, in assessing the reasonableness of a penalty, the Board places primary importance upon the nature and seriousness of the offense and its relation

to the appellant's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated. *Id.*; see also *Arena v. U.S. Postal Service*, 121 M.S.P.R. 125, ¶ 6 (2014), *aff'd per curiam*, 617 F. App'x 996 (Fed. Cir. 2015).

The factors relevant for consideration in determining the appropriateness of a penalty were set out by the Board in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). While not purporting to be exhaustive, the Board identified the following factors: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *Id.* at 305-06

Here, the deciding official, Director Williams, testified that she found the appellant's repeated willful refusal to follow agency COVID-19 testing policy and failure to provide a COVID-19 test result extremely serious, and I find that she provided a credible, detailed explanation as to the adverse impact upon the agency in attempting to deal with an ongoing pandemic to ensure the health and safety of its workforce and continuity of operations. HR, Tab 33 (Williams Testimony). She testified that the appellant was on clear notice of the consequences of his misconduct and his actions were a breach of the agency's trust in his ability to uphold its mission. *Id.* Director Williams noted that his continuing reluctance to adhere to agency policies called into question his judgment, reliability, and trustworthiness, resulting in the agency's lack of confidence in the appellant's ability to do his job or follow agency policy. *Id.* She specifically considered the agency's attempts to use progressive discipline in improving his behavior, providing him with several opportunities to adhere to agency policy by issuing first a written reprimand and then a 10-day suspension, neither of which resulted in the appellant's compliance. *Id.* Director Williams considered the appellant's past performance and tenure with the agency, finding those factors to be insufficient to overcome the adverse impact of the agency's persistent refusal to follow agency policy regarding COVID-19 testing. *Id.*

I find Director Williams credibly testified in a manner consistent with her written Douglas factor analysis as it pertains to notoriety of the offence and impact upon the agency's reputation, noting that tolerance of the appellant's behavior during a global pandemic would create an impression of defiance and disregard of the health and safety of the agency's workforce and general public, as well as disregard for properly promulgated regulations and guidance of the executive branch. *Id.*; see also IAF, Tab 5, Subtab 4c. In addition, given the appellant's open refusal to comply with the testing policy, and statements to his supervisor suggesting that he would not change his stance on the issue, Director

Williams reasonably concluded that there would be no opportunity for rehabilitation with a lesser penalty. *Id.*

Director Williams also found that the penalty was consistent with other employees, that the appellant presented no unusual personal circumstances justifying his behavior, and that no alternative sanctions would be available under the circumstances to deter his continuing refusal to comply with the agency's COVID-19 testing policy. *Id.* With regard to these last considerations, I note that the appellant testified as to his willingness to use accrued annual or sick leave, and his efforts to seek temporary telework authorization, to avoid having to comply with the testing mandate. HR, Tab 33 (Kroenung Testimony). However, I find compelling and persuasive Nahlik's testimony that the solutions suggested by the appellant were unworkable from the agency's perspective because the appellant was required to perform his job duties at his worksite and also because the appellant was in the midst of training for an assignment within Geo-areas, a unit within which he had not worked for several years. *Id.* (Nahlik Testimony). The training being provided to the appellant required engagement and oversight that could only be conducted in the office. *Id.* I credit the agency's explanation as to mission degradation and do not find support for the appellant's speculation as to personal animus or any other reason as to why Nahlik could not authorize telework or accrued leave simply as a means of allowing the appellant to avoid the COVID-19 testing requirement. HR, Tab 33 (Nahlik and Kroenung Testimony).

The appellant also cites to several other employees who had expressed concerns with the agency's testing policy and, according to the appellant, received some form of accommodation. *Id.*; *see also* IAF, Tab 33 (Stipulations). As the agency points out, however, the anecdotal information provided by the appellant does not suggest that he was treated in a disparate manner. Indeed, the employees identified by the appellant as comparators each had distinguishing characteristics that render them inapposite for comparison, either because they

had formally requested reasonable accommodations on medical or religious grounds, or because their jobs were eligible for fulltime telework. *Id.* None of these factors applied to the appellant's circumstances, however, as he acknowledged from the outset that he was not entitled to any of the applicable exceptions. HR, Tab 33 (Kroenung Testimony). Therefore, I find that the agency's disciplinary considerations as to the appellant were not inconsistent with other agency employees.

The Board's role is not "to displace management's responsibility" in deciding on the appropriate penalty, but only "to ensure that managerial judgment has been properly exercised." *Singletary v. Department of the Air Force*, 94 M.S.P.R. 553, ¶ 9 (2003). Here, after considering Director Williams's testimony, I find that she fully and carefully considered the relevant Douglas factors, and I concur that the sustained charge is extremely serious and outweighs any mitigating factors. Accordingly, I find that the agency's selected penalty of removal is warranted under the circumstances and is within the tolerable bounds of reasonableness and promotes the efficiency of the service. *See Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999); *Beard v. General Services Administration*, 801 F.2d 1318, 1322 (Fed. Cir. 1986) (when the agency's penalty is not unreasonable, it must be accorded deference by the Board). Thus, I find no basis to disturb the agency's chosen penalty based on the sustained charge.

DECISION

The agency's action is AFFIRMED.

David R Lidow

FOR THE BOARD:

David R Lidow
Administrative Judge**NOTICE TO APPELLANT**

This initial decision will become final on **November 12, 2024**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. The date that the petitioner receives the initial decision is determined according to the standard set forth at § 1201.22(b)(3), pertaining to an appellant's receipt of an agency decision. If the petitioner is represented, the 30-day time begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the “Notice of Appeal Rights” section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

Your petition must state your objections to the initial decision, including all of your legal and factual arguments, and must be supported by references to applicable laws or regulations and by specific references to the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov/>).

Criteria for Granting a Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition for review. Situations in which the Board may grant a petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To

constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words. A reply to a response to a petition for review is limited to 15 pages or 3750 words. A party relying on word count to adhere to the length limitation must include certification of the word count with their pleading. Argument formatted such that the length of the pleading cannot be determined may be rejected. Computer generated and typed pleadings must use no less than 12-point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. Length limitations may not be circumvented by including argument in attachments. Failure to comply with length limitations, after sufficient opportunity to comply, may lead to dismissal of the petition for review. A request for leave to file a pleading that exceeds the limitations must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length.

If you file a petition for review, you should not include documents that were part of the record below, as the entire administrative record will be available to the Board. Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. The date that the petitioner receives the initial decision is determined according to the standard set forth at § 1201.22(b)(3), pertaining to an appellant's receipt of an agency

decision. If the petitioner is represented, the 30-day time period begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first.

Any response to a petition for review must be filed within 25 days after the date of service of the petition. Any reply to a response to a petition for review must be filed within 10 days after the date of service of the response to the petition for review. The Board's regulation at 5 C.F.R. § 1201.23 governs the computation of time.

NOTICE TO AGENCY/INTERVENOR

Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel (under 5 U.S.C. 1212(c)) may file a petition for review. Each party is limited to filing a single petition for review, response to a petition for review, and reply to a response to a petition for review. A petition for review filed by an agency should address the agency's compliance with any interim relief requirements and should contain a certification, as set forth at 5 C.F.R. § 1201.116(a).

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the

applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days after this decision becomes final** under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after this decision becomes final** as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days of the date this decision becomes final** under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court’s website, www.cafc.uscourts.gov. Of particular relevance is the court’s “Guide for Pro Se Petitioners and Appellants,” which is contained within the court’s Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation

for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Service Chris Kroenung
Served on email address registered with MSPB

Appellant Representative

Electronic Service Edward Lloyd
Served on email address registered with MSPB

Agency Representative

Electronic Service Dennis Dailey
Served on email address registered with MSPB

Agency Representative

Electronic Service Jack Rickert
Served on email address registered with MSPB

Agency Representative

Electronic Service Doretha Stephenson
Served on email address registered with MSPB

10/08/2024
(Date)

Rosa Canchola-Cudaback
Rosa Canchola-Cudaback
Paralegal Specialist



DIRECTOR OF ADMINISTRATION AND MANAGEMENT
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

10 JAN 2022

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Supplemental Guidance for Implementing Mandatory COVID-19 Vaccination Attestation, Screening Testing, and Vaccination Verification of DoD Civilian Employees for the DoD Fourth Estate - Revision 3

On December 20, 2021, the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) issued "Force Health Protection Guidance (Supplement 23), Revision 3 - Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation, Screening Testing, and Vaccination Verification," ("FHP-23, Rev. 3") (Attachment 1). This memorandum provides supplemental guidance concerning DoD civilian employees for Fourth Estate Components, including the Office of the Secretary of Defense, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, Defense Agencies, and DoD Field Activities (hereafter referred to as the Fourth Estate). Director, Administration and Management memorandum, "Supplemental Guidance for Implementing Mandatory COVID-19 Vaccination Attestation, Screening Testing, and Vaccination Verification of DoD Civilian Employees for the DoD Fourth Estate - Revision 2," November 8, 2021, is hereby rescinded.

In accordance with FHP-23, Rev. 3, DoD civilian employees in the Fourth Estate are required to be fully vaccinated, subject to exemptions required by law; to complete DD Form 3175 "Civilian Employee Certification of Vaccination;" and, as applicable, provide proof of vaccination. Supervisors are responsible to know their employees' vaccination status and, for not fully vaccinated employees, to enforce applicable force health protection measures, to include masking, physical distancing, and COVID-19 screening testing. Additional guidance on implementing screening testing programs in the Fourth Estate is in Attachment 2 of this memorandum.

In accordance with FHP-23, Rev. 3, Fourth Estate Components will establish procedures to process vaccination exemption requests. Additional guidance on implementing exemption review processes in the Fourth Estate is in Attachment 3 of this memorandum.

My points of contact are Mr. Thomas M. Muir, who may be reached at (703) 692-7138 or thomas.m.muir.civ@mail.mil or Dr. Curt M. Masiello, who may be reached at (571) 372-6955 or curtis.m.masiello.civ@mail.mil.

A handwritten signature in black ink that reads "Michael B. Donley".
Michael B. Donley

Attachments:
As stated

TAB 1



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

DEC 20 2021

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
COMMANDERS OF THE COMBATANT COMMANDS
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Force Health Protection Guidance (Supplement 23) Revision 3 – Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation, Screening Testing, and Vaccination Verification

This memorandum rescinds and replaces reference (a),¹ and provides updated guidance for implementing additional force health protection and workplace safety measures directed by the White House Safer Federal Workforce Task Force (reference (b)) to reduce the transmission of the virus that causes coronavirus disease 2019 (COVID-19).

In accordance with references (b), (c), and (d), DoD civilian employees were required to be fully vaccinated by November 22, 2021, subject to exemptions as required by law. For purposes of this guidance, "DoD civilian employee" includes foreign nationals employed by DoD outside the United States to the maximum extent possible while respecting host nation agreements and laws. It also includes DoD civilian employees who are engaged in full-time telework or remote work. Additional information about the requirements for DoD civilian employees can be found in Attachment 1.

DoD contractor personnel and official visitors must attest to being fully vaccinated and, if not fully vaccinated, present the results of a recent negative COVID-19 test as a condition of physical access to DoD buildings and DoD-leased spaces in non-DoD buildings in which official DoD business takes place (referred to jointly in this memorandum as "DoD facilities"). For purposes of this physical access requirement, "contractor personnel" are those individuals issued a credential by DoD that affords the individual recurring access to DoD facilities, classified herein as "credentialed recurring access" (CRA) (e.g., Common Access Cardholders). "Official visitors" are non-DoD individuals seeking access, one time or recurring, in association with the performance of official DoD business (e.g., to attend a meeting), but who do not have CRA. The COVID-19 vaccination status for all individuals with CRA and official visitors will be determined in accordance with Attachment 2.

These vaccination and physical access requirements do not apply to personnel receiving ad hoc access to DoD facilities (e.g., delivery personnel, taxi services); to individuals who have access to the grounds of, but not the buildings on, DoD installations (e.g., contract groundskeepers, fuel delivery personnel, household goods transportation personnel); to personnel accessing DoD buildings unrelated to the performance of DoD business (e.g., residential housing); or to personnel accessing DoD facilities to receive a public benefit (e.g., commissary;

¹ References are listed in Attachment 10.

exchange; public museum; air show; military medical treatment facility; Morale, Welfare, and Recreation resources).

In accordance with reference (e), Service members (members of the Armed Forces under DoD authority on active duty or in the Ready Reserve, including members of the National Guard) are required to be fully vaccinated against COVID-19. Service members' vaccination status will be validated utilizing their Military Service-specific Individual Medical Readiness (IMR) system. If a Service member has been vaccinated against COVID-19 outside the Military Health System, that Service member must show official proof of his or her COVID-19 vaccination status to update the IMR system. Once the applicable mandatory vaccination date has passed, COVID-19 screening testing as described in Attachment 7 is required at least weekly for Service members entering a DoD facility who are not fully vaccinated, including those who have an exemption request under review, or who are exempted from COVID-19 vaccination. Service members who are not on active duty and who also are DoD civilian employees or DoD contractor personnel must follow the applicable requirements in this memorandum for DoD civilian employees or DoD contractor personnel, as the case may be. Service members not on active duty must comply with any other applicable DoD or DoD Component guidance. Service members who are actively participating in COVID-19 vaccine clinical trials begun prior to November 22, 2021 are exempted from mandatory vaccination against COVID-19 until the trial is complete in order to avoid invalidating such clinical trial results.

Individuals are considered fully vaccinated 2 weeks after completing the second dose of a two-dose COVID-19 vaccine or 2 weeks after receiving a single dose of a one-dose COVID-19 vaccine. Individuals must be vaccinated with vaccines that are either fully licensed or authorized for emergency use by the Food and Drug Administration (FDA) (e.g., Pfizer-BioNTech/COMIRNATY, Moderna, Johnson & Johnson/Janssen vaccines); listed for emergency use on the World Health Organization Emergency Use Listing (e.g., AstraZeneca/Oxford); or approved for use in a clinical vaccine trial for which vaccine efficacy has been independently confirmed (e.g., Novavax). Those with previous COVID-19 infection(s) or antibody test results are not considered fully vaccinated on that basis for the purposes of this memorandum.

All medical and other information collected from individuals will be maintained in a manner meeting the privacy requirements in Attachment 9.

The Secretaries of Military Departments and the Director of Administration and Management for all other DoD Components will publish any necessary supplemental instructions and ensure that all contract and associated funding implications are considered.

DoD Components should engage with DoD civilian employee unions as they develop supplemental guidance and otherwise satisfy any applicable collective bargaining obligations under the law at the earliest convenience, including on a post-implementation basis.

This memorandum and other COVID-19 guidance memoranda are centrally located at: <https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/Latest-DOD-Guidance/>.

Please direct any questions or comments to the following email address: dha.ncr.ha-support.list.policy-hrpo-kmc-owners@mail.mil.



Gilbert R. Cisneros, Jr.

Attachments:

1. ATTACHMENT 1: Vaccination Requirements for DoD Civilian Employees
2. ATTACHMENT 2: Requirements for DoD Contractor Personnel, Official Visitors, and Others Seeking Access to Facilities
3. ATTACHMENT 3: DD Form 3175 – “DoD Civilian Employee Certification of Vaccination”
4. ATTACHMENT 4: DD Form 3150 – “Contractor and Visitor Certification of Vaccination”
5. ATTACHMENT 5: DD Form 3176 – “Request for a Medical Exemption or Delay to the COVID-19 Vaccination Requirement”
6. ATTACHMENT 6: DD Form 3177 – “Request for a Religious Exemption to the COVID-19 Vaccination Requirement”
7. ATTACHMENT 7: COVID-19 Screening Testing Requirements
8. ATTACHMENT 8: Requirements for Obtaining Self-Collection Kits and Self-Tests
9. ATTACHMENT 9: Privacy Requirements
10. ATTACHMENT 10: References

ATTACHMENT 1
Vaccination Requirements for DoD Civilian Employees

1. Vaccination Requirement

- a. DoD civilian employees are required to be fully vaccinated, unless they have received a temporary or permanent exemption. DoD civilian employees who are actively participating in COVID-19 vaccine clinical trials begun prior to November 22, 2021, are exempted from mandatory vaccination against COVID-19 until the trial is complete in order to avoid invalidating such clinical trial results.
- b. DoD civilian employees who are not fully vaccinated must comply with all DoD requirements for individuals who are not fully vaccinated, including those requirements related to masking, physical distancing, and travel. Weekly COVID-19 testing is required for those DoD civilian employees who are not fully vaccinated, including those who have medical or religious exemptions. DoD civilian employees who telework or work remotely on a full-time basis are not subject to weekly testing, but must provide a negative result from a test performed within the prior 72 hours for entry into a DoD facility.
- c. DoD civilian employees are eligible to receive the COVID-19 vaccine at any DoD vaccination site, including military medical treatment facilities. They may also opt to receive the COVID-19 vaccine at locations other than DoD vaccination sites, such as retail stores, private medical practices, and/or local and State public health department sites.
- d. New DoD civilian employees must be fully vaccinated by their entry on duty (start) date.
 - i. The DoD or Office of the Secretary of Defense (OSD) Component head concerned may approve temporary exemptions in writing for up to 60 days after a DoD civilian employee's start date for urgent, mission-critical hiring needs in circumstances in which a DoD civilian employee could not have been fully vaccinated between the time the job opportunity announcement closes and the DoD civilian employee's start date. This authority may be delegated in writing to the DoD or OSD Component head's Principal Deputy (or equivalent) but no lower.
 - ii. DoD Components must address the COVID-19 vaccination requirement in job opportunity announcements and tentative and final offer letters. For hiring actions currently underway, DoD Components must issue revised tentative and final offer letters. Sample language can be found in reference (f).
- e. DoD civilian employees are authorized official duty time to receive vaccination doses. For DoD civilian employees who are unable to receive a COVID-19 vaccination within their duty hours, regular overtime rules are applicable.

- f. DoD civilian employees are authorized administrative leave for purposes of taking a family member to get a vaccination and for themselves to recover from vaccination. DoD civilian employees who experience an adverse reaction to a COVID-19 vaccination should be granted no more than two workdays of administrative leave for recovery associated with a single COVID-19 vaccination dose. DoD civilian employees should use the time and attendance code for “physical fitness” to record administrative leave for COVID-19 vaccination recovery time that prevents the employee from working or for taking a family member to be vaccinated for COVID-19. The type hour code is “LN” and the environmental/hazard/other code is “PF”. Non-appropriated fund employers should code administrative leave related to COVID-19 in a way that can be easily reported.

2. Verification of Vaccination

- a. DoD civilian employees who have received a dose of a one-dose vaccine, or both doses of a two-dose vaccine, must provide proof of vaccination to their direct supervisor. For purposes of the vaccination data submission and verification requirements, “direct supervisor” includes an authorized human resources official.
- b. Proof of vaccination may be submitted either in hard copy or in an electronic format. The proof may be a photocopy or photograph of the vaccination record, if it legibly displays the data points to be verified by the supervisor. DoD civilian employees who are not fully vaccinated must provide proof of vaccination to their supervisor upon receipt of each required dose. Acceptable proof includes:
- i. A copy of the record of immunization from a health care provider or pharmacy;
 - ii. A copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813_r, published on September 3, 2020);
 - iii. A copy of medical records documenting the vaccination;
 - iv. A copy of immunization records from a public health or State immunization information system; or
 - v. A copy of any other official documentation containing the data points required to be verified by the supervisor.
- c. In addition to providing proof of vaccination to their supervisors, DoD civilian employees also will complete Section A of DD Form 3175 (Attachment 3). DoD civilian employees with access to milConnect (<https://milconnect.dmdc.osd.mil/>) will complete the DD Form 3175 via milConnect; otherwise use of a hard copy² is acceptable. DoD civilian employees who complete the DD Form 3175 via milConnect do not need to email or otherwise transmit a copy of the form to their supervisors. DoD civilian employees using a hard copy will provide the hard copy to their supervisor. DoD civilian employees are required to complete the DD Form 3175 even if they already completed the DD Form 3150 (Attachment 4).

² <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd3175.pdf>

- d. Upon receiving proof of vaccination, a DoD civilian employee's supervisor will verify that the proof of vaccination provided contains the following data points:
 - i. Type of vaccine administered;
 - ii. Number of doses received;
 - iii. Date(s) of administration; and
 - iv. Name of the health care professional(s) or clinic site(s) administering the vaccine(s).
- e. In addition to verifying that a DoD civilian employee's proof of vaccination includes the required data points, supervisors also will complete Section B of DD Form 3175. Supervisors with access to milConnect (<https://milconnect.dmdc.osd.mil/>) will complete the DD Form 3175 via milConnect using the DoD civilian employee's Employee Identification Number; otherwise use of a hard copy is acceptable.
- f. Supervisors will retain DoD civilian employees' proof of vaccination and DD Form 3175 (for those DoD civilian employees not using milConnect) in accordance with their DoD Component's recordkeeping requirements for DoD civilian employee medical records and the privacy requirements contained in Attachment 9. Supervisors should not ask for copies of the DD Form 3175 from those employees who used milConnect to complete the form. Supervisors who receive completed copies of the DD Form 3175 from DoD civilian employees who completed the DD Form 3175 using milConnect shall destroy the copy or return it to the employee.
- g. DoD civilian employees may not be required to use their own personal equipment for the purpose of submitting proof of vaccination or DD Form 3175. DoD civilian employees who submit proof of vaccination or the DD Form 3175 in an electronic format are encouraged to use encrypted email or password protected files with DoD SAFE file transfer (<https://safe.apps.mil/>).

3. Enforcement of DoD Civilian Employee COVID-19 Vaccination Requirement:

- a. DoD civilian employees who refuse to be vaccinated, or to provide proof of vaccination, are subject to disciplinary measures, up to and including removal from Federal service, unless the DoD civilian employee has received an exemption or the DoD civilian employee's request for an exemption is pending a decision. DoD Components should generally follow the recommended guidelines in reference (g), subject to any applicable Component policy and collective bargaining agreements.
- b. Progressive enforcement actions include, but are not limited, to:
 - i. A 5 calendar-day period of counseling and education;
 - ii. A short suspension without pay, generally 14 calendar days or less, with an appropriate notice period. Senior Executive Service members may only be suspended for more than 14 calendar days;
 - iii. Removal from Federal service for failing to follow a direct order.

- c. During the notice periods preceding adverse employment actions, DoD civilian employees generally should not be placed on administrative leave. DoD Components should require DoD civilian employees to continue to telework or report to the worksite and follow all mitigation measures applicable to not fully vaccinated DoD civilian employees when reporting to the worksite.
- d. DoD Components will designate officials, at the appropriate organizational level, to handle the disciplinary process to promote consistent application of disciplinary measures. Such officials will decide each case with due regard to the facts and circumstances of that case.
- e. Supervisors should contact their servicing human resources and legal offices to discuss options available to address individual situations regarding enforcement of this requirement.
- f. For employees who have not yet attested to vaccination status; are not vaccinated and did not submit an exemption request, or have not begun vaccination following denial of an exemption request, Components are generally encouraged to continue with robust education and counseling efforts as the first step in an enforcement process, with no subsequent enforcement actions beyond that education and counseling and, if warranted, a letter of reprimand, until the new calendar year begins in January 2022.
- g. DoD Components are encouraged to identify an occupational health office, medical office, or other resource with which a DoD civilian employee may consult during the period of counseling and education.

4. Exemptions to DoD Civilian Employee COVID-19 Vaccination Requirement:

- a. **Exemption Requests and Decision-Making Procedures.** DoD civilian employees may request an exemption on the basis of a medical condition or circumstance or a sincerely held religious belief, practice or observance. Because all DoD civilian employees must now be vaccinated against COVID-19 as a condition of employment, exemptions will be granted in limited circumstances and only where legally required. The Secretaries of the Military Departments and the Director of Administration and Management for all other DoD Components will oversee Component implementation of the following decision-making procedures.
- b. **Personnel.**
 - i. **Decision Authorities.** Management official(s) will be designated to serve as Decision Authorities to make decisions concerning requests for exemption from the COVID-19 vaccination requirement, in consultation with the organization's servicing legal office. Decision Authorities will be at an appropriate level within the organization to consider the impact, if any, that granting a request will have on the DoD Component operations and to promote similar cases being handled in a consistent manner, with due regard

- for the facts and circumstances of each case. Each employee's request must be considered on its own merits.
- ii. **Subject Matter Experts.** DoD Components may identify subject matter experts in areas such as human resources (HR), equal employment opportunity (EEO), medicine, and religious matters to serve as advisors to assist Decision Authorities. Such advisors may provide individual advice, as needed by the Decision Authority, but may not be used to develop a group or consensus recommendation or decision.
 - iii. **Administrative Support.** DoD Components will provide appropriate personnel and other resources to administratively support the Decision Authorities, including support necessary to assist the Decision Authorities with preparing written products.
- c. **Employee Notice.** DoD Components will inform DoD civilian employees how to make a request for an exemption and notify them that requests must have been submitted no later than November 8, 2021, absent extenuating circumstances, to be considered timely. A DoD civilian employee's failure to submit a timely request for exemption is not a basis to deny a request but may be relevant in evaluating the request.
 - d. **Employee Responsibilities.** To make a request for exemption from the COVID-19 vaccination requirement, DoD civilian employees must submit a request to their direct supervisor. For purposes of submitting this exemption request, "direct supervisor" includes an authorized human resources official. The employee must provide an official statement which describes the medical or religious reason the employee objects to vaccination against COVID-19. Generally, such requests must be in writing. DoD civilian employees may use DD Form 3176 (Attachment 5) or DD Form 3177 (Attachment 6) to submit their requests. **DoD civilian employees who make oral requests may be provided a sample written request format and/or be interviewed to develop the basis for the request.** While the use of the DD Form 3176 and DD Form 3177 is optional for DoD civilian employees, when DoD civilian employees make a request, they must provide the following information:
 - i. **Medical Exemption Requests.**
 - A description of the medical condition or circumstance that is the basis for the request for a medical exemption from the COVID-19 vaccination requirement;
 - An explanation of why the medical condition or circumstance prevents the employee from being safely vaccinated against COVID-19;
 - If it is a temporary medical condition or circumstance, a statement concerning when it will no longer be a medical necessity to delay vaccination against COVID-19; and
 - Any additional information, to include medical documentation that addresses the employee's particular medical condition or circumstance, which may be helpful in resolving the employee's request for a medical exemption from the COVID-19 vaccination requirement.

- ii. Religious Exemption Requests.
 - A description of the religious belief, practice, or observance that is the basis for the request for a religious exemption from the COVID-19 vaccination requirement;
 - A description of when and how the DoD civilian employee came to hold the religious belief or observe the religious practice;
 - A description of how the DoD civilian employee has demonstrated the religious belief or observed the religious practice in the past;
 - An explanation of how the COVID-19 vaccine conflicts with the religious belief, practice, or observance;
 - A statement concerning whether the DoD civilian employee has previously raised an objection to a vaccination, medical treatment, or medicine based on a religious belief or practice. If so, a description of the circumstances, timing, and resolution of the matter; and
 - Any additional information that may be helpful in resolving the DoD civilian employee's request for a religious exemption from the COVID-19 vaccination requirement.
- e. Supervisor Responsibilities.
 - i. Following receipt of an employee's request for exemption, supervisors must update Section B of the employee's DD Form 3175 to indicate that a request for exemption determination is pending.
 - ii. As necessary, supervisors will engage with the employee to ensure completeness of the employee's exemption request.
 - iii. In coordination with human resources officials, supervisors will prepare an exemption request package that contains factual information about the circumstances of the employee's request. A complete exemption request package will include the basis for the employee's request and any supporting documentation submitted by the employee, a description of the nature of the employee's job responsibilities and work environment, and any circumstances relevant to a management-level assessment of the reasonably foreseeable effects on the agency's operations, including protecting the agency's workforce and members of the public with whom the employee interacts in the workplace from COVID-19, if the employee remains unvaccinated.
 - iv. Supervisors will forward the exemption request package to the Decision Authority Support Office.
- f. Decision Authority Support Office.
 - i. DoD Components will establish Decision Authority Support Offices to support exemption request Decision Authorities.
 - ii. The Decision Authority Support Office will intake exemption request packages and, under the supervision of the Decision Authority, provide administrative support to the Decision Authority.
 - iii. At the request of the Decision Authority, the Decision Authority Support

Office may coordinate with subject matter experts to obtain written documentation which includes relevant factual information and, as necessary, a professional opinion related to the factual information, for inclusion in the exemption request package.

- iv. The Decision Authority Support Office may not provide a consensus opinion or recommendation to the Decision Authority.

g. Decision Authority Determination.

- i. The Decision Authority first analyzes the exemption request package. As necessary, the Decision Authority may request additional information and consult with subject matter experts.
- ii. After conducting a review of the exemption request, the Decision Authority makes a determination, prepares a written statement that includes the reasons for the determination (which may involve drafting assistance based on the Decision Authority's instructions regarding its contents), and obtains a legal review of the determination.
- iii. In cases where the exemption is temporary or denied, the Decision Authority's determination must specify a date by which the DoD civilian employee must be fully vaccinated against COVID-19. In specifying that date, DoD civilian employees must be given a minimum period of 14 days to receive their first (or only) dose of a COVID-19 vaccine.

- h. Employee Notification of Determination. The Decision Authority Support Office will transmit the Decision Authority's written determination to the DoD civilian employee's supervisor, who, in turn, provides the DoD civilian employee with a copy of the written determination, updates the DD Form 3175, and informs the DoD civilian employee of next steps.

- i. A chart illustrating the exemption request process is below.

Position	Role/Responsibility	Output	Submit to
Requesting employee	Attest to vaccination status via DD Form 3175 to indicate exemption pending.	Completed DD Form 3175.	Supervisor
Requesting employee	Request exemption.	Completed DD Form 3176 (medical) or DD Form 3177 (religious), as appropriate, or other request that contains the information required by FHP 23, Revision 3.	Supervisor

Supervisor, in consultation with HR officials	Provide relevant information concerning employee's occupation and work environment, to include: availability of measures to physically distance requestor from co-workers and members of the public, the volume of exemption requests in the organization, and any other relevant information concerning the circumstances of the employee's request.	Exemption request package that includes employee's request and supervisory information concerning employee's occupation, work environment, and other circumstances of the request.	Decision Authority Support Office
Decision Authority Support Office	Receive and track processing of exemption request package. Supplement package with individual advice from subject matter experts and relevant factual information, as directed by the Decision Authority.	Exemption request package that includes employee's request; supervisor information concerning employee's occupation, work environment, and other circumstances of the request; and any supporting documentation relevant to the Decision Authority's analysis.	Decision Authority

Decision Authority	Review submitted documentation, request any reasonably necessary additional information, and prepare written decision in consultation with legal advisors and with the advice of subject matter experts as appropriate.	Written decision that addresses employee's individual circumstances and has been reviewed by appropriate legal advisors.	Supervisor
Supervisor	Receive decision, discuss with employee. If exemption approved, implement mitigation measures and, if necessary, address any follow-on requests for accommodation in accordance with Component EEO procedures. If disapproved, provide opportunity for counseling by medical professional or other appropriate expert/ initiate requirement for vaccination. Work with the legal advisor(s) and, as appropriate, HR LMER and EEO offices.	If approved, employee continues to comply with generally-applicable mitigation measures (e.g., screening testing, masking, and physical distancing) and any other mitigation measures directed by the Decision Authority or management officials. If disapproved, vaccination tracking and/or progressive discipline.	Employee

j. Exemption Criteria.

- i. Religious Exemption Requests. Requests for religious exemption will be analyzed pursuant to the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb et seq. RFRA prohibits the Government from substantially burdening a person's exercise of religion, unless it demonstrates

that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. In the first instance, Decision Authorities are to determine whether the requestor has met his or her burden to establish that the vaccination requirement imposes a substantial burden on exercise of a sincerely held religious belief. If so, Decision Authorities analyze the request to determine whether the burden on religious exercise is the least restrictive means of furthering the Government's compelling interest in health and safety of the DoD workforce, and the health and safety of members of the public with whom they interact. If vaccination is not the least restrictive means, the exemption will be granted and supervisors will implement the less restrictive means.

- ii. **Medical Exemption Requests.** Pursuant to the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq. Decision Authorities will analyze requests for medical exemption to determine whether the medical condition or circumstance prevents the employee from safely being vaccinated. If so, the employee will be exempt from vaccination (temporarily or permanently, as appropriate). Supervisors will direct compliance with applicable force health protection guidance and direct any mitigation measures that are necessary to prevent the spread of the virus that causes COVID-19 in the workplace and to the members of the public with whom the employee interacts. If such measures result in the employee being unable to perform the essential functions of the position, such matters will be referred to the equal employment opportunity reasonable accommodation process.

k. **Additional Guidance.**

- i. Information collected concerning medical and religious exemption requests must be maintained in accordance with the privacy requirements in Attachment 9. Requests for medical exemption will be treated as medical records to be maintained separately from other personnel files.
- ii. Discipline for failure to meet the COVID-19 vaccination requirement will not be initiated against a DoD civilian employee while a request for a medical or religious exemption from the COVID-19 vaccination requirement is pending determination. If a DoD civilian employee submits a request after discipline is initiated, disciplinary measures may be held in abeyance where appropriate.
- iii. DoD civilian employees who are not fully vaccinated but who have a pending request for exemption from vaccination are required to comply with all force health protection and mitigation measures that are applicable to DoD civilian employees in the worksite who are not fully vaccinated (for example, screening testing (Attachment 7), masking, and physical distancing). Requests for reasonable accommodation related to those measures will be combined with any pending medical or religious exemption to vaccination request, for purposes of making a final determination concerning those measures. Without making a finding concerning whether a sufficient basis for a reasonable accommodation concerning those measures exists, the supervisor

may use the normal interactive process to pursue a temporary accommodation that protects the health and safety of the workplace while a decision concerning those measures is pending. Otherwise, requests for reasonable accommodation related to force health protection and mitigation measures may be analyzed separately from requests for exemption from vaccination.

- iv. A DoD civilian employee who receives an exemption from the vaccination requirement may, because of the exemption, be unable to perform the duties and responsibilities of the position without a change in working conditions. Supervisors will immediately implement any mitigation measures required by the Decision Authority and applicable force health protection guidance. Supervisors may engage in the normal interactive process concerning any other measures necessary to protect the health and safety of the workplace.
- v. Requests for exemption from candidates for employment will be handled consistent with the provisions in this attachment.
- vi. Unless responsibility is otherwise established in a written support agreement, the Combatant Command Support Agent identified in reference (h) is responsible for administration of exemption processes applicable to DoD civilian employees assigned, detailed, or otherwise deployed to a Combatant Command area of responsibility.

ATTACHMENT 2
Requirements for DoD Contractor Personnel, Official Visitors, and Others Seeking Access to Facilities

1. DoD Contractor Personnel

- a. For DoD contractor personnel, the DoD civilian vaccination deadline of November 22, 2021, does not apply. Vaccination requirements for DoD contractor personnel will be in accordance with reference (i), as implemented by reference (j), as directed under Executive Order 14042 (reference (k)).
- b. DoD contractor personnel will complete the DD Form 3150, "Contractor and Visitor Certification of Vaccination" (Attachment 4), maintain a current completed DD Form 3150, and show it to authorized DoD personnel upon request. Failure to complete the DD Form 3150 may result in denying DoD contractor personnel access to the DoD facility to which access is sought.
- c. DoD contractor personnel who are not fully vaccinated against COVID-19 because they are not performing under a covered contract that requires COVID-19 vaccination, due to a legally required accommodation, or who decline to attest to their COVID-19 vaccination status will be subject to COVID-19 screening testing at least weekly as set forth in this guidance (Attachment 7). DoD contractor personnel who refuse required screening testing will be denied access to DoD facilities.
- d. In accordance with applicable contracts, DoD contractor personnel may be offered, but are not required to receive, COVID-19 vaccines at their DoD worksites.

2. Official Visitors

- a. Official visitors will complete DD Form 3150, "Contractor and Visitor Certification of Vaccination"³ (Attachment 4); and maintain a current completed DD Form 3150 and show it to authorized DoD personnel, upon request. Failure to complete the DD Form 3150 may result in denial of an official visitor's access to the DoD facility to which access is sought.
- b. Official visitors who are not fully vaccinated against COVID-19, or who decline to volunteer their COVID-19 vaccination status, must show an electronic or paper copy of negative results from an FDA-authorized or approved COVID-19 test administered no earlier than 72 hours prior to their visit. If an official visitor is unable to show a negative COVID-19 test result, the visitor may be provided onsite self-testing, if available, or will be denied access to the DoD facilities to which access is sought. Service members who are not on active duty at the time of their official visit are subject to the requirements in this paragraph.

³ <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd3150.pdf>

- c. Official visitors will follow applicable policies and procedures of both DoD and the Department or Agency they are visiting, if different from DoD.

3. Others Seeking Access to Facilities

Individuals other than official visitors seeking access to facilities located on DoD installations, but operated by other Federal departments and agencies, will follow the policies and procedures of that other department or agency.

ATTACHMENT 3

DD Form 3175 – “DoD Civilian Employee Certification of Vaccination”

CUI (when filled in)

DoD CIVILIAN EMPLOYEE CERTIFICATION OF VACCINATION	
PRIVACY ACT STATEMENT Authority: Pursuant to 5 U.S.C. chapters 11 and 79, and in discharging the functions directed under Executive Order 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (Sept. 9, 2021), DoD is authorized to collect this information. Additional authorities for the systems of records associated with this collection of information also include: E.O. 13991, Protecting the Federal Workforce and Requiring Mask-Wearing; E.O. 12196, Occupational Safety and Health Program for Federal Employees; 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 9013, 10 U.S.C. 2672; DoD Directive 5525.21; and DoD Instruction 6200.03. Providing this information is mandatory, and DoD is authorized to impose penalties for failure to provide the information pursuant to applicable Federal personnel laws and regulations. Principal Purpose: This information is being collected and maintained to implement Coronavirus Disease 2019 (COVID-19) workplace safety plans, and ensure the safety and protection of the DoD workforce, workplace, and other DoD facilities and environments, consistent with the above-referenced authorities, the COVID-19 Workplace Safety: Agency Model Safety Principles established by the Safer Federal Workforce Task Force, and guidance from the Centers for Disease Control and Prevention and the Occupational Safety and Health Administration. Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally, for example to disclose information to: a person, organization or governmental entity as necessary and relevant to notify them of, respond to, or guard against a public health emergency, or other similar crisis, including to comply with laws governing the reporting of communicable disease or other laws concerning health and safety in the work environment; adjudicative bodies (e.g., the Merit System Protection Board), arbitrators, and hearing examiners to the extent necessary to carry out their authorized duties regarding Federal employment; contractors, grantees, experts, consultants, students, and others as necessary to perform their duties for the Federal government; or agencies, courts, and persons as necessary and relevant in the course of litigation, and as necessary and in accordance with requirements for law enforcement; or to a person authorized to act on your behalf. A complete list of routine uses may be found in the applicable System of Records Notice (SORN) associated with the collection of this information as follows: For most Federal civilian employees: OPM/GOVT-10, Employee Medical File System Records, 75 Fed. Reg. 35099 (Jun. 21, 2010), amended 80 Fed. Reg. 74815 (Nov. 30, 2015). For Federal civilian employees not covered by OPM/GOVT-10: DPR 39 DoD, DoD Personnel Accountability and Assessment System of Records, 85 Fed. Reg. 17047 (Mar. 26, 2020) (also available at https://dpcld.defense.gov/Portals/49/Documents/Privacy/SORNs/OSDJS/DPR-39-DoD.pdf). Consequences of Failure to Provide Information: Providing this information is mandatory. Unless granted an exemption, all covered Federal civilian employees are required to be vaccinated against COVID-19. Employees are required to provide documentation concerning their vaccination status to their employing DoD Component. Failure to provide this information may subject you to disciplinary action, including and up to removal from Federal service.	
INSTRUCTIONS: Section A of this form should be completed by DoD civilian employees only. Section B of this form should be completed by the DoD civilian employee's supervisor (or authorized human resources official). This form should be completed by DoD civilian employees only. Service members and employees of DoD contractors should not complete this form.	
SECTION A. To be completed by DoD civilian employees.	
1. CIVILIAN EMPLOYEE NAME (Last, First, MI):	2. CIVILIAN EMPLOYEE DoD ID NUMBER:
3. PLEASE CHECK ALL THAT COINCIDES WITH YOUR COVID-19 VACCINATION STATUS: ☐ 3.a. I am fully vaccinated. Individuals are considered "fully vaccinated" two weeks after completing the second dose of a two-dose COVID-19 vaccine or two weeks after receiving a single dose of a one-dose vaccine. Accepted COVID-19 vaccines are those which have received a license or emergency use authorization from the U.S. Food and Drug Administration and those COVID-19 vaccines on the World Health Organization Emergency Use Listing. "Fully vaccinated" also includes circumstances in which the individual was a participant in a U.S. site clinical trial and has received all recommended doses. ☐ 3.b. I have received one or more doses, but I am not yet considered fully vaccinated (in accordance with the definition of fully vaccinated above). ☐ 3.c. I have submitted proof of vaccination to my supervisor. Proof of vaccination includes a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card, a copy of medical records documenting the vaccination, a copy of immunization records from a public health or state immunization information system, or a copy of any other official documentation. Employees may provide a digital copy of such records, including, for example, a digital photograph, scanned image, or PDF of such a record that is clear and legible. ☐ 3.d. I have not received any vaccination doses. ☐ 3.e. I have submitted a request for an exemption from vaccination and a decision is still pending. ☐ 3.f. I have an approved exemption from vaccination.	

DD FORM 3175, OCT 2021

CUI (when filled in)

Controlled by: OUSD(P&R)
 Controlled by: ASD(HA)
 CUI Category: HLTH, PRIVCY, OPSEC
 LDC: DL(DoD Only)
 POC: usd.pentagon.ousd-p-r.mbx.forms@mail.mil

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CUI (when filled in)

4. EMPLOYEE VACCINE INFORMATION (Employees checking block 3.a. should skip block 4 and go to block 5):	
4.a. VACCINE MANUFACTURER(S) OR VACCINE PRODUCT NAME(S): ☐ Pfizer-BioNTech/Cominaty ☐ Moderna ☐ AstraZeneca/Oxford ☐ Johnson and Johnson (J&J)/Janssen ☐ Novavax ☐ Other U.S. Food and Drug Administration licensed or authorized, World Health Organization Emergency Use listed vaccine or U.S. site clinical trial vaccine (provide name):	4.b. DATE OF FIRST DOSE:
	4.c. DATE OF SECOND DOSE (if two-dose vaccine):
	4.d. DATE FULLY VACCINATED:
5. CERTIFICATION/KNOWLEDGE OF POSSIBLE ACTIONS FOR FALSE STATEMENTS ☒ I certify that the information I have provided on this form and the proof of vaccination documentation I have submitted is true and correct. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both (18 U.S.C. 1001). I understand that making a false statement on this form could result in additional administrative action including an adverse personnel action up to and including removal from my position.	
6. CIVILIAN EMPLOYEE SIGNATURE: 	7. DATE:
SECTION B. To be completed by the supervisor of the DoD civilian employee completing section A (or an authorized human resources official)	
8. SUPERVISOR PROOF OF VACCINATION REVIEW ☐ 8.a. Proof of vaccination not received. ☐ 8.b. Proof of vaccination received and under review. ☐ 8.c. Proof of vaccination received and reviewed.	9. STATUS OF VACCINATION - EXEMPTION REVIEW ☐ 9.a. Exemption request received and pending disposition. ☐ 9.b. Exemption request received and approved. ☐ 9.c. Exemption request received and denied. ☐ 9.d. Exemption request not received.
10. SUPERVISOR / AUTHORIZED HR OFFICIAL NAME (Last, First, MI):	11. SUPERVISOR / AUTHORIZED HR OFFICIAL DoD ID NUMBER:
12. SUPERVISOR / AUTHORIZED HR OFFICIAL SIGNATURE: 	13. DATE:

DD FORM 3175, OCT 2021
PREVIOUS EDITION IS OBSOLETE.

CUI (when filled in)

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ATTACHMENT 4

DD Form 3150 – “Contractor Personnel and Visitor Certification of Vaccination”

CUI (when filled in)

CONTRACTOR PERSONNEL AND VISITOR CERTIFICATION OF VACCINATION		OMB No. 0704-0613 Expiration: 20220228
AGENCY DISCLOSURE NOTICE The public reporting burden for this collection of information is estimated to average 2 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, at whs.mc-alex.esd.mbx-dd-dod-informationcollections@mail.mil. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.		
PRIVACY ACT STATEMENT Authority: DoD is authorized to collect the information on this form pursuant to Executive Order (E.O.) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors; E.O. 13991, Protecting the Federal Workforce and Requiring Mask-Wearing; and E.O. 12196, Occupational Safety and Health Program for Federal Employees; as well as 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 9013, 10 U.S.C. 2672, 5 U.S.C. chapter 79, and DoD Instruction 6200.03. Principal Purpose: This information is being collected to implement Coronavirus Disease 2019 (COVID-19) workplace safety plans, including DoD's COVID-19 testing programs, and to ensure the safety and protection of the DoD workforce, workplace, and other DoD facilities and environments, consistent with the above-referenced authorities, the COVID-19 Workplace Safety: Agency Model Safety Principles established by the Safer Federal Workforce Task Force, and guidance from the Centers for Disease Control and Prevention and the Occupational Safety and Health Administration. Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally, for example to disclose information to: a person, organization, or governmental entity as necessary and relevant to notify them of, respond to, or guard against a public health emergency or other similar crisis, including to comply with laws governing the reporting of communicable disease or other laws concerning health and safety in the work environment; adjudicative or administrative bodies or officials when the records are relevant and necessary to an adjudicative or administrative proceeding; contractors, grantees, experts, consultants, students, and others as necessary to perform their duties for the Federal government; agencies, courts, and persons as necessary and relevant in the course of litigation, and as necessary and in accordance with requirements for law enforcement; or to a person authorized to act on your behalf. A complete list of routine uses may be found in the applicable System of Records Notice (SORN) associated with the collection of this information from contractor personnel and DoD visitors: DPR 39 DoD, DoD Personnel Accountability and Assessment System of Records, 85 Fed. Reg. 17047 (Mar. 26, 2020) (also available at https://dpcid.defense.gov/Portals/49/Documents/Privacy/SORNs/OSDJS/DPR-39-DoD.pdf). Consequences of Failure to Provide Information: Providing this information is voluntary. However, if you fail to provide this information, you will be treated as not fully vaccinated for purposes of implementing safety measures, including subject to COVID-19 screening testing and/or denied access to DoD facilities. Failure to provide such information may also hinder DoD's ability to implement COVID-19 workplace safety plans, thereby increasing the health or safety risk to DoD-affiliated personnel and DoD facilities.		
INSTRUCTIONS: This form should be completed by DoD contractor personnel and official visitors in accordance with current DoD Force Health Protection Guidance. DoD civilian employees should not complete this form.		
1. NAME (Last, First, MI):	2. DoD ID NUMBER:	
3. PLEASE CHECK THE BOX BELOW THAT COINCIDES WITH YOUR COVID-19 VACCINATION STATUS : ☐ I am fully vaccinated. Individuals are considered "fully vaccinated" two weeks after completing the second dose of a two-dose COVID-19 vaccine or two weeks after receiving a single dose of a one-dose vaccine. Accepted COVID-19 vaccines are those which have received a license or emergency use authorization from the U.S. Food and Drug Administration and those COVID-19 vaccines on the World Health Organization Emergency Use Listing. "Fully vaccinated" also includes circumstances in which the individual was a participant in a U.S. site clinical trial and has received all recommended doses. ☐ I am not yet fully vaccinated. I received only one dose of an accepted two-dose COVID-19 vaccine, or I received my final dose of an accepted COVID-19 vaccine less than two weeks ago. ☐ I have not been vaccinated. ☐ I decline to respond. Individuals who choose not to complete the form will be assumed to be not fully vaccinated for purposes of application of the safety protocols, if you are not vaccinated due to medical or religious reasons, please check either "I have not been vaccinated" or "I decline to respond." Note that if you have already received one dose of a vaccine, but are not yet fully vaccinated, or if you received your final dose less than two weeks ago, then you will be treated as not fully vaccinated until you are at least two weeks past your final dose and resubmit your vaccination information. ☐ I certify that the information provided in this form is accurate and true to the best of my knowledge. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both (18 U.S.C. 1001). Checking "I decline to respond" does not constitute a false statement.		
4. DATE (YYYYMMDD)	5. SIGNATURE (Full Name)	

DD FORM 3150, OCT 2021

CUI (when filled in)

Controlled by: OUSD(P&R)
Controlled by: ASD(HA)
CUI Category: HLTH: PRVCY: OPSEC
LDC: DL(DoD Only)
POC: osd.pentagon.osd-p-r.mbx-forms@mail.mil

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ATTACHMENT 5

DD Form 3176 – “Request for a Medical Exemption or Delay to the COVID-19 Vaccination Requirement”

CUI (when filled in)

REQUEST FOR A MEDICAL EXEMPTION OR DELAY TO THE COVID-19 VACCINATION REQUIREMENT		OMB No. 0704-0619 Exp. 20220430
The public reporting burden for this collection of information is estimated to average 5 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, at whs.mc-alex.esd.mbx.dd-dod-informationcollections@mail.mil. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.		
PRIVACY ACT STATEMENT Authority: DoD is authorized to collect the information on this form pursuant to 29 U.S.C. 794, 42 U.S.C. Chapter 21, Subch. VI; Executive Order (E.O.) 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees; E.O. 13163, Increasing the Opportunities for Individuals with Disabilities to be Employed in the Federal Government; E.O. 13164, Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation; 29 CFR 1614.203, Rehabilitation Act; DoD Directive 1020.1, Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of Defense; as well as 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 9013, 10 U.S.C. 2672, 5 U.S.C. chapter 79, and DoD Instruction 6200.03. Principal Purpose: The information on this form is being collected so that DoD may determine whether to grant your request for a medical exemption from the COVID-19 vaccination requirement for federal employees, pursuant to Executive Order 14043 and in furtherance of COVID-19 workplace safety plans. Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally. For example, disclosure of medical condition or history information to authorized government officials for the purpose of conducting an investigation into DoD's compliance with the Rehabilitation Act of 1973; disclosure of medical condition or history information to first aid and safety personnel in the event an employee's medical condition might require emergency treatment or special procedures; to Federal agencies/entities participating in the DoD Computer/Electronic Accommodations Program (CEAP) to permit the agency to carry out its responsibilities under the program; A complete list of routine uses may be found in the applicable System of Records Notice (SORN) associated with the collection of this information: DoD 0007, Defense Reasonable Accommodations and Assistive Technology Records, 86 Fed. Reg. 38692 (July, 22, 2010) (available at https://www.govinfo.gov/content/pkg/FR-2021-07-22/pdf/2021-13601.pdf). Consequences of Failure to Provide Information: Providing this information is voluntary and use of this form is optional. Failure to provide the information requested on this form may impact DoD's ability to evaluate or act upon a request for a medical exemption from the COVID-19 vaccination requirement. Any intentional misrepresentation to the Federal Government may result in legal consequences, including termination or removal from Federal Service. Instructions: Part 1 is to be completed by DoD civilian employees. Part 2 is to be completed by a licensed health care provider. Provide narrative responses where applicable (Blocks 8-10, 15-17). If additional space is needed, proceed on the appropriate continuation block (Block 11 or 20) by annotating the Section and Line number and continue your narrative response. Signing this form constitutes a declaration that the information you provide is, to the best of your knowledge and ability, true and correct. Any intentional misrepresentation to the Federal Government may result in legal consequences, including removal from Federal Service.		
PART 1. TO BE COMPLETED BY THE DOD CIVILIAN EMPLOYEE		
1. Employee Name (Last, First, Middle Initial)		2. DoD ID Number
3. Office Symbol		4. Date of Request (YYYYMMDD)
5. Position/Title	6. Supervisor Name	7. Supervisor Phone Number
8. Please provide a description of the medical condition or circumstance that is the basis for the request for a medical exemption from the COVID-19 vaccination requirement.		
9. Please provide an explanation of why the medical condition or circumstance prevents you from being vaccinated.		
10. Please provide any additional information, that addresses your particular medical condition or circumstance, which may be helpful in resolving your request for a medical exemption or delay from the COVID-19 vaccination requirement. If you have medical documentation (in addition to Part 2 of this Form) that addresses your particular medical condition or circumstance you may submit the documentation to your supervisor along with this form.		

DD FORM 3176, OCT 2021
PREVIOUS EDITION IS OBSOLETE

CUI (when filled in)

Controlled by: OUSD(P&R)
CUI Category: HLTH, PRIVCY, OPSEC
LDC: DL(DoD Only)
POC: dodhra.mc-alex.dhra-hq.mbx.forms@mail.mil

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CUI (when filled in)

11. Continuation	
I declare to the best of my knowledge and ability that the foregoing is true and correct.	
12. Date (YYYYMMDD)	13. Signature
PART 2. COMPLETED BY EMPLOYEE'S HEALTH CARE PROVIDER	
14. Employee Name	
MEDICAL CERTIFICATION FOR COVID-19 VACCINE EXEMPTION OR DELAY	
Dear Health Care Provider:	
The Department of Defense requires its employees to be fully vaccinated against COVID-19, pursuant to Executive Order of the President of the United States. As indicated in Part 1, the individual named above is seeking a medical exemption to the requirement for COVID-19 vaccination or a delay because of a temporary condition or medical circumstance. Please complete this form to assist the Department in its review process.	
Please provide at least the following information, where applicable, and use the continuation block as needed:	
15. Please identify any contraindication(s) or precaution(s) for COVID-19 vaccination that are applicable to the individual, and for each contraindication or precaution, indicate: (a) whether it is recognized by the U.S. Centers for Disease Control and Prevention pursuant to its guidance; and (b) whether it is listed in the package insert or Emergency Use Authorization fact sheet for each of the COVID-19 vaccines authorized or approved for use in the United States.	
16. Please provide a statement detailing how the individual's condition and medical circumstances are such that COVID-19 vaccination is not considered safe. Please explain the specific nature of the medical condition or circumstance that contraindicates immunization with a COVID-19 vaccine or might increase the risk for a serious adverse reaction.	
17. Please provide any other medical information that would limit the employee from receiving any COVID-19 vaccine.	
18. The condition described above is: ☐ Temporary ☐ Long-Term/Permanent	19. If the employee is seeking a delay due to a temporary medical condition or circumstance, please indicate when the employee would be able to safely receive a COVID-19 vaccination - provide details if limited to specific COVID-19 vaccine(s) or type(s) of COVID-19 vaccine.
20. Continuation	
21. Health Care Provider Name/Title	
22. Date (YYYYMMDD)	23. Medical Provider Signature

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PREVIOUS EDITION IS OBSOLETE.

CUI (when filled in)

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ATTACHMENT 6

DD Form 3177 – “Request for a Religious Exemption to the COVID-19 Vaccination Requirement”

CUI (when filled in)

REQUEST FOR A RELIGIOUS EXEMPTION TO THE COVID-19 VACCINATION REQUIREMENT		
PRIVACY ACT STATEMENT Authority: DoD is authorized to collect the information on this form pursuant to Executive Order (E.O.) 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, 42 U.S.C. Chapter 21, Subchapter VI; 42 U.S.C. Chapter 21B; as well as 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 9013, 10 U.S.C. 2672, 5 U.S.C. chapter 79, and DoD Instruction 6200.03. Principal Purpose: The information on this form is being collected so that DoD may determine whether to grant your request for a religious exemption from the COVID-19 vaccination requirement for federal employees, pursuant to Executive Order 14043 and in furtherance of COVID-19 workplace safety plans. Consistent with the Religious Freedom Restoration Act of 1993, 42 U.S.C. Chapter 21B, and Title VII of the Civil Rights Act, 42 U.S.C. Chapter 21, Subchapter VI, individuals seeking a religious exemption from the vaccination requirement will submit to DoD supporting information about their religious beliefs or practices in order for DoD to evaluate the exemption request. Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally. For example to disclose information to: a person, organization, or governmental entity as necessary and relevant to notify them of, respond to, or guard against a public health emergency or other similar crisis, including to comply with laws governing the reporting of communicable disease or other laws concerning health and safety in the work environment; adjudicative or administrative bodies or officials when the records are relevant and necessary to an adjudicative or administrative proceeding; contractors, grantees, experts, consultants, students, and others as necessary to perform their duties for the Federal government; agencies, courts, and persons as necessary and relevant in the course of litigation, and as necessary and in accordance with requirements for law enforcement; or to a person authorized to act on your behalf. A complete list of routine uses may be found in the applicable System of Records Notices (SORN) associated with the collection of this information: DPR 39 DoD, DoD Personnel Accountability and Assessment System of Records, 95 Fed. Reg. 17047 (Mar. 28, 2020) (also available at https://dpcld.defense.gov/Portals/49/Documents/Privacy/SORNs/OSDJS/DPR-39-DoD.pdf). Consequences of Failure to Provide Information: Providing this information is voluntary and use of this form is optional. Failure to provide the information requested on this form may impact DoD's ability to evaluate or act upon a request for a religious exemption from the COVID-19 vaccination requirement. Any intentional misrepresentation to the Federal Government may result in legal consequences, including removal from Federal Service.		
Instructions: To be completed by DoD civilian employees. Provide narrative responses where applicable (Blocks 8-11, 12.b, 12.c, 13). If additional space is needed, proceed on the continuation block (Block 14) by annotating the Section and Line number and continue your narrative response. Signing this form constitutes a declaration that the information you provide is, to the best of your knowledge and ability, true and correct. Any intentional misrepresentation to the Federal Government may result in legal consequences, including removal from Federal Service.		
1. Employee Name (Last, First, Middle Initial)	2. DoD ID Number	
3. Office Symbol	4. Date of Request (YYYYMMDD)	
5. Position/Title	6. Supervisor Name	7. Supervisor Phone Number
8. Please describe the religious belief, practice, or observance that is the basis for your request for a religious exemption from the COVID-19 vaccination requirement.		
9. Please describe when and how you came to hold the religious belief or observe the religious practice.		
10. Please describe how you have demonstrated the religious belief or observed the religious practice in the past.		
11. Please explain how the COVID-19 vaccines conflict with your religious belief, practice, or observance.		
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CUI (when filled in)

Controlled by: OUSD(P&R) Page 1 of 2
 CUI Category: HLTH, PRIVCY, OPSEC
 LDC: DL (DoD Only)
 POC: dedhra.mc-alex.dhra-hq.mbx.forms@mail.mil

CUI (when filled in)

12.a Have you previously raised an objection to a vaccination, medical treatment, or medicine based on a religious belief or practice.	
☐ Yes ☐ No	
12.b If Yes, please provide a description of the circumstances, timing, and resolution of the matter.	
12.c If No, please provide an explanation as to why your objection is limited to the particular COVID-19 vaccines.	
13. Please provide any additional information that may be helpful in resolving your request for a religious exemption from the COVID-19 vaccination requirement. You may submit additional documentation in support of this request to your supervisor along with this form.	
14. Continuation	
I declare to the best of my knowledge and ability that the foregoing is true and correct.	
15. Date (YYYYMMDD)	16. Signature

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ATTACHMENT 7
COVID-19 Screening Testing Requirements

1. To establish COVID-19 screening testing for individuals for whom screening testing is required, DoD Components will:
 - a. Execute the screening testing requirement with COVID-19 self-collection kits or self-tests at least weekly (depending on the type of test kit used) that should be performed primarily onsite at the installation or facility with proper supervision and documentation of testing results. If onsite COVID-19 screening testing is not feasible, as an alternative self-testing may be performed at home or in other locations (Note: these COVID-19 self-tests do not require a health care provider's clinical care order and are, therefore, considered an over-the-counter test and do not require medical support to complete). Screening testing will use those tests authorized by Attachment 8; and
 - b. Procure and provide these COVID-19 self-tests and establish guidance for where and how these tests will be distributed and conducted and how results are to be reported.
 - i. DoD civilian employees are responsible for providing documentation of negative COVID-19 test results, upon receipt, to the appropriate supervisor. For purposes of screening testing requirements, "supervisor" includes authorized human resources officials. DoD civilian employees may not be required to use their own personal equipment for the purpose of documenting test results; offsite tests may not be used if there is not a means to document results using government equipment. The supervisor is responsible for maintaining any COVID-19 test results provided by DoD civilian employees in accordance with the privacy protection measures in Attachment 9.
 - ii. DoD contractor personnel with CRA will maintain their most recent COVID-19 test result and show such results to authorized DoD personnel upon request.
2. After COVID-19 screening testing procedures are established, the personnel identified in this memorandum as subject to screening testing are required to have a COVID-19 screening test using a test authorized by Attachment 8, and receive a negative COVID-19 screening test result for entry into a DoD facility. If the COVID-19 screening test is administered offsite, the negative result must be from a test performed within the prior 72 hours. If a COVID-19 screening test is administered onsite, the test will be administered before DoD civilian employees and contractor personnel go to their work areas. In accordance with reference (1) and CDC guidance, personnel who have recovered from a recent COVID infection and who remain asymptomatic are exempted from regular screening testing for 90 days following their documented date of recovery. Documented proof of this recovery shall be provided upon request.
3. DoD civilian employees and DoD contractor personnel with CRA who have positive COVID-19 screening tests will be required to remain away from the workplace in accordance

with references (l) and (m). DoD civilian employees and DoD contractor personnel with CRA with positive COVID-19 screening tests will be offered, but not required to take, confirmatory laboratory-based molecular (i.e., polymerase chain reaction) testing paid for by the relevant DoD Component. Contact tracing and mitigation measures will be conducted in accordance with references (l) and (m). If the confirmatory test is negative, the individual is not considered to be COVID-19 positive and will be allowed into the workplace.

4. For DoD civilian employees, COVID-19 screening testing is expected to take no more than one hour of regular duty time, per test, to complete required testing as directed by the DoD Component. Laboratory-based confirmatory COVID-19 testing for initial positive screening test results is expected to take no more than two hours of duty time. This includes time for travel to the testing site, time to complete testing, and time to return to work. Commanders and supervisors will monitor duty time usage and keep duty time used for testing within these parameters to the extent possible.
5. DoD Components may bar DoD civilian employees who refuse required screening testing from their worksites on the installation or facility to protect the safety of others, including while any progressive disciplinary actions are pending. While barred from their worksites on the installation or facility, such DoD civilian employees may be required to telework, as appropriate.

ATTACHMENT 8
Requirements for Obtaining Self-Collection Kits and Self-Tests

COVID-19 self-tests must have Instructions for Use and FDA approval, 510(K) premarket clearance or have an FDA Emergency Use Authorization, and will be made available through the Defense Logistics Agency. DoD Components are responsible for funding required COVID-19 screening tests.

Funding for COVID-19 testing, if self-collection kits or self-tests are not available:

- a. Each DoD Component will reimburse Service members and DoD civilian employees for COVID-19 screening tests that require payment for purposes of meeting the screening testing requirement (e.g., if the screening test is not available through the DoD Component and must be administered by a facility who charges for the test).
- b. For COVID-19 testing of DoD contractor personnel with CRA, DoD Components will offer, if available, COVID-19 testing similar to that offered to DoD civilian employees at the DoD Component's expense and at no cost to the contractor personnel or the contractor.

ATTACHMENT 9

Privacy Requirements

Under this guidance memorandum, the DoD may collect and maintain sensitive and private information about individuals, including medical information. Consistent with the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq., and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., individuals seeking a religious exemption from the vaccination requirement will submit to DoD supporting information about their religious beliefs and practices in order for DoD to evaluate the exemption request. Information collected from individuals under this guidance, including vaccination information, test results, and medical or religious information supporting vaccine exemption requests, will be treated in accordance with applicable laws and policies on privacy, including the Privacy Act of 1974, 5 U.S.C. § 552a, and Department of Defense Instruction (DoDI) 5400.11, "DoD Privacy and Civil Liberties Programs," January 29, 2019 (reference (n)), the Rehabilitation Act of 1973, as amended ("Rehabilitation Act"), 29 U.S.C. § 791 et seq., and 5 CFR part 293, subpart E. While such information may be sensitive and is to be safeguarded, it is not covered by the Health Insurance Portability and Accountability Act (HIPAA) regulations found at 45 CFR parts 160, 162, and 164, and as implemented in DoDI 6025.18, "Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule Compliance in DoD Health Care Programs," and DoD Manual 6025.18, "Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DOD Health Care Programs."

Information gathered under this guidance may be shared with immediate supervisors, authorized human resources officials, designated decision makers, and, in appropriate cases, subject matter experts, who must access the information to implement the guidance. DoD Components are advised to consult their Component Privacy Officer and servicing legal office if there is a need to share medical or religious information collected under this guidance with DoD personnel beyond what this guidance permits or with individuals outside of DoD. Religious information will be accessible only to those persons who have a role in carrying out the procedures outlined in this memorandum. Medical information obtained from DoD civilian employees, including vaccination status, will be accessible only to immediate supervisors, authorized human resources officials, and, for exemption requests, designated decision makers and subject matter experts, who must access the information to implement the guidance in this memorandum. The Rehabilitation Act's requirements on confidentiality of medical information apply whether or not a DoD civilian employee has a disability.

DoD personnel will use appropriate safeguards in handling and storing DoD civilian employee medical information, including a DoD civilian employee's proof of vaccination, the DD Form 3175, COVID-19 test results, and exemption requests. Appropriate safeguards may include encrypting emails and electronic files, and role-based access to electronic storage environments where this information is maintained. In the event the information is maintained in paper form, supervisors and other authorized DoD personnel must ensure DoD civilian employee medical information remains confidential and is maintained separately from other personnel files (e.g., stored in a separate, sealed envelope marked as confidential DoD civilian employee medical information and maintained in locked file cabinets or a secured room). DoD Components are advised to refer to applicable internal guidance on the handling, storage, and disposition of DoD civilian employee medical records, and to consult their Component Privacy Officer as needed for further guidance.

ATTACHMENT 10

References

- (a) Under Secretary of Defense for Personnel and Readiness Memorandum, "Force Health Protection Guidance (Supplement 23) Revision 2 – Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation, Screening Testing, and Vaccination Verification," October 29, 2021 (hereby rescinded)
- (b) Safer Federal Workforce Task Force, "COVID-19 Workplace Safety: Agency Model Safety Principles," September 13, 2021
- (c) Executive Order 14043, "Requiring Coronavirus Disease 2019 Vaccination for Federal Employees," September 9, 2021
- (d) Deputy Secretary of Defense Memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of DoD Civilian Employees," October 1, 2021
- (e) Secretary of Defense Memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members," August 24, 2021
- (f) United States Office of Personnel Management Memorandum, "Guidance on Applying Coronavirus Disease 2019 Vaccination Requirements to New Hires – Executive Order 14043," October 1, 2021
- (g) United States Office of Personnel Management Memorandum, "Guidance on Enforcing Coronavirus Disease 2019 Vaccination Requirement for Federal Employees – Executive Order 14043," October 1, 2021
- (h) Department of Defense Directive 5100.03, "Support of the Headquarters of Combatant and Subordinate Unified Command" February 9, 2011, Incorporating Change 1, September 7, 2017
- (i) Safer Federal Workforce Task Force, "COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors," September 24, 2021
- (j) Principal Director for Defense Pricing and Contracting Memorandum, "Class Deviation 2021-O0009—Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors," October 1, 2021
- (k) Executive Order 14042, "Ensuring Adequate COVID Safety Protocols for Federal Contractors," September 9, 2021
- (l) Acting Under Secretary of Defense for Personnel and Readiness Memorandum, "Force Health Protection Guidance (Supplement 18) – Department of Defense Guidance for Protecting All Personnel in Department of Defense Workplaces During the Coronavirus Disease 2019 Pandemic," March 17, 2021
- (m) Acting Under Secretary of Defense for Personnel and Readiness Memorandum, "Force Health Protection Guidance (Supplement 15) Revision 2 – Department of Defense Guidance for Coronavirus Disease 2019 Laboratory Testing Services," July 2, 2021
- (n) Department of Defense Instruction 5400.11, "DoD Privacy and Civil Liberties Programs," January 29, 2019

TAB 2

Attachment 2, Planning & Implementation of Screening Testing Programs

DoD Fourth Estate Components were required to implement coronavirus disease 2019 (COVID-19) screening testing programs for unvaccinated personnel by November 22, 2021, as required by Force Health Protection Guidance (Supplement 23) Revision 3, "Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation, Screening Testing, and Vaccination Verification," December 20, 2021 ("FHP-23, Rev. 3"). Supplemental information on planning and implementation of COVID-19 screening testing programs is below.

Fourth Estate Components are responsible for funding required COVID-19 screening testing programs. Although initial planning involved conducting programs until April 2022, Fourth Estate Components now should plan to conduct screening testing programs through June 2022.

Component screening testing programs must have the capability to test unvaccinated Service members, DoD civilian employees, and DoD contractor personnel who make unscheduled visits to the workplace. To preclude long lines and wait times every Monday morning for those locations with larger populations, those DoD civilian employees subject to the weekly testing requirement and enrolled in an onsite screening test program may test any time during the work week. Personnel enrolled in weekly testing should test on the same day each week where possible.

Fourth Estate Components may procure over-the-counter self-test kits, consistent with requirements in FHP-23, Rev. 3, through the Defense Logistics Agency (DLA), which are available through FedMall. Authorized Fourth Estate Component personnel may order such test kits using Government Purchase Cards.

Fourth Estate Components may consider the following options to ensure unvaccinated personnel are tested as required by FHP-23, Rev. 3:

1. Pentagon Reservation. Washington Headquarters Services (WHS) has established an on-site screening testing program on the Pentagon Reservation for Service members, DoD civilian employees, and DoD contractor personnel who are subject to testing and who work on the Pentagon Reservation. Onsite testing is available in Pentagon Room 1B843 Monday through Friday from 0800-1400 hours daily. On site testing is available at the Mark Center, Room 01B27, on Tuesdays from 0800-1400. Testing is available at Crystal Square 4, 2d Floor, Suite 201, on Thursdays from 0800-1400. Testing for visitors may be made available if capacity and supplies permit. Information on making reservations for tests, testing locations, and hours of operations are at <https://apps.sp.pentagon.mil/sites/Vaccination/Lists/COVID%20TESTING/calendar.aspx> Components that use the Pentagon Reservation on site screening testing program should be prepared to provide reimbursement to WHS, if required.

2. Tenant locations. Fourth Estate Components that are tenants at, or adjacent to, other DoD or Federal facilities/military installations may coordinate with the host installation or facility to enroll their personnel in their host's screening testing program if available. Co-located

components also may pool their resources to establish a local testing program. This may be done on a reimbursable basis.

3. Stand-alone locations. Fourth Estate Components that are located in stand-alone facilities or contractor locations where the DoD conducts official business, or are within an agency's jurisdiction or control, and not located at, or adjacent to, other DoD or Federal facilities/military installations will establish their own screening testing plans and are encouraged to leverage DLA contract vehicle(s) to help establish such plans.

4. Third-party screening test programs. Fourth Estate Components with dispersed Service members, DoD civilian employees, and/or onsite DoD contractor personnel who are not located near a DoD installation or facility may leverage third-party COVID-19 screening tests. Service members and DoD civilian employees may be authorized to use third-party screening tests (e.g., drug stores, grocery store pharmacies, contracted test support). Fourth Estate Components must be prepared to reimburse Service members and DoD civilian employees who receive COVID-19 screening tests directly from third-party vendors. DoD Financial Management Regulation, Volume 10, Chapter 11, provides guidance on payment as reimbursement for personal expenses. COVID-19 screening test requirements for overseas locations are the same as for U.S.-based locations.

Test result documentation. As per Attachment 7 of FHP-23, Rev. 3, employees are responsible for providing documentation of negative COVID-19 test results to the appropriate supervisor, which may include an authorized human resources official.

Helpful links to COVID-19 related guidance and information:¹

- [Washington Headquarters Services](#) (COVID-19 Guidance)
- [Department of Defense](#) (Coronavirus: DoD Response)
- [Safer Federal Workforce](#) (Frequently Asked Questions on COVID-19)
- [Office of Personnel Management](#) (Pandemic Frequently Asked Questions)
- [Centers for Disease Control and Prevention](#) (COVID-19 protocols)
- [Occupational Safety and Health Administration](#) (Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace)
- [Food and Drug Administration](#) (lists of approved in vitro diagnostic test devices)
- [Food and Drug Administration](#) (list of authorized vaccines)
- [World Health Organization](#) (lists approved vaccines for use around the world)

¹ To the extent any non-DoD guidance is inconsistent with DoD guidance, the DoD guidance is controlling for DoD.

TAB 3

Attachment 3, Fourth Estate Civilian Employee Requests for Exemption from Mandatory COVID-19 Vaccination

Fourth Estate Components will follow the procedures for exemption requests contained in Attachment 1 of FHP-23, Rev. 3. The following is supplemental guidance for Fourth Estate Components.

Fourth Estate Components will designate one or more Decision Authorities to act upon exemption requests and establish a Decision Authority Support Office. Fourth Estate Components will provide appropriate personnel and other resources to administratively support Decision Authorities, including support necessary to assist the Decision Authorities with preparing written products.

In addition, Fourth Estate Components will identify personnel to serve in advisory roles as subject matter experts who are available to advise the Decision Authority on a full-time basis. Identified subject matter experts may change over time, depending on the volume of requests. Subject matter experts provide individual input to the Decision Authority. In addition to legal advisors, Fourth Estate Components will identify subject matter experts with the following expertise:

Advisory Role	Suggested Source for Advisory Team Personnel
Human Resources (HR) representative	Defense Agency or DoD Field Activity (DAFA) HR office or servicing HR provider
Equal Employment Opportunity (EEO) representative	DAFA, EEO service provider
Medical representative	DAFA, Defense Health Agency, or Military Department (MILDEP)
Religious representative	DAFA or MILDEP

Defense Agencies and DoD Field Activities leading an exemption review process will designate a senior accountable official (SAO) to lead and provide oversight of their respective Component exemption review process and provide contact information to the DA&M. The DA&M will designate the SAO for WHS-serviced Components, including OSD, and establish a weekly in-progress review with Component SAOs to track progress, share best practices, lessons learned, and help address any concerns that may arise during the review process.

Fourth Estate Components, working with their respective HR and EEO offices or HR service providers, may enter into written agreements to use the exemption process established by another Fourth Estate Component. Such agreements shall address resourcing requirements, including military and civilian personnel.

The following chart reflects the current construct for Fourth Estate Component Decision Authorities. Components will provide any changes or requests for assistance to the ODA&M.

Decision Authority	Components Covered
Defense Logistics Agency (DLA)	DLA
Defense Finance and Accounting Service (DFAS)	DFAS, Defense Acquisition University and National Defense University
Washington Headquarters Service (WHS)	Office of the Secretary of Defense (including Defense Legal Services Agency (DLSA) elements not assigned to a client Defense agency or DoD field activity), WHS, Pentagon Force Protection Agency, Defense Personnel Accountability Agency, Defense Technology Security Administration, Defense Test Resource Management Center, Office of Local Defense Community Cooperation, Defense Security Cooperation Agency, Defense Technical Information Center, Defense Threat Reduction Agency, Defense Media Activity, Defense, Defense Microelectronics Activity, Missile Defense Agency, Space Development Agency, Joint Staff, and National Guard Bureau Headquarters ¹
Defense Counterintelligence and Security Agency (DCSA)	DCSA
Defense Intelligence Agency (DIA)	DIA
National Geospatial Imagery Agency (NGA)	NGA
National Reconnaissance Office (NRO)	NRO
National Security Agency (NSA)	NSA
Defense Information Systems Agency (DISA)	DISA
Defense Contract Management Agency (DCMA)	DCMA
Defense Contract Audit Agency (DCAA)	DCAA
Defense Advanced Research Projects Agency (DARPA)	DARPA
Defense Health Agency (DHA)	DHA, military medical treatment facilities under its authority, and Uniformed Services University of the Health Sciences
DoD Education Activity (DoDEA)	DoDEA
Defense Human Resources Activity (DHRA)	DHRA
Defense Commissary Agency	DeCA

¹ Consistent with DoD Instruction 1442.02, "Personnel Actions Involving Civilian Attorneys," September 30, 2010, for attorneys in the Office of General Counsel (OGC) and DLSA, Decision Authorities will decide only whether the requesting attorneys have met their burden of demonstrating that a medical condition prevents their vaccination or that the vaccination policy substantially burdens their religious exercise. The requests will then be referred back to the OGC/DLSA supervisory chain for further disposition.

Decision Authority	Components Covered
Army and Air Force Exchange Service (AAFES)	AAFES ²

Fourth Estate Components will discuss exemption process plans and any necessary implementing agreements with the DA&M prior to the initiation of case reviews.

Fourth Estate Components should begin processing vaccination exemption requests on January 12, 2022, and with a goal to complete the review process by March 31, 2022. Fourth Estate Components must provide routine updates to their respective employees on the progress of their exemption requests with the estimated timeframe for when the employee will receive a response on their requested exemption from mandatory vaccination.

Fourth Estate Components will ensure coordination of strategic messaging including White House reporting, responses to Congressional inquiries, and media requests with the ODA&M.

² Although AAFES is not part of the Fourth Estate, vaccination and exemption reporting for AAFES is captured in the Fourth Estate Component reporting.

TAB 4

DoD OGC Coordination

Supplemental DA&M Guidance Implementing FHP-23, Revision 3

There is no legal objection, subject to comments.

//SIGNED//

Paul S. Koffsky
Senior Deputy General Counsel/Deputy General Counsel
(P&HP)

Date: 01/04/2022

Reproduction of Statutes, Rules and Regulations

5 U.S.C. § 101

§ 101. Executive departments

The Executive departments are:

The Department of State.

The Department of the Treasury.

The Department of Defense.

The Department of Justice.

The Department of the Interior.

The Department of Agriculture.

The Department of Commerce.

The Department of Labor.

The Department of Health and Human Services.

The Department of Housing and Urban Development.

The Department of Transportation.

The Department of Energy.

The Department of Education.

The Department of Veterans Affairs.

The Department of Homeland Security.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 378; Pub.L. 89-670, § 10(b), Oct. 15, 1966, 80 Stat. 948; Pub.L. 91-375, § 6(c)(1), Aug. 12, 1970, 84 Stat. 775; Pub.L. 95-91, Title VII, § 710(a), Aug. 4, 1977, 91 Stat. 609; Pub.L. 96-88, Title V, § 508(b), Oct. 17, 1979, 93 Stat. 692; Pub.L. 100-527, § 13(b), Oct. 25, 1988, 102 Stat. 2643; Pub.L. 109-241, Title IX, § 902(a)(1), July 11, 2006, 120 Stat. 566.)

5 U.S.C. § 105

§ 105. Executive agency

Currentness

For the purpose of this title, “Executive agency” means an Executive department, a Government corporation, and an independent establishment.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379.)

5 U.S.C. § 551

§ 551. Definitions

Currentness

For the purpose of this subchapter--

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;1

(2) “person” includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) “party” includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) “rule making” means agency process for formulating, amending, or repealing a rule;

(6) “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) “adjudication” means agency process for the formulation of an order;

(8) “license” includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

- (9) “licensing” includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;
- (10) “sanction” includes the whole or a part of an agency--
- (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
 - (B) withholding of relief;
 - (C) imposition of penalty or fine;
 - (D) destruction, taking, seizure, or withholding of property;
 - (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
 - (F) requirement, revocation, or suspension of a license; or
 - (G) taking other compulsory or restrictive action;
- (11) “relief” includes the whole or a part of an agency--
- (A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;
 - (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or
 - (C) taking of other action on the application or petition of, and beneficial to, a person;
- (12) “agency proceeding” means an agency process as defined by paragraphs (5), (7), and (9) of this section;
- (13) “agency action” includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and
- (14) “ex parte communication” means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub.L. 94-409, § 4(b), Sept. 13, 1976, 90 Stat. 1247; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(2), Jan. 4, 2011, 124 Stat. 3841.)

5 U.S.C. § 3301 (applicants),
§ 3301. Civil service; generally
Currentness

The President may--

- (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
- (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 417.)

5 U.S.C. § 3302 (competitive service)

§ 3302. Competitive service; rules

Currentness

The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for--

(1) necessary exceptions of positions from the competitive service; and

(2) necessary exceptions from the provisions of sections 2951, 3304(b), 3321, 7202, and 7203 of this title.

Each officer and individual employed in an agency to which the rules apply shall aid in carrying out the rules.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 417; Pub.L. 95-228, § 2(b), Feb. 10, 1978, 92 Stat. 25; Pub.L. 95-454, Title VII, § 703(c)(1), Oct. 13, 1978, 92 Stat. 1217; Pub.L. 96-54, § 2(a)(16), Aug. 14, 1979, 93 Stat. 382; Pub.L. 103-94, § 2(b)(1), Oct. 6, 1993, 107 Stat. 1004; Pub.L. 118-188, § 2(a)(2)(A)(i)(I), Dec. 23, 2024, 138 Stat. 2645.)

5 U.S.C. § 7301

§ 7301. Presidential regulations

The President may prescribe regulations for the conduct of employees in the executive branch.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 524.)

§ 7501. Definitions

Currentness

For the purpose of this subchapter--

(1) “employee” means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year

of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; and

(2) “suspension” means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

CREDIT(S)

(Added Pub.L. 95-454, Title II, § 204(a), Oct. 13, 1978, 92 Stat. 1134; amended Pub.L. 114-92, Div. A, Title XI, § 1105(c)(3), Nov. 25, 2015, 129 Stat. 1024; Pub.L. 117-81, Div. A, Title XI, § 1106(b)(2)(C), Dec. 27, 2021, 135 Stat. 1950.)

5 U.S.C. § 7703(b)(1)(A)

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

5 U.S.C. § 7703(c)

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

10 U.S.C. § 1107(a))

§ 1107. Notice of use of an investigational new drug or a drug unapproved for its applied use

Currentness

(a) Notice required.--(1) Whenever the Secretary of Defense requests or requires a member of the armed forces to receive an investigational new drug or a drug unapproved for its applied use, the Secretary shall provide the member with notice containing the information specified in subsection (d).

(2) The Secretary shall also ensure that health care providers who administer an investigational new drug or a drug unapproved for its applied use, or who are likely to treat members who receive such a drug, receive the information required to be provided under paragraphs (3) and (4) of subsection (d).

21 U.S.C. § 355(b)(1)(A)(i)

§ 355. New drugs

(b) Filing application; contents

(1)(A) Any person may file with the Secretary an application with respect to any drug subject to the provisions of subsection (a). Such persons shall submit to the Secretary as part of the application--

(i) full reports of investigations which have been made to show whether such drug is safe for use and whether such drug is effective in use;

21 U.S.C. § 355(i)

(i) Exemptions of drugs for research; discretionary and mandatory conditions; direct reports to Secretary

(1) The Secretary shall promulgate regulations for exempting from the operation of the foregoing subsections of this section drugs intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety and effectiveness of drugs. Such regulations may, within the discretion of the Secretary, among other conditions relating to the protection of the public health, provide for conditioning such exemption upon--

(A) the submission to the Secretary, before any clinical testing of a new drug is undertaken, of reports, by the manufacturer or the sponsor of the investigation of such drug, of nonclinical tests of such drug adequate to justify the proposed clinical testing;

(B) the manufacturer or the sponsor of the investigation of a new drug proposed to be distributed to investigators for clinical testing obtaining a signed agreement from each of such investigators that patients to whom the drug is administered will be under his personal supervision, or under the supervision of investigators responsible

to him, and that he will not supply such drug to any other investigator, or to clinics, for administration to human beings;

(C) the establishment and maintenance of such records, and the making of such reports to the Secretary, by the manufacturer or the sponsor of the investigation of such drug, of data (including but not limited to analytical reports by investigators) obtained as the result of such investigational use of such drug, as the Secretary finds will enable him to evaluate the safety and effectiveness of such drug in the event of the filing of an application pursuant to subsection (b); and

(D) the submission to the Secretary by the manufacturer or the sponsor of the investigation of a new drug of a statement of intent regarding whether the manufacturer or sponsor has plans for assessing pediatric safety and efficacy.

(2) Subject to paragraph (3), a clinical investigation of a new drug may begin 30 days after the Secretary has received from the manufacturer or sponsor of the investigation a submission containing such information about the drug and the clinical investigation, including--

(A) information on design of the investigation and adequate reports of basic information, certified by the applicant to be accurate reports, necessary to assess the safety of the drug for use in clinical investigation; and

(B) adequate information on the chemistry and manufacturing of the drug, controls available for the drug, and primary data tabulations from nonclinical tests or human studies.

(3)(A) At any time, the Secretary may prohibit the sponsor of an investigation from conducting the investigation (referred to in this paragraph as a “clinical hold”) if the Secretary makes a determination described in subparagraph (B). The Secretary shall specify the basis for the clinical hold, including the specific information available to the Secretary which served as the basis for such clinical hold, and confirm such determination in writing.

(B) For purposes of subparagraph (A), a determination described in this subparagraph with respect to a clinical hold is that--

(i) the drug involved represents an unreasonable risk to the safety of the persons who are the subjects of the clinical investigation, taking into account the qualifications of the clinical investigators, information about the drug, the design of the clinical investigation, the condition for which the drug is to be investigated, and the health status of the subjects involved; or

(ii) the clinical hold should be issued for such other reasons as the Secretary may by regulation establish (including reasons established by regulation before November 21, 1997).

(C) Any written request to the Secretary from the sponsor of an investigation that a clinical hold be removed shall receive a decision, in writing and specifying the reasons therefor, within 30 days after receipt of such request. Any such request shall include sufficient information to support the removal of such clinical hold.

(4) Regulations under paragraph (1) shall provide that such exemption shall be conditioned upon the manufacturer, or the sponsor of the investigation, requiring that experts using such drugs for investigational purposes certify to such manufacturer or sponsor that they will inform any human beings to whom such drugs, or any controls used in connection therewith, are being administered, or their representatives, that such drugs are being used for investigational purposes and will obtain the consent of such human beings or their representatives, except where it is not feasible, it is contrary to the best interests of such human beings, or the proposed clinical testing poses no more than minimal risk to such human beings and includes appropriate safeguards as prescribed to protect the rights, safety, and welfare of such human beings. Nothing in this subsection shall be construed to require any clinical investigator to submit directly to the Secretary reports on the investigational use of drugs. The Secretary shall update such regulations to require inclusion in the informed consent documents and process a statement that clinical trial information for such clinical investigation has been or will be submitted for inclusion in the registry data bank pursuant to subsection (j) of section 282 of Title 42.

21 U.S.C. § 360bbb-0a

§ 360bbb-0a. Investigational drugs for use by eligible patients

(a) Definitions

For purposes of this section--

(1) the term “eligible patient” means a patient--

(A) who has been diagnosed with a life-threatening disease or condition (as defined in section 312.81 of title 21, Code of Federal Regulations (or any successor regulations));

(B) who has exhausted approved treatment options and is unable to participate in a clinical trial involving the eligible investigational drug, as certified by a physician, who-

-

(i) is in good standing with the physician's licensing organization or board; and

(ii) will not be compensated directly by the manufacturer for so certifying; and

(C) who has provided to the treating physician written informed consent regarding the eligible investigational drug, or, as applicable, on whose behalf a legally authorized representative of the patient has provided such consent;

(2) the term “eligible investigational drug” means an investigational drug (as such term is used in section 360bbb of this title)--

(A) for which a Phase 1 clinical trial has been completed;

(B) that has not been approved or licensed for any use under section 355 of this title or section 351 of the Public Health Service Act;

(C)(i) for which an application has been filed under section 355(b) of this title or section 351(a) of the Public Health Service Act; or

(ii) that is under investigation in a clinical trial that--

(I) is intended to form the primary basis of a claim of effectiveness in support of approval or licensure under section 355 of this title or section 351 of the Public Health Service Act; and

(II) is the subject of an active investigational new drug application under section 355(i) of this title or section 351(a)(3) of the Public Health Service Act, as applicable; and

(D) the active development or production of which is ongoing and has not been discontinued by the manufacturer or placed on clinical hold under section 355(i) of this title; and

(3) the term “phase 1 trial” means a phase 1 clinical investigation of a drug as described in section 312.21 of title 21, Code of Federal Regulations (or any successor regulations).

(b) Exemptions

Eligible investigational drugs provided to eligible patients in compliance with this section are exempt from sections 352(f), 353(b)(4), 355(a), and 355(i) of this title, section 351(a) of the Public Health Service Act, and parts 50, 56, and 312 of title 21, Code of Federal Regulations (or any successor regulations), provided that the sponsor of such eligible investigational drug or any person who manufactures, distributes, prescribes, dispenses, introduces or delivers for introduction into interstate commerce, or provides to an eligible patient an eligible investigational drug pursuant to this section is in compliance with the applicable requirements set forth in sections 312.6, 312.7, and 312.8(d)(1) of title 21, Code of Federal Regulations (or any successor regulations) that apply to investigational drugs.

(c) Use of clinical outcomes

(1) In general

Notwithstanding any other provision of this chapter, the Public Health Service Act, or any other provision of Federal law, the Secretary may not use a clinical outcome associated with the use of an eligible investigational drug pursuant to this section to delay or adversely affect the review or approval of such drug under section 355 of this title or section 351 of the Public Health Service Act unless--

(A) the Secretary makes a determination, in accordance with paragraph (2), that use of such clinical outcome is critical to determining the safety of the eligible investigational drug; or

(B) the sponsor requests use of such outcomes.

(2) Limitation

If the Secretary makes a determination under paragraph (1)(A), the Secretary shall provide written notice of such determination to the sponsor, including a public health justification for such determination, and such notice shall be made part of the administrative record. Such determination shall not be delegated below the director of

the agency center that is charged with the premarket review of the eligible investigational drug.

(d) Reporting

(1) In general

The manufacturer or sponsor of an eligible investigational drug shall submit to the Secretary an annual summary of any use of such drug under this section. The summary shall include the number of doses supplied, the number of patients treated, the uses for which the drug was made available, and any known serious adverse events. The Secretary shall specify by regulation the deadline of submission of such annual summary and may amend section 312.33 of title 21, Code of Federal Regulations (or any successor regulations) to require the submission of such annual summary in conjunction with the annual report for an applicable investigational new drug application for such drug.

(2) Posting of information

The Secretary shall post an annual summary report of the use of this section on the internet website of the Food and Drug Administration, including the number of drugs for which clinical outcomes associated with the use of an eligible investigational drug pursuant to this section was--

(A) used in accordance with subsection (c)(1)(A);

(B) used in accordance with subsection (c)(1)(B); and

(C) not used in the review of an application under section 355 of this title or section 351 of the Public Health Service Act.

CREDIT(S)

(June 25, 1938, c. 675, § 561B, as added Pub.L. 115-176, § 2(a), May 30, 2018, 132 Stat. 1372.)

21 USC § 360bbb-3

§ 360bbb-3. Authorization for medical products for use in emergencies

(a) In general**(1) Emergency uses**

Notwithstanding any provision of this chapter and section 351 of the Public Health Service Act, and subject to the provisions of this section, the Secretary may authorize the introduction into interstate commerce, during the effective period of a declaration under subsection (b), of a drug, device, or biological product intended for use in an actual or potential emergency (referred to in this section as an “emergency use”).

(2) Approval status of product

An authorization under paragraph (1) may authorize an emergency use of a product that--

(A) is not approved, licensed, or cleared for commercial distribution under section 355, 360(k), 360b, or 360e of this title or section 351 of the Public Health Service Act or conditionally approved under section 360ccc of this title (referred to in this section as an “unapproved product”); or

(B) is approved, conditionally approved under section 360ccc of this title, licensed, or cleared under such a provision, but which use is not under such provision an approved, conditionally approved under section 360ccc of this title, licensed, or cleared use of the product (referred to in this section as an “unapproved use of an approved product”).

(3) Relation to other uses

An emergency use authorized under paragraph (1) for a product is in addition to any other use that is authorized for the product under a section of this chapter or the Public Health Service Act referred to in paragraph (2)(A).

(4) Definitions

For purposes of this section:

(A) The term “biological product” has the meaning given such term in section 351 of the Public Health Service Act.

(B) The term “emergency use” has the meaning indicated for such term in paragraph (1).

(C) The term “product” means a drug, device, or biological product.

(D) The term “unapproved product” has the meaning indicated for such term in paragraph (2)(A).

(E) The term “unapproved use of an approved product” has the meaning indicated for such term in paragraph (2)(B).

(b) Declaration of emergency or threat justifying emergency authorized use**(1) In general**

The Secretary may make a declaration that the circumstances exist justifying the authorization under this subsection for a product on the basis of--

(A) a determination by the Secretary of Homeland Security that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a biological, chemical, radiological, or nuclear agent or agents;

(B) a determination by the Secretary of Defense that there is a military emergency, or a significant potential for a military emergency, involving a heightened risk to United States military forces, including personnel operating under the authority of Title 10 or Title 50, of attack with--

(i) a biological, chemical, radiological, or nuclear agent or agents; or

(ii) an agent or agents that may cause, or are otherwise associated with, an imminently life-threatening and specific risk to United States military forces;

(C) a determination by the Secretary that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of United States citizens living abroad, and that involves a biological, chemical, radiological, or nuclear agent or agents, or a disease or condition that may be attributable to such agent or agents; or

(D) the identification of a material threat pursuant to section 319F-2 of the Public Health Service Act sufficient to affect national security or the health and security of United States citizens living abroad.

(2) Termination of declaration

(A) In general

A declaration under this subsection shall terminate upon the earlier of--

(i) a determination by the Secretary, in consultation as appropriate with the Secretary of Homeland Security or the Secretary of Defense, that the circumstances described in paragraph (1) have ceased to exist; or

(ii) a change in the approval status of the product such that the circumstances described in subsection (a)(2) have ceased to exist.

(B) Disposition of product

If an authorization under this section with respect to an unapproved product ceases to be effective as a result of a termination under subparagraph (A) of this paragraph, the Secretary shall consult with the manufacturer of such product with respect to the appropriate disposition of the product.

(3) Advance notice of termination

The Secretary shall provide advance notice that a declaration under this subsection will be terminated. The period of advance notice shall be a period reasonably determined to provide--

(A) in the case of an unapproved product, a sufficient period for disposition of the product, including the return of such product (except such quantities of product as are necessary to provide for continued use consistent with subsection (f)(2)) to the manufacturer (in the case of a manufacturer that chooses to have such product returned); and

(B) in the case of an unapproved use of an approved product, a sufficient period for the disposition of any labeling, or any information under subsection (e)(2)(B)(ii), as the case may be, that was provided with respect to the emergency use involved.

(4) Publication

The Secretary shall promptly publish in the Federal Register each declaration, determination, and advance notice of termination under this subsection.

(5) Explanation by Secretary

If an authorization under this section with respect to an unapproved product or an unapproved use of an approved product has been in effect for more than 1 year, the Secretary shall provide in writing to the sponsor of such product an explanation of the scientific, regulatory, or other obstacles to approval, licensure, or clearance of such product or use, including specific actions to be taken by the Secretary and the sponsor to overcome such obstacles.

(6) Military emergencies

In the case of a determination described in paragraph (1)(B), the Secretary shall determine, within 45 calendar days of such determination, whether to make a declaration under paragraph (1), and, if appropriate, shall promptly make such a declaration.

(c) Criteria for issuance of authorization

The Secretary may issue an authorization under this section with respect to the emergency use of a product only if, after consultation with the Assistant Secretary for Preparedness and Response, the Director of the National Institutes of Health, and the Director of the Centers for Disease Control and Prevention (to the extent feasible and appropriate given the applicable circumstances described in subsection (b)(1)), the Secretary concludes--

(1) that an agent referred to in a declaration under subsection (b) can cause a serious or life-threatening disease or condition;

(2) that, based on the totality of scientific evidence available to the Secretary, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that--

(A) the product may be effective in diagnosing, treating, or preventing--

(i) such disease or condition; or

(ii) a serious or life-threatening disease or condition caused by a product authorized under this section, approved or cleared under this chapter, or licensed under section 351 of the Public Health Service Act, for diagnosing, treating, or preventing such a disease or condition caused by such an agent; and

(B) the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product, taking into consideration the material threat posed by the agent or agents identified in a declaration under subsection (b)(1)(D), if applicable;

- (3) that there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition;
- (4) in the case of a determination described in subsection (b)(1)(B)(ii), that the request for emergency use is made by the Secretary of Defense; and
- (5) that such other criteria as the Secretary may by regulation prescribe are satisfied.

(d) Scope of authorization

An authorization of a product under this section shall state--

- (1) each disease or condition that the product may be used to diagnose, prevent, or treat within the scope of the authorization;
- (2) the Secretary's conclusions, made under subsection (c)(2)(B), that the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product; and
- (3) the Secretary's conclusions, made under subsection (c), concerning the safety and potential effectiveness of the product in diagnosing, preventing, or treating such diseases or conditions, including, to the extent practicable given the circumstances of the emergency, an assessment of the available scientific evidence.

(e) Conditions of authorization

(1) Unapproved product

(A) Required conditions

With respect to the emergency use of an unapproved product, the Secretary, to the extent practicable given the applicable circumstances described in subsection (b)(1), shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:

- (i) Appropriate conditions designed to ensure that health care professionals administering the product are informed--
 - (I) that the Secretary has authorized the emergency use of the product;
 - (II) of the significant known and potential benefits and risks of the emergency use of the product, and of the extent to which such benefits and risks are unknown; and
 - (III) of the alternatives to the product that are available, and of their benefits and risks.
- (ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are informed--
 - (I) that the Secretary has authorized the emergency use of the product;
 - (II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and
 - (III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.
- (iii) Appropriate conditions for the monitoring and reporting of adverse events associated with the emergency use of the product.

(iv) For manufacturers of the product, appropriate conditions concerning recordkeeping and reporting, including records access by the Secretary, with respect to the emergency use of the product.

(B) Authority for additional conditions

With respect to the emergency use of an unapproved product, the Secretary may, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:

(i) Appropriate conditions on which entities may distribute the product with respect to the emergency use of the product (including limitation to distribution by government entities), and on how distribution is to be performed.

(ii) Appropriate conditions on who may administer the product with respect to the emergency use of the product, and on the categories of individuals to whom, and the circumstances under which, the product may be administered with respect to such use.

(iii) Appropriate conditions with respect to collection and analysis of information concerning the safety and effectiveness of the product with respect to the use of such product during the period when the authorization is in effect and a reasonable time following such period.

(iv) For persons other than manufacturers of the product, appropriate conditions concerning recordkeeping and reporting, including records access by the Secretary, with respect to the emergency use of the product.

(2) Unapproved use

With respect to the emergency use of a product that is an unapproved use of an approved product:

(A) For a person who carries out any activity for which the authorization is issued, the Secretary shall, to the extent practicable given the applicable circumstances described in subsection (b)(1), establish conditions described in clauses (i) and (ii) of paragraph (1)(A), and may establish conditions described in clauses (iii) and (iv) of such paragraph or in paragraph (1)(B).

(B)(i) If the authorization under this section regarding the emergency use authorizes a change in the labeling of the product, but the manufacturer of the product chooses not to make such change, such authorization may not authorize distributors of the product or any other person to alter or obscure the labeling provided by the manufacturer, except as provided in section 360bbb-3a of this title with respect to authorized changes to the product expiration date.

(ii) In the circumstances described in clause (i), for a person who does not manufacture the product and who chooses to act under this clause, an authorization under this section regarding the emergency use shall, to the extent practicable given the circumstances of the emergency, authorize such person to provide appropriate information with respect to such product in addition to the labeling provided by the

manufacturer, subject to compliance with clause (i). While the authorization under this section is effective, such additional information shall not be considered labeling for purposes of section 352 of this title.

(C) In establishing conditions under this paragraph with respect to the distribution and administration of the product for the unapproved use, the Secretary shall not impose conditions that would restrict distribution or administration of the product when distributed or administered for the approved use.

(3) Good manufacturing practice; prescription

With respect to the emergency use of a product for which an authorization under this section is issued (whether an unapproved product or an unapproved use of an approved product), the Secretary may waive or limit, to the extent appropriate given the applicable circumstances described in subsection (b)(1)--

(A) requirements regarding current good manufacturing practice otherwise applicable to the manufacture, processing, packing, or holding of products subject to regulation under this chapter, including such requirements established under section 351 or 360j(f)(1) of this title, and including relevant conditions prescribed with respect to the product by an order under section 360j(f)(2) of this title;

(B) requirements established under subsection (b) or (f) of section 353 of this title or under section 354 of this title; and

(C) requirements established under section 360j(e) of this title.

(4) Advertising

The Secretary may establish conditions on advertisements and other promotional descriptive printed matter that relate to the emergency use of a product for which an authorization under this section is issued (whether an unapproved product or an unapproved use of an approved product), including, as appropriate--

(A) with respect to drugs and biological products, requirements applicable to prescription drugs pursuant to section 352(n) of this title; or

(B) with respect to devices, requirements applicable to restricted devices pursuant to section 352(r) of this title.

(f) Duration of authorization

(1) In general

Except as provided in paragraph (2), an authorization under this section shall be effective until the earlier of the termination of the declaration under subsection (b) or a revocation under subsection (g).

(2) Continued use after end of effective period

Notwithstanding the termination of the declaration under subsection (b) or a revocation under subsection (g), an authorization shall continue to be effective to provide for continued use of an unapproved product with respect to a patient to whom, or an animal to which, it was administered during the period described by paragraph (1), to the extent found necessary by such patient's attending physician or by the veterinarian caring for such animal, as applicable.

(g) Review and revocation of authorization**(1) Review**

The Secretary shall periodically review the circumstances and the appropriateness of an authorization under this section. As part of such review, the Secretary shall regularly review the progress made with respect to the approval, conditional approval under section 360ccc of this title, licensure, or clearance of--

(A) an unapproved product for which an authorization was issued under this section; or

(B) an unapproved use of an approved product for which an authorization was issued under this section.

(2) Revision and revocation

The Secretary may revise or revoke an authorization under this section if--

(A) the circumstances described under subsection (b)(1) no longer exist;

(B) the criteria under subsection (c) for issuance of such authorization are no longer met; or

(C) other circumstances make such revision or revocation appropriate to protect the public health or safety.

(h) Publication; confidential information**(1) Publication**

The Secretary shall promptly publish on the internet website of the Food and Drug Administration and in the Federal Register a notice of each authorization, and each termination or revocation of an authorization under this section, and an explanation of the reasons therefor (which may include a summary of data or information that has been submitted to the Secretary in an application, request, or submission under this section or section 355(b), 355(i), 355(j), 360b(b), 360b(j), 360b(n), 360e, 360(k), 360c(f)(2), 360j(g), 360j(m), 360ccc, or 360ccc-1 of this title, or section 351(a) or 351(k) of the Public Health Service Act, even if such summary may reveal the existence of such an application, request, or submission, or data contained in such application, request, or submission). The Secretary shall make any revisions to an authorization under this section available on the Internet Web site of the Food and Drug Administration, which may include a summary of the data and information supporting such revisions.

(2) Confidential information

Nothing in this section alters or amends section 1905 of Title 18 or section 552(b)(4) of Title 5. Information made publicly available by the Secretary in accordance with paragraph (1) shall be considered a disclosure authorized by law for purposes of section 1905 of Title 18¹

(i) Actions committed to agency discretion

Actions under the authority of this section by the Secretary, by the Secretary of Defense, or by the Secretary of Homeland Security are committed to agency discretion.

(j) Rules of construction

The following applies with respect to this section:

(1) Nothing in this section impairs the authority of the President as Commander in Chief of the Armed Forces of the United States under article II, section 2 of the United States Constitution.

(2) Nothing in this section impairs the authority of the Secretary of Defense with respect to the Department of Defense, including the armed forces, under other provisions of Federal law.

(3) Nothing in this section (including any exercise of authority by a manufacturer under subsection (e)(2)) impairs the authority of the United States to use or manage quantities of a product that are owned or controlled by the United States (including quantities in the stockpile maintained under section 319F-2 of the Public Health Service Act.

(4) Nothing in this section shall be construed as authorizing a delay in the review or other consideration by the Secretary of any application or submission pending before the Food and Drug Administration for a product for which an authorization under this section is issued.

(k) Relation to other provisions

If a product is the subject of an authorization under this section, the use of such product within the scope of the authorization shall not be considered to constitute a clinical investigation for purposes of section 355(i), 360b(j), or 360j(g) of this title or any other provision of this chapter or section 351 of the Public Health Service Act.

(l) Option to carry out authorized activities

Nothing in this section provides the Secretary any authority to require any person to carry out any activity that becomes lawful pursuant to an authorization under this section, and no person is required to inform the Secretary that the person will not be carrying out such activity, except that a manufacturer of a sole-source unapproved product authorized for emergency use shall report to the Secretary within a reasonable period of time after the issuance by the Secretary of such authorization if such manufacturer does not intend to carry out any activity under the authorization. This section only has legal effect on a person who carries out an activity for which an authorization under this section is issued. This section does not modify or affect activities carried out pursuant to other provisions of this chapter or section 351 of the Public Health Service Act. Nothing in this subsection may be construed as restricting the Secretary from imposing conditions on persons who carry out any activity pursuant to an authorization under this section.

(m) Categorization of laboratory tests associated with devices subject to authorization

(1) In general

In issuing an authorization under this section with respect to a device, the Secretary may, subject to the provisions of this section, determine that a laboratory examination

or procedure associated with such device shall be deemed, for purposes of section 353 of the Public Health Service Act, to be in a particular category of examinations and procedures (including the category described by subsection (d)(3) of such section) if, based on the totality of scientific evidence available to the Secretary--

- (A) such categorization would be beneficial to protecting the public health; and
- (B) the known and potential benefits of such categorization under the circumstances of the authorization outweigh the known and potential risks of the categorization.

(2) Conditions of determination

The Secretary may establish appropriate conditions on the performance of the examination or procedure pursuant to such determination.

(3) Effective period

A determination under this subsection shall be effective for purposes of section 353 of the Public Health Service Act notwithstanding any other provision of that section during the effective period of the relevant declaration under subsection (b).

CREDIT(S)

(June 25, 1938, c. 675, § 564, as added Pub.L. 108-136, Div. A, Title XVI, § 1603(a), Nov. 24, 2003, 117 Stat. 1684; amended Pub.L. 108-276, § 4(a), July 21, 2004, 118 Stat. 853; Pub.L. 113-5, Title III, § 302(a), Mar. 13, 2013, 127 Stat. 179; Pub.L. 114-255, Div. A, Title III, § 3088(a), Dec. 13, 2016, 130 Stat. 1148; Pub.L. 115-92, § 1(a), Dec. 12, 2017, 131 Stat. 2023; Pub.L. 117-328, Div. FF, Title II, § 2504, Dec. 29, 2022, 136 Stat. 5802.)

42 U.S.C. § 9501

It is the sense of the Congress that each State should review and revise, if necessary, its laws to ensure that mental health patients receive the protection and services they require; and in making such review and revision should take into account the recommendations of the President's Commission on Mental Health and the following:

(1) A person admitted to a program or facility for the purpose of receiving mental health services should be accorded the following:

(A) The right to appropriate treatment and related services in a setting and under conditions that--

(i) are the most supportive of such person's personal liberty; and

(ii) restrict such liberty only to the extent necessary consistent with such person's treatment needs, applicable requirements of law, and applicable judicial orders.

(B) The right to an individualized, written, treatment or service plan (such plan to be developed promptly after admission of such person), the right to treatment based on such plan, the right to periodic review and reassessment of treatment and related service needs, and the right to appropriate revision of such plan, including any revision necessary to provide a description of mental health services that may be needed after such person is discharged from such program or facility.

(C) The right to ongoing participation, in a manner appropriate to such person's capabilities, in the planning of mental health services to be provided such person (including the right to participate in the development and periodic revision of the plan described in subparagraph (B)), and, in connection with such participation, the right to be provided with a reasonable explanation, in terms and language appropriate to such person's condition and ability to understand, of--

(i) such person's general mental condition and, if such program or facility has provided a physical examination, such person's general physical condition;

(ii) the objectives of treatment;

(iii) the nature and significant possible adverse effects of recommended treatments;

(iv) the reasons why a particular treatment is considered appropriate;

(v) the reasons why access to certain visitors may not be appropriate; and

(vi) any appropriate and available alternative treatments, services, and types of providers of mental health services.

(D) The right not to receive a mode or course of treatment, established pursuant to the treatment plan, in the absence of such person's informed, voluntary, written consent to such mode or course of treatment, except treatment--

(i) during an emergency situation if such treatment is pursuant to or documented contemporaneously by the written order of a responsible mental health professional; or

(ii) as permitted under applicable law in the case of a person committed by a court to a treatment program or facility.

(E) The right not to participate in experimentation in the absence of such person's informed, voluntary, written consent, the right to appropriate protections in connection with such participation, including the right to a reasonable explanation of the procedure to be followed, the benefits to be expected, the relative advantages of alternative treatments, and the potential discomforts and risks, and the right and opportunity to revoke such consent.

(F) The right to freedom from restraint or seclusion, other than as a mode or course of treatment or restraint or seclusion during an emergency situation if such restraint or seclusion is pursuant to or documented contemporaneously by the written order of a responsible mental health professional.

(G) The right to a humane treatment environment that affords reasonable protection from harm and appropriate privacy to such person with regard to personal needs.

(H) The right to confidentiality of such person's records.

(I) The right to access, upon request, to such person's mental health care records, except such person may be refused access to--

(i) information in such records provided by a third party under assurance that such information shall remain confidential; and

(ii) specific material in such records if the health professional responsible for the mental health services concerned has made a determination in writing that such access would be detrimental to such person's health, except that such material may be made available to a similarly licensed health professional selected by such person and such health professional may, in the exercise of professional judgment, provide such person with access to any or all parts of such material or otherwise disclose the information contained in such material to such person.

(J) The right, in the case of a person admitted on a residential or inpatient care basis, to converse with others privately, to have convenient and reasonable access to the telephone and mails, and to see visitors during regularly scheduled hours, except that, if a mental health professional treating such person determines that denial of access to a particular visitor is necessary for treatment purposes, such mental health professional may, for a specific, limited, and reasonable period of time, deny such access if such mental health professional has ordered such denial in writing and such order has been incorporated in the treatment plan for such person. An order denying such access should include the reasons for such denial.

(K) The right to be informed promptly at the time of admission and periodically thereafter, in language and terms appropriate to such person's condition and ability to understand, of the rights described in this section.

(L) The right to assert grievances with respect to infringement of the rights described in this section, including the right to have such grievances considered in a fair, timely, and impartial grievance procedure provided for or by the program or facility.

(M) Notwithstanding subparagraph (J), the right of access to (including the opportunities and facilities for private communication with) any available--

- (i) rights protection service within the program or facility;
- (ii) rights protection service within the State mental health system designed to be available to such person; and
- (iii) qualified advocate;

for the purpose of receiving assistance to understand, exercise, and protect the rights described in this section and in other provisions of law.

(N) The right to exercise the rights described in this section without reprisal, including reprisal in the form of denial of any appropriate, available treatment.

(O) The right to referral as appropriate to other providers of mental health services upon discharge.

(2)(A) The rights described in this section should be in addition to and not in derogation of any other statutory or constitutional rights.

(B) The rights to confidentiality of and access to records as provided in subparagraphs (H) and (I) of paragraph (1) should remain applicable to records pertaining to a person after such person's discharge from a program or facility.

(3)(A) No otherwise eligible person should be denied admission to a program or facility for mental health services as a reprisal for the exercise of the rights described in this section.

(B) Nothing in this section should--

(i) obligate an individual mental health or health professional to administer treatment contrary to such professional's clinical judgment;

(ii) prevent any program or facility from discharging any person for whom the provision of appropriate treatment, consistent with the clinical judgment of the mental health professional primarily responsible for such person's treatment, is or has become impossible as a result of such person's refusal to consent to such treatment;

(iii) require a program or facility to admit any person who, while admitted on prior occasions to such program or facility, has repeatedly frustrated the purposes of such admissions by withholding consent to proposed treatment; or

(iv) obligate a program or facility to provide treatment services to any person who is admitted to such program or facility solely for diagnostic or evaluative purposes.

(C) In order to assist a person admitted to a program or facility in the exercise or protection of such person's rights, such person's attorney or legal representatives should have reasonable access to--

(i) such person;

(ii) the areas of the program or facility where such person has received treatment, resided, or had access; and

(iii) pursuant to the written authorization of such person, the records and information pertaining to such person's diagnosis, treatment, and related services described in paragraph (1)(I).

(D) Each program and facility should post a notice listing and describing, in language and terms appropriate to the ability of the persons to whom such notice is addressed to understand, the rights described in this section of all persons admitted to such program or facility. Each such notice should conform to the format and content for such notices, and should be posted in all appropriate locations.

(4)(A) In the case of a person adjudicated by a court of competent jurisdiction as being incompetent to exercise the right to consent to treatment or experimentation described in subparagraph (D) or (E) of paragraph (1), or the right to confidentiality of or access to records described in subparagraph (H) or (I) of such paragraph, or to provide authorization as described in paragraph (3)(C)(iii), such right may be exercised or such authorization may be provided by the individual appointed by such court as such person's guardian or representative for the purpose of exercising such right or such authorization.

(B) In the case of a person who lacks capacity to exercise the right to consent to treatment or experimentation under subparagraph (D) or (E) of paragraph (1), or the right to confidentiality of or access to records described in subparagraph (H) or (I) of such paragraph, or to provide authorization as described in paragraph (3)(C)(iii), because such person has not attained an age considered sufficiently advanced under State law to permit the exercise of such right or such authorization to be legally binding, such right may be exercised or such authorization may be provided on behalf of such person by a parent or legal guardian of such person.

(C) Notwithstanding subparagraphs (A) and (B), in the case of a person admitted to a program or facility for the purpose of receiving mental health services, no individual employed by or receiving any remuneration from such program or facility should act as such person's guardian or representative.

CREDIT(S)

(Pub.L. 96-398, Title V, § 501, Oct. 7, 1980, 94 Stat. 1598.)

42 U.S.C. § 12112(d)(4)(A)

§ 12112. Discrimination

(d) Medical examinations and inquiries

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

5 C.F.R. § 1201.63

§ 1201.63 Stipulations.

The parties may stipulate to any matter of fact. The stipulation will satisfy a party's burden of proving the fact alleged.

45 C.F.R. § 46.116

§ 46.116 General requirements for informed consent.

Currentness

(a) General. General requirements for informed consent, whether written or oral, are set forth in this paragraph and apply to consent obtained in accordance with the requirements set forth in paragraphs (b) through (d) of this section. Broad consent may be obtained in lieu of informed consent obtained in accordance with paragraphs (b) and (c) of this section only with respect to the storage, maintenance, and secondary research uses of identifiable private information and identifiable biospecimens. Waiver or alteration of consent in research involving public benefit and service programs conducted by or subject to the approval of state or local officials is described in paragraph (e) of this section. General waiver or alteration of informed consent is described in paragraph (f) of this section. Except as provided elsewhere in this policy:

- (1) Before involving a human subject in research covered by this policy, an investigator shall obtain the legally effective informed consent of the subject or the subject's legally authorized representative.
- (2) An investigator shall seek informed consent only under circumstances that provide the prospective subject or the legally authorized representative sufficient opportunity to discuss and consider whether or not to participate and that minimize the possibility of coercion or undue influence.
- (3) The information that is given to the subject or the legally authorized representative shall be in language understandable to the subject or the legally authorized representative.
- (4) The prospective subject or the legally authorized representative must be provided with the information that a reasonable person would want to have in order to make an informed decision about whether to participate, and an opportunity to discuss that information.
- (5) Except for broad consent obtained in accordance with paragraph (d) of this section:
 - (i) Informed consent must begin with a concise and focused presentation of the key information that is most likely to assist a prospective subject or legally authorized representative in understanding the reasons why one might or might not want to

participate in the research. This part of the informed consent must be organized and presented in a way that facilitates comprehension.

(ii) Informed consent as a whole must present information in sufficient detail relating to the research, and must be organized and presented in a way that does not merely provide lists of isolated facts, but rather facilitates the prospective subject's or legally authorized representative's understanding of the reasons why one might or might not want to participate.

(6) No informed consent may include any exculpatory language through which the subject or the legally authorized representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution, or its agents from liability for negligence.

(b) Basic elements of informed consent. Except as provided in paragraph (d), (e), or (f) of this section, in seeking informed consent the following information shall be provided to each subject or the legally authorized representative:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures that are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others that may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject;

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled; and

(9) One of the following statements about any research that involves the collection of identifiable private information or identifiable biospecimens:

(i) A statement that identifiers might be removed from the identifiable private information or identifiable biospecimens and that, after such removal, the information or biospecimens could be used for future research studies or distributed to another

investigator for future research studies without additional informed consent from the subject or the legally authorized representative, if this might be a possibility; or
 (ii) A statement that the subject's information or biospecimens collected as part of the research, even if identifiers are removed, will not be used or distributed for future research studies.

(c) Additional elements of informed consent. Except as provided in paragraph (d), (e), or (f) of this section, one or more of the following elements of information, when appropriate, shall also be provided to each subject or the legally authorized representative:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) that are currently unforeseeable;

(2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's or the legally authorized representative's consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research that may relate to the subject's willingness to continue participation will be provided to the subject;

(6) The approximate number of subjects involved in the study;

(7) A statement that the subject's biospecimens (even if identifiers are removed) may be used for commercial profit and whether the subject will or will not share in this commercial profit;

(8) A statement regarding whether clinically relevant research results, including individual research results, will be disclosed to subjects, and if so, under what conditions; and

(9) For research involving biospecimens, whether the research will (if known) or might include whole genome sequencing (i.e., sequencing of a human germline or somatic specimen with the intent to generate the genome or exome sequence of that specimen).

(d) Elements of broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens. Broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens (collected for either research studies other than the proposed research or nonresearch purposes) is permitted as an alternative to the informed consent requirements in paragraphs (b) and (c) of this section. If the subject or the legally authorized representative is asked to provide broad consent, the

following shall be provided to each subject or the subject's legally authorized representative:

- (1) The information required in paragraphs (b)(2), (b)(3), (b)(5), and (b)(8) and, when appropriate, (c)(7) and (9) of this section;
 - (2) A general description of the types of research that may be conducted with the identifiable private information or identifiable biospecimens. This description must include sufficient information such that a reasonable person would expect that the broad consent would permit the types of research conducted;
 - (3) A description of the identifiable private information or identifiable biospecimens that might be used in research, whether sharing of identifiable private information or identifiable biospecimens might occur, and the types of institutions or researchers that might conduct research with the identifiable private information or identifiable biospecimens;
 - (4) A description of the period of time that the identifiable private information or identifiable biospecimens may be stored and maintained (which period of time could be indefinite), and a description of the period of time that the identifiable private information or identifiable biospecimens may be used for research purposes (which period of time could be indefinite);
 - (5) Unless the subject or legally authorized representative will be provided details about specific research studies, a statement that they will not be informed of the details of any specific research studies that might be conducted using the subject's identifiable private information or identifiable biospecimens, including the purposes of the research, and that they might have chosen not to consent to some of those specific research studies;
 - (6) Unless it is known that clinically relevant research results, including individual research results, will be disclosed to the subject in all circumstances, a statement that such results may not be disclosed to the subject; and
 - (7) An explanation of whom to contact for answers to questions about the subject's rights and about storage and use of the subject's identifiable private information or identifiable biospecimens, and whom to contact in the event of a research-related harm.
- (e) Waiver or alteration of consent in research involving public benefit and service programs conducted by or subject to the approval of state or local officials—
- (1) Waiver. An IRB may waive the requirement to obtain informed consent for research under paragraphs (a) through (c) of this section, provided the IRB satisfies the requirements of paragraph (e)(3) of this section. If an individual was asked to provide broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens in accordance with the requirements at paragraph (d) of this section, and refused to consent, an IRB cannot waive consent for the storage, maintenance, or secondary research use of the identifiable private information or identifiable biospecimens.

(2) Alteration. An IRB may approve a consent procedure that omits some, or alters some or all, of the elements of informed consent set forth in paragraphs (b) and (c) of this section provided the IRB satisfies the requirements of paragraph (e)(3) of this section. An IRB may not omit or alter any of the requirements described in paragraph (a) of this section. If a broad consent procedure is used, an IRB may not omit or alter any of the elements required under paragraph (d) of this section.

(3) Requirements for waiver and alteration. In order for an IRB to waive or alter consent as described in this subsection, the IRB must find and document that:

(i) The research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine:

(A) Public benefit or service programs;

(B) Procedures for obtaining benefits or services under those programs;

(C) Possible changes in or alternatives to those programs or procedures; or

(D) Possible changes in methods or levels of payment for benefits or services under those programs; and

(ii) The research could not practicably be carried out without the waiver or alteration.

(f) General waiver or alteration of consent—

(1) Waiver. An IRB may waive the requirement to obtain informed consent for research under paragraphs (a) through (c) of this section, provided the IRB satisfies the requirements of paragraph (f)(3) of this section. If an individual was asked to provide broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens in accordance with the requirements at paragraph (d) of this section, and refused to consent, an IRB cannot waive consent for the storage, maintenance, or secondary research use of the identifiable private information or identifiable biospecimens.

(2) Alteration. An IRB may approve a consent procedure that omits some, or alters some or all, of the elements of informed consent set forth in paragraphs (b) and (c) of this section provided the IRB satisfies the requirements of paragraph (f)(3) of this section. An IRB may not omit or alter any of the requirements described in paragraph (a) of this section. If a broad consent procedure is used, an IRB may not omit or alter any of the elements required under paragraph (d) of this section.

(3) Requirements for waiver and alteration. In order for an IRB to waive or alter consent as described in this subsection, the IRB must find and document that:

(i) The research involves no more than minimal risk to the subjects;

(ii) The research could not practicably be carried out without the requested waiver or alteration;

(iii) If the research involves using identifiable private information or identifiable biospecimens, the research could not practicably be carried out without using such information or biospecimens in an identifiable format;

- (iv) The waiver or alteration will not adversely affect the rights and welfare of the subjects; and
 - (v) Whenever appropriate, the subjects or legally authorized representatives will be provided with additional pertinent information after participation.
 - (g) Screening, recruiting, or determining eligibility. An IRB may approve a research proposal in which an investigator will obtain information or biospecimens for the purpose of screening, recruiting, or determining the eligibility of prospective subjects without the informed consent of the prospective subject or the subject's legally authorized representative, if either of the following conditions are met:
 - (1) The investigator will obtain information through oral or written communication with the prospective subject or legally authorized representative, or
 - (2) The investigator will obtain identifiable private information or identifiable biospecimens by accessing records or stored identifiable biospecimens.
 - (h) Posting of clinical trial consent form.
 - (1) For each clinical trial conducted or supported by a Federal department or agency, one IRB–approved informed consent form used to enroll subjects must be posted by the awardee or the Federal department or agency component conducting the trial on a publicly available Federal Web site that will be established as a repository for such informed consent forms.
 - (2) If the Federal department or agency supporting or conducting the clinical trial determines that certain information should not be made publicly available on a Federal Web site (e.g. confidential commercial information), such Federal department or agency may permit or require redactions to the information posted.
 - (3) The informed consent form must be posted on the Federal Web site after the clinical trial is closed to recruitment, and no later than 60 days after the last study visit by any subject, as required by the protocol.
 - (i) Preemption. The informed consent requirements in this policy are not intended to preempt any applicable Federal, state, or local laws (including tribal laws passed by the official governing body of an American Indian or Alaska Native tribe) that require additional information to be disclosed in order for informed consent to be legally effective.
 - (j) Emergency medical care. Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable Federal, state, or local law (including tribal law passed by the official governing body of an American Indian or Alaska Native tribe).
- (Approved by the Office of Management and Budget under Control Number 0990–0260)

SOURCE: 56 FR 28032, June 18, 1991; 59 FR 28276, June 1, 1994; 62 FR 16955, 17005, April 8, 1997; 62 FR 31669, June 10, 1997; 66 FR 3882, Jan. 17, 2001; 66 FR 56778, Nov. 13, 2001; 82 FR 7259, 7273, Jan. 19, 2017; 83 FR 2885, Jan. 22, 2018; 83 FR 28497, June 19, 2018, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 42 U.S.C. 289(a).; 5 U.S.C. 301; Pub.L. 107–296, sec. 102, 306(c); Pub.L. 108–458, sec. 8306.

Exec. Order No. 13991, 86 FR 7045, 2021 WL 229392(Pres.)

Executive Order 13991

Protecting the Federal Workforce and Requiring Mask-Wearing

January 20, 2021

*7045 By the authority vested in me as President by the Constitution and the laws of the United States of America, including [section 7902\(c\) of title 5, United States Code](#), it is hereby ordered as follows:

Section 1. Policy. It is the policy of my Administration to halt the spread of coronavirus disease 2019 (COVID-19) by relying on the best available data and science-based public health measures. Such measures include wearing masks when around others, physical distancing, and other related precautions recommended by the Centers for Disease Control and Prevention (CDC). Put simply, masks and other public health measures reduce the spread of the disease, particularly when communities make widespread use of such measures, and thus save lives.

Accordingly, to protect the Federal workforce and individuals interacting with the Federal workforce, and to ensure the continuity of Government services and activities, on-duty or on-site Federal employees, on-site Federal contractors, and other individuals in Federal buildings and on Federal lands should all wear masks, maintain physical distance, and adhere to other public health measures, as provided in CDC guidelines.

Sec. 2. Immediate Action Regarding Federal Employees, Contractors, Buildings, and Lands. (a) The heads of executive departments and agencies (agencies) shall immediately take action, as appropriate and consistent with applicable law, to require compliance with CDC guidelines with respect to wearing masks, maintaining physical distance, and other public health measures by: on-duty or on-site Federal employees; on-site Federal contractors; and all persons in Federal buildings or on Federal lands.

(b) The Director of the Office of Management and Budget (OMB), the Director of the Office of Personnel Management (OPM), and the Administrator of General Services, in coordination with the President's Management Council and the Coordinator of the COVID-19 Response and Counselor to the President (COVID-19 Response Coordinator), shall promptly issue guidance to assist heads of agencies with implementation of this section.

(c) Heads of agencies shall promptly consult, as appropriate, with State, local, Tribal, and territorial government officials, Federal employees, Federal employee unions, Federal contractors, and any other interested parties concerning the implementation of this section.

(d) Heads of agencies may make categorical or case-by-case exceptions in implementing subsection (a) of this section to the extent that doing so is necessary or required by law, and consistent with applicable law. If heads of agencies make such exceptions, they shall require appropriate alternative safeguards, such as additional physical distancing measures, additional testing, or reconfiguration of workspace,

consistent with applicable law. Heads of agencies shall document all exceptions in writing.

(e) Heads of agencies shall review their existing authorities and, to the extent permitted by law and subject to the availability of appropriations and resources, seek to provide masks to individuals in Federal buildings when needed.

(f) The COVID-19 Response Coordinator shall coordinate the implementation of this section. Heads of the agencies listed in [31 U.S.C. 901\(b\)](#) shall *7046 update the COVID-19 Response Coordinator on their progress in implementing this section, including any categorical exceptions established under subsection (d) of this section, within 7 days of the date of this order and regularly thereafter. Heads of agencies are encouraged to bring to the attention of the COVID-19 Response Coordinator any questions regarding the scope or implementation of this section.

Sec. 3. Encouraging Masking Across America. (a) The Secretary of Health and Human Services (HHS), including through the Director of CDC, shall engage, as appropriate, with State, local, Tribal, and territorial officials, as well as business, union, academic, and other community leaders, regarding mask-wearing and other public health measures, with the goal of maximizing public compliance with, and addressing any obstacles to, mask-wearing and other public health best practices identified by CDC.

(b) The COVID-19 Response Coordinator, in coordination with the Secretary of HHS, the Secretary of Homeland Security, and the heads of other relevant agencies, shall promptly identify and inform agencies of options to incentivize, support, and encourage widespread mask-wearing consistent with CDC guidelines and applicable law.

Sec. 4. Safer Federal Workforce Task Force.

(a) Establishment. There is hereby established the Safer Federal Workforce Task Force (Task Force).

(b) Membership. The Task Force shall consist of the following members:

- (i) the Director of OPM, who shall serve as Co-Chair;
- (ii) the Administrator of General Services, who shall serve as Co-Chair;
- (iii) the COVID-19 Response Coordinator, who shall serve as Co-Chair;
- (iv) the Director of OMB;
- (v) the Director of the Federal Protective Service;
- (vi) the Director of the United States Secret Service;
- (vii) the Administrator of the Federal Emergency Management Agency;
- (viii) the Director of CDC; and
- (ix) the heads of such other agencies as the Co-Chairs may individually or jointly invite to participate.

(c) Organization. A member of the Task Force may designate, to perform the Task Force functions of the member, a senior-level official who is a full-time officer or employee of the member's agency. At the direction of the Co-Chairs, the Task Force

may establish subgroups consisting exclusively of Task Force members or their designees, as appropriate.

(d) Administration. The General Services Administration shall provide funding and administrative support for the Task Force to the extent permitted by law and within existing appropriations. The Co-Chairs shall convene regular meetings of the Task Force, determine its agenda, and direct its work.

(e) Mission. The Task Force shall provide ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic. Such guidance shall be based on public health best practices as determined by CDC and other public health experts, and shall address, at a minimum, the following subjects as they relate to the Federal workforce:

- (i) testing methodologies and protocols;
- (ii) case investigation and contact tracing;
- (iii) requirements of and limitations on physical distancing, including recommended occupancy and density standards;
- (iv) equipment needs and requirements, including personal protective equipment;
- (v) air filtration; *7047
- (vi) enhanced environmental disinfection and cleaning;
- (vii) safe commuting and telework options;
- (viii) enhanced technological infrastructure to support telework;
- (ix) vaccine prioritization, distribution, and administration;
- (x) approaches for coordinating with State, local, Tribal, and territorial health officials, as well as business, union, academic, and other community leaders;
- (xi) any management infrastructure needed by agencies to implement public health guidance; and
- (xii) circumstances under which exemptions might appropriately be made to agency policies in accordance with CDC guidelines, such as for mission-critical purposes.

(f) Agency Cooperation. The head of each agency listed in [31 U.S.C. 901\(b\)](#) shall, consistent with applicable law, promptly provide the Task Force a report on COVID-19 safety protocols, safety plans, or guidance regarding the operation of the agency and the safety of its employees, and any other information that the head of the agency deems relevant to the Task Force's work.

Sec. 5. Federal Employee Testing. The Secretary of HHS, through the Director of CDC, shall promptly develop and submit to the COVID-19 Response Coordinator a testing plan for the Federal workforce. This plan shall be based on community transmission metrics and address the populations to be tested, testing types, frequency of testing, positive case protocols, and coordination with local public health authorities for contact tracing.

Sec. 6. Research and Development. The Director of the Office of Science and Technology Policy, in consultation with the Secretary of HHS (through the National

Science and Technology Council), the Director of OMB, the Director of CDC, the Director of the National Institutes of Health, the Director of the National Science Foundation, and the heads of any other appropriate agencies, shall assess the availability of Federal research grants to study best practices for implementing, and innovations to better implement, effective mask-wearing and physical distancing policies, with respect to both the Federal workforce and the general public.

Sec. 7. Scope. (a) For purposes of this order:

(i) “Federal employees” and “Federal contractors” mean employees (including members of the Armed Forces and members of the National Guard in Federal service) and contractors (including such contractors' employees) working for the executive branch;

(ii) “Federal buildings” means buildings, or office space within buildings, owned, rented, or leased by the executive branch of which a substantial portion of occupants are Federal employees or Federal contractors; and

(iii) “Federal lands” means lands under executive branch control.

(b) The Director of OPM and the Administrator of General Services shall seek to consult, in coordination with the heads of any other relevant agencies and the COVID-19 Response Coordinator, with the Sergeants at Arms of the Senate and the House of Representatives and the Director of the Administrative Office of the United States Courts (or such other persons designated by the Majority and Minority Leaders of the Senate, the Speaker and Minority Leader of the House, or the Chief Justice of the United States, respectively), to promote mask-wearing, physical distancing, and adherence to other public health measures within the legislative and judicial branches, and shall provide requested technical assistance as needed to facilitate compliance with CDC guidelines.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or *7048

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) Independent agencies are strongly encouraged to comply with the requirements of this order.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE, January 20, 2021.

Exec. Order No. 1399186 FR 70452021 WL 229392(Pres.)

Exec. Order No. 14043, 86 FR 50989, 2021 WL 4148113(Pres.)

Executive Order 14043

Requiring Coronavirus Disease 2019 Vaccination for Federal Employees

September 9, 2021

*50989 By the authority vested in me as President by the Constitution and the laws of the United States of America, including [sections 3301](#), [3302](#), and [7301 of title 5, United States Code](#), it is hereby ordered as follows:

Section 1. Policy. It is the policy of my Administration to halt the spread of coronavirus disease 2019 (COVID-19), including the B.1.617.2 (Delta) variant, by relying on the best available data and science-based public health measures. The Delta variant, currently the predominant variant of the virus in the United States, is highly contagious and has led to a rapid rise in cases and hospitalizations. The nationwide public health emergency, first declared by the Secretary of Health and Human Services on January 31, 2020, remains in effect, as does the National Emergency [Concerning the Coronavirus Disease 2019 \(COVID-19\) declared pursuant to the National Emergencies Act in Proclamation 9994](#) of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak). The Centers for Disease Control and Prevention (CDC) within the Department of Health and Human Services has determined that the best way to slow the spread of COVID-19 and to prevent infection by the Delta variant or other variants is to be vaccinated.

COVID-19 vaccines are widely available in the United States. They protect people from getting infected and severely ill, and they significantly reduce the likelihood of hospitalization and death. As of the date of this order, one of the COVID-19 vaccines, the Pfizer-BioNTech COVID-19 Vaccine, also known as Comirnaty, has received approval from the Food and Drug Administration (FDA), and two others, the Moderna COVID-19 Vaccine and the Janssen COVID-19 Vaccine, have been authorized by the FDA for emergency use. The FDA has determined that all three vaccines meet its rigorous standards for safety, effectiveness, and manufacturing quality.

The health and safety of the Federal workforce, and the health and safety of members of the public with whom they interact, are foundational to the efficiency of the civil service. I have determined that ensuring the health and safety of the Federal workforce and the efficiency of the civil service requires immediate action to protect the Federal workforce and individuals interacting with the Federal workforce. It is essential that Federal employees take all available steps to protect themselves and avoid spreading COVID-19 to their co-workers and members of the public. The CDC has found that the best way to do so is to be vaccinated.

The Safer Federal Workforce Task Force (Task Force), established by [Executive Order 13991](#) of January 20, 2021 (Protecting the Federal Workforce and Requiring Mask-Wearing), has issued important guidance to protect the Federal workforce and

individuals interacting with the Federal workforce. Agencies have also taken important actions, including in some cases requiring COVID-19 vaccination for members of their workforce.

Accordingly, building on these actions, and in light of the public health guidance regarding the most effective and necessary defenses against COVID-19, I have determined that to promote the health and safety of the Federal workforce and the efficiency of the civil service, it is necessary to require COVID-19 vaccination for all Federal employees, subject to such exceptions as required by law. *50990

Sec. 2. Mandatory Coronavirus Disease 2019 Vaccination for Federal Employees. Each agency shall implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees, with exceptions only as required by law. The Task Force shall issue guidance within 7 days of the date of this order on agency implementation of this requirement for all agencies covered by this order.

Sec. 3. Definitions. For the purposes of this order:

(a) The term “agency” means an Executive agency as defined in [5 U.S.C. 105](#) (excluding the Government Accountability Office).

(b) The term “employee” means an employee as defined in [5 U.S.C. 2105](#) (including an employee paid from nonappropriated funds as referenced in [5 U.S.C. 2105\(c\)](#)).

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of any of its other provisions to any other persons or circumstances shall not be affected thereby.

THE WHITE HOUSE, September 9, 2021.

Exec. Order No. 1404386 FR 509892021 WL 4148113(Pres.)

Exec. Order No. 14099, 88 FR 30891, 2023 WL 3434921(Pres.)

Executive Order 14099

Moving Beyond COVID-19 Vaccination Requirements for Federal Workers

May 9, 2023

*30891 By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. In 2021, based on the best available data and guidance from our public health experts, I issued [Executive Order 14043](#) of September 9, 2021 (Requiring Coronavirus Disease 2019 Vaccination for Federal Employees), to direct executive departments and agencies (agencies) to require coronavirus disease 2019 (COVID-19) vaccination for their employees, and [Executive Order 14042](#) of September 9, 2021 (Ensuring Adequate COVID Safety Protocols for Federal Contractors), to ensure that Federal contractors and subcontractors have adequate COVID-19 safety protocols. I issued those orders at a time when the highly contagious B.1.617.2 (Delta) variant was the predominant variant of the virus in the United States and had led to a rapid rise in cases and hospitalizations. Those orders were necessary to protect the health and safety of critical workforces serving the American people and to advance the efficiency of Government services during the COVID-19 pandemic. Following issuance of those orders, my Administration successfully implemented a vaccination requirement for the Federal Government, the largest employer in the Nation, achieving a 98 percent compliance rate (reflecting employees who had received at least one dose of the COVID-19 vaccine or had a pending or approved exemption or extension request) by January 2022. More broadly, my Administration has effectively implemented the largest adult vaccination program in the history of the United States, with over 270 million Americans receiving at least one dose of the COVID-19 vaccine.

Following this important work, along with continued critical investments in tests and therapeutics that are protecting against hospitalization and death, we are no longer in the acute phase of the COVID-19 pandemic, and my Administration has begun the process of ending COVID-19 emergency declarations. Our public health experts have issued guidance that allows individuals to understand mitigation measures to protect themselves and those around them. Our healthcare system and public health resources throughout the country are now better able to respond to any potential surge of COVID-19 cases without significantly affecting access to resources or care. Since September 2021, COVID-19 deaths have declined by 93 percent, and new COVID-19 hospitalizations have declined by 86 percent. Considering this progress, and based on the latest guidance from our public health experts, we no longer need a Government-wide vaccination requirement for Federal employees or federally specified safety protocols for Federal contractors. Vaccination remains an important tool to protect individuals from serious illness, but we are now able to move beyond these Federal requirements.

Sec. 2. Revocation of Vaccination Requirements. [Executive Order 14042](#) and [Executive Order 14043](#) are revoked. Agency policies adopted to implement [Executive Order 14042](#) or [Executive Order 14043](#), to the extent such policies are premised on those orders, no longer may be enforced and shall be rescinded consistent with applicable law.

Sec. 3. Effective Date. This order is effective at 12:01 a.m. eastern daylight time on May 12, 2023. *30892

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE, May 9, 2023.

Billing code 3395-F3-P

Exec. Order No. 1409988 FR 308912023 WL 3434921(Pres.)

Exec. Order No. 14148, 90 FR 8237, 2025 WL 305765(Pres.)

Executive Order 14148

Initial Rescissions of Harmful Executive Orders and Actions

January 20, 2025

*8237 By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose and Policy. The previous administration has embedded deeply unpopular, inflationary, illegal, and radical practices within every agency and office of the Federal Government. The injection of “diversity, equity, and inclusion” (DEI) into our institutions has corrupted them by replacing hard work, merit, and equality with a divisive and dangerous preferential hierarchy. Orders to open the borders have endangered the American people and dissolved Federal, State, and local resources that should be used to benefit the American people. Climate extremism has exploded inflation and overburdened businesses with regulation.

To commence the policies that will make our Nation united, fair, safe, and prosperous again, it is the policy of the United States to restore common sense to the Federal Government and unleash the potential of the American citizen. The revocations within this order will be the first of many steps the United States Federal Government will take to repair our institutions and our economy.

Sec. 2. Revocation of Orders and Actions. The following executive actions are hereby revoked:

- (a) [Executive Order 13985](#) of January 20, 2021 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government).
- (b) [Executive Order 13986](#) of January 20, 2021 (Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census).
- (c) [Executive Order 13987](#) of January 20, 2021 (Organizing and Mobilizing the United States Government To Provide a Unified and Effective Response To Combat COVID-19 and To Provide United States Leadership on Global Health and Security).
- (d) [Executive Order 13988](#) of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation).
- (e) [Executive Order 13989](#) of January 20, 2021 (Ethics Commitments by Executive Branch Personnel).
- (f) [Executive Order 13990](#) of January 20, 2021 (Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis).
- (g) [Executive Order 13992](#) of January 20, 2021 (Revocation of Certain Executive Orders Concerning Federal Regulation).
- (h) [Executive Order 13993](#) of January 20, 2021 (Revision of Civil Immigration Enforcement Policies and Priorities).
- (i) [Executive Order 13995](#) of January 21, 2021 (Ensuring an Equitable Pandemic Response and Recovery).

- (j) [Executive Order 13996](#) of January 21, 2021 (Establishing the COVID-19 Pandemic Testing Board and Ensuring a Sustainable Public Health Workforce for COVID-19 and Other Biological Threats).
- (k) [Executive Order 13997](#) of January 21, 2021 (Improving and Expanding Access to Care and Treatments for COVID-19). *8238
- (l) [Executive Order 13999](#) of January 21, 2021 (Protecting Worker Health and Safety).
- (m) [Executive Order 14000](#) of January 21, 2021 (Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers).
- (n) [Executive Order 14002](#) of January 22, 2021 (Economic Relief Related to the COVID-19 Pandemic).
- (o) [Executive Order 14003](#) of January 22, 2021 (Protecting the Federal Workforce).
- (p) [Executive Order 14004](#) of January 25, 2021 (Enabling All Qualified Americans To Serve Their Country in Uniform).
- (q) [Executive Order 14006](#) of January 26, 2021 (Reforming Our Incarceration System To Eliminate the Use of Privately Operated Criminal Detention Facilities).
- (r) [Executive Order 14007](#) of January 27, 2021 (President's Council of Advisors on Science and Technology).
- (s) [Executive Order 14008](#) of January 27, 2021 (Tackling the Climate Crisis at Home and Abroad).
- (t) [Executive Order 14009](#) of January 28, 2021 (Strengthening Medicaid and the Affordable Care Act).
- (u) [Executive Order 14010](#) of February 2, 2021 (Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border).
- (v) [Executive Order 14011](#) of February 2, 2021 (Establishment of Interagency Task Force on the Reunification of Families).
- (w) [Executive Order 14012](#) of February 2, 2021 (Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans).
- (x) [Executive Order 14013](#) of February 4, 2021 (Rebuilding and Enhancing Programs To Resettle Refugees and Planning for the Impact of Climate Change on Migration).
- (y) [Executive Order 14015](#) of February 14, 2021 (Establishment of the White House Office of Faith-Based and Neighborhood Partnerships).
- (z) [Executive Order 14018](#) of February 24, 2021 (Revocation of Certain Presidential Actions).
- (aa) [Executive Order 14019](#) of March 7, 2021 (Promoting Access to Voting).
- (bb) [Executive Order 14020](#) of March 8, 2021 (Establishment of the White House Gender Policy Council).

- (cc) [Executive Order 14021](#) of March 8, 2021 (Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity).
- (dd) [Executive Order 14022](#) of April 1, 2021 (Termination of Emergency With Respect to the International Criminal Court).
- (ee) [Executive Order 14023](#) of April 9, 2021 (Establishment of the Presidential Commission on the Supreme Court of the United States).
- (ff) [Executive Order 14027](#) of May 7, 2021 (Establishment of the Climate Change Support Office).
- (gg) [Executive Order 14029](#) of May 14, 2021 (Revocation of Certain Presidential Actions and Technical Amendment).
- (hh) [Executive Order 14030](#) of May 20, 2021 (Climate-Related Financial Risk). *8239
- (ii) [Executive Order 14031](#) of May 28, 2021 (Advancing Equity, Justice, and Opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders).
- (jj) [Executive Order 14035](#) of June 25, 2021 (Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce).
- (kk) [Executive Order 14037](#) of August 5, 2021 (Strengthening American Leadership in Clean Cars and Trucks).
- (ll) [Executive Order 14044](#) of September 13, 2021 (Amending [Executive Order 14007](#)).
- (mm) [Executive Order 14045](#) of September 13, 2021 (White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Hispanics).
- (nn) [Executive Order 14049](#) of October 11, 2021 (White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Native Americans and Strengthening Tribal Colleges and Universities).
- (oo) [Executive Order 14050](#) of October 19, 2021 (White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Black Americans).
- (pp) [Executive Order 14052](#) of November 15, 2021 (Implementation of the Infrastructure Investment and Jobs Act).
- (qq) [Executive Order 14055](#) of November 18, 2021 (Nondisplacement of Qualified Workers Under Service Contracts).
- (rr) [Executive Order 14057](#) of December 8, 2021 (Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability).
- (ss) [Executive Order 14060](#) of December 15, 2021 (Establishing the United States Council on Transnational Organized Crime).
- (tt) [Executive Order 14069](#) of March 15, 2022 (Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency).
- (uu) [Executive Order 14070](#) of April 5, 2022 (Continuing To Strengthen Americans' Access to Affordable, Quality Health Coverage).

- (vv) [Executive Order 14074](#) of May 25, 2022 (Advancing Effective, Accountable Policing and Criminal Justice Practices To Enhance Public Trust and Public Safety).
- (ww) [Executive Order 14075](#) of June 15, 2022 (Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals).
- (xx) [Executive Order 14082](#) of September 12, 2022 (Implementation of the Energy and Infrastructure Provisions of the Inflation Reduction Act of 2022).
- (yy) [Executive Order 14084](#) of September 30, 2022 (Promoting the Arts, the Humanities, and Museum and Library Services).
- (zz) [Executive Order 14087](#) of October 14, 2022 (Lowering Prescription Drug Costs for Americans).
- (aaa) [Executive Order 14089](#) of December 13, 2022 (Establishing the President's Advisory Council on African Diaspora Engagement in the United States).
- (bbb) [Executive Order 14091](#) of February 16, 2023 (Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government).
- (ccc) The Presidential Memorandum of March 13, 2023 (Withdrawal of Certain Areas off the United States Arctic Coast of the Outer Continental Shelf from Oil or Gas Leasing).
- (ddd) [Executive Order 14094](#) of April 6, 2023 (Modernizing Regulatory Review).
- *8240
- (eee) [Executive Order 14096](#) of April 21, 2023 (Revitalizing Our Nation's Commitment to Environmental Justice for All).
- (fff) [Executive Order 14099](#) of May 9, 2023 (Moving Beyond COVID-19 Vaccination Requirements for Federal Workers).
- (ggg) [Executive Order 14110](#) of October 30, 2023 (Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence).
- (hhh) [Executive Order 14115](#) of February 1, 2024 (Imposing Certain Sanctions on Persons Undermining Peace, Security, and Stability in the West Bank).
- (iii) [Executive Order 14124](#) of July 17, 2024 (White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity Through Hispanic-Serving Institutions).
- (jjj) [Executive Order 14134](#) of January 3, 2025 (Providing an Order of Succession Within the Department of Agriculture).
- (kkk) [Executive Order 14135](#) of January 3, 2025 (Providing an Order of Succession Within the Department of Homeland Security).
- (lll) [Executive Order 14136](#) of January 3, 2025 (Providing an Order of Succession Within the Department of Justice).
- (mmm) [Executive Order 14137](#) of January 3, 2025 (Providing an Order of Succession Within the Department of the Treasury).
- (nnn) [Executive Order 14138](#) of January 3, 2025 (Providing an Order of Succession Within the Office of Management and Budget).

(ooo) [Executive Order 14139](#) of January 3, 2025 (Providing an Order of Succession Within the Office of the National Cyber Director).

(ppp) The Presidential Memorandum of January 3, 2025 (Designation of Officials of the Council on Environmental Quality to Act as Chairman).

(qqq) The Presidential Memorandum of January 3, 2025 (Designation of Officials of the Office of Personnel Management to Act as Director).

(rrr) The Presidential Memorandum of January 3, 2025 (Designation of Officials of the Office of Science and Technology Policy to Act as Director).

(sss) The Presidential Memorandum of January 3, 2025 (Designation of Officials of the United States Agency for Global Media to Act as Chief Executive Officer).

(ttt) The Presidential Memorandum of January 3, 2025 (Designation of Officials of the United States Agency for International Development to Act as Administrator).

(uuu) The Presidential Memorandum of January 3, 2025 (Designation of Officials of the United States International Development Finance Corporation to Act as Chief Executive Officer).

(vvv) The Presidential Memorandum of January 6, 2025 (Withdrawal of Certain Areas of the United States Outer Continental Shelf from Oil or Natural Gas Leasing).

(www) The Presidential Memorandum of January 6, 2025 (Withdrawal of Certain Areas of the United States Outer Continental Shelf from Oil or Natural Gas Leasing).

(xxx) The Presidential Memorandum of January 14, 2025 (Certification of Rescission of Cuba's Designation as a State Sponsor of Terrorism).

(yyy) The Presidential Memorandum of January 14, 2025 (Revocation of National Security Presidential Memorandum 5).

(zzz) [Executive Order 14143](#) of January 16, 2025 (Providing for the Appointment of Alumni of AmeriCorps to the Competitive Service).

Sec. 3. Implementation. (a) To effectuate the revocations described in section 2 of this order, the heads of each agency shall take immediate steps to end Federal implementation of unlawful and radical DEI ideology. *8241

(b) The Director of the Domestic Policy Council (DPC) and the Director of the National Economic Council (NEC) shall review all Federal Government actions taken pursuant to the orders, memoranda, and proclamations listed in section 2 of this order and take necessary steps to rescind, replace, or amend such actions as appropriate. Within 45 days of the date of this order, the Director of the DPC and the Director of the NEC shall submit to the President an additional list of orders, memoranda, and proclamations issued by the prior administration that should be rescinded, as well as a list of replacement orders, memoranda, or proclamations, to increase American prosperity.

(c) The National Security Advisor (NSA) shall immediately begin a complete and thorough review of all National Security Memoranda (NSMs) issued from January 20, 2021, through January 20, 2025, for harm to national security, domestic resilience, and

American values. No later than 45 days from the date of this order, the NSA shall recommend to the President NSMs for rescission.

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
 - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE, January 20, 2025.

Billing code 3395-F4-P

Exec. Order No. 1414890 FR 82372025 WL 305765(Pres.)

Exec. Order No. 14174, 90 FR 8637, 2025 WL 343887(Pres.)

Executive Order 14174

Revocation of Certain Executive Orders

January 21, 2025

*8637 By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Revocation. The following Executive Orders are hereby revoked:

(a) [Executive Order 14042](#) of September 9, 2021 (Ensuring Adequate COVID Safety Protocols for Federal Contractors); and

(b) [Executive Order 14043](#) of September 9, 2021 (Requiring Coronavirus Disease 2019 Vaccination for Federal Employees).

Sec. 2. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE, January 21, 2025.

Billing code 3395-F4-P

Exec. Order No. 1417490 FR 86372025 WL 343887(Pres.)