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DATE: September 23, 2021

TO: Interested Parties

FROM: Margaret C. Daun, Corporation Counsel
Scott F. Brown, Deputy Corporation Counsel
Lisa M. Procaccio, Assistant Corporation Counsel
William G. Davidson, Assistant Corporation Counsel

SUBJECT: Emergency Powers Under Wisconsin State Statutes and MGCO Chapter 99

DETAILED BACKGROUND and PRIOR GUIDANCE

With the onset of the COVID-19 pandemic, in the spring-summer of 2020, very little certainty existed about the virus itself, remediation, treatment, symptoms, or when a vaccine might become available. Moreover, personal protective equipment supplies were short, testing was not widely available, no vaccine was available, nor was there any known treatment generally accepted by knowledgeable scientific experts. Concerns about exhaustion of available hospital beds, ventilators, etc. were widespread. Many communities faced the grim reality of requiring refrigerated trucks to store the deceased.

In response to this unprecedented global crisis, on March 13, 2020, County Executive Abele issued a "Proclamation of Existence of a County Emergency" ("Proclamation") (Exhibit 1), pursuant to Wis. Stat. § 323.14(4)(b). Following the Proclamation, County Executives Abele and Crowley have issued various Administrative Orders ("Orders") to address COVID-19.

Also on March 13, 2020, the Office of Corporation Counsel ("OCC") issued an opinion (Exhibit 2), which explained the basic state statutory division and sharing of emergency powers between and among the County Executive and County Board:

> Wis. Stat. § 323.11 authorizes the County Board "to declare, by ordinance or resolution, an emergency existing within" Milwaukee County. The powers conferred by such a declaration include the "general authority to order … whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within" the County. Wis. Stat. § 323.14(4)(a). "If, because of the

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The Office of Corporation Counsel strengthens the County community and empowers residents through highly competent, creative, compassionate and responsive legal services provided in strategic partnership with County stakeholders to optimize decision making, reduce risks, and maximize public resources.

> emergency conditions, [the Board] is unable to meet promptly, [the County Executive] shall exercise by proclamation all of the powers conferred upon the [Board] … that appear necessary and expedient." Wis. Stat. § 323.14(4)(b). Such a proclamation by the Executive is "subject to ratification, alteration, modification, or repeal by [the Board] as soon as [the Board] can meet, but the subsequent action taken by the [the Board] shall not affect the prior validity of the proclamation." *Id.*

Ex. 2 at 3. The opinion clarified that in March 2020, given the facts at that time, the Executive validly issued the Proclamation and related Orders with immediate effect, without Board preapproval. *Id.*

Importantly, on the final page of its March 2020 opinion, the OCC stated three times that the County Executive's Proclamation and Orders are "subject to review, withdrawal, or amendment by the County Board." *Id.*

On June 11, 2020,[1] this guidance was reaffirmed by the OCC during oral testimony before the Judiciary Committee. At approximately minute 28:24-29:59, Corporation Counsel stated, "[o]f course, any of the emergency declarations or administrative orders issued by the CEX related to, or relying upon, the emergency declaration are subject to review, withdrawal, or amendment by the County Board." This was repeated again moments later.

Taking Corporation Counsel's June 2020 testimony properly in context and as a whole,[2] she explained that at that time, the County Executive had authority to issue these types of orders first, with immediate effect, subject to review, withdrawal, or amendment by the County Board, given the exigent need to respond "real-time" to the advice of scientific experts. She also emphasized the need for collaboration and cooperation between the executive and legislative branches.

Corporation Counsel concluded her remarks that day by stating, "[a]nd so, these questions of coordination are not ones of unilateral authority existing really anywhere. These are all shared authorities, and the challenge is to figure-out how to do that."[3]

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[1] Importantly, the Wisconsin Supreme Court's decision that addressed emergency powers among the state legislature and governor was not issued until March 11, 2021. *See Fabick v. Evers*, 2021 WI 28, ¶ 29 ("the governor's power is more circumscribed [than a local government's]"), *infra* at pp. 8, 10.

[2] A transcript of the relevant portions of Corporation Counsel's testimony before the Judiciary Committee on June 11, 2020, is attached as Exhibit 3.

[3] In the June 2020 Judiciary meeting, the OCC did not address which committee was the appropriate committee to review the Proclamation or related Orders. The OCC first opined on this topic in writing on September 13, 16, and 17, 2020, and concluded that Judiciary, as opposed to Finance, should substantively take up emergency matters under MGCO § 99.03. That remains the OCC's guidance today. Referrals are in the Board Chair's discretion, including the possibility of a dual referral. The OCC's understanding is that the Chair intends to refer Orders going forward to the Judiciary Committee for substantive action.

Circumstances have changed substantially since June of 2020. The questions addressed herein must account for these changed circumstances. Very few policymakers and elected officials anticipated in the early months of the pandemic that we would still be struggling to control the virus nearly two years after the initial contagion. The pandemic has proved persistent, to say the least, with variants, as is normal with viruses, differing in severity and transmissibility (Alpha and Delta variants being the most infectious and deadly), with infections, hospitalizations, and death rates in some communities spiking back alarmingly to mid-2020 levels.

In this opinion, the OCC will expand, clarify, and build upon our original March 2020 guidance, in light of these changed circumstances.[4]

Importantly, Wisconsin courts have not definitely addressed the questions about shared emergency powers in local governments under circumstances like these, as addressed herein. This OCC guidance is therefore just that—mere guidance. It is based upon objective, common-sense interpretations of the applicable and bare bones Wisconsin Statutes and Milwaukee County Ordinances. Where we believe there are clear answers, we will so state. Likewise, when the answer isn't clear, we will not pretend otherwise. Given the politization of the public health challenge posed by COVID-19, it is more difficult than usual to prognosticate regarding how courts may rule in these matters, if challenged.

To date, the OCC has not offered any formal guidance regarding the following questions, grouped into two categories below. *See infra* n.4.

[4] This opinion and OCC's prior March 2020 opinion are the definitive and formal guidance of the OCC on these topics, which may be supplemented, amended, or altered at any time. Prior oral statements, some of which are addressed herein, do not represent the definitive and formal guidance of the OCC, and any conflict between oral statements and these opinions should be resolved in favor of these written, formal opinions. Moreover, the OCC respectfully suggests that ad hoc OCC guidance provided via email to clients should be not disclosed to the press or third parties, without first consulting with the OCC, as it is informal and is provided as a professional courtesy to attempt to provide feedback to clients as quickly as possible. That said, it is ultimately up to the client whether to share emailed advice.

ANALYSIS

Vaccine Mandate[5]

1. ***Does the vaccine mandate, Administrative Order 21-3v1 ("Mandate")[6], apply to members of the public, who attend meetings or obtain services in County buildings? If not, can the Chairwoman unilaterally require that members of the public show proof of vaccination to attend meetings in person? Can the County Board as a body?***

   No, the Mandate, by its plain terms, does not apply to members of the public. No, the Chairwoman cannot unilaterally require the public to vaccinate. No, the County Board cannot require the public to vaccinate to attend meetings or obtain services in County buildings.

2. ***Does the Mandate improperly hinder the ability of the public to observe or participate in public meetings?***

   No, it does not apply to the public. Regardless, alternate virtual accommodations are available to the public so that they may access hybrid public meetings and be heard in full, including live streaming with the ability to comment in real time via video/Microsoft Teams, written comments via CLIC, and live, in-person comments with social distancing, masking, and screening (*see also* #4 below).

3. ***Does the Mandate apply to elected officials? If not, can the Chairwoman unilaterally require that fellow Supervisors show proof of vaccination to attend meetings in person? Can the County Board as a body?***

   No. Elected officials are not "employees" for purposes of the Mandate under relevant state statutes and local ordinances. Section 1, subsection 13, of Appendix A to Milwaukee County Ordinances, titled "Civil Service Rules," defines "employees" as those in the classified civil service. Wisconsin statute section 63.03(2)(a) excludes all elected officials from the classified service. Thus, elected officials are not considered employees for the purposes of the Mandate.

   Similarly, under federal law relevant here,[7] elected officials are not employees. *See* 29 U.S.C. § 20(e)(2)(C)(ii)(I); 29 C.F.R. § 553.11 (Fair Labor Standards Act does not apply to elected officials).

   No, the Chairwoman cannot unilaterally mandate vaccines for County Supervisors.

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[5] The "Frequently Asked Questions" regarding the Mandate, prepared by the administration, is attached as Exhibit 4.

[6] *See* Exhibit 5.

[7] To avoid confusion, elected officials are considered employees under federal and/or state law for the purposes of taxation and certain benefit availability, as well as other circumstances, not relevant here.

However, the County Board arguably could impose, by majority vote, a vaccine requirement for its members. However, the only enforcement measure arguably would be censure, under Robert's Rules of Order.[8]

It is ultimately up to voters, whether by recall or other regular election, to determine if its elected officials represent their views regarding vaccines, as well as other public health issues related to COVID-19.

4. ***If the Mandate does not apply to elected officials or members of the public, do other Orders apply?***

Highly likely, yes. The Social Distancing Administrative Policy (Order 20-4v1),[9] Universal Face Mask Policy (Order 20-14v7),[10] and Health Screening Policy (Order 21-17v4)[11] apply to members of the public and elected officials ***only when they are in County buildings***. Should a Supervisor or member of the public not wish to comply with these policies, they can nonetheless participate in public meetings virtually, through the hybrid meeting format. Other reasonable accommodations are made on a case-by-case basis for those seeking County services.

Enforcement of these Orders with respect to elected officials and the general public who do not comply with these directives involves a spectrum of enforcement possibilities, many of which are outlined in the applicable Orders, as well as significant discretion. Where entry to a facility might be denied due to noncompliance, alternate accommodations will be made on a case-by-case basis (i.e., such as hybrid meetings, mailing requested documents, delivery of documents by hand outside County buildings, etc.), as noted immediately above. To date, the OCC is unaware of significant compliance or related enforcement issues.

5. ***Could the Mandate be successfully challenged in court on its face?***

Anyone can sue for anything at any time.

The Supreme Court of the United States has long standing precedent that supports the lawfulness of Milwaukee County's COVID-19 vaccine mandate. *See Jacobsen v Mass*, 197 U.S. 11 (1905) (state vaccine mandate upheld as valid exercise of state police power); *Zucht v. King*, 260 U.S. 174 (1922) (City ordinance mandating vaccines for public school attendance and the manner of enforcement is not a violation of the 14th amendment).

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[8] Similarly, even if the Mandate somehow did apply to elected officials, there is no County government-based enforcement mechanism that would likely be upheld by a court. It would be up to the voters regarding whether to remove an elected for noncompliance.

[9] *See* Exhibit 6.

[10] *See* Exhibit 7.

[11] *See* Exhibit 8.

Furthermore, the Employment Opportunity Commission ("EEOC") and the Department of Justice ("DOJ") opined that employers may require COVID-19 vaccination as a condition of employment, with exemptions for sincerely held religious beliefs and medical reasons.[12] Milwaukee County offers such exemptions and established a process to evaluate exemption requests.

The OCC respectfully, but strongly, recommends that the County Board take up and either ratify, repeal, or amend the Mandate.

6. ***Could the Mandate be successfully challenged by an employee who is terminated for failure to comply with the Mandate (i.e., does not supply proof of vaccination, nor obtain a valid religious or medical exemption)?***

   Anyone can sue for anything at any time. *See* #5 above.

7. ***Can the County Executive establish work rules, such as a vaccine mandate, hybrid work from home rules, social distancing/health screening/masking requirements, etc., separate and apart from any emergency proclamation, as a function of his day-to-day management powers, without Board oversight?***

   Highly likely, yes. This question is beyond the scope of this opinion, as it relates to the allocation of power—in a nonemergency context—among and between the executive (day-to-day management) and legislative (policymaking) branches of government, including Acts 14 and 55.

Emergency Powers

8. ***Does Milwaukee County Ordinance 99.03 strip the County Executive of emergency powers granted under state statute, and render emergency rulemaking exclusively a matter for the County Board, specifically the Judiciary Committee?***

   No.

   Ordinance 99.03 states: "The committee on judiciary, safety and general services of the county board is established as the standing committee of the county board that shall retain policy-making and rule-making powers in the establishment and development of county emergency management plans and programs under ch. 323, Wis. Stats."

[12] *See* EEOC guidance "*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws*" (Exhibit 9); July 6, 2021 DOJ Opinion "*Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization*." (Exhibit 10); Fluker, Natalie D., Rubin, John A., "*U.S. Department of Justice Gives Go-Ahead to Mandatory COVID-19 Vaccines in the Workplace*," Volume XI, The National Law Review, August 2, 2021 (Exhibit 11).

Wisconsin state statute section 313.14 states:

> (4) Powers during an emergency.
> (a) The emergency power of the governing body conferred under s. 323.11 includes the general authority to order, by ordinance or resolution, whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government in the emergency and includes the power to bar, restrict, or remove all unnecessary traffic, both vehicular and pedestrian, from the highways, notwithstanding any provision of chs. 341 to 349.
> (b) If, because of the emergency conditions, the governing body of the local unit of government is unable to meet promptly, the chief executive officer or acting chief executive officer of any local unit of government shall exercise by proclamation all of the powers conferred upon the governing body under par. (a) or s. 323.11 that appear necessary and expedient. The proclamation shall be subject to ratification, alteration, modification, or repeal by the governing body as soon as that body can meet, but the subsequent action taken by the governing body shall not affect the prior validity of the proclamation.

To the extent that Ordinance 99.03 might arguably be read to strip the County Executive of his emergency powers, it cannot do so because those powers—with limits—are enshrined in state statute, and state statute trumps local ordinance.

That said, the Wisconsin Statutes do not vest in the County Executive any independent or exclusive emergency powers. Instead, the County Executive is authorized only to unilaterally act, without preapproval of the County Board, when the County Board is unable to meet "promptly" due to the conditions giving rise to the emergency, and to exercise only those powers that would otherwise be vested in the County Board. *See* Wis. Stat. § 323.14(4)(b). *See also* #9, 10 below.

9. Did the effectiveness of the Proclamation or Orders cease, as a matter of law, because a new County Executive took office?

A court would nearly certainly decline to repeal the Proclamation or an Order on this basis. First, the conditions underlying the original Proclamation continue, and by some expert scientific accounts, have become differently acute due to low vaccination rates and the more transmissible and more deadly Alpha and Delta variants.

Second, there is no specific expiration time limit for a proclamation or related order in state statute or County ordinance.

Third, once the County Executive has issued a proclamation under Section 323.14(4)(b) of the Wisconsin Statutes, the County Board may only act to repeal, ratify, or amend prospectively. This means that a Proclamation or Order validly issued by the Executive takes effect immediately and remains in effect until subsequent action by the Board.

However, if the conditions that gave rise to the Proclamation cease, then by operation of law and common sense, the Proclamation and related Orders would cease to have effect.

Because the County Executive enjoys no greater emergency powers than does the County Board, an executive's authority to undertake emergency actions may not exceed that "time during which the emergency conditions exist or are likely to exist." Wis. Stat. §§ 323.11, 323.14(4)(a)-(b). *See also Fabick v. Evers*, 2021 WI 28, ¶ 29 (discussing, in dicta, that a municipal government's authority to act in an emergency under Wis. Stat. § 323.11 is more temporally broad, as compared to the governor's powers, which are subject to a specific 60-day limit, absent extension by the state legislature) ("This unmistakably shows that when the legislature wishes to authorize an emergency response that is coextensive with the emergency conditions, it knows how to say so.") (March 11, 2021). Stated differently, even if the County Board declined to meet or was unable to meet indefinitely for the purpose of reviewing the County Executive's emergency proclamation, the County Executive's authority to act by proclamation would end once the conditions giving rise to the proclamation abated. *Id*. *See also* #8, 10.

In conclusion, an emergency proclamation and/or related orders cannot be indefinite.

10. ***Did the County Executive's emergency powers cease, as a matter of law, because the Board arguably is now able to "promptly" meet to review Orders? Or, put another way, does the County Executive still retain the authority to act first (i.e., to implement, with immediate effectiveness, Orders based on the Proclamation, without pre-approval by the County Board)?***

Uncertain. This pandemic is persistent and now approaching two years in duration, while communities are also currently observing acute spikes in the relevant metrics due to COVID variants. This is clearly differentiable from the more time-bound emergencies that the statute and ordinances much more easily apply to, such as a bombing, courthouse fire, or flooding.

Section 323.14(4)(b) states (emphasis added), "[i]f, because of the emergency conditions, [the Board] is unable to meet promptly, [the County Executive] shall exercise by proclamation all of the powers conferred upon the [Board] … that appear necessary and expedient." No Wisconsin court has considered what "promptly" means under section 323.14(4)(b), and a court's analysis would necessitate a fact-specific determination.

It is possible that if a particular order is challenged, a court could hold that the Executive exceeded his authority *at the time of issuance* because arguably, the County Board could have "promptly" met to consider the proposed order, if the court held that the order was not in response to evolving and urgent circumstances.

However, as alluded to above, if the court found that the exercise of the Executive emergency powers was appropriate and exigently required *at the time of issuance* of the Proclamation or Order, the court would not repeal the order. Wisconsin statute section 323.14(4)(b) makes plain that a validly issued emergency Proclamation or Order takes immediate effect and remains in effective until ratified, withdrawn or amended by the Board.

Of course, as noted above, a court would need to engage in a very fact intensive analysis to parse this question. And indisputably, the rise of extremely transmissible and lethal variants would be relevant to any challenge to most recent Orders, such as the Mandate.

To maximally reduce risks, the OCC respectfully recommends that (1) the County Board substantively take action on all Orders, particularly the Proclamation[13] and Mandate, and/or (2) whenever possible, based on public health needs and exigencies, the administration and legislative branches work cooperatively to implement orders together.

11. ***If the prior Orders were arguably incorrectly heard by the Finance Committee, as opposed to the Judiciary Committee, before being heard by the entire Board, does that invalidate the orders? Related, could they be successfully challenged in court on this basis?***

Anyone can sue for anything at any time.

But as to both questions, nearly certainly, no.

First, the state statute presumes immediate effect of Orders, subject to subsequent and prospectively applicable amendment or withdrawal by the Board. *See also* #13b.

Second, the full County Board has explicitly adopted certain Orders (i.e., relating to pandemic pay), reviewed and been briefed on Orders (Ref. Files 20-26 and 21-34), and can ratify, repeal, or modify any Order at any time. Moreover, committees may take action on an informational report at any time—i.e., to ratify, amend, or repeal a proclamation or order.

Third, County Ordinance 99.03 is a procedural rule that establishes the Judiciary Committee's jurisdiction over emergency actions. And the Board routinely suspends its procedural rules as a matter of course under Ordinance 1.08(c). A court could find that because the Orders were part of the above-noted files, subject to review and debate by the entire Board, the Board effectively suspended procedural rule in Ordinance 99.03.

[13] The County Executive and the County Board employed this exact process in January of 2020, when severe flooding caused extensive damage to County property. *See* File 20-144. The County Executive first unilaterally issued a proclamation declaring a state of emergency on January 17, 2020 (Exhibit 12), with immediate effect. And then, on February 6, 2020, the County Board ratified that Proclamation, with final signatures provided on February 28, 2020 (Exhibit 13).

Fourth, the Chairperson has the discretion to determine which committee to refer a file and also has the authority to make dual referrals

Taking the above factors together, if challenged, it is extremely unlikely that a court would invalidate any Orders or the Proclamation where there has been substantive action or review by both the executive and legislative branches, based upon a local procedural rule.

12. ***Given the persistent nature of this pandemic, are the Proclamation and Orders indefinite (i.e., continuing on with no end in sight)? Related, could the County Board adopt an Ordinance or Resolution to set a definitive sunset time for the expiration of such emergency proclamations or orders?***

See #8, 9, 10 above. An emergency proclamation and/or related orders cannot be indefinite.

Yes, the Board could adopt a sunset provision for emergency actions by the County Executive under Wisconsin statute section 323.11, that states: "The period of the emergency shall be limited by the ordinance or resolution to the time during which the emergency conditions exist or are likely to exist."

But again, the Board can review, withdraw, or amend any proclamation or order at any time.

13. ***If the County Board withdraws or otherwise rejects any of the existing Orders, or the Proclamation itself, does that void the Proclamation or Orders retroactively?***

No. Once the County Executive has issued a proclamation and related orders, under Section 323.14(4)(b), the County Board may ratify, alter, modify, or repeal those actions only prospectively, "as soon as the County Board is able to meet."

14. ***If the County Board withdraws or otherwise rejects any of the existing Orders, or the Proclamation itself, can the County Executive immediately issue a similar proclamation or order and survive a legal challenge?***

Likely not. If the subsequent proclamation or order is identical or substantially similar, a court would view that suspiciously. In *Fabick*, the Wisconsin Supreme Court concluded that Governor Evers exceeded his statutory authority because he issued several nearly identical emergency declarations in response to the ongoing COVID-19 crisis, where the empowering statute limits the duration of a gubernatorial emergency order to 60 days without legislative action to extend its effect. 2021 WI 28, ¶¶ 5-8, 40. "We recognize that determining when a set of facts gives rise to a unique enabling condition may not always be easy. But here, COVID-19 has been a consistent threat, and no one can suggest this threat has gone away and then reemerged. The threat has ebbed and flowed, but this does not negate the basic reality that COVID-19 has been a significant and constant danger for a year, with no letup. In the words of the statute, the occurrence of an 'illness or health condition' cause by a 'novel . . . biological agent' has remained, unabated." *Id.* ¶ 39. Fatally, the Court found that Governor Evers "relied

on the same enabling condition for the states of emergency announced in [each of his emergency declarations]." *Id.* ¶ 40.

However, if there was a materially different factual predicate for the order, a court maybe more likely to be inclined to defer to the County Executive. But even then, the Board could meet and void that.

Of course, regardless of whether Wisconsin courts were asked to review such an order, the County Board, under Section 323.14(4)(b), could immediately meet to "rati[fy], alter[], modif[y], or repeal" a subsequent emergency proclamation.

CLOSING

These are novel legal questions during a novel time. There is no definitive case law addressing these questions under analogous facts as between the branches of local government. Our guidance is only that—guidance. A few broad, takeaway points:

- The Board and Executive share emergency powers, and under limited circumstances, the Executive may act first, without Board preapproval.
- A county executive's ability to act first is limited under statute. An executive may only exercise that power when the Board is unable to meet "promptly."
- No Wisconsin case law defines or interprets "promptly" as used in this statute. Any legal challenge to a particular order would be specific to the particular order and require a fact intensive inquiry by the court.
- The Board has the final say on emergency actions and can ratify, amend, or vacate any emergency action by the County Executive at any time.
- Respectfully, to avoid uncertainty, the OCC recommends:
  - Collaboration and cooperation between the branches to address COVID-19, guided by reliable scientific experts.
  - Substantive review by the County Board of the Proclamation and all Orders for ratification, repeal, or amendment, with initial review before the Judiciary Committee.

***

PROCLAMATION OF EXISTENCE OF A COUNTY EMERGENCY

WHEREAS, ordinance 99 of Milwaukee County and State Statute 323, empowers the Office of Emergency Management to proclaim the existence or threatened existence of local emergency when said county is affected or likely to be affected by a public health emergency and/or extraordinary disturbance and the County Board is not in session; and

WHEREAS, the Office of Emergency Management of Milwaukee County does hereby declare that Milwaukee County must undertake efforts to prevent the spread of COVID-19, a/k/a Coronavirus, which has been declared a world-wide pandemic by the World Health Organization, and which caused the Governor of the State of Wisconsin to declare a public health emergency under Wis. Stat. § 323.10; and

WHEREAS, the County of Milwaukee is responsible for the well-being of its employees and the public it serves; and

WHEREAS, it must undertake efforts to prevent the spread of COVID-19.

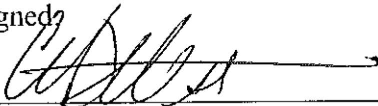
NOW THEREFORE, IT IS HEREBY PROCLAIMED, by the County Executive, that a local public health emergency now exists throughout Milwaukee County; and

IT IS FURTHER PROCLAIMED AND ORDERED, by the County Executive, that during the existence of said local emergency the powers, functions and duties of the emergency management organization of this County shall be those prescribed by State law, and by ordinances and resolutions of this County, and by the Milwaukee County Comprehensive Emergency Management Plan, as previously approved by the Milwaukee County Board of Supervisors; and

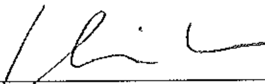
IT IS FURTHER PROCLAIMED AND ORDERED, by the County Executive, acting under the powers granted pursuant to Wis. Stat. § 323.14(4)(b), for and on behalf of the employees and residents of Milwaukee County, will do whatever is necessary and expedient to protect the health and well-being of Milwaukee County, including the issuance of Administrative Orders and other directives as may be required.

Adopted this 13 day of March, 2020.

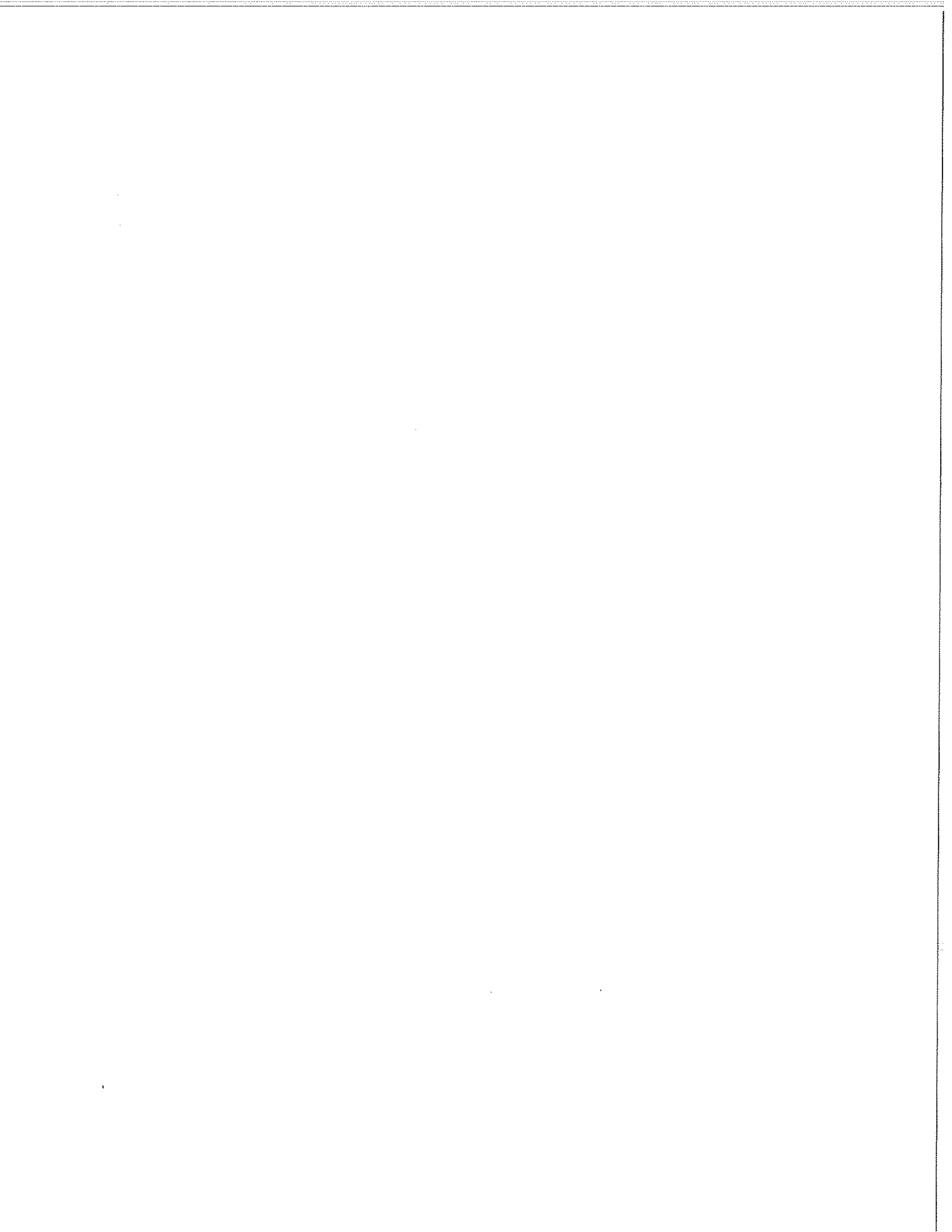
Signed:



Milwaukee County Office of Emergency Management, Director Christine Westrich,



Milwaukee County Executive, Chris Abele



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DATE: March 13, 2020

TO: Interested Parties

FROM: Margaret C. Daun, Corporation Counsel
Paul D. Kuglitsch, Deputy Corporation Counsel
Anne B. Kearney, Deputy Corporation Counsel

SUBJECT: County Executive's Authority to Issue Administrative Orders During Declared Emergencies

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The Office of Corporation Counsel ("OCC") has been asked whether the County Executive has the authority to issue and implement immediately, without prior County Board approval, administrative orders during the COVID-19 pandemic. The answer is yes. Under section 323.14(4)(b) of the Wisconsin Statutes, the County Executive can issue such orders if (1) he first declares that a state of emergency exists within Milwaukee County; and (2) the administrative orders are necessary to protect the health, safety and welfare of the people in Milwaukee County. However, the proclamation and administrative orders are subject to subsequent review, ratification, repeal, and/or modification by the County Board. *Id.*

What is COVID-19?

COVID-19, a/k/a Coronavirus, is a respiratory illness that can spread from person to person.[1] It was first identified during an investigation into an illness outbreak in Wuhan, China. *Id.* The virus is spread mainly between people who are in close contact with one another (within about 6 feet) through respiratory droplets produced when an infected person coughs or sneezes. *Id.* It also may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes. *Id.*

What are the Symptoms of COVID-19?

People infected with COVID-19 have had mild to severe respiratory illness with symptoms of fever, cough, and shortness of breath. *Id.* COVID-19 has caused pneumonia in both lungs, multi-organ failure, and in some cases death. *Id.*

Is there a vaccine or treatment for COVID-19?

[1] https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf

No. There is currently no vaccine or treatment for COVID-19. The Centers for Disease Control and Prevention ("CDC") recommends the following:

- Avoid close contact with people who are sick.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Wash your hands often with soap and water for at least 20 seconds. Use an alcohol-based hand sanitizer that contains at least 60% alcohol if soap and water are not available.

If you are sick:

- Stay home.[2]
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
- Clean and disinfect frequently touched objects and surfaces.

COVID-19 has been Declared a Global Pandemic by the World Health Organization.

On Wednesday, March 11, 2020, the World Health Organization declared COVID-19 a global pandemic as the new coronavirus, which was unknown to world health officials just three months ago, has rapidly spread to more than 121,000 people from Asia to the Middle East, Europe and the United States.[3] At the time of the writing of this opinion, there are currently up to 8 active cases in Wisconsin.[4] Evidence shows that COVID-19 spreads rapidly if exigent measures are not taken. For example, Italy has closed its borders, closed schools, restricted travel within its borders, and recorded over 15,000 cases and 1000 deaths in less than a month of when a case first was diagnosed.[5]

The State of Wisconsin has Declared COVID-19 a Public Health Emergency.

On Thursday, March 12, 2020, Governor Evers declared COVID-19 a public health emergency as defined as an "imminent threat" under Wis. Stat. § 323.02(16) in the state of Wisconsin.[6] *See also* Wis. Stat. § 323.10. The Governor's declaration designated the State Department of Health Services ("DHS") as the lead agency to respond to the public health emergency and directed DHS to take all necessary and appropriate measure to prevent and respond to incidents of COVID-19 in the state. The declaration also authorized the Adjutant General to activate the Wisconsin National Guard as appropriate and necessary.

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[2] The CDC recommends self-quarantine for a period of fourteen (14) days.

[3] https://www.who.int/emergencies/diseases/novel-coronavirus-2019; https://www.who.int/docs/default-source/coronaviruse/20200312-sitrep-52-covid-19.pdf?sfvrsn=e2bfc9c0_2

[4] https://www.dhs.wisconsin.gov/outbreaks/index.htm

[5] Supra n. 3.

[6] Executive Order No. 72, 2020;
https://content.govdelivery.com/attachments/WIGOV/2020/03/12/file_attachments/1399035/EO072-DeclaringHealthEmergencyCOVID-19.pdf

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What is the Authority of Milwaukee County to Declare an Emergency?

Wis. Stat. § 323.11 authorizes the County Board "to declare, by ordinance or resolution, an emergency existing within" Milwaukee County. The powers conferred by such a declaration include the "general authority to order … whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within" the County. Wis. Stat. § 323.14(4)(a). "If, because of the emergency conditions, [the Board] is unable to meet promptly, [the County Executive] shall exercise by proclamation all of the powers conferred upon the [Board] … that appear necessary and expedient." Wis. Stat. § 323.14(4)(b). Such a proclamation by the Executive is "subject to ratification, alteration, modification, or repeal by [the Board] as soon as [the Board] can meet, but the subsequent action taken by the [the Board] shall not affect the prior validity of the proclamation." *Id.*

Executive's Power to Issue Administrative Orders with Immediate Effect

As noted above, the County Executive is authorized to declare, by proclamation, a local emergency. Wis. Stat. § 323.14(4)(b). Just yesterday, the Governor declared a state of emergency in Wisconsin due to COVID-19. The County Board does not meet for another 2 weeks, or until March 26, 2020. Recognizing the seriousness of this public health emergency, the County Executive earlier today issued proclamation declaration a County-wide public health emergency. Therefore, he now has the authority to do "whatever is necessary" to protect Milwaukee County, including issuing Administrative Orders.

Shortly after declaring a County-wide public health emergency earlier today, the County Executive issued Administrative Orders 20-1v1 & 20-2v1, both effective immediately. He has the legal authority to do so, subject to later review, ratification, repeal, and/or modification by the County Board. Both orders refer to the Governor's declaration of a public health emergency associated with COVID-19. The orders also specifically cite to Milwaukee County's principal goal of protecting the health of its employees and the public. The orders further recognize that the populations that Milwaukee County serves have essential needs that must be met, and that County employees are essential in fulfilling that mission. Therefore, the Executive has the legal authority to issue Administrative Orders 20-1v1 & 20-2v1 and other such orders required to protect public health and safety with immediate effect.

However, the proclamation and attendant orders are not without possibility of modification or repeal. The same statutory provision that confers upon the County Executive the authority to issue proclamations and orders also requires the same to be reviewed by the County Board. Wis. Stat. § 323.14(4)(b). Once presented "as soon as the body can meet," the Board can either ratify, amend, modify or repeal the proclamation and/or orders. *Id.* This is consistent with the County Board's powers under Wis. Stat. § 323.11.[7]

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[7] This same process was recently used in Res. File No. 20-144. https://milwaukeecounty.legistar.com/LegislationDetail.aspx?ID=4312163&GUID=2C286E6A-719C-4686-9B3F-B94FB1B6561D

EXHIBIT 3 – Rough Transcript (excerpt only)

Judiciary, Safety and General Services Committee
Chairperson: Supervisor Anthony Staskunas
Vice Chairperson: Supervisor Sylvia Ortiz-Velez
Supervisor Patti Logsdon
Supervisor Steven Shea
Supervisor Ryan Clancy

June 11, 2020

Excerpt beginning at minute 28:24

Supervisor Logsdon:

Thank you Chair. My question is and this might be directed to Corporate Counsel. You mentioned that there is going to be a requirement that everybody has to wear mask. Do we have to have an ordinance for that or is there some special rules in effect for situations like this? When we require something like this different – I've been questioned so I thought I would and direct it to you, thank you.

Chairperson Staskunas:

Corporation Counsel Daun you have your hand up?

Corporation Counsel Daun:

Thank you, Chairman, Supervisors, I hope everyone is doing well. The answer to your question is because there is a continuing Emergency Declaration in the County, the County Executive or the Chief Judge could, in effect, require universal use of face masks within the Courthouse Complex and deny access to those who refuse to wear masks. As the Chief Judge indicated, there are some complexities related to defendants and their right to be physically present. But again, at this point and time, yes it can be required of members of the general public that are trying to access services in the courthouse. Of course, any of the emergency declarations or administrative orders issued by the County Executive related to, or relying upon, the Emergency Declaration are subject to review, withdrawal, or amendment by the County Board. Thank you.

Supervisor Patti Logsdon:

Thank you for that answer.

Chairperson Staskunas:

Supervisor Ortiz-Velez?

Supervisor Ortiz-Velez:

Thank you and going back Corporation Counsel. I think you partly answered my question in the last sentence, which was who is the final authority. So, we have this um Emergency Declaration that's going on and I mean potentially how long could that declaration go on for? Could it go on for a year, two years, indefinitely, 5 months? Is there a time frame for that declaration and if there isn't one, can this Board set one at some point, if we decided to? I mean, I am just trying to figure-out what the, you know how Chapter 99 works in that respect.

Corporation Counsel Daun:

Candidly, Chapter 99 is a bit of a mess. There are errors, there are inconsistencies, there are conflicts with state statute within Chapter 99 that need to be corrected. I fielded, and my office has fielded numerous inquiries from many of your colleagues on this matter. We issued an opinion literally within days of the Governor's Declaration of an Emergency that tried to correct what our office viewed as immediate inconsistencies in Chapter 99 to allow the smooth functioning of County government during an Emergency Declaration.

As that opinion states in multiple places in the opinion, and as I just stated, both the Declaration of the Emergency itself, as well as any related orders are all subject to review, amendment, or withdrawal by the County Board. How you choose to do that, and when you choose to do that, and how you want to coordinate that with the County Executive – that is, as far as I know and from my conversations with his Chief of Staff, eager to coordinate the County's reopening and any other considerations that this body has related to COVID with the help of public health experts. As the Chief Judge noted, this is still a pandemic and the briefings being provided from Dr. Ben Weston are, I don't want to characterize them, they speak for themselves. But one fact worthy of note is that hospitalizations are on the rise right now and so, again, caution is urged, as the Chief Judge and others have noted. Thank you.

Supervisor Ortiz-Velez:

I guess just to follow that up a little bit, if I'm not mistaken, under Chapter 99 it does describe the Judiciary Committee, this committee, as the committee that has the rule-making um authority for Chapter 99, initially this committee. And then secondly, you know because I mean there's some real concerns from my constituents that we can have an executive branch that doesn't have any expiration of any kind of an executive order and that can operate and we are kind of sometimes, as supervisors, being made aware of things kind of like, you know, after decisions are made. And I think maybe, you know, as a legislative branch we might want to weigh-in a little bit more on some things that are happening. Especially that this is a long-term emergency, it's not really like a sixty-day emergency or a thirty-day emergency or there really isn't a timeframe on this emergency. So how long does the administrative branch have these executive powers without first, first not afterwards, but first coming through to the County Board and letting us weigh-in on certain-certain things? Thank you.

Corporation Counsel Daun:

So, Chairman, Supervisors if I could address that again. It is explained in detail in the opinion that we issued within days of the Governor's Declaration of Emergency that details many of the inconsistencies within Chapter 99 and answers these questions. And the answer is it's all of, it's everyone, right. It's the very nature of an emergency is the heart of the need for an executive branch to act immediately. Your points are, of course, well taken. To wit, now we've got a slow-moving, yet still emergent situation.

It is a blending, there is not a conference of authority exclusively to the Judiciary or the County Board. That is not what Chapter 99 does at all. These are shared authorities that are set forth first and foremost by state statutes. State statute clearly confers unilateral authority to this County Executive to declare that emergency and issue related orders. I say that to simply say it's not good, bad or indifferent, it's just the current state of play in the law and then I think it's really up to this body, this committee, your body, the body as a whole, to decide how to work with the administration on reviewing the orders that are already in place and on reopening plans.

These as you can imagine, this was many of these issues were central to the case brought by the republican legislature challenging the Governor's Safer at Home Order. Suffice it to say the very

nature of many of these questions are steeped in expertise; medical expertise; epidemiological expertise; and this gets down to the root of, how do the two branches cooperate together while still leaving a place for experts to be able to respond in real time.

To something that is a long-term but still an emergent situation, we're seeing clusters and flare-ups and things like that. So, this is really one of those questions that is much easier, much more easily susceptible to partisan sound bites, and candidly it is in the gray area of everyday government that we face and the challenges that we face.

So, I would simply suggest, I think there is absolute openness to coordination and cooperation as we review how the County is moving forward and I would encourage this body to engage with the new County Executive and Chief of Staff to help to make that happen.

The last comment I'll make is – and the Chief Judge has eluded to, not eluded to, has expressly stated – my office will do anything and everything it can to cooperate and to facilitate cooperation and coordination both amongst the branches but as well as with the court system for example the other elected branches, the Clerk of Courts, etcetera. The court system is a state system and yet we exist in a County building.

And so, these questions of coordination are not ones of unilateral authority existing really anywhere. These are all shared authorities, and the challenge is to figure-out how to do that, right?

So again, lots of words there. I-I apologize that it's not a nice clean answer as you have come to know from me. When it is a clear answer, I will give that to you. But this is one of those times where there's really a lot of shared authorities here and some lack of clarity in our own ordinances.

I just shared with one of your colleagues the opinion that my office wrote on Chapter 99 within about forty-eight hours of the uh Governor's Declaration of Emergency in response to these questions. I will send it around to this larger group as well. Thank you so much and again, apologies for the slightly long-winded answer there. Thanks folks.

Chairman Staskunas:

Sylvia, any follow-up?

<u>Supersivor Ortiz-Velez</u>:

No. I just, I mean, I look forward to rereading the memo, your opinion, on Chapter 99 and maybe having a further discussion, further presentation maybe even. I know some of my other colleagues are interested in learning more about Chapter 99 to see how we can make it better, how can we manage better. The first time I read Chapter 99 was when all this happened. That's probably the truth for everyone. And I really don't see it as being something that can conducively [sic] continue to. I mean, we have an emergency. There's an emergency declaration. But how long does the emergency go on for? And for long do those powers last for? I feel that there is some, there is some disconnect I feel from the Board and the Executive. And I think that because Chapter 99 really falls short. There's not much described in there. It's about a page and half long. I don't know if it was meant to function in a long-term pandemic.

Excerpt ending at minute 38:37

FAQS: Vaccine Mandate for Milwaukee County

Do you have a question that is not addressed below? Please reference the administrative order, or contact your HR Business Partner. Additionally, click here and scroll to the "Vaccine Question & Answer Town Hall" section to view the recording and a comprehensive Q&A from the recent COVID-19 Vaccination Town Hall.

Use the following links to navigate to specific sections of FAQs:

- General Questions
- Vaccine Requirements
- Vaccine Verification
- Vaccine Accommodations / Exemptions
- Vaccine Rewards and Incentives
- Consequences for Noncompliance
- Risk Mitigation for Unvaccinated Employees
- Management / Implementation Questions

GENERAL QUESTIONS

1. **Why is Milwaukee County mandating vaccinations for employees?**
Vaccinations are safe and effective and will continue to be the best way to protect employees and those they serve from contracting COVID-19. As demonstrated through the months of data gathered so far, vaccinated people have greatly reduced rates of serious illness, hospitalizations, and deaths due to COVID-19. With the Delta variant and the likelihood of other variants that may continue to disproportionately impact unvaccinated individuals and communities, the urgency around vaccination efforts has increased.

2. **Is a vaccine mandate legal?**
Many months ago, the federal (Equal Employment Opportunity Commission) EEOC issued guidance indicating that mandatory vaccines are generally permissible in the workplace as long as reasonable accommodations are made for those with medical conditions constituting disabilities and those with sincerely held religious beliefs. More recently, the U.S. Department of Justice issued an opinion indicating that mandatory vaccine workplace policies are permissible, allowing employers to impose a COVID-19 vaccination as a condition of employment.

3. **Why is this the right policy decision?**
Nearly all Wisconsin counties are experiencing high rates of transmission of COVID-19. Rates of vaccination are not as high as they need to be to effectively slow or stop transmission. Hundreds of thousands of people are still too young to get the vaccine, and immunocompromised people remain in grave danger with vaccination rates as low as they are. Our hospitals are at or near capacity in many parts of the state. Raising rates of vaccination in all eligible populations protects our most vulnerable state residents, helps stop the spread of COVID-19, lessens the severity of illness and the risk of hospitalization and death, and protects all we serve at Milwaukee County.

4. **What are other counties and municipalities doing relative to vaccine mandates, incentives, and consequences?**
Local governments' approaches to vaccine mandates exist along a spectrum. The City of Milwaukee mandated vaccination for its workers, as has St. Louis, New York City, New Orleans, and San Francisco. Some states, such as Washington, Virginia, California, Washington, D.C., Hawaii, and Illinois have implemented vaccine mandates for state workers. The National Association of Counties (NACO) conducted polling of its member Counties, and found that some include insentives such as additional time off and cash payments of between $25 - $250, while many other Counties have not included incentives in their policies. Weekly testing or required double-masking are common repercussions.

5. **When will this policy go into effect?**
All County employees who are not members of public safety unions are required to submit documentation verifying their fully vaccinated status or must submit a completed medical, religion or creed exemption and accommodation request form by no later than October 1, 2021. Incentives are available now and consequences and additional risk mitigation measures will begin October 11, with some additional consequences beginning January 1, 2022.

6. **Will employees be made aware of colleagues / contractors they interact with who are unvaccinated?**
   No. While department leadership will be informed of their staff's vaccination status, employees will not be informed of colleagues' and/or contractors' vaccination statuses.

7. **How will the County ensure I am protected against colleagues who are unvaccinated?**
   In order to mitigate the risk of spread of COVID-19, effective October 11, 2021, all unvaccinated employees, including those with an approved accommodation, will be subject to the following additional risk mitigation measures:
   - Unvaccinated employees working in any County healthcare setting will be required to wear a fitted N95 mask when a face mask is required.
   - Unvaccinated employees working in person in a non-healthcare setting will be required to wear a KN95 mask when a face mask is required.
   - Unvaccinated employees working in-person full- or part-time at HOC, the County Jail, or the DYFS Detention Center will be subject to COVID-19 testing on a bi-weekly basis, consistent with current policy, in addition to being required to wear a KN95 mask.

8. **Does this apply to employees who are working remotely and / or outdoors? Does the mandated vaccine mean we are looking at a full in-person return to the workforce vs a hybrid model?**
   The policy applies to all current employees regardless of telework or indoor / outdoor work status. One of the goals of this policy is to slow the spread of COVID-19 in our community and ensure continuity of our operations. These goals are met by ensuring our entire workforce is vaccinated, regardless of where they work. The County's permanent telework policy will be established separately from this policy, but we will not be stopping the current telework expectations and increasing our in-person footprint while transmission rates are high in our community.

9. **Does this policy mandate booster shots?**
   The current administrative order defines a completed vaccination as an individual who has completed either the two-dose series of the Pfizer or Moderna vaccine or the single dose of the Johnson & Johnson vaccine. It does not include any booster vaccinations at this time.

10. **What time codes should I use if I get a vaccination during work hours?**
    Time spent traveling to a vaccination appointment and receiving a vaccination can be assigned to Emergency Paid Sick Leave (EPSL) using the payroll code, "EPSL Vaccine."

11. **What time code can I use if I experience side effects and cannot work after receiving a vaccination?**
    Anytime an employee feels ill and unable to work, they should use the standard Sick Time bank.

VACCINE REQUIREMENTS

12. Who is required to be vaccinated? What are expectations for contracted staff?

The vaccine mandate policy lays out vaccination requirements for three primary groups:

- **New Employees:** Effective October 1, 2021, vaccination status (or an approved accommodation) will be a condition of employment for any current and future posted positions, excluding MCSO postings.
- **Current Employees:** Current employees must submit required documentation verifying their complete vaccination status or must submit a completed medical or religious exemption request form by no later than October 1, 2021. This policy does not immediately apply to County employees who are represented by public safety unions.
- **Contractors:** All contractors working in County High Risk or Congregate Living Facilities must complete their vaccination by no later than October 11, 2021. Departments may also require vaccinations for their contractors more broadly. Departments should consider the risk profile of service users, staffing levels, the necessity of the service being open for in-person use, and other operational needs when considering broader requirements.

13. How are contractor vaccinations being tracked and recorded?

Each contracting organization is responsible for ensuring any of its staff assigned to work at any of the County's high risk or congregate living facilities, or other location where the managing department is requiring vaccines for its contractors, have completed their COVID-19 vaccination. Contractors are strongly encouraged to model Milwaukee County's procedures for vaccine verification for its employees, which requires two forms of proof of vaccination, as outlined in the administrative order.

14. What is the penalty for any contracted staff who do not comply with the vaccine mandate?

After October 11, 2021, unvaccinated employees may not be allowed onsite to any of the County's high risk or congregate living facilities (Milwaukee County Jail, the House of Correction (HOC), the Division of Youth and Family Service (DYFS) Juvenile Justice Center, and certain facilities operated by the Behavioral Health Division (BHD), including the BHD inpatient hospital. Contractors may also not be allowed onsite at locations where the managing department is requiring vaccines for its contractors in alignment with the compliance date set by the department, which may differ from the October 11, 2021 deadline for high-risk facilities.

15. Are there exemptions for contractors? Will they be required to complete the county's exemption request form?

Milwaukee County will not grant exemptions / accommodations for unvaccinated contracted employees. If a contractor wishes to provide exemptions to its employees, that is at their discretion, but those unvaccinated employees will not be granted access to the County's high risk or congregate living facilities.

16. Does the mandate apply to individuals who are not contract employees but are conducting work at County facilities (for example, State employees, interns, or volunteers who work at County facilities or who help deliver County services)?

We are not requiring State employees working in our facilities to follow our mandate at this time. However, volunteers, interns, and others may be expected to follow the guidelines of the mandate. For help with a specific question about an organization working in County

facilities, please email COVID-19@milwaukeecountywi.gov so we can provide advice tailored to the specific circumstances.

17. **Does this apply to employees who are fully remote?**
    Yes, all current employees, regardless of telework status, are included in this mandate.

18. **Does this apply to employees who are working outdoors?**
    Yes, all current employees, regardless of indoor / outdoor work, are included in this mandate.

19. **Does the policy apply to union employees?**
    The policy immediately applies to all current union / nonunion employees other than County employees who are represented by public safety unions.

20. **How does the mandate impact employees who were recently hired?**
    For new hires after October 1, 2021, vaccination is a condition of employment. For new hires before October 1. 2021, they will be grandfathered in as with current employees. For these employees vaccination is not a condition of employment, but they could be subject to corrective action for noncompliance as outlined in the policy.

21. **What does "completed vaccination" mean? Does this mandate include booster shots?**
    "Completed vaccination" requires employees to have completed their COVID-19 vaccination series, meaning they have received either one dose in a one-dose series (Johnson & Johnson), or both doses in a two-dose series (Pfizer and Moderna). This does not include booster shots at this time.

22. **Are all COVID-19 vaccinations included in this mandate?**
    All vaccinations authorized for use in the United States are included in this policy. The three authorized vaccines include Johnson & Johnson, Pfizer, and Moderna.

VACCINE VERIFICATION

23. How can I prove that I have completed vaccination? Where do I submit proof of vaccination, and what qualifies as proof of vaccination?

Employees must submit two different forms of proof from the following five options:

1. A copy of the CDC vaccination card provided at the vaccine appointment.
2. A copy / screenshot of the employee's COVID-19 vaccination status from the Wisconsin Registry of Immunization Registry (WIR).
3. A copy / screenshot from the employee's healthcare system patient profile (for example, MyChart).
   - If you were vaccinated outside of Wisconsin, vaccination records can be accessed via each State's operational immunization information system (IIS). Employees may upload a copy/screenshot from the IIS for the state in which they were vaccinated.
4. A note from the employee's healthcare provider or Milwaukee County vaccinator verifying vaccination status.
5. A copy / screenshot of the employee's COVID-19 vaccination status from the federal Vaccine Administration Management System (VAMS).

Proof of vaccination should be submitted to Dayforce by October 1, 2021. Please contact COVID-19@milwaukeecountywi.gov if you have questions or need assistance submitting the proper documentation and an HR representative will contact you.

24. What file types can be submitted to Dayforce to verify my vaccination status?

Dayforce accepts the following file types:

- JPG
- PNG
- DOC
- DOCX
- PDF
- ZIP
- BMP
- GIF
- TIF
- TIFF
- ODT
- MSG
- FTF SVG
- SVGZ

25. If I received my vaccine at BHD, do I still need two proofs?

Yes. All employees need to meet the verification requirements in the order.

26. What if I lost my vaccination card?

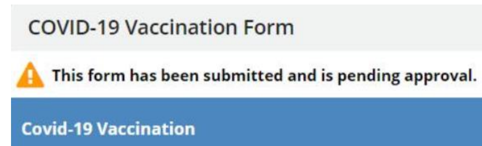
Contact and / or visit the clinic or facility where you received your COVID-19 vaccination for a replacement card.

27. What if WIR doesn't have my vaccine recorded or I can't look up my record?

You should contact the WIR Help Desk for assistance as soon as possible at: 608-266-9691. They are receiving many requests presently and may be slow to respond. Employees should make this request promptly to start the process. There is also a chance that your vaccinator did not update your vaccine information in WIR. If this is the case, you may contact your vaccinator to request that WIR be updated with your vaccine information. If the October 1 deadline is nearing and an employee hasn't received assistance from the WIR Help Desk and cannot find a second form of proof, they should email COVID-19@milwaukeecountywi.gov for assistance.

28. **What if I can't find two points of proof?**
    If an employee has tried to find a second form of vaccination proof from all of the approved options in the order and cannot identify a second form, they should email COVID-19@milwaukeecountywi.gov for assistance.

29. **I just submitted my vaccination verification along with two forms of proof. Can I anticipate receiving an acknowledgement confirming that I submitted my verification and proof documents correctly and that they were received?**
    Once an employee submits their verification form, they will be able to see that it is pending approval by clicking on the form.



    Once Human Resources has reviewed the submitted paperwork, you will receive a notification in your Dayforce Inbox, located in the top right corner, indicating the status. Please be patient when awaiting your verification, as we are getting many submissions every day.

30. **How can the County be sure employees aren't submitting fraudulent vaccination information?**
    As with any documentation process that requires employee attestation to the accuracy of information presented, individuals who submit fraudulent documentation would be subject to corrective action up to and including termination and could be subject to prosecution under federal law. Additionally, we believe the requirement of two forms of vaccine verification will assist in or efforts to ensure truthful submissions.

31. **I submitted my vaccine documentation for Vaccin8, do I need to resubmit information for this mandate?**
    Yes. Proof of vaccination status submitted for the Vaccin8 program does not satisfy verification requirements for this policy. To be in compliance with the mandate policy, employees who previously submitted one document as proof of vaccination, will now need to submit two forms of vaccination verification to Dayforce.

32. **How will my data be stored and shared?**
    Vaccination status is protected health information, which the County may require employees provide. Once in receipt of this information, the County is required to maintain the confidentiality of all employee medical information, including any documentation of the COVID-19 vaccination. This confidentiality requirement applies regardless of where the employee gets the vaccination.

33. **Who will have access to information about my vaccination status?**
    Your management, human resources, and any COVID-policy team members involved in the administration of this policy will have this information on a need-to-know basis. Data about vaccine rates may be shared in aggregate without any individual identifiable information included.

34. Isn't this protected information? Do I have to share my vaccination status?

HIPAA's Privacy Rule is not applicable to the County's request for its employees to provide proof of COVID-19 vaccination. Employees are free to choose whether to share their vaccination status or information. However, this freedom of choice is subject to the consequences for non-compliance and additional risk mitigation measures for unvaccinated individuals as established in the vaccine mandate order.

35. Will managers know my vaccination / exemption status and the reasons?

Managers will know the vaccination status of employees they oversee and will be informed of whether any of their employees have an approved accommodation. They will only know an employee's status, and not any of the underlying reasons. For example, managers may be given a report for the employees they oversee that indicates whether the individual is Vaccinated, Unvaccinated – No Accommodation, or Unvaccinated – Approved Accommodation.

36. How does gathering vaccine information comply with HIPPA?

HIPPA's Privacy Rule applies primarily to the disclosures made by your health care provider, not the questions of your employer. Vaccination information is classed as PHI and is covered by the HIPAA rules; however, HIPAA only applies to disclosures made by HIPAA-covered entities, such as healthcare providers, health plans, and healthcare clearinghouses and their business associates. Absent any disclosure of the vaccination information acquired by the County from its employees, which is prohibited by other laws, HIPPA is not implicated in any way.

37. Will information on employee vaccination or exemptions be subject to open records requests?

No. Federal laws require that the County maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. This confidentiality requirement applies regardless of where the employee gets the vaccination.

38. Who will have access to the vaccine documentation or accommodation / exemption information that is being submitted?

Only Human Resources staff involved in the exemption / accommodation process will have access to the information submitted by employees. The information will not be available to management beyond reporting whether the employee has an approved accommodation.

VACCINE ACCOMODATIONS / EXEMPTIONS

39. Will there be accommodations made for people with approved exemptions?

Milwaukee County recognizes that employees may be unable to complete vaccination either because of specific medical conditions or because of sincerely held religious beliefs.

HR will consider requests for exemptions and accommodations on a case-by-case basis and may engage with the employee, with medical providers, and/or with faith community leaders as allowed by law in considering requests. HR staff will review requests for exemptions weekly and will contact employees as needed.

40. What is the process for filing and receiving an approved exemption?

Employees seeking an exemption are required to submit an exemption and accommodation request form to HR Business Partners by October 1, 2021. Forms can be obtained from HR Business Partners or by emailing COVID-19@milwaukeecountywi.gov.

Employees who claim a medical or religious exemption but fail to submit the documents necessary to act on the request, or who fail to engage in the interactive process to address exemptions, and who are not vaccinated, shall be denied an exemption and shall be viewed as non-compliant.

41. Will there be accommodations for people who have just recovered from COVID? What if you have natural immunity?

People who are recovered from COVID-19 are still encouraged to get the vaccine. An employee should consult with their healthcare provider and submit a medical exemption form if the provider is recommending that the individual wait before getting vaccinated. Otherwise, “natural immunity” does not exempt an employee from the expectations set forth in the vaccine mandate.

42. What qualifies as a provider or physician? Who is a healthcare professional qualified to provide a medical exemption?

M.D.s, D.O.s, Nurse Practitioners and Physician’s Assistants qualify.

43. If people file for exemptions and get rejected, will they have a grace period before they face consequences, so they can opt to get vaccinated?

There will be no grace period offered and employees who receive a denied exemption will be subject to consequences starting October 11, 2021, as they will be non-compliant with the order. Employees seeking an accommodation are encouraged to get their forms in to HR as soon as possible to avoid consequences if they choose to get vaccinated following a denied request. Consequences will be dropped as soon as the employee completes their vaccine series and submits their paperwork to Dayforce.

44. Wi Statute 252.041 allows refusal for religion AND conscience. How will those who refuse for conscience be addressed?

Exceptions based upon conscience will be evaluated under the same rubric as exceptions sought for religious practices. There is a substantial body of law in Wisconsin surrounding what constitutes a valid religious belief or a creed that qualifies for purposes of workplace exceptions, as well as what is required of employers who are presented with requests for work rule exceptions based upon beliefs and practices associated with religion or creed. The County will apply and follow these laws in all cases.

45. **How will HR determine who gets religious exemption? How will decisions regarding these individual accommodations be made objectively?**
    HR will consider requests for exemptions and accommodations on a case-by-case basis. HR may engage with the employee, with medical providers, and / or with faith community leaders as allowed by law, if necessary, in considering requests. HR staff will review requests for exemptions weekly and will contact employees, as needed.

46. **Who is deeming the forms and applicable information (for vaccination documentation and for exemptions) is acceptable?**
    Human Resources leadership.

47. **How will exemptions / accommodations work for new hires?**
    Successful candidates seeking an exemption should make a request prior to their start date.

VACCINE REWARDS AND INCENTIVES

48. Will Vaccin8 incentives be available for employees who receive a vaccine after the October 1, 2021, deadline?
Yes. The deadline to receive Vaccin8 time off has been extended to December 31, 2021.

49. Did the original Vaccin8 policy end?
As of September 17, 2021, the policy for the Vaccin8 recognition program is now solely outlined in the vaccine mandate administrative order. In order to receive Vaccin8 time off moving forward, employees will need to submit two forms of proof of vaccination to Dayforce. Terminating this order is solely to avoid duplicative orders covering this program. The incentive is still available for people who complete a vaccine series prior to December 31, 2021. Vaccin8 time off will be available for use through December 31, 2022.

50. If I cannot use my vacation time this year, will Vaccin8 time roll over?
Yes. The time will roll over automatically and will not count towards the 56 hours that employees may roll over each year. The Vaccin8 time off must be used before December 31, 2022.

51. What is the "Vax Cash" program?
Milwaukee County is incentivizing and recognizing employees who have made the decision to get a complete vaccination with a variety of reward and incentive programs, including through Vax Cash, Vax Champions, and Vaccin8.

The new "Vax Cash" program will provide employees with $50 after they complete their full vaccine series and submit the required paperwork in Dayforce. Payments will be made directly through payroll. This payment is taxable and will show up on employees' W-2 tax forms.

52. Is Vax Cash available to all employees including those already vaccinated prior to the Vaccine Mandate?
Yes. This reward will be available through December 31, 2021, and all employees vaccinated before the effective date of this order will receive this reward once they submit two forms of proof of vaccination to Dayforce.

53. How will I receive my Vax Cash payment?
Payments will be made directly through payroll.

54. If I receive a first dose and my doctor recommends I do not receive the second dose, will I still be eligible for the Vax Cash program?
Employees who have not completed their full vaccine series are not eligible for this direct payment. For specific questions about Vax Cash eligibility, contact your HR Business Partner.

55. Are contractors eligible for Vaccin8 or Vax Cash?
No.

56. What is a "Vax Champion?"
Employees who champion vaccinations and successfully encourage a colleague to complete vaccination will receive a $25 bonus payment, accessible directly through payroll.

Only people receiving their first shot after the effective date of the mandate order, September 2, 2021, will be able to refer a Vax Champion as part of their verification process.

57. **How can I prove that I encouraged a colleague to receive a vaccination and I should receive a Vax Champion payment?**
    The employee who receives their first shot after September 2, 2021, and completes the series prior to December 31, 2021, may report the name of one Vax Champion who encouraged their decision in the Dayforce reporting system. The person listed as the Vax Champion in Dayforce will receive the reward via direct payment. No further proof of the role of the Vax Champion is required beyond the referral listed by the vaccinated employee.

58. **Will incentives through Milwaukee County's mandate be stackable with other incentives at the State level or through other organizations?**
    Yes.

RISK MITIGATION FOR UNVACCINATED EMPLOYEES

59. Are there additional requirements for unvaccinated employees?
In order to mitigate the risk of spread of COVID-19, effective October 11, 2021, all unvaccinated employees, including those with an approved exemption, will be subject to the following additional risk mitigation measures:

- Unvaccinated employees working in any County healthcare setting will be required to wear a fitted N95 mask when a face mask is required.
- Unvaccinated employees working in person in a non-healthcare setting will be required to wear a KN95 mask when a face mask is required.
- Unvaccinated employees working in-person full- or part-time at HOC, the County Jail, or the DYFS Detention Center will be subject to COVID-19 testing on a bi-weekly basis, consistent with current policy, in addition to being required to wear a KN95 mask.

Only employees who are unvaccinated and who do not have an approved accommodation will be subject to consequences.

60. What will be the consequence for an unvaccinated employee who refuses to wear a mask?
Unvaccinated employees who refuse to wear a mask will be subject to corrective action up to and including termination.

61. How can employees be fitted for N95 and KN95 masks?
Only unvaccinated employees working in a **healthcare setting** will need to wear a fitted N95 mask. Departments / divisions who manage healthcare settings already have fit-test processes in place to meet this requirement.

KN95 masks are a "universal" fit and therefore do not require fit testing. Unvaccinated employees working in any **non-healthcare setting** will be required to wear KN95 masks when a face mask is required by the policies set forth in Administrative Order 20-14.

62. Who will be responsible for ordering N95 and KN95 masks? How will those orders take place?
Departments are required to requisition appropriate face masks from Infor. Only departments / divisions with healthcare workers should order fitted N95 masks and they should follow their standard procedures for purchasing. Every other department or work unit should be requisitioning **KN95** masks for their unvaccinated non-healthcare workers.

In the INFOR Punchout Catalog the ordering department should choose the "COREXPAND LLC REQUEST PPE ITEMS" as the vendor. Once in the vendors catalog, the KN95 masks are under the "Masks, Shields and Respirators" category. Once in this category they can chose from the necessary items. Unvaccinated employees should be provided a new KN95 mask for each day of use. It is up to the department how they will distribute KN95 masks to unvaccinated employees.

63. Will the County provide N95 / KN95 masks to employees who are unvaccinated?
Yes.

CONSEQUENCES FOR NONCOMPLIANCE

64. What are consequences for noncompliance?

Starting October 11, 2021, employees who are noncompliant will be ineligible for voluntary overtime or Risk Recognition Pay, when it is available. Additional department-level consequences might include:

- Unpaid suspension for up to 10 days;
- Consideration of non-compliance as a factor when making decisions about promotions, hiring current employees into new positions at the County, or TAHCs; and/or
- Consideration of non-compliance as a factor in DOSAA allocations.

Starting January 1, 2022, employees who are noncompliant and are enrolled in the County's healthcare will incur a $20/pay period surcharge and employees working in the Behavioral Health Division (BHD) may be restricted from work until vaccination requirements are completed. Non-compliance may lead to separation.

65. Will individuals who do not abide by this vaccine mandate have their employment terminated?

Milwaukee County views non-compliance with this vaccine mandate, that is, employees who are not vaccinated and do not have an approved exemption in place, as a decision inconsistent with our vision of becoming the healthiest county in Wisconsin and inconsistent with our responsibilities as public servants. At this time, only BHD employees will face possible separation of employment if they are non-compliant on January 1, 2022. All other non-compliant employees will be subject to the consequences and additional risk mitigation measures outlined in the policy. Employees failing to comply with consequences or risk mitigation measures may face corrective action, up to and including termination.

66. How will overtime be tracked / limited?

Overtime will be managed at the department level.

67. Will employees who have an approved medical / religious exemption be ineligible for voluntary overtime or Risk Recognition Pay?

Employees with an approved accommodation will still be eligible for voluntary overtime and Risk Recognition Pay. However, departments are encouraged to staff high-risk positions with vaccinated staff as a risk mitigation measure, so unvaccinated employees may have less ability to claim risk recognition pay than vaccinated employees.

68. If an employee is suspended 10 days, do they have to prove vaccination to return?

No. Return to work from a suspension is not dependent on vaccination.

69. What happens to people who are suspended and then are unable to use all their time off for the year?

Employees will only be permitted to carryover 56 hours of vacation consistent with the Milwaukee County ordinance.

70. If a person is suspended for 10 days, how will they pay for their health insurance?

Generally, payroll will double deduct insurance premiums from the next pay period if a payment is missed due to a suspension.

71. Are there additional requirements for unvaccinated employees?

In order to mitigate the risk of spread of COVID-19, effective October 11, 2021, all unvaccinated employees, including those with an approved exemption, will be subject to the following additional risk mitigation measures:

- Unvaccinated employees working in any County **healthcare** setting will be required to wear a fitted N95 mask when a face mask is required.
- Unvaccinated employees working in person in a **non-healthcare** setting will be required to wear a KN95 mask when a face mask is required.
- Unvaccinated employees working in-person full- or part-time at HOC, the County Jail, or the DYFS Detention Center will be subject to COVID-19 testing on a bi-weekly basis, consistent with current policy, in addition to being required to wear a KN95 mask.

72. If an employee decides not to get vaccinated (and doesn't have an exemption) can they opt to retire early?

Eligible employees can elect to retire at any time. More information about options for retirement are available here.

73. Will suspensions affect retirement benefits in any way?

Suspensions may affect retirement benefits as service time is not granted for employees on suspension.

MANAGEMENT AND IMPLEMENTATION

74. Who screens for vaccine status at the point of hiring new staff?
Human Resources will be responsible for screening.

75. I hired someone before the mandate was in place. Do I reach out to that employee to let them know or will HR?
Human Resources will reach out to the new hire to advise them of the change in Milwaukee County policy.

76. How will we know who has or hasn't been vaccinated?
Leaders and managers will be given basic information about their employees' vaccination status to support the implementation of consequences and additional risk mitigation measures. Managers will be able to see whether an employee they supervise is vaccinated, unvaccinated, and if they have an approved accommodation, but will not have any detail beyond this basic information.

77. Will the new hire vaccine requirements impact our pool of staff / talent recruitment?
Milwaukee County, and all organizations, do not know what the impacts of vaccine mandates will be on recruitment efforts.

78. Is Milwaukee County prepared for employees who will resign due to the mandate?
With the number of mandates for employees across all organizations presently, we are not anticipating major impacts from employee resignations. We have given careful thought to the incentives and consequences and believe we have a policy that is a good starting point for our organization.

79. What are the anticipated racial equity impacts of this policy?
Milwaukee County's vaccine requirement enhances equity on several fronts. Racial equity was considered throughout the development of the policy and was generally considered on four different dimensions, focusing on lessening the disparate impact of COVID-19:

1. **Individual Employees:** The mandate will prevent unvaccinated people from becoming severely ill or dying from COVID-19. Consequences of COVID-19 infection have had an inequitable impact on individuals who are members of racial or ethnic groups with low rates of vaccination. Preventing further harm to these communities was a primary consideration in establishing the vaccination mandate.
2. **Co-workers:** Milwaukee County is committed to providing a workplace that is safe for all people. Vulnerable groups, including black and brown people, tend to be more at risk of severe illness or death from COVID-19 because of the higher prevalence of pre-existing health conditions perpetuated by racism and other forms of discrimination. Therefore, a policy that increases the vaccination rate among employees helps keep everyone safe.
3. **Service Users:** The policy ensures that the vulnerable populations we serve can feel safer in their interactions with Milwaukee County employees. By interacting with vaccinated employees, they have a lower likelihood of being exposed to COVID positive individuals. Furthermore, higher vaccination rates among our employees will help ensure that there are no service disruptions caused by employees being out due to infection or exposure.

4. **Community:** More broadly, higher rates of vaccination in our community protect all members of that community by lowering disease burden and decreasing transmission of the virus.

There are still a lot of unknowns about how vaccine mandates will impact racial and health equity overall and we will continue to put racial equity at the forefront of our thinking and will share information as we learn more.

80. Will the Dayforce vaccine registration be available for new hires, similar to all other onboarding (direct deposit, emergency contact form) new hire forms?

We are still exploring this option for new hires. We are hopeful that this functionality will be available in the near future. Human Resources will work with new hires on this process when it is available.

81. Do departments have to suspend non-compliant employees?

Department heads or designees are encouraged to pursue up to 10-day unpaid suspensions for non-compliant employees as strictly as possible without: a) exceeding 10 days per employee, or b) impeding service delivery or operations, or c) triggering overtime. Suspensions should be applied evenly across work units, as designated by the department head.

82. If the penalty for not accepting the vaccine is a premium on health insurance, what would be the County's approach to dealing with individuals who do not receive County health care benefits?

Employees who do not receive County health care benefits and remain unvaccinated will face the other consequences in the Vaccine Mandate Administrative Order.

83. Will Departments be penalized if they do not comply with the requirements of the order?

Leaders and elected officials overwhelmingly support this policy and we do not anticipate issues with non-compliance when implementing consequences or risk mitigation measures. However, departments have different operational considerations, and it will not be possible to have consistent application of the new work rules across all departments or elected offices. We will be tracking key data on consequences and following-up with departments to support implementation efforts, as needed.

Milwaukee County COVID-19 Public Health Emergency
Vaccine Mandate for Milwaukee County
Administrative Order 21-3v1

Version 1 Issued and Effective as of 12:01 a.m. on Thursday, September 2, 2021

The development and rollout of vaccines for COVID-19 has been a major success in the face of the worst pandemic in a century. With broad international cooperation between governments and private industry, several vaccines have been launched worldwide, with three receiving emergency use authorization in the United States and at least one receiving full approval from the U.S. Food and Drug Administration.

As of August 2021, over 200 million residents in the U.S. have received a COVID-19 vaccine, and the three vaccines authorized for use in the U.S. have been shown to be safe and effective in reducing the instance and severity of COVID-19 and in dramatically reducing the risk of death from COVID-19. As a result, organizations are making vaccination against COVID-19 a requirement for employment to protect employees and those they serve from the risk of serious illness and death from COVID-19. The Federal government, the City of Milwaukee, healthcare organizations, as well as countless businesses are now requiring vaccination for employees.

As part of its stated vision to be the healthiest County in Wisconsin, Milwaukee County is joining these organizations in making vaccination against COVID-19 a requirement, as explained in this Administrative Order. Consistent with federal and state law, Milwaukee County may grant reasonable accommodations for medical reasons or sincerely-held religious beliefs, as also outlined in the Order. Note that at present this policy does not address vaccination boosters; as health policy regarding the use of boosters becomes clearer, this Order will be amended to address them. The current Order:

- Explains key terms used in the Order.
- Defines the requirements for vaccination for employees, contractors, and those accepting employment with the County.
- Describes the documentation process for vaccinated individuals.
- Specifies the process for employees requesting an exemption and accommodation.
- Outlines rewards and incentives for vaccination, potential consequences for non-compliance, and additional risk mitigation measures for unvaccinated employees.

If you have questions about this, or any other Administrative Order or policy, please email: **COVID-19@milwaukeecountywi.gov**

I. Definitions

a. **Completed Vaccination:** An individual who has completed either the two-dose series of the Pfizer or Moderna vaccine or the single dose of the Johnson & Johnson vaccine. This does not include any booster vaccinations at this time.

b. **County High-risk or Congregate Living Facilities:** These facilities include the Milwaukee County Jail, the House of Correction (HOC), the Division of Youth and Family

Service (DYFS) Detention Center, and certain facilities operated by the Behavioral Health Division (BHD) including the BHD inpatient hospital.

c. **Non-Compliant:** An individual who has neither met the requirement of this order for Completed Vaccination nor received an approved accommodation for medical or religious reasons.

II. Policies for Current Employees, New Employees, and County Contractors

This section outlines the COVID-19 vaccination policies for current employees, new employees, and contractors.

a. Vaccine Requirements for Current Employees

All employees are required to submit required documentation verifying their Completed Vaccination status or to submit a completed medical or religious exemption and accommodation request form by no later than **October 1, 2021**. Vaccinated, exempt, or non-compliant employees will be subject to the policies and associated timelines outlined in Section V. This vaccine requirement applies to all employees,[1] regardless of current or previous COVID-19 infection status.

Employees who get vaccinated as a result of this Order may use up to one (1) hour of their Expanded Paid Sick Leave (EPSL) time bank to cover time away from work for each vaccine dose they receive. Employees should use the **payroll code "EPSL Vaccine".**

b. Vaccine Requirements for New Employees

Effective **October 1, 2021**, with the exception of new hires by the Milwaukee County Sheriff's Office (MCSO), only job candidates who have Completed Vaccination or who have received an approved medical or religious accommodation shall be hired by Milwaukee County. The Department of Human Resources (HR) should add vaccination status as a condition of employment for any current and future posted positions, excluding MCSO postings, as soon as is feasible. In offer letters to potential new employees after October 1, 2021, candidates will be asked to provide proof of vaccination status to HR using the verification requirements for employees in Section III. New employees hired before October 1, 2021, but after the effective date of this order, will be subject to the policies for current employees (see Section III). This vaccine requirement applies to all job candidates, regardless of current or previous COVID-19 infection status.

c. Vaccine Requirements for County Contractors

All contractors working in County High Risk or Congregate Living Facilities must have Completed Vaccination status no later than **October 11, 2021**. Unvaccinated personnel

[1] The terms and conditions of this Administrative Order do not currently apply to employee-members of the Milwaukee County public safety unions.

will not be permitted to work on-site at County-operated High Risk or Congregate Living Facilities after **October 11, 2021**. This vaccine requirement applies to all applicable contracted staff, regardless of current or previous COVID-19 infection status.

Departments may require Completed Vaccination status for their contractors more broadly than just contractors working in County High Risk or Congregate Living Facilities. Departments are encouraged to consider the risk profile of service users,[2] staffing levels, the necessity of the service being open for in-person use, and other operational needs when considering broader vaccine mandates for their contractors.

III. Vaccination Verification Process

Employees who have Completed Vaccination, new hires, or employees seeking an accommodation are required to submit proof of their vaccination status (described below) or an exemption and accommodation request form (see Section IV) by **October 1, 2021**. Please note that proof of vaccination status submitted for the Vaccin8 program does **not** satisfy verification requirements for this policy.

a. To verify Completed Vaccination status, employees must submit two (2) different forms of proof from the following five (5) options into Dayforce:
    1. A copy of the CDC vaccination card provided at the vaccine appointment.
    2. A copy/screenshot of the employee's COVID-19 vaccination status from the Wisconsin Immunization Registry (WIR).[3]
        a. If you were vaccinated outside of Wisconsin, vaccination records can be accessed via each State's operational immunization information system (IIS).[4] Employees may upload a copy/screenshot from the IIS for the state in which they were vaccinated.
    3. A copy/screenshot from the employee's healthcare system patient profile (for example, MyChart).
    4. A note from the employee's healthcare provider or Milwaukee County vaccinator verifying vaccination status.
    5. A copy/screenshot of the employee's COVID-19 vaccination status from the federal Vaccine Administration Management System (VAMS).[5] Please note that only people receiving vaccines from select providers will have a record in this federal system.

   Please contact COVID-19@milwaukeecountywi.gov if you have questions or need assistance submitting the proper documentation and an HR representative will contact you.

[2] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html
[3] https://www.dhfswir.org/PR/clientSearch.do?language=en
[4] https://www.cdc.gov/vaccines/programs/iis/contacts-locate-records.html
[5] https://vams.cdc.gov/vaccineportal/s/login/?language=en_US&startURL=%2Fvaccineportal%2Fs%2F&ec=302

b. Employees who fail to meet the October 1 vaccine verification deadline should submit the required documentation as soon as possible. These employees will be subject to consequences (see Section V) until they have verified their vaccination status or received an approved accommodation.

   NOTE: *If photographs or screenshots are submitted, the image must be legible and must contain the following information: the vaccine recipient's name and the date(s) when COVID-19 vaccine dose(s) were administered. When submitting information, employees should take care to avoid submitting other medical information. Employees submitting fraudulent documentation are subject to corrective action up to and including termination and could be subject to prosecution under federal law.*

d. HR will verify employees' proof of Completed Vaccination on a weekly basis. If there are issues with the submission, employees will be contacted by an HR representative to resolve the issue.
e. Employees not submitting proof of their Completed Vaccination (or a request for accommodation described in Section IV) in a timely manner will be subject to policies for non-compliance (see Section V) until they have provided the appropriate documentation.

IV. Accommodation Process

Milwaukee County recognizes that employees may be unable to have Completed Vaccination status because of specific medical conditions or sincerely-held religious beliefs.

a. Employees seeking an accommodation should request either a "Medical Exemption and Accommodation Request Form" or "Religion or Creed Exemption and Accommodation Request Form" from their HR Business Partner. Employees should return their completed exemption and accommodation request form to their HR Business Partner as soon as possible, but no later than October 1, 2021.
b. Consistent with federal and state law, HR will consider requests for accommodation on a case-by-case basis and may engage with the employee, with medical providers, and/or with faith community leaders as allowed by law in considering requests. HR staff will review requests for accommodation weekly and will contact employees, as needed.
c. Accommodations may be granted where they are required by law and do not create undue hardship on Milwaukee County or pose a direct threat to the health and safety of others, including those working for or served by Milwaukee County.
d. Employees who claim a medical or religious exemption but fail to submit the documents necessary to act on the request, or who fail to engage in the interactive process to address accommodations, and who do not have a Completed Vaccination shall be denied an accommodation and shall be viewed as non-compliant and subject to the actions described in Section V.
e. Employees receiving an exemption may or may not qualify for specific rewards or incentives, as described in Section V.

V. Incentives, Consequences, and Additional Risk Mitigation Measures

With three (3) highly safe, highly effective vaccines available, the full approval of the Pfizer vaccine on August 23, 2021, and the Delta variant surging in the community, County leaders recognize that the time has come to strengthen policies and expectations around vaccines for all current employees. This policy seeks to incentivize and reward employees who get vaccinated and impose consequences on non-compliant employees.

a) Rewards and Incentives for Employees with Completed Vaccination

Milwaukee County is offering a variety of incentives to increase acceptance of this vital tool in keeping one another and those we serve safe:

1. Employees with Completed Vaccination prior to December 31, 2021, will qualify for the Vaccin8 paid time off, as detailed in Administrative Order 21-2. Employees without Completed Vaccination by December 31 are not eligible for this additional paid time off.
2. New "Vax Cash" Program:
   i. Employees will receive $50 after they complete their full vaccine series and submit the required paperwork in Dayforce (see Section III). Payments will be made directly through payroll. This payment is taxable and will be included on employees' W-2 tax forms.
      1. This reward will be available through December 31, 2021.
      2. All employees with Completed Vaccination status, whether obtained before or after the effective date of this order, will be eligible to receive the Vax Cash reward.
      3. New employees will be eligible for the reward.
      4. Employees who have not completed their full vaccine series, including those with approved accommodations, will not be eligible for this direct payment.

   ii. Vax Champions: Employees who champion vaccinations and successfully encourage a colleague to receive a Completed Vaccination will receive a $25 bonus payment for each successful referral.
      1. Only people with Completed Vaccinated after the effective date of this order (in other words, people who receive their first shot on or after September 2, 2021, and who complete their vaccine series) will be able to refer a Vax Champion to receive the $25 bonus. This program will end December 31, 2021.
      2. An employee who begins and Completes Vaccination after September 2, 2021, may report the name of the Vax Champion who encouraged their decision in the Dayforce reporting system. Only employees who have completed a full vaccination series will be able to identify a Vax Champion. The person listed as the Vax Champion in Dayforce will receive the $25 reward via direct payment.

3. Employees who Completed Vaccination may list only one (1) Vax Champion in Dayforce. The same Vax Champion could be named by multiple employees and will receive $25 per successful referral.
4. All employees are eligible to be Vax Champions and to receive the $25 Vax Champion payment for successfully encouraging a colleague to get vaccinated, regardless of the Vax Champion's own vaccination status.

b) Consequences for Non-Compliance

Milwaukee County views non-compliance with this vaccine mandate, that is, employees who are not vaccinated and do not have an approved accommodation in place, as a decision inconsistent with our vision of becoming the healthiest county in Wisconsin and inconsistent with our responsibilities as public servants. As a result, the County will impose escalating consequences on employees who fail to comply with this vaccine mandate. Failure to comply with vaccination requirements outlined in this Order may result in corrective action, up to and including termination.[6]

Employees who report Completed Vaccination status or who receive an approved accommodation before October 11, 2021, will not be subject to consequences for non-compliance with this Order. Employees who report Completed Vaccination or receive an approved accommodation on or after October 11, 2021, will be subject to consequences until such time as they Complete Vaccination or receive an approved accommodation. The consequences for non-compliant employees include:

1. **Effective October 11, 2021**
   i. Employees will not be eligible for voluntary overtime.
   ii. Employees will not be eligible for Risk Recognition Pay, when it is available.
   iii. **(OPTIONAL DEPARTMENT POLICY)** Employees failing to comply with the terms of this Order may be placed on unpaid suspension for up to 10 days.
      1. **Departments are encouraged to pursue unpaid suspensions for non-compliant employees as strictly as possible** without: a) exceeding 10 days per employee, or b) impeding service delivery or operations, or c) triggering overtime.
      2. Unpaid suspensions may be scheduled at the discretion of the Department Head or designee(s), consistent with operational needs.

[6] Employees who claim a medical or religious exemption, but have failed to submit documentation in accordance with the established deadlines, and/or any additional requested support for their request, and who are not vaccinated, shall be denied an accommodation and shall be subject to the actions described in this order.

3. Unpaid suspensions should occur between October 11 – December 31, 2021.
4. A suspension policy should be evenly applied across non-compliant employees within the department or subunits, as determined by department heads.

iv. **(OPTIONAL DEPARTMENT POLICY)** Department Heads or designee(s) may use an employee's compliance or non-compliance with this Order as a factor when making decisions about promotions, hiring current employees into new positions at the County, or giving a Temporary Assignment to a Higher Classification (TAHC).

v. **(OPTIONAL DEPARTMENT POLICY)** Department Heads or designee(s) may use an employee's compliance or non-compliance with this order as a factor when making decisions about Departmental Other Salary Adjustment Allocation (DOSAA).

2. **Effective January 1, 2022**
   i. Employees enrolled in Milwaukee County health insurance will incur a **$20 per pay period** surcharge. If an employee opts to Complete Vaccination in 2022, the surcharge will be eliminated after they submit their documentation for the full vaccine series (see Section III), effective the following pay period.
   ii. Any employees working in the Behavioral Health Division (BHD) who do not meet the requirements of this policy by January 1, 2022, may be restricted from work until vaccination requirements are completed. Non-compliance may lead to separation.

c) Additional Risk Mitigation Measures for Unvaccinated Employees

In order to mitigate the risk of spread of COVID-19, all unvaccinated employees, including those with an approved accommodation, will be subject to the following additional risk mitigation measures:

1. **Effective October 11, 2021**
   i. Employees working in any County healthcare setting will be required to wear a fitted N95 mask whenever a face mask is required per the current version of the Universal Face Mask Policies and Procedures Administrative Order (20-14).
   ii. All employees working in person in a non-healthcare setting will be required to wear a KN95 mask whenever a face mask is required per the current version of the Universal Face Mask Policies and Procedures Administrative Order (20-14).
   iii. Employees working in-person full- or part-time at the HOC, the County Jail, or the DYFS Detention Center will be subject to COVID-19 testing on a bi-weekly basis, consistent with current policy.

Milwaukee County COVID-19 Public Health Emergency
In-Person Workers: Social Distancing and Symptomatic Employees and Contractors
Administrative Order 20-4v1
Version 1 Issued and Effective as of 7:00 a.m. on Monday, March 16, 2020

COVID-19 Public Health Emergency, In-Person Workers: Social Distancing and Symptomatic Employees and Contractors Guidelines & Procedures.

Given Governor Ever's declaration of a public health emergency associated with COVID-19 on March 12, 2020, the County's principal goal is to protect the health of its employees and the public. The County recognizes that the populations it serves have essential needs that must be met even – or especially – during such an emergency.

This Administrative Order provides guidelines for Social Distancing in the workplace and responding to symptomatic employees and contractors who have reported to work. This policy is effective at 7:00 a.m. Monday, March 16, 2020.

If you have questions about this, or any other Administrative Order or policy, please email: **COVID-19@milwaukeecountywi.gov**

I. COVID-19 Social Distancing and Working Safely Guidelines & Procedures

During a pandemic, social distancing[1] is critical to preventing the spread of the disease among our employees and the people we serve. Teleworking is key to achieving social distancing, though it is not the only mechanism. This Administrative Order will cover expectations for employees who are **not** able to telework because of the nature of their work or an equipment barrier to teleworking.

A. Social Distancing Guidelines

County employees and contractors who cannot telework are encouraged to follow the below guidelines for social distancing:

- Always maintain 6 feet (2 meters) of distance between people, if possible. In other words, two people should be able to extend their arms and not reach each other.
- Clean and disinfect frequently (no less than daily) touched objects and surfaces using a regular household cleaning spray or disinfecting wipe.
- Avoid non-essential in-persons meetings. If a meeting is necessary, it should be limited to no more than 10 in-person attendants. All meetings should be in a space large enough for participants to be 6 feet apart. If posted, follow the guidelines for maximum room occupancy on the door of the meeting space.
- In-person meeting participants should wash their hands before and after meetings.
- Avoid sharing personal equipment (e.g., keyboard, computer mouse, phone).

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[1] **Social distancing** means remaining out of congregate settings, avoiding mass gatherings, and maintaining distance (approximately 6 feet) from others when possible. https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html

B. Symptomatic Employees and Contractors Procedures

According to the Center for Disease Control (CDC), the following symptoms may appear 2-14 days after exposure:

- Fever
- Cough
- Shortness of breath

If an employee or contractor notices that a colleague is displaying any of these symptoms at work, a supervisor should be notified immediately. Supervisors may ask the employee or contractor about their symptoms. **Symptomatic employees or contractors can and should be sent home at the supervisor's discretion.**

If an employee or contractor has any of these symptoms, they should self-quarantine for 14 calendar days. If the employee can telework while self-quarantining, they should work with their manager to start teleworking. The employee will have access to the Supplemental Paid Leave (SPL) Bank if they cannot telework while self-quarantining. The CDC website provides additional guidance for people experiencing symptoms.[2]

Employees are responsible for following and upholding workplace rules, including those outlined in this Administrative Order.

[2] CDC, What to do if you are sick: https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html

Milwaukee County COVID-19 Public Health Emergency
Universal Face Mask Policy and Procedures Administrative Order 20-14v7

Version 1 Issued and Effective as of 12:01 a.m. on Thursday, June 4, 2020

Version 2 Issued Tuesday, July 28 and Effective as of 12:01 a.m. on Saturday, August 1, 2020

Version 3 Issued and Effective as of 12:01 a.m. on Monday, October 19, 2020

Version 4 Issued and Effective as of 12:01 a.m. on Tuesday, June 1, 2021

Version 5 Issued and Effective as of 12:01 a.m. on Thursday, July 1, 2021

Version 6 Issued and Effective as of 12:01 a.m. on Monday, July 12, 2021

Version 7 Issued and Effective as of 12:01 a.m. on Monday, August 2, 2021

The Centers for Disease Control and Prevention (CDC) recommends that face masks be worn to slow the spread of COVID-19, particularly in areas of significant community transmission, such as Milwaukee County.[1] This Universal Face Mask Policy and Procedures Administrative Order outlines expectations for Milwaukee County employees, contractors, vendors, volunteers, service users, visitors, the general public, and all others entering or working in Milwaukee County facilities, grounds, or other places where services are delivered.

Version 7 of Milwaukee County's Universal Face Mask Policy and Procedures Administrative Order replaces 20-14v6. This Administrative Order goes into effect at 12:01 a.m. on Monday, August 2, 2021. Major changes are denoted in red. This order aligns to the "High Risk Levels" for County face masks policies.

If you have questions about this, or any other Administrative Order or policy, please email: **COVID-19@milwaukeecountywi.gov**

I. General

COVID-19 is transmitted mainly by people interacting in close proximity with each other. A universal face mask policy serves to protect all employees, contractors, vendors, service users and the general public by providing a "source control" for all individuals who may have pre-symptomatic and asymptomatic COVID-19 infection should those individuals come into close contact with others. It is important to remember that **wearing a face mask does not eliminate the need to physically distance from each other.** This face mask policy is an important component of Milwaukee County's overall COVID-19 risk mitigation and response efforts.

II. Types of Face Masks

The following types of face masks are recommended by the CDC as effective in stopping the spread of COVID-19 and are acceptable for use in County facilities, grounds, or other places where services are delivered.

Allowed:

1. Cloth face masks with two or more layers of breathable, washable fabric.
2. Disposable face masks, such as non-medical grade paper or procedure masks.

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[1] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html

3. FDA-approved face masks for sign language (ASL or LEP) interpreters.[2]
4. Medical-grade surgical face masks, N95 or KN95 respirators (typically reserved for use by healthcare workers, first responders, and others who work in high-risk environments).

The following types of face coverings **are not recommended** by the CDC as effective in stopping the spread of COVID-19 and **are not acceptable** for use in County facilities, grounds, or other places where services are delivered.

Not Allowed:

1. Neck scarves or bandanas
2. Neck gaiters or buffs
3. Winter scarfs
4. Face shields
5. Masks with exhalation valves or vents
6. Masks with inappropriate writing or images

III. Face Mask Requirements for County Employees, Contractors, and Vendors (together "Workers"), and Volunteers

A. Indoor Face Mask Requirements for Workers and Volunteers (see exemptions in Section V)

NOTE: Supervisors may seek verification of an employee's vaccination status if required for staffing needs or by industry health and safety requirements. They may also seek verification of status in the context of a potential disciplinary action if there is credible evidence that an employee is misrepresenting their vaccine status to avoid face covering requirements.

1. **All fully vaccinated and unvaccinated[3] workers or volunteers must wear a face mask at all times while inside County facilities or inside other places where services are delivered** (e.g., home visits). This includes wearing a face mask when moving through a facility, using a restroom, or being in other shared spaces inside the facility.
2. All fully vaccinated and unvaccinated workers or volunteers must wear a face mask at all times while in a vehicle with other people.
3. If a worker or volunteer is **alone** inside their enclosed office, a cubicle with a partition, or a work vehicle, they are not required to wear a mask.
4. Workers and volunteers who require medical grade face masks or respiratory protection are required to follow above policies until reporting to their work area where medical-grade face masks or respiratory protection are distributed.

[2] ClearMask: https://www.theclearmask.com
[3] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html

B. Outdoor Face Mask Requirements for Workers and Volunteers (see exemptions in Section V)

1. Milwaukee County workers and volunteers **do not** need to wear face masks in outdoor settings regardless of their vaccination status and regardless of their ability to physically distance (that is, maintain at least 6 feet / 2 meters of distance) from people, including colleagues and members of the public.
2. Maintaining physical distance between individuals remains a key component of managing the risk of COVID-19, especially for the unvaccinated, and wherever possible workers and volunteers should continue to maintain distance between themselves and others.

C. Other Guidance for Departments, Workers, and Volunteers

1. If a department's operations or services require a separate face mask policy specific to recommended industry standards (e.g., healthcare, emergency response), the worker should follow industry face masks requirements.
2. If a worker or volunteer forgets their cloth mask when reporting to work, they should use a paper face mask from the distribution at the point of entry.
3. Workers and volunteers are expected to regularly wash cloth masks or replace a disposable mask after daily use.[4]

IV. Service Users, Visitors, and General Public (together, "Members of the Public")

A. Indoor Face Mask Requirements for Members of the Public (see exemptions in Section V)

1. Fully vaccinated and unvaccinated members of the public ages 3 and older must wear face masks while inside County facilities or when receiving County services indoors (e.g., home visits).
2. Private indoor events held at County facilities:
   i. All non-wedding, indoor private events are required to wear face masks, regardless of the vaccination status of attendees.
   ii. Private, indoor weddings may follow the face mask policy in place at the time of their booking unless a local health order requires stricter protocols at the date of the event. No proof of vaccination status shall be required of any member of the public attending a private event.
3. Face masks are required at all times on Milwaukee County Transit System (MCTS) Buses and at General Mitchell International Airport. This requirement is consistent with current federal law.[5]
4. Face masks are required in indoor facilities that are adjacent to outdoor areas (e.g., golf shops, indoor exhibits at the Zoo, and indoor food service areas).

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[4] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-to-wash-cloth-face-coverings.html
[5] https://www.tsa.gov/news/press/releases/2021/04/30/tsa-extends-face-mask-requirement-airports-and-throughout#:~:text=The%20CDC%20recently%20announced%20that,hands%20or%20use%20hand%20sanitizer.

B. Outdoor Face Mask Requirements for Members of the Public

Fully vaccinated and unvaccinated members of the public are not required to wear a face mask on outdoor County grounds. Unvaccinated members of the public are strongly encouraged, though not required, to wear face masks at all times in outside public areas where consistent physical distancing is not possible.

C. Supply and Distribution of Face Masks to Members of the Public

The County will provide face masks to members of the public at all indoor County facilities and service areas, including on MCTS buses. The County will be supplying masks at the Zoo, or similar facilities, to people who did not bring their own masks. A member of the public may use their own face mask.

Departments or elected offices that manage entry points to County facilities shall be responsible for the requisition of disposable face masks and the process for distribution. Departments operating within facilities should keep a small supply of disposable face masks on hand for instances in which a member of the public shows up without a mask. Non-medical grade disposable face masks can be requisitioned through Marketplace Central.

V. Exemptions from Wearing a Face Mask

A. People Who are Exempted from Wearing a Mask

1. Children ages two (2) years old and younger.[6] Children ages 3 through 12 should only wear a face mask if a parent or guardian monitors to make sure it is worn safely. All children under 12 years old must remain within six (6) feet of parent/guardian, or household unit, and those who are small enough should be in a stroller or cart.
2. Anyone with a disability that makes it difficult to put on, wear, or remove a face mask.
3. Anyone consistently interacting with a person who is deaf or hard of hearing and primarily relies on lip reading.
4. Anyone who has been advised by a medical professional not to wear a face mask because of personal health issues.[7]
5. Anyone who has difficulty breathing[8] or is incapacitated.

B. Times When a Person May Temporarily Remove Their Face Mask

1. Some services require that workers or members of the public not have a face mask on during certain times (e.g., witness in a court hearing, genetics test). Departments and elected offices may have local exemption policies for face mask removal for points in time; additional risk mitigation measures should be put in place per the minimum requirements in Administrative Order Phased Re-Opening Guidance for Milwaukee County Services and Facilities (20-13).[9]

[6] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-to-wear-cloth-face-coverings.html

[7] Employees, contractors, and vendors must provide a note from their doctor to use this exemption.

[8] Employees, contractors, and vendors must provide a note from their doctor to use this exemption.

[9] See "Administrative Orders" Section: https://county.milwaukee.gov/EN/COVID-19

2. When consuming food or beverages indoors when other risk mitigation measures are in place per the minimum requirements in Administrative Order Phased Re-Opening Guidance for Milwaukee County Services and Facilities (20-13).[10]
3. If a worker or volunteer is alone inside their enclosed office or work vehicle. This does not apply to cubicles unless the partition extends above 6 feet high, or the worker or volunteer is the only person in the entire cubicle workspace.

C. Visual Marker for Exemptions

1. **Employees:** Any exemption from this Order will require a request for accommodation and certification from a health care provider. If an employee requests an exemption, they must notify their supervisor and designated HR Business Partner as part of the request. An HR Business Partner will provide an employee with a qualifying exemption in the form of a yellow badge holder that they may wear as a visual marker to identify the exemption when moving through County facilities.
2. **Members of the Public:** Members of the public who state that they have a qualifying exemption to wearing a face mask should be provided an exemption sticker to wear while inside County facilities, excluding buses and the airport. Stickers shall only be distributed at County facilities and grounds with controlled entry points. Members of the public do not need to provide any documentation of a qualifying exemption. Departments managing controlled entry points should order exemption stickers in Marketplace Central by searching "Face Mask Exempt Sticker" or "COVID-19 SIGN 013".

V. Enforcement Policy & Procedure

A. Employees: Milwaukee County employees are expected to follow the face mask requirements. Employees who fail to follow any of the work rules outlined in this policy may be subject to disciplinary action, up to and including termination.

B. Members of the Public

Enforcement of the policies in this Order will be based on the County facility per the below:

1. **Milwaukee County Courthouse Complex & Vel Phillips Juvenile Justice Center:**
   1. Any member of the public who refuses to wear a face mask without a qualifying exemption shall be refused entrance. If the person refusing to wear a mask is at the Courthouse because of a mandated court hearing, subpoena, and/or a court case-related activity, facility security shall give that person a call list and tell them to call the appropriate number for instructions **before leaving the facility**. The court official will determine the next steps for the individual refusing to wear a mask.
   2. If a member of the public states that they have a qualifying exemption they will be allowed into the facility. Individuals with a qualifying exemption should be given a visual marker for their time in the facility upon entry.
   3. Trained law enforcement staff will be responsible for enforcing this order, and members of the public who fail to comply with face mask policies will be asked by law enforcement to leave the facility.

[10] See "Administrative Orders" Section: https://county.milwaukee.gov/EN/COVID-19

2. **Buses Operated by MCTS**
    i. Bus operators shall enforce the policy at the same time and in the same manner as fare collection; riders will be asked to wear a mask upon entry to the bus and if they refuse, or remove their mask during the ride, they may be encouraged to put a mask on for their own protection and that of other passengers.

3. **For all other County facilities, grounds, and service delivery locations:**
    i. Some departments or elected offices may have different and/or additional risk mitigation strategies or exemptions (see Section IV.B.1) in place for safe, effective delivery of their services and members of the public may therefore be subject to additional face mask requirements before being able to access services; members of the public who fail to comply with this Order or local policies may be refused entry or service by the managing department.

Milwaukee County COVID-19 Public Health Emergency
COVID-19 Health Screening Policies and Procedures
Administrative Order 20-17v4

Version 1 Effective as of 12:01 a.m. on Monday, November 9, 2020
Version 2 Effective as of 12:01 a.m. on Wednesday, November 11, 2020
Version 3 Effective as of 12:01 a.m. on Tuesday, December 1, 2020
Version 4 Effective as of 12:01 a.m. on Thursday, July 15, 2021

COVID-19 Health Screening Policies and Procedures

The health of Milwaukee County employees, Contractors, and visitors is of vital concern and importance. Identifying cases of COVID-19 has been a challenge for individuals and institutions because of the difficulties in making testing easily and quickly available and because of the limits of testing to identify positive cases of COVID-19, particularly during the early stages of infection.[1] Thus, Symptoms and Exposures are often important indicators of possible cases of COVID-19. This Administrative Order (AO) defines circumstances when individuals should be screened for COVID-19 Symptoms and Exposures and establishes procedures for conducting such screening. Version 4 of this AO is effective as of 12:01 a.m. on Thursday, July 15, 2021, and replaces Version 3.

Version 4 revises temperature screening procedures at Milwaukee County facilities. While completing a Screening Questionnaire is still required for employees and visitors reporting for in-person work, temperature screening is only required for employees and visitors to High Risk or Congregate Living Facilities operated by Milwaukee County as well as for Persons in the Care or Custody of Milwaukee County. Note that fever, that is temperature of 100.4^0F (38^0C)[2] or higher, remains a Symptom Compatible with COVID-19, and employees and visitors should self-report any fever when completing the Screening Questionnaire. Updates to this AO are denoted in **red**.

Version 4 of this Administrative Order covers:

- Definitions of terms used in this Order.
- Employee and Contractor Daily Health Screening and Response Requirements for In-Person Workers.
- Procedures for Completing the Screening Questionnaire, Temperature Check when required, and Verification Process.
- Screening and signage requirements for Visitors to indoor County facilities.
- Standards and procedures for departments to screen Visitors.
- Screening requirements for departments responsible for Individuals in the Care or Custody of Milwaukee County.

Key dates associated with this order include:

- November 11, 2020: All departments to begin screening employees and Contractors reporting for in-person work using the Screening Questionnaire

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[1] See https://www.acpjournals.org/doi/10.7326/M20-1495
[2] Note: Throughout this order, healthcare workers working in a medical setting should follow the CDC guidelines of fever being a temperature of 100.0^0F or higher.

- November 16, 2020: All departments to notify the Re-Opening Steering Committee (ROSC) of plans to address employees without technology necessary to complete the Screening Questionnaire
- November 23, 2020: All departments to have implemented the Screening Tool for all employees and Contractors, save in exceptional cases identified to ROSC by 11/16/2020, and all departments to begin temperature screening for employees and Contractors reporting for in-person work.
- November 30, 2020: Public Safety Officers (PSOs) to begin screening all employees and Contractors for Symptoms, including fever, and for Exposure at the Courthouse Complex, Vel Phillips Juvenile Justice Center, and Zoofari using the Screening Tool and temperature screening.
- December 7, 2020, or as soon as possible: PSOs to begin screening all Visitors for Symptoms, including fever, and for Exposure at the Courthouse Complex, Vel Phillips Juvenile Justice Center, and Zoofari using the Visitor Questionnaire and temperature screening.
- December 7, 2020, or as soon as possible: All departments operating indoor locations without PSOs to begin Visitor screening (see Section IV for policy and procedures).
- December 7, 2020, or as soon as possible: All departments to post Visitor Questionnaire at all locations used by Visitors, regardless of length of visit.
- July 15, 2021: Temperature screening is only required for employees and visitors to High Risk or Congregate Living Facilities operated by Milwaukee County. These include the Criminal Justice Facility (CJF or jail), House of Correction (HOC), Behavioral Health Division (BHD) inpatient hospital, and Division of Youth and Family Services (DYFS) youth detention center. Temperature screening is also still required for Persons entering the Care or Custody of Milwaukee County.

If you have questions about this, or any other AO or policy, email: **COVID-19@milwaukeecountywi.gov**

I. Definitions

A. Close Contact:[3] A person with Close Contact is someone who:

i. Was within 6 feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period starting from 2 days before illness onset (or, for an asymptomatic infected person, 2 days prior to test specimen collection) until the time the infected person is isolated. This is the definition **regardless of whether face masks or personal protective equipment (PPE) were worn by any or all individuals;** and/or

ii. Provided care at home to an infected person; and/or

iii. Had direct physical contact with an infected person (touched, hugged, or kissed them); and/or

iv. Shared eating or drinking utensils with an infected person; and/or

[3] For employees at work in a healthcare or medical setting, Close Contact does not qualify if the CDC-recommended PPE was used when job duties were performed.

v. Got respiratory droplets (for example, was sneezed or coughed on) on them from an infected person.

B. **Confirmed Case of COVID-19:** A case of COVID-19 that has been confirmed through a positive test for COVID-19 or, in the absence of testing, has been confirmed by a medical professional as being a suspected case of COVID-19 based on symptoms.

C. **Contractor**: For the purpose of this order a Contractor is an individual working alongside County employees as part of the overall County workforce.

D. **Critical Infrastructure Worker:** The CDC defines a Critical Infrastructure Worker as one needed to deliver critical services, including law enforcement, transportation, 911 call center response, and others. See the CDC guidelines[4] for a complete list. For this administrative order, department heads may consider essential workers under the umbrella of Critical Infrastructure Workers and follow relevant policies and procedures accordingly.

E. **Exposure to COVID-19 (Exposure)**: Any form of Close Contact (see A. above) with an individual with a Confirmed Case of COVID-19 during the last 14 days.

F. **Green Status**: An individual who has no Symptoms (see N. below) and has had no Exposure (see E. above).

G. **High Risk or Congregate Living Facility**: Any facility operated by Milwaukee County that houses individuals for eight hours or longer, including the CJF, HOC, BHD inpatient hospital, and DYFS youth detention center.

H. **Person in Care or Custody**: Anyone who is legally under the care of Milwaukee County, including those in detention, in jail, or in a medical care facility, and for whom Milwaukee County has a custodial responsibility.

I. **Public Safety Officers (PSOs):** Security staff stationed at public entrances at the County Courthouse complex, the Vel Phillips Juvenile Justice Center, and Zoofari who screen individuals seeking entrance to the facilities.

J. **Red Status**: An individual who, at the time of screening, has at least one Symptom (see N. below) and/or has had Exposure (see E. above).

K. **Screening Questionnaire**: A survey designed to assess whether an individual has Symptoms or has had Exposure. The current version of the Screening Questionnaire is posted with Administrative Orders on the County's website.

L. **Screening Questionnaire for Visitors (Visitor Questionnaire)**: A modified version of the Screening Questionnaire used to screen Visitors to indoor County facilities. See Section IV.B for options on where to access and post required signage.

M. **Screening Tool:** An online tool that allows County employees and Contractors to access the Screening Questionnaire to self-assess for Symptoms and for Exposure. The Screening Tool may be accessed using any device that can connect to the Internet, including smart phones, personal computers, and tablets. The Screening Tool may be accessed at: https://county.milwaukee.gov/EN/COVID-19/MKE-Health-Screen

N. **Social Distancing:** Maintaining a distance of six feet or more between individuals.[5]

[4] https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html

[5] For more details, see Administrative Order 20-4 In-Person Workers: Social Distancing and Symptomatic Employees and Contractors.

O. Symptoms Compatible with COVID-19 (Symptoms): The following symptoms may be symptoms of COVID-19 if they are new or uncommon for an individual:

i. Feverish or temperature of 100.4^0F (38^0C)[6] or higher
ii. Chills
iii. Nausea or vomiting
iv. Diarrhea
v. New shortness of breath or difficulty breathing
vi. New congestion or runny nose
vii. New loss of taste or smell
viii. New sore throat
ix. New cough
x. Headache that is new or different
xi. Unexpected fatigue
xii. Unexpected muscle or body ache

P. Visitor: Any individual seeking entry to a Milwaukee County facility, grounds, or workplace, excluding Milwaukee County employees, Contractors, and Persons in Care or Custody.

II. Employee and Contractor Daily Health Screening and Response Requirements

All employees and Contractors **must screen** for Symptoms and for Exposure **on each day they are working in-person**, and the screening must be completed before or upon entrance to the work site. In addition, employees at and visitors to High Risk or Congregate Living facilities must complete a temperature scan before or upon entrance to the work site. Only employees with Green Status may report for in-person work, and departments or PSOs must confirm each employee's Green Status prior to the employee starting work.[7]

In general, employees should complete their Health Questionnaire at home prior to reporting for in-person work to minimize the spread of COVID-19 in the workplace. The daily health screen should not be taken as medical advice; employees with questions about any symptoms they are experiencing should consult their medical provider.

A. Requirements for Employee and Contractor Daily Screening

This section establishes the screening requirements for employees, Contractors, departments, and facility managers. Procedures for how to complete and verify these requirements are detailed in the sections that follow.

i. It is the responsibility of every employee to complete the Screening Questionnaire using the Screening Tool on each day they are working in person. The Screening Questionnaire should be completed at home, prior to reporting to the job site.[8]

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[6] Note: Throughout this order, healthcare workers working in a medical setting should follow the CDC guidelines of fever being a temperature of 100.0^0F or higher.

[7] Note that the one exception is for Critical Infrastructure Workers who screened RED due to Exposure and have been told by a manager to follow adapted quarantine procedures and report to work as long as they have no Symptoms Compatible with COVID-19 (See Administrative Order 20-7, Section V).

[8] See Section III.A.ii for procedures when an employee may not have access to the Screening Tool.

ii. It is the responsibility of employees who work in High Risk or Congregate Living Facilities to complete a temperature screen prior to starting their workday to verify that they do not have a fever (temperature of 100.4^{0}F or 38^{0}C or higher).

iii. No later than November 11, 2020, prior to starting in-person work, all employees must be verified as Green Status based on the results of the Screening Questionnaire.

iv. Employees who are teleworking are encouraged to monitor for Symptoms and Exposures but are not required to complete the Health Questionnaire or temperature screening unless their Department requires them to do so.

v. Departments cannot set screening standards that are less restrictive than those outlined in this AO, but they may set standards that are more restrictive. For instance, they may require all employees to self-screen, rather only those who are reporting for in-person work, or they may set a lower standard for fever if advised by the CDC for their specific line of work. They may also continue temperature screening based on industry-specific recommendations.

vi. Departments shall, at minimum, use the questions in the County's Screening Questionnaire without altering the wording. Any changes to the Screening Questionnaire will be made centrally based on input from public health experts.

vii. The time employees spend completing the Screening Questionnaire, as well as the temperature screen, is **not** compensable time.

B. Responding to and Reporting Results of Health Questionnaire and Temperature Screenings

This section outlines the requirements for employees, Contractors, and managers for interpreting, and in the case of Red Status, responding to, the results of the health screening for employees who are reporting for in-person work.

i. **Red Status Requirements:** If employees or Contractors screen as Red Status, that is, they ARE experiencing any one or more Symptoms and/or have had Exposure, they should:

a) Stay home or return home and not report for in-person work (Note: in the case of Exposure, this procedure may vary for Critical Infrastructure Workers; see Section II.B.i.d below).

b) Notify their manager immediately of their Red Status, using the department-approved notification system. Note that employees **are required** to report whether they are reporting Red Status for Symptoms and/or for Exposure, but they **do not** need to disclose the specific Symptom(s). Managers may ask follow-up questions about the nature of an Exposure to determine if it happened in the work setting to determine whether additional contact tracing among the workforce is necessary.

c) Work remotely, if possible.

d) Follow the instructions in AO 20-7: Procedures for Responding to Confirmed COVID-19 Cases, Symptomatic Individuals, and Exposed Individuals and Their Close Contacts. Individuals:

- **With Symptoms** should follow Section III of AO 20-7.
- **With Exposure** should follow the instructions in Section IV of AO 20-7. If the employee is a Critical Infrastructure Worker, the

individual's supervisor should also consider adapted procedures in Section V of AO 20-7. Employees **do not** make their own decisions about an adapted quarantine and should follow Section IV until notified otherwise by their supervisor.

- **With Symptoms AND Exposure**: This is a probable case of COVID-19, and employee should immediately seek out testing and follow the instructions in Section II of AO 20-7. If they test positive during their quarantine, they should continue following instructions in Section II. If they do not get tested or test negative, they should complete a full 14-day quarantine, regardless of whether they are a Critical Infrastructure Worker (AO 20-7, Section IV).

ii. **Green Status Requirements:** If employees or Contractors are Green Status for Symptoms and for Exposure, they should report to work as scheduled.

III. Procedures for Completing the Screening Questionnaire, Temperature Screen, and Verification Process

Departments, divisions, or offices must verify each day that all employees scheduled to work in person have been screened for COVID-19 Symptoms and Exposures prior to employees starting in-person work duties. Departments may accomplish this screening, including verifying employee temperatures when required, in a variety of ways depending on the work location, available technology, and environmental or operational risk factors. In general, Departments should make every effort to ensure employees use the Screening Tool to help with data collection across the workforce and to support any centralized changes to the Health Questionnaire based on new CDC guidance or operational needs.

This section outlines options for departments to accomplish and verify the Green Statuses for in-person workers. Because the Screening Questionnaire and the temperature screening use different tools and will likely entail different processes, this section is separated into procedures for completing and verifying the Screening Questionnaire and procedures for completing and verifying the temperature screening.

A. Procedures for Completing and Verifying the Screening Questionnaire

This section provides procedures for completing the Screening Questionnaire based on whether the Screening Tool can be used by employees or whether technology barriers require a different system. Procedures will also vary by whether departments are located in facilities with PSOs at entrances or whether they are located in facilities without PSOs.

i. **Completing the Screening Questionnaire Using the Screening Tool**

a) Employees may use work or personal devices connected to the Internet, including cell phones, tablets, or personal computers, to complete the Screening Questionnaire.[9]

b) The Screening Tool will display either Green Status or Red Status based

[9] Note: Departments may choose to provide County cell phones to employees who do not have personal devices; in these cases, Departments should plan to cover the monthly cost of the device and may need to provide employee training in the use of such devices.

on the individual's reported Symptoms and Exposure.

- The Screening Tool will inform employees with Green Status to report to work as scheduled.
- Employees with Red Status will be informed to stay home and contact their supervisor. The Screening Tool will also direct employees to AO 20-7 for specific instructions.

c) The Screening Tool will create a daily employee status badge and time stamp based on the results of the employee self-assessment.

- If both Symptoms and Exposure are Green, then the status badge will be Green.
- If either Symptoms or Exposure is Red, or if both Symptoms and Exposure are Red, then the status badge will be Red.
- If the employee is a Critical Infrastructure Worker who has Exposure only (no Symptoms) and who has already been instructed to report to work under an adapted quarantine (Section V of AO 20-7), then the employee will be instructed to report to work.
- If the employee or Contractor is Recovered from COVID-19 in the Past 90 Days and is Exposed to a Confirmed Case of COVID-19 (Section IV.C.i of AO 20-7), they will be instructed to report to work.
- **The time stamp must be within the 12-hour period before the individual is presenting their status badge for verification to be valid for the employee's shift.** For example, an employee starting work on a Tuesday at 9 a.m. must have completed their Health Questionnaire and temperature screening after 9 p.m. on Monday. Employees are encouraged to take the Health Questionnaire and their temperature as close to the start of their shift as possible.

d) No later than November 11, 2020, departments should have the necessary procedures in place to verify the Green Status of each employee scheduled to work in person prior to starting their shift.

- Employees working at locations with Public Safety Officers (PSOs) at entry (the Courthouse Complex, Vel Phillips Juvenile Justice Center, Zoofari) will display their status badge to the PSO along with their County ID. Employees with Green Status and a valid time stamp will proceed to the temperature screening. No additional verification by departments operating within these facilities is needed for employees able to display their Green Status to PSOs.[10]
- Employees working at all other in-person locations shall verify their Green Status and time stamp as outlined in department procedures. This may include:
  - Employees showing their Green badge and time stamp to a department recorder located at the entrance to a facility or department suite, or

[10] Note: If employees entering these facilities are using entrances not staffed by Public Safety Officers, departments will need to establish and enforce local verification protocol.

- Employees showing their Green badge and time stamp to a manager upon arrival, or
- Employees certifying their status on a log sheet that is verified by a manager, or
- Departments implementing supervisor reporting from the Screening Tool for immediate notification of Red Status for employees and for daily screening reports at the start of every shift (see (h) below).

e) Departments with employees who report directly to a job site must ensure that manager reporting from the Screening Tool is implemented for immediate notification of Red Status for employees and for daily screening reports at the start of every shift (see (h) below).

f) Departments are responsible for communicating notification policies for employees who screen as Red Status, including:
- Who to notify
- How to notify (phone, email, text)
- Time to notify (for example, no later than two hours before start of shift)
- What to communicate (e.g., "I screened Red for Symptoms" or "I screened Red for Exposure")

g) Departments leaders and managers of Critical Infrastructure Workers must determine how they will apply a quarantine for employees who have had Exposure but have **no Symptoms** at the time of the screening (See Section V of AO 20-7 for adapted quarantine procedures). Asymptomatic Critical Infrastructure Workers screening Red for **Exposure** should **not** report to work unless they receive instructions to do so from a supervisor.

h) IMSD and the Re-Opening Steering Committee (ROSC) will work with departments during the month of November to set up any manager reporting or notification needed. The Screening Tool will be able to send an automatic notification to designated recipients and can generate reports listing employees who have completed the Screening Questionnaire that day and their Red or Green Status for Symptoms and Exposure. Departments interested in these options should begin identifying their employee groups and points of contact immediately for efficient implementation and should email: COVID-19@milwaukeecountywi.gov.

i) Supervisors of employees reporting Red Status will follow Manager Instructions in AO 20-7 for Individuals with Symptoms Compatible with COVID-19 (Section III) or for Individuals with Exposure (Section IV), depending on the status of the employee.

ii. **Procedures for Employee Screening Questionnaire When the Screening Tool Cannot be Accessed**

Departments should try to overcome any technology barriers employees face in using the Screening Tool, as the Screening Questionnaire is likely to be updated when CDC guidance changes. In addition, the Screening Tool allows the County to track

Symptoms and Exposures at the Department and Division level to inform risk mitigation strategies.

If significant technology barriers prevent an employee or employee group from using the Screening Tool by the 11/11/2020 deadline, department leaders may administer either verbal or hard-copy versions (see Administrative Order section of website for printable version) of the Health Questionnaire while they work to overcome technology barriers. Departments should plan to be using the Screening Tool by 11/23/2020 in all but exceptional cases.

If technology barriers are insurmountable for a given employee or employee group, the department should email the ROSC at COVID-19@milwaukeecountywi.gov with a comprehensive plan by 11/16/2020. This plan should include information about the nature of the barrier(s) and the proposed solution(s) for employees in their workforce who cannot use the Screening Tool. Possible alternatives could include setting up a Health Questionnaire kiosk at a designated location, managers verbally administering the Health Questionnaire to an employee, or similar. In general, the County does not support the distribution and collection of hard copy versions of the questionnaire or passive completion of the questionnaire by employees (e.g., having a sign with the questions that employees say they read and passed that day).

B. Temperature Screening Requirements and Procedures

Employees who work in High Risk or Congregate Living Facilities must confirm that they do not have a fever (temperature of 100.4⁰F or 38.0⁰C or higher[11]) prior to working in person by taking or having their temperature taken. Departments have several options to verify employee temperatures, depending on the employee work location.

i. **High Risk or Congregate Living Facilities with PSOs at entrances (CJF and DYFS youth detention center in the Vel Phillips Juvenile Justice Center)**

PSOs will oversee temperature screening of all employees and Contractors entering through public entrances using temperature kiosks. Departments located in these facilities do not need to make independent arrangements for temperature screening, as long as they instruct employees and Contractors to use public entrances when entering for the first time each day. If employees routinely use unstaffed entrances, then departments must make arrangements to verify employee temperature (see options in Section ii below).

a) Once employees and Contractors have shown the PSO at entry their Green Status badge and current time stamp, they will follow the PSO directions for temperature screening.
b) If their temperature registers below 100.4⁰F, they will be allowed entry to the facility.
c) If their temperature registers 100.4⁰F or higher, the PSO will conduct a secondary temperature screen using a handheld device. If the temperature

[11]Note: Throughout this order, healthcare workers working in a medical setting should follow the CDC guidelines of fever being a temperature of 100.0⁰F or higher.

then registers below 100.4^{0}F, they will be allowed entry. If the temperature continues to register 100.4^{0}F or higher, they will be turned away and should return home, contact their supervisor, and follow the instructions in Administrative Order 20-7, Section III for Responding to Symptoms Compatible with COVID-19.

ii. **Departments located in facilities without PSOs at entrances may:**

a) Request a touchless temperature screening kiosk be installed at or near entrances used by staff (email COVID-19@milwaukeecountywi.gov).

b) Requisition and distribute individual digital thermometers for employees to self-screen at home (such as Medline Industries model MDS99902 available from Marketplace Central). Employees should take their temperature prior to completing the Health Questionnaire, and a "No" answer to the symptom question on having a fever will serve as the verification for the temperature screen for supervisors of these employees.

c) Create a screening location where a member of the Department or Division management team screens employee temperatures at entry using a handheld infrared scanning thermometer (such as the IR forehead thermometer model JT-E0202 available from Marketplace Central). See Section III.B.iii below for specific screening procedures.

d) Create a screening location where employees self-screen their temperatures upon entering the work site using a handheld infrared scanning thermometer. See Section III.B.iii below for specific screening procedures.

iii. Departments creating temperature screening locations, whether staffed by the department or self-service for employees, should follow these procedures:

a) Employees and Contractors must be screened immediately upon arrival and, if possible, before entering the actual workspace.

b) Temperature screening must be performed in a location that supports social distancing standards and protects employee privacy.

c) Temperature screening should be performed by a supervisor or a third party to protect employee privacy, or employees may self-screen.

d) Temperature screening should be performed using a touchless forehead / temporal artery thermometer (such as the IR forehead thermometer model JT-E0202 available from Marketplace Central). If other types of thermometers must be used, follow the manufacturer's directions for disinfecting between uses;

e) The individual conducting the temperature screen for another person should wear a face mask, gloves, and protective eyewear. The person being screened should wear a face mask.

f) If employees are performing temperature self-screens using a handheld thermometer:

- Employees must be trained in the use of the thermometer and on proper hygiene before, during, and after the self-screen.
- A manager should be available nearby for questions and/or cases where employees have temperature of 100.4^{0}F or higher.

- The department must ensure that hand sanitizer is available at the screening station, and employees should sanitize before and after using the thermometer. Departments should also provide supplies to allow employees to disinfect the thermometer between each use.
- The department shall develop procedures by which employees report their temperature status as Red or Green using a log or otherwise reporting their status to the manager on duty or to the designated department recorder. If pens are provided, then some method for disinfecting the pens must also be provided.

g) Regardless of who conducts temperature screening, departments should not record specific employee temperatures.

iv. If an employee records Red Status (temperature of 100.4^{0}F degrees or higher) then the employee should:

a) Notify the manager on duty or follow department notification procedures, **and**

b) Return or stay home, **and**

c) Follow the instruction in Section III of AO 20-7.

v. If an employee records temperature below 100.4^{0}F and has Green Status for the Health Questionnaire, they should report to work.

vi. Managers of employees reporting Red Status based on the temperature screen should follow Manager Instructions in Section III of AO 20-7.

IV. Screening and Signage Requirements for Visitors to Milwaukee County Facilities

Requirements for screening Visitors to Milwaukee County facilities vary by the location accessed by Visitors and by the expected length of the visit. Note that this section does not apply to Persons in Care or Custody (see Section VI).

A. Screening Requirements

Visitors will be required to answer the Visitor Questionnaire screening at the following locations:

i. Locations with Public Safety Officers (PSOs) at public entry points, which include the Courthouse Complex, the Vel Phillips Juvenile Justice Center, and Zoofari.

ii. Other indoor facilities or points of service where Visitors typically spend 15 minutes or more in a confined space with other people. Examples include:[12]

- Client counseling sessions
- Indoor food service areas
- Community centers
- Chalets at beer gardens or similar outdoor dining structures

Visitors will be required to complete a temperature screen prior to entering any High Risk or Congregate Living Facility. Temperature screening will be conducted by PSO at public entry

[12] Employees who must make home visits as part of the delivery of County services should view the visit as if it were taking place in an indoor County facility and should follow these requirements for using the Visitor Questionnaire and temperature screening.

points or by the staff of departments operating High Risk or Congregate Living Facilities, depending on facility staffing.

Visitor screening is **not** required for outdoor services or for services where Visitors spend less than 15 minutes in a confined space with other people. For example, Visitor screening is not required for people moving through an indoor cultural exhibit (e.g., the Domes, indoor Zoo exhibits), skating at an outdoor rink, or Visitors picking up or dropping off items. Visitor screenings will also not be required on buses operated by the Milwaukee County Transit System (MCTS). **Departments may elect to conduct screening for Visitors even if it is not required, but their policies may never be less strict than County policy.**

B. Signage Requirements

All entrances to indoor County facilities used by Visitors must display the Visitor Questionnaire in a **prominent location near the entrance to the facility or space**. For facilities managed by the Facilities Management Division (FMD), FMD staff will be responsible for placement and management of such signs. For all other locations, departments occupying the facilities will be responsible for the placement and management of signs. Various sign size options and how to order are below:

- **8.5x11" Visitor Questionnaire:** Best used in low-traffic visitor areas and/or smaller spaces. Can be printed locally using this version[13] or can be ordered from HOC printing on MarketPlace Central under the item name, "COVID_Health_Checkpoint_8.5x11.jpg"
- **12x18" Visitor Questionnaire:** Best used in low- to medium-traffic visitor areas in small to medium-sized spaces. Can be ordered from HOC printing on MarketPlace Central under the item name, "COVID_Health_Checkpoint_12x18.jpg"
- **35x82" Visitor Questionnaire:** Large retractable banner best suited for high-traffic visitor areas and/or large spaces. Departments that would like a banner should send the total number they would like for the entire department to COVID-19@milwaukeecountwi.gov and distribution will be managed by the ROSC.

V. Procedures for Conducting Visitor Screening

Visitor screening at locations with PSOs at entries will be conducted by PSOs. Screening required at indoor facilities without PSOs at entries will be conducted by departments operating in such facilities. Note that this section does not apply to Persons in Care or Custody (see Section VI).

Note that in all cases, staff and Visitors must diligently follow the County's Administrative Orders for Social Distancing[14] and for Face Masks.[15]

A. Procedures for Facilities with PSOs at Entries (Courthouse Complex, Vel Phillips Juvenile Justice Center, Zoofari)

[13] https://county.milwaukee.gov/files/county/COVID-19/HealthScreeningCheckpointSign8.5x11.pdf
[14] See Administrative Order 20-4.
[15] See Administrative Order 20-14.

i. PSOs will be responsible for administering the Visitor Questionnaire to all Visitors and for temperature screening Visitors seeking entrance to High Risk or Congregate Living Facilities (CJF and DYFS youth detention center located in Vel Phillips Juvenile Justice Center).

ii. The Visitor Questionnaire will be posted prominently at all Visitor entrances. PSOs will instruct Visitors to read the sign and will then ask Visitors if they answer YES to any of the questions on the Visitor Questionnaire.

   a) If a Visitor answers YES to any question, the Visitor will be asked to leave.
   b) If a Visitor answers NO to all questions, the Visitor will be allowed to proceed to the temperature screening location.
   c) Visitors may also choose to complete the Screening Questionnaire using the online Screening Tool and may choose to show a Green Status badge on their phones in lieu of verbally answering the Visitor Questionnaire. The time stamp for the Questionnaire must be within the past 12 hours.

iii. Once Visitors have successfully completed the Visitor Questionnaire, those seeking entry to a High Risk or Congregate Living Facility will proceed to the temperature screening station. They will follow the PSOs' instructions to have their temperature registered by the temperature kiosk.

   a) Visitors whose temperature registers below 100.4^{0}F will be allowed to proceed through the remainder of the security screening at the location.
   b) Visitors whose temperature registers at 100.4^{0}F or above may choose to be re-scanned.
      - The Visitor may have their temperature re-scanned at the temperature screening kiosk. If this second scan still registers at 100.4^{0}F or higher, the PSO will then ask the Visitor to move to the secondary scanning location for screening conducted by a PSO using a handheld device.
      - If the secondary temperature screening registers a temperature below 100.4^{0}F, the Visitor may proceed to the security screening.
      - If the secondary temperature screening registers at 100.4^{0}F or higher, the PSO will ask the Visitor to leave the facility.

iv. If any Visitor refuses to answer the Visitor Questionnaire or complete a temperature screen when screening is required, they will not be permitted to enter the facility.

B. Procedures for Indoor Facilities without PSOs at Entries

i. Departments operating in other indoor facilities or delivering services at places where Visitors or service users typically spend 15 minutes or more in a confined space with other people are responsible for implementing Visitor screenings.

   a) **Visitor Questionnaire:** The department must post the Visitor Questionnaire at the entrance to the facility or office suite and must have some means of asking Visitors if they answer YES to any question. Visitors who answer NO to all questions may proceed to temperature screening. Visitors who answer YES to any question must be asked to leave and, as appropriate, to reschedule their visit.

- Departments may have a staff member located at entrances to ask Visitors if they answered YES to any question on the posted Visitor Questionnaire.
- Departments may ask Visitors to complete the Screening Questionnaire using the online Screening Tool and may admit those with a Green Status badge and current time stamp (within last 12 hours) on their device in lieu of answering the Visitor Questionnaire. If a department chooses this method, they may email a link for the Screening Questionnaire in advance to scheduled Visitors, or they may install a kiosk for Visitors to use. For help in securing a kiosk for the Screening questionnaire, please contact: **COVID-19@milwaukeecountywi.gov**

b) **Temperature Screening:** Once Visitors have been successfully screened using the Visitor Questionnaire or the Screening Questionnaire, the department must then perform temperature screening if the department operates a High Risk or Congregate Living Facility using any of the methods outlines in Section III.B.iii above.

- If the Visitor has a temperature below 100.4^{0}F, the Visitor may be admitted to the facility.
- If the Visitor has a temperature of 100.4^{0}F or higher, the Visitor must be asked to leave the facility.

ii. If a Visitor refuses to answer the Visitor Questionnaire or complete a required temperature screen, they will not be permitted to enter the facility or grounds.

VI. Screening Requirements for Persons in Care or Custody

Any County unit with Persons in Care or Custody must be given a full health screening (Health Questionnaire and Temperature Screening) at the time of intake and before any transfer is made within the facility or to a new facility, at minimum. The Health Questionnaire may be administered verbally, in hard copy, or electronically, at the discretion of the department.

Departments must have protocols in place, in accordance with CDC and State guidelines for their industry, to inform procedures for quarantining and isolation of Persons in Care or Custody. The ROSC will work individually with departments operating congregate and long-term care facilities on such protocols.

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on May 28, 2021.

INTRODUCTION

- *All EEOC materials related to COVID-19 are collected at* ***www.eeoc.gov/coronavirus (https://www.eeoc.gov/coronavirus)*** *.*
- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act. Note: Other federal laws, as well as state or local laws, may provide employees with additional protections.
- Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards under Title I of the ADA also apply to federal agencies under Section 501 of the Rehabilitation Act. Basic background information about the ADA and the Rehabilitation Act is available

on EEOC's **disability page (https://www.eeoc.gov/disability-discrimination)**
.

- The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the **guidelines and suggestions made by the CDC or state/local public health authorities (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html)** about steps employers should take regarding COVID-19. **Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.** This includes evolving guidance found in the CDC publication, "**Interim Public Health Recommendations for Fully Vaccinated People (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html)** ." Many common workplace inquiries about the COVID-19 pandemic are addressed in the CDC publication "**General Business Frequently Asked Questions (https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html)** ."

- The EEOC has provided guidance (a publication entitled **Pandemic Preparedness in the Workplace and the Americans With Disabilities Act (https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act)** [**PDF version (https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf)**]) ("Pandemic Preparedness"), consistent with these workplace protections and rules, that can help employers implement strategies to navigate the impact of COVID-19 in the workplace. This pandemic publication, which was written during the prior H1N1 outbreak, is still relevant today and identifies established ADA and Rehabilitation Act principles to answer questions frequently asked about the workplace during a pandemic. It has been updated as of March 19, 2020 to address examples and information regarding COVID-19; **the new 2020 information appears in bold and is marked with an asterisk**.

- On March 27, 2020 the EEOC provided a webinar ("3/27/20 Webinar") which was recorded and transcribed and is available at **www.eeoc.gov/coronavirus (https://www.eeoc.gov/coronavirus)** . The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. The EEOC pandemic

publication includes a **separate section (https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act#secB)** that answers common employer questions about what to do after a pandemic has been declared. Applying these principles to the COVID-19 pandemic, the following may be useful:

A. Disability-Related Inquiries and Medical Exams

*The ADA has restrictions on when and how much medical information an employer may obtain from any applicant or employee. Prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category. Once an employee begins work, any disability-related inquiries or medical exams must be job related and consistent with business necessity. See CDC guidance, including the CDC's "**Interim Public Health Recommendations for Fully Vaccinated People. (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.htm)** " The EEOC monitors CDC publications.*

A.1. How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic? *(3/17/20)*

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

A.2. When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1) , or may it ask about any symptoms identified by public health authorities as associated with COVID-19? *(4/9/20)*

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

A.3. When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic? *(3/17/20)*

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

A.4. Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19? *(3/17/20)*

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

A.5. >When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty? *(3/17/20)*

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee’s initial or continued

presence in the workplace? *(4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)*

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if **employees entering the workplace have COVID-19 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#A.2)** because **an individual with the virus will pose a direct threat (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1)** to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following **recommendations by the CDC (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html)** or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review **information (https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostic-testing-sars-cov-2)** from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require–to the greatest extent possible–that employees observe infection control

practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

Note: Question A.6 and A.8 address screening of employees generally. See Question A.9 regarding decisions to screen individual employees.

A.7. CDC said in its Interim Guidelines (https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html) that antibody test results "should not be used to make decisions about returning persons to the workplace." In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace? *(6/17/20)*

No. An antibody test constitutes a medical examination under the ADA. In light of CDC's **Interim Guidelines (https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html)** that antibody test results "should not be used to make decisions about returning persons to the workplace," an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are **permissible under the ADA (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#A.6)** .

The EEOC will continue to closely monitor CDC's recommendations, and could update this discussion in response to changes in CDC's recommendations.

A.8. May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 1)*

Yes. Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a **current list of symptoms (https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html)** .

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others. However, for those employees who are teleworking and are not physically interacting with coworkers or others (for example, customers), the employer would generally not be permitted to ask these questions.

A.9. May a manager ask only one employee—as opposed to asking all employees—questions designed to determine if she has COVID-19, or require that this employee alone have her temperature taken or undergo other screening or testing? *(9/8/20; adapted from 3/27/20 Webinar Question 3)*

If an employer wishes to ask only a particular employee to answer such questions, or to have her temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this particular employee, such as a display of COVID-19 symptoms. In addition, the ADA does not interfere with employers following **recommendations by the CDC (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html)** or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate.

A.10. May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 4)*

No. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking an employee about his contact with family members would unnecessarily limit the information obtained about an employee's potential exposure to COVID-19.

A.11. What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature or refuses to answer questions about

whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 2)*

Under the circumstances existing currently, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace, and that these steps are consistent with health screening recommendations from CDC. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. The ADA prohibits such broad disclosures. Alternatively, if an employee requests reasonable accommodation with respect to screening, the usual accommodation process should be followed; this is discussed in Question G.7.

A.12. During the COVID-19 pandemic, may an employer request information from employees who work on-site, whether regularly or occasionally, who report feeling ill or who call in sick? *(9/8/20; adapted from Pandemic Preparedness Question 6)*

Due to the COVID-19 pandemic, at this time employers may ask employees who work on-site, whether regularly or occasionally, and report feeling ill or who call in sick, questions about their symptoms as part of workplace screening for COVID-19.

A.13. May an employer ask an employee why he or she has been absent from work? *(9/8/20; adapted from Pandemic Preparedness Question 15)*

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

A.14. When an employee returns from travel during a pandemic, must an employer wait until the employee develops COVID-19 symptoms to ask questions about where the person has traveled? *(9/8/20; adapted from Pandemic Preparedness Question 8)*

No. Questions about where a person traveled would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal.

B. Confidentiality of Medical Information

With limited exceptions, the ADA requires employers to keep confidential any medical information they learn about any applicant or employee. Medical information includes not only a diagnosis or treatments, but also the fact that an individual has requested or is receiving a reasonable accommodation.

B.1. May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? *(4/9/20)*

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this **confidential information (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q9)** . An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

B.2. If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results? *(4/9/20)*

Yes. The employer needs to maintain the confidentiality of this information.

B.3. May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? *(4/9/20)*

Yes (https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces.html) .

B.4. May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? *(4/9/20)*

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

B.5. Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do? *(9/8/20; adapted from 3/27/20 Webinar Question 5)*

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee—unnamed—has symptoms of COVID-19 or a diagnosis, or is it the identity of that employee? Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee’s identity. For example, using a generic descriptor, such as telling employees that “someone at this location” or “someone on the fourth floor” has COVID-19, provides notice and does not violate the ADA’s prohibition of disclosure of confidential medical information. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee’s identity. Also, all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. Employers may want to plan in advance what supervisors and

managers should do if this situation arises and determine who will be responsible for receiving information and taking next steps.

B.6. An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does ADA confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor? *(9/8/20; adapted from 3/27/20 Webinar Question 6)*

No. ADA confidentiality does not prevent this employee from communicating to his supervisor about a coworker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform his supervisor about a coworker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

B.7. An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why? *(9/8/20; adapted from 3/27/20 Webinar Question 7)*

Yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure that the employee is teleworking without saying why is permissible. Also, if the employee was on leave rather than teleworking because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

B.8. Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? *(9/8/20; adapted from 3/27/20 Webinar Question 9)*

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to

the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can access the protected information.

Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

C. Hiring and Onboarding

Under the ADA, prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category.

C.1. If an employer is hiring, may it screen applicants for symptoms of COVID-19? *(3/18/20)*

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

C.2. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam? *(3/18/20)*

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

C.3. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it? *(3/18/20)*

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

C.4. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it? *(3/18/20)*

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

C.5. May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19? *(4/9/20)*

No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

D. Reasonable Accommodation

Under the ADA, reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless it would pose an undue hardship, meaning significant difficulty or expense. An employer has the discretion to choose among effective accommodations. Where a requested accommodation would result in undue hardship, the employer must offer an alternative accommodation if one is available absent undue hardship. In discussing accommodation requests, employers and employees may find it helpful to consult the Job Accommodation Network (JAN) website for types of accommodations, ***www.askjan.org (http://www.askjan.org/)*** *. JAN's materials specific to COVID-19 are at* ***https://askjan.org/topics/COVID-19.cfm (https://askjan.org/topics/COVID-19.cfm)*** *.*

D.1. If a job may only be performed at the workplace, are there reasonable accommodations (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#general) for individuals with disabilities, absent undue hardship (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue) , that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? *(4/9/20)*

There may be reasonable accommodations that **could offer protection to an individual whose disability puts him at greater risk from COVID-19**

(https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q17) and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per **CDC guidance (https://www.cdc.gov/coronavirus/2019-ncov/community/index.html)** or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

D.2. If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)? *(4/9/20)*

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

D.3. In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee

with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends? *(4/9/20)*

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

D.4. What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation? *(4/9/20)*

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he **uses in the workplace (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q20)** . The employer **may discuss (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

D.5. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability? *(4/17/20)*

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).

D.6. During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed? *(4/17/20)*

Yes, if it is not obvious or already known, an employer may ask questions or request **medical documentation (https://www.eeoc.gov/transcript-march-27-2020-**

outreach-webinar#q17) to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. **Possible questions (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties).

D.7. If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation? *(4/17/20)*

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process" (discussed in D.5 and D.6., above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process—and devise end dates for the accommodation—to suit changing circumstances based on public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. This **could also apply (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.2)** to employees who have disabilities exacerbated by the pandemic.

Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

D.8. May an employer invite employees now to ask for reasonable accommodations they may need in the future when they are permitted to return to the workplace? *(4/17/20; updated 9/8/20 to address stakeholder questions)*

Yes. Employers may inform the workforce that employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. This is discussed in greater detail in Question G.6. If advance requests are received, employers may begin the "interactive process" – the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed. If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.

D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? *(4/17/20)*

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "**undue hardship (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue)** ," which means "significant difficulty or expense." As described in the two questions that follow, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

D.10. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? *(4/17/20)*

An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

D.11. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? *(4/17/20)*

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time—when considering other expenses—and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

D.12. Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as "critical infrastructure workers (https://www.cdc.gov/coronavirus/2019-ncov/downloads/Essential-Critical-Workers_Dos-and-Donts.pdf) " or "essential critical workers (https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html) " by the CDC? *(4/23/20)*

Yes. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act, or any other equal employment opportunity law. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees falling in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

D.13. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? *(6/11/20)*

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or

harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

D.14. When an employer requires some or all of its employees to telework because of COVID-19 or government officials require employers to shut down their facilities and have workers telework, is the employer required to provide a teleworking employee with the same reasonable accommodations for disability under the ADA or the Rehabilitation Act that it provides to this individual in the workplace? *(9/8/20; adapted from 3/27/20 Webinar Question 20)*

If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation could suffice in the home setting. For example, an employee may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.

Also, the undue hardship considerations might be different when evaluating a request for accommodation when teleworking rather than working in the workplace. A reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose one when considering circumstances, such as the place where it is needed and the reason for telework. For example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment.

As a practical matter, and in light of the circumstances that led to the need for telework, employers and employees should both be creative and flexible about what can be done when an employee needs a reasonable accommodation for telework at home. If possible, providing interim accommodations might be

appropriate while an employer discusses a request with the employee or is waiting for additional information.

D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? *(9/8/20; adapted from 3/27/20 Webinar Question 21)*

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

D.16. Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework as a reasonable

accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request? *(9/8/20; adapted from 3/27/20 Webinar Question 22)*

Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.

D.17. Might the pandemic result in excusable delays during the interactive process? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Yes. The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

D.18. Federal agencies are required to have timelines in their written reasonable accommodation procedures governing how quickly they will process requests and provide reasonable accommodations. What happens if circumstances created by the pandemic prevent an agency from meeting this timeline? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Situations created by the current COVID-19 crisis may constitute an "extenuating circumstance"—something beyond a Federal agency's control—that may justify exceeding the normal timeline that an agency has adopted in its internal reasonable accommodation procedures.

E. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

E.1. What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic? *(4/9/20)*

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their **national origin, race (https://www.eeoc.gov/wysk/message-eeoc-chair-janet-dhillon-national-origin-and-race-discrimination-during-covid-19)** , or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

- Anti-harassment **policy tips (https://www.eeoc.gov/employers/small-business/harassment-policy-tips)** for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
    - **report (https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686319)** ;
    - **checklists (https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686319)** for employers who want to reduce and address harassment in the workplace; and
    - **chart (https://www.eeoc.gov/chart-risk-factors-harassment-and-responsive-strategies)** of risk factors that lead to harassment and appropriate responses.

E.2. Are there steps an employer should take to address possible harassment and discrimination against coworkers when it re-opens the workplace? *(4/17/20)*

Yes. An employer may remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

E.3. How may employers respond to pandemic-related harassment, in particular against employees who are or are perceived to be Asian? *(6/11/20)*

Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools—regardless of whether employees are in the workplace, teleworking, or on leave—and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers or clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be **instructed (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#E.2)** to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated, and inviting anyone who experiences or witnesses workplace harassment to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.

E.4. An employer learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker. What actions should the employer take? *(6/11/20)*

The employer should take the same actions it would take if the employee was in the workplace. Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.

F. Furloughs and Layoffs

F.1. Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs? *(4/9/20)*

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's **technical assistance document on severance agreements (https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-severance-agreements)** .

F.2. What are additional EEO considerations in planning furloughs or layoffs? *(9/8/20; adapted from 3/27/20 Webinar Question 13)*

The laws enforced by the EEOC prohibit covered employers from selecting people for furlough or layoff because of that individual's race, color, religion, national origin, sex, age, disability, protected genetic information, or in retaliation for protected EEO activity.

G. Return to Work

G.1. As government stay-at-home orders and other restrictions are modified or lifted in your area, how will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace? *(4/17/20)*

The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety.

Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence. Therefore, employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.

For example, this may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) **of all those entering the workplace**. Similarly, the CDC recently posted **information (https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html)** on return by certain types of critical workers.

Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

G.2. An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests? *(4/17/20)*

An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols).

However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

G.3. What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) that CDC says may put her at higher risk for severe illness from COVID-19? *(5/5/20)*

An employee—or a third party, such as an employee's doctor—must **let the employer know (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing.

While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, she may do so.

The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may **ask questions or seek medical documentation (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.6)** to help decide if the individual has a disability and if there is a reasonable accommodation, barring **undue hardship (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D)** , that can be provided.

G.4. The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? *(5/7/20)*

First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee—or take any other adverse action—*solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under **29 C.F.R. section 1630.2(r) (https://www.ecfr.gov/cgi-bin/text-idx?SID=28cadc4b7b37847fd37f41f8574b5921&mc=true&node=pt29.4.1630&rgn=div5#se29.4.1630_12)** (regulation addressing direct threat to health or safety of self or others). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability—not the disability

in general—using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

G.5. What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self? *(5/5/20)*

Accommodations (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.1) may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be

elimination or substitution of particular “marginal” functions (less critical or incidental job duties as distinguished from the “essential” functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee’s job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (**www.askjan.org (http://www.askjan.org/)**) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

G.6. As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements? *(6/11/20)*

Yes. The ADA and the Rehabilitation Act permit employers to make information available in advance to **all** employees about who to contact—if they wish—to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, the employer may begin the **interactive process (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.8)** . An employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees

with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.

Either approach is consistent with the ADEA, the ADA, and the May 29, 2020 **CDC guidance (https://www.cdc.gov/coronavirus/2019-ncov/community/high-risk-workers.html?deliveryName=USCDC_2067-DM29601)** that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.

G.7. What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? *(6/11/20)*

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a **disability (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.5)** and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is **available under Title VII (https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace)** .

H. Age

H.1. The CDC has explained (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws? *(6/11/20)*

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable **accommodation for their disability (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.1)** as opposed to their age.

H.2. If an employer is choosing to offer flexibilities to other workers, may older comparable workers be treated less favorably based on age? *(9/8/20; adapted from 3/27/20 Webinar Question 12)*

No. If an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers less favorably based on their age.

I. Caregivers/Family Responsibilities

I.1. If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations? *(6/11/20)*

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have **caretaking responsibilities (https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities)** for children.

J. Pregnancy

J.1. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html) ? *(6/11/20)*

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

J.2. Is there a right to accommodation based on pregnancy during the pandemic? *(6/11/20)*

There are two federal employment discrimination laws that may trigger **accommodation for employees based on pregnancy (https://www.eeoc.gov/laws/guidance/legal-rights-pregnant-workers-under-federal-law)** .

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to

work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

K. Vaccinations

The availability of COVID-19 vaccinations raises questions under the federal equal employment opportunity (EEO) laws, including the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act (Title VII) (see also ***Section J, EEO rights relating to pregnancy****).*

This section was originally issued on Dec. 16, 2020, and was clarified and supplemented on May 28, 2021. The May 2021 updates are consistent in substance with the original technical assistance and also address new subjects. (See, e.g., discussion of vaccine incentives under the ADA (starting at K.16) and under GINA (starting at K.18)). Also note that the Centers for Disease Control and Prevention (CDC) issued ***guidance (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html)*** *for fully vaccinated individuals that addresses, among other things, when they need to wear a mask indoors.*

The EEOC has received many inquiries from employers and employees about the type of authorization granted by the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) for the administration of three COVID-19 vaccines. These three vaccines were granted Emergency Use Authorizations (EUA) by the FDA. It is beyond the EEOC's jurisdiction to discuss the legal implications of EUA or the FDA approach. Individuals seeking more information about the legal implications of EUA or the FDA approach to vaccines can visit the ***FDA's EUA page*** **(https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained)** *. The EEOC's jurisdiction is limited to the federal EEO laws as noted above.*

Indeed, other federal, state, and local laws and regulations govern COVID-19 vaccination of employees, including requirements for the federal government as an employer. The federal government as an employer is subject to the EEO laws. Federal departments and agencies should consult the Safer Federal Workforce Task Force for additional guidance on agency operations during the COVID-19 pandemic.

The EEOC questions and answers provided here only set forth applicable EEO legal standards, unless another source is expressly cited. In addition, whether an employer meets the EEO standards will depend on the application of these standards to particular factual situations.

The technical assistance on vaccinations below was written to help employees and employers better understand how federal workplace discrimination laws apply during the COVID-19 pandemic caused by the SARS-CoV-2 virus and its variants. The technical assistance here is based on and consistent with the federal civil rights laws enforced by the EEOC and with EEOC regulations, guidance, and technical assistance. Analysis of how it applies in any specific instance should be conducted on an individualized basis.

COVID-19 Vaccinations: EEO Overview

K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated for COVID-19? *(5/28/21)*

The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the **reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below**. These principles apply if an employee gets the vaccine in the community or from the employer.

In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) (see K.6) or for religion (see K.12).

As with any employment policy, employers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act (40+)). Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination

than others, some employees may be more likely to be negatively impacted by a vaccination requirement.

It would also be unlawful to apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason.

K.2. What are some examples of reasonable accommodations or modifications that employers may have to provide to employees who do not get vaccinated due to disability; religious beliefs, practices, or observance; or pregnancy? *(5/28/21)*

An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business. For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

Employees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working, if the employer makes modifications or exceptions for other employees. These modifications may be the same as the accommodations made for an employee based on disability or religion.

K.3. How can employers encourage employees and their family members to be vaccinated without violating the EEO laws, especially the ADA and GINA? *(5/28/21, updated 6/28/21)*

Employers may provide employees and their family members with information to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns. Also, under certain circumstances employers may offer incentives to employees who receive COVID-19 vaccines, as discussed in **K.16 – K. 21**. As of May 2021, the federal government is providing vaccines at no cost to everyone ages 12 and older.

There are many resources available to employees seeking more information about how to get vaccinated:

- The federal government's online **vaccines.gov (https://www.vaccines.gov/)** site can identify vaccination sites anywhere in the country (or **https://www.vacunas.gov (https://www.vacunas.gov)** for Spanish). Individuals also can text their zip code to "GETVAX" (438829) – or "VACUNA" (822862) for Spanish – to find three vaccination locations near them.

- Employees with disabilities (or employees' family members with disabilities) may need extra support to obtain a vaccination, such as transportation or in-home vaccinations. The U.S. Dept. of Health and Human Services/Administration for Community Living has launched a hotline to assist individuals with disabilities in obtaining such help. The Disability Information and Assistance Center (DIAL) can be reached at: 888-677-1199 from 9 am to 8 pm (Eastern Standard Time) Mondays through Fridays or by emailing **DIAL@n4a.org**.

- CDC's website offers a link to a listing of **local health departments (https://www.cdc.gov/publichealthgateway/healthdirectories/index.html)**, which can provide more information about local vaccination efforts.

- In addition, the CDC offers **background information for employers about workplace vaccination programs (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html)**. The CDC provides a complete communication "tool kit" for employers to use with their workforce to educate people about getting the COVID-19 vaccine. (Although originally written for essential workers, it is useful for all workers.) *See* **CDC's Essential Workers COVID-19 Toolkit (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html#anchor_1612717640568)**. Employers should provide the contact information of a management representative for employees who need to request a reasonable accommodation for a disability or religious belief, practice, or observance or to ensure nondiscrimination for an employee who is pregnant.

- Some employees may not have reliable access to the internet to identify nearby vaccination locations or may speak no or limited English and find it difficult to make an appointment for a vaccine over the phone. The CDC operates a toll-free telephone line that can provide assistance in many languages for individuals seeking more information about vaccinations: 800-232-4636; TTY 888-232-6348.

- Some employees also may require assistance with transportation to vaccination sites. Employers may gather and disseminate information to their employees on low-cost and no-cost transportation resources available in their community serving vaccination sites and offer time-off for vaccination, particularly if transportation is not readily available outside regular work hours.

General

K.4. Is information about an employee's COVID-19 vaccination confidential medical information under the ADA? *(5/28/21)*

Yes. The ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. This ADA confidentiality requirement applies regardless of where the employee gets the vaccination. Although the EEO laws themselves do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

Mandatory Employer Vaccination Programs

K.5. Under the ADA, may an employer require a COVID-19 vaccination for all employees entering the workplace, even though it knows that some employees may not get a vaccine because of a disability? *(12/16/20, updated 5/28/21)*

Yes, provided certain requirements are met. Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a "direct threat" to the health or safety of the employee or others in the workplace. A "direct threat" is a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. **29 C.F.R. 1630.2(r) (https://www.govinfo.gov/content/pkg/CFR-2012-title29-vol4/xml/CFR-2012-title29-vol4-sec1630-2.xml)** . This determination can be broken down into two

steps: determining if there is a direct threat and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.

To determine if an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace, an employer first must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis. (See also **K.12** recommending the same best practice for religious accommodations.)

K.6. Under the ADA, if an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do? *(12/16/20, updated 5/28/21)*

An employee with a disability who does not get vaccinated for COVID-19 because of a disability must let the employer know that he or she needs an exemption from the requirement or a change at work, known as a reasonable accommodation. To request an accommodation, an individual does not need to mention the ADA or use the phrase "reasonable accommodation."

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know **how to recognize an accommodation request from an employee with a disability (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** and know to whom to refer the request for full consideration. As a best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors, and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy.

Employers and employees typically engage in a flexible, interactive process to identify workplace accommodation options that do not impose an undue hardship (significant difficulty or expense) on the employer. This process may include determining whether it is necessary to obtain supporting medical documentation about the employee's disability.

In discussing accommodation requests, employers and employees may find it helpful to consult the **Job Accommodation Network (JAN) website (https://www.askjan.org)** as a resource for different types of accommodations. JAN's materials about COVID-19 are available at **https://askjan.org/topics/COVID-19.cfm (https://askjan.org/topics/COVID-19.cfm)**. Employers also may consult applicable **Occupational Safety and Health Administration (OSHA) COVID-specific resources (https://www.osha.gov/SLTC/covid-19/)**. Even if there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform his or her current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible.

The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense. See 29 C.F.R. 1630.2(p). Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration. Employers may rely on **CDC recommendations (https://www.cdc.gov/coronavirus/2019-ncov/)** when deciding whether an effective accommodation is available that would not pose an undue hardship.

Under the ADA, it is unlawful for an employer **to disclose that an employee is receiving a reasonable accommodation (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li42)** or **to retaliate against an employee for requesting an accommodation (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li19)** .

K.7. If an employer requires employees to get a COVID-19 vaccination from the employer or its agent, do the ADA's restrictions on an employer making disability-related inquiries or medical examinations of its employees apply to any part of the vaccination process? *(12/16/20, updated 5/28/21)*

Yes. The ADA's restrictions apply to the screening questions that must be asked immediately prior to administering the vaccine if the vaccine is administered by the employer or its agent. An **employer's agent (https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2)** is an individual or entity having the authority to act on behalf of, or at the direction of, the employer.

The ADA generally restricts when employers may require medical examinations (procedures or tests that seek information about an individual's physical or mental impairments or health) or make disability-related inquiries (questions that are likely to elicit information about an individual's disability). The act of administering the vaccine is not a "medical examination" under the ADA because it does not seek information about the employee's physical or mental health.

However, because the pre-vaccination screening questions are likely to elicit information about a disability, the ADA requires that they must be "job related and

consistent with business necessity" when an employer or its agent administers the COVID-19 vaccine. To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, cannot be vaccinated, will pose a direct threat to the employee's own health or safety or to the health and safety of others in the workplace. (See general discussion in **Question K.5**.) Therefore, when an employer requires that employees be vaccinated by the employer or its agent, the employer should be aware that an employee may challenge the mandatory pre-vaccination inquiries, and an employer would have to justify them under the ADA.

The ADA also requires employers to keep any employee medical information obtained in the course of an employer vaccination program confidential.

Voluntary Employer Vaccination Programs

K.8. Under the ADA, are there circumstances in which an employer or its agent may ask disability-related screening questions before administering a COVID-19 vaccine *without* needing to satisfy the "job-related and consistent with business necessity" standard? *(12/16/20, updated 5/28/21)*

Yes. If the employer offers to vaccinate its employees on a voluntary basis, meaning that employees can choose whether or not to get the COVID-19 vaccine from the employer or its agent, the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. However, the employee's decision to answer the questions must be voluntary. (See also Questions **K.16 – 17**.) The ADA prohibits taking an adverse action against an employee, including harassing the employee, for refusing to participate in a voluntary employer-administered vaccination program. An employer also must keep any medical information it obtains from any voluntary vaccination program confidential.

K.9. Under the ADA, is it a "disability-related inquiry" for an employer to inquire about or request documentation or other confirmation that an employee obtained the COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic? *(12/16/20, updated 5/28/21)*

No. When an employer asks employees whether they obtained a COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic, the employer is not asking a question that is likely to

disclose the existence of a disability; there are many reasons an employee may not show documentation or other confirmation of vaccination in the community besides having a disability. Therefore, requesting documentation or other confirmation of vaccination by a third party in the community is not a disability-related inquiry under the ADA, and the ADA's rules about such inquiries do not apply.

However, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential.

K.10. May an employer offer voluntary vaccinations only to certain groups of employees? *(5/28/21)*

If an employer or its agent offers voluntary vaccinations to employees, the employer must comply with federal employment nondiscrimination laws. For example, not offering voluntary vaccinations to certain employees based on national origin or another protected basis under the EEO laws would not be permissible.

K.11. What should an employer do if an employee who is fully vaccinated for COVID-19 requests accommodation for an underlying disability because of a continuing concern that he or she faces a heightened risk of severe illness from a COVID-19 infection, despite being vaccinated? *(5/28/21)*

Employers who receive a reasonable accommodation request from an employee should process the request in accordance with applicable ADA standards.

When an employee asks for a reasonable accommodation, whether the employee is fully vaccinated or not, the employer should engage in an interactive process to determine if there is a disability-related need for reasonable accommodation. This process typically includes seeking information from the employee's health care provider with the employee's consent explaining why an accommodation is needed.

For example, some individuals who are immunocompromised might still need reasonable accommodations because their conditions may mean that the vaccines may not offer them the same measure of protection as other vaccinated individuals. If there is a disability-related need for accommodation, an employer must explore potential reasonable accommodations that may be provided absent undue hardship.

Title VII and COVID-19 Vaccinations

K.12. Under Title VII, how should an employer respond to an employee who communicates that he or she is unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance? (*12/16/20, updated 5/28/21*)

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests.

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. See also 29 CFR 1605.

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodation for unvaccinated employees, see **question and answer K.6.**, above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.

Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability. Considerations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible

for the vaccine. Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee

K.13. Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy? *(12/16/20, updated 5/28/21)*

Under Title VII, some employees may seek job adjustments or may request exemptions from a COVID-19 vaccination requirement due to pregnancy.

If an employee seeks an exemption from a vaccine requirement due to pregnancy, the employer must ensure that the employee is not being discriminated against compared to other employees similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid **disparate treatment in violation of Title VII**.

GINA And COVID-19 Vaccinations

Title II of GINA prohibits covered employers from using the genetic information of employees to make employment decisions. It also restricts employers from requesting, requiring, purchasing, or disclosing genetic information of employees. Under Title II of GINA, genetic information includes information about the manifestation of disease or disorder in a family member (which is referred to as "family medical history") and information from genetic tests of the individual employee or a family member, among other things.

K.14. Is Title II of GINA implicated if an employer requires an employee to receive a COVID-19 vaccine administered by the employer or its agent?
(12/16/20, updated 5/28/21)

No. Requiring an employee to receive a COVID-19 vaccination administered by the employer or its agent would not implicate Title II of GINA unless the pre-vaccination medical screening questions include questions about the employee's genetic information, such as asking about the employee's family medical history.   As of May 27, 2021, the pre-vaccination medical screening questions for the first three COVID-

19 vaccines to receive Emergency Use Authorization (EUA) from the FDA do not seek family medical history or any other type of genetic information. See **CDC's Pre-vaccination Checklist (https://www.cdc.gov/vaccines/covid-19/downloads/pre-vaccination-screening-form.pdf)** (last visited May 27, 2021). Therefore, an employer or its agent may ask these questions without violating Title II of GINA.

The act of administering a COVID-19 vaccine does not involve the use of the employee's genetic information to make employment decisions or the acquisition or disclosure of genetic information and, therefore, does not implicate Title II of GINA.

K.15. Is Title II of GINA implicated when an employer requires employees to provide documentation or other confirmation that they received a vaccination from a doctor, pharmacy, health agency, or another health care provider in the community? *(12/16/20, updated 5/28/21)*

No. An employer requiring an employee to show documentation or other confirmation of vaccination from a doctor, pharmacy, or other third party is not using, acquiring, or disclosing genetic information and, therefore, is not implicating Title II of GINA. This is the case even if the medical screening questions that must be asked before vaccination include questions about genetic information, because documentation or other confirmation of vaccination would not reveal genetic information. Title II of GINA does not prohibit an employee's *own* health care provider from asking questions about genetic information. This GINA Title II prohibition only applies to the employer or its agent.

Employer Incentives For COVID-19 Voluntary Vaccinations Under ADA and GINA

ADA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.16. Under the ADA, may an employer offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community? *(5/28/21)*

Yes. Requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received

in the community. As noted elsewhere, the employer is required to keep vaccination information confidential pursuant to the ADA.

K.17. Under the ADA, may an employer offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent? *(5/28/21)*

Yes, if any incentive (which includes both rewards and penalties) is not so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information. As explained in K.16., however, this incentive limitation does not apply if an employer offers an incentive to employees to voluntarily provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or an agent of their employer.

GINA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.18. Under GINA, may an employer offer an incentive to employees to provide documentation or other confirmation that they or their family members received a vaccination from their own health care provider, such as a doctor, pharmacy, health agency, or another health care provider in the community? *(5/28/21)*

Yes. Under GINA, an employer may offer an incentive to employees to provide documentation or other confirmation from a third party not acting on the employer's behalf, such as a pharmacy or health department, that employees or their family members have been vaccinated. If employers ask an employee to show documentation or other confirmation that the employee or a family member has been vaccinated, it is not an unlawful request for genetic information under GINA because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member (known as family medical history under GINA), nor is it any other form of genetic information. GINA's restrictions on employers acquiring genetic information (including those prohibiting incentives in exchange for genetic information), therefore, do not apply.

K.19. Under GINA, may an employer offer an incentive to employees in exchange for the employee getting vaccinated by the employer or its agent? *(5/28/21)*

Yes. Under GINA, as long as an employer does not acquire genetic information while administering the vaccines, employers may offer incentives to employees for getting vaccinated. Because the pre-vaccination medical screening questions for the three COVID-19 vaccines now available do not inquire about genetic information, employers may offer incentives to their employees for getting vaccinated. See **K.14** for more about GINA and pre-vaccination medical screening questions.

K.20. Under GINA, may an employer offer an incentive to an employee in return for an employee's *family member* getting vaccinated by the employer or its agent? *(5/28/21)*

No. Under GINA's Title II health and genetic services provision, an employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history *of the employee*. The regulations implementing Title II of GINA prohibit employers from providing incentives in exchange for genetic information. Therefore, the employer may not offer incentives in exchange for the family member getting vaccinated. However, employers may still offer an employee's family member the opportunity to be vaccinated by the employer or its agent, if they take certain steps to ensure GINA compliance.

K.21. Under GINA, may an employer offer an employee's family member an opportunity to be vaccinated *without* offering the employee an incentive? *(5/28/21)*

Yes. GINA permits an employer to offer vaccinations to an employee's family members if it takes certain steps to comply with GINA. Employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated. Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees. In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about his or her

medical conditions. If these requirements are met, GINA permits the collection of genetic information.

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(Slip Opinion)

Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization

Section 564(e)(1)(A)(ii)(III) of the Food, Drug, and Cosmetic Act concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an emergency use authorization.

July 6, 2021

MEMORANDUM OPINION FOR THE
DEPUTY COUNSEL TO THE PRESIDENT

Section 564 of the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 360bbb-3,[1] authorizes the Food and Drug Administration ("FDA") to issue an "emergency use authorization" ("EUA") for a medical product, such as a vaccine, under certain emergency circumstances. This authorization permits the product to be introduced into interstate commerce and administered to individuals even when FDA has not approved the product for more general distribution pursuant to its standard review process. Section 564 directs FDA—"to the extent practicable" given the emergency circumstances and "as the [agency] finds necessary or appropriate to protect the public health"—to impose "[a]ppropriate" conditions on each EUA. FDCA § 564(e)(1)(A). Some of these conditions are designed to ensure that recipients of the product "are informed" of certain things, including "the option to accept or refuse administration of the product." *Id.* § 564(e)(1)(A)(ii)(III).

Since December 2020, FDA has granted EUAs for three vaccines to prevent coronavirus disease 2019 ("COVID-19"). In each of these authorizations, FDA imposed the "option to accept or refuse" condition by requiring the distribution to potential vaccine recipients of a Fact Sheet that states: "It is your choice to receive or not receive [the vaccine]. Should you decide not to receive it, it will not change your standard medical care." *E.g.*, FDA, Fact Sheet for Recipients and Caregivers at 5 (revised June 25, 2021), https://www.fda.gov/media/144414/download

[1] Because it is commonly referred to by its FDCA section number, and for the sake of simplicity, we will refer to this provision as section 564, rather than by its United States Code citation.

("Pfizer Fact Sheet"). In recent months, many public and private entities have announced that they will require individuals to be vaccinated against COVID-19—for instance, in order to attend school or events in person, or to return to work or be hired into a new job. We will refer to such policies as "vaccination requirements," though we note that these policies typically are conditions on employment, education, receipt of services, and the like rather than more direct legal requirements.[2]

In light of these developments, you have asked whether the "option to accept or refuse" condition in section 564 prohibits entities from imposing such vaccination requirements while the only available vaccines for COVID-19 remain subject to EUAs. We conclude, consistent with FDA's interpretation, that it does not. This language in section 564 specifies only that certain information be provided to potential vaccine recipients and does not prohibit entities from imposing vaccination requirements.[3]

I.

A.

Federal law generally prohibits anyone from introducing or delivering for introduction into interstate commerce any "new drug" or "biological product" unless and until FDA has approved the drug or product as safe and effective for its intended uses. *See, e.g.*, FDCA §§ 301(a), 505(a), 21 U.S.C. §§ 331(a), 355(a); 42 U.S.C § 262(a). A vaccine is both a drug and a biological product. *See* FDCA § 201(g), 21 U.S.C § 321(g); 42 U.S.C. § 262(i)(1). Consistent with section 564, we will generally refer to it here as a "product." *See* FDCA § 564(a)(4)(C) (defining "product" to mean "a drug, device, or biological product").

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[2] For an example of the latter, see our discussion in Part II.B of a hypothetical military order to service members.

[3] We do not address whether other federal, state, or local laws or regulations, such as the Americans with Disabilities Act ("ADA"), might restrict the ability of public or private entities to adopt particular vaccination policies. *See, e.g.*, Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (updated June 28, 2021), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (discussing the ADA).

In 2003, Congress addressed a problem raised in emergency situations where "the American people may be placed at risk of exposure to biological, chemical, radiological, or nuclear agents, and the diseases caused by such agents," but where, "[u]nfortunately, there may not be approved or available countermeasures to treat diseases or conditions caused by such agents," even though "a drug, biologic, or device is highly promising in treating [such] a disease or condition." H.R. Rep. No. 108-147, pt. 1, at 2 (2003). President George W. Bush had flagged this problem in his 2003 State of the Union Address, in which he proposed Project BioShield, a legislative initiative "to quickly make available effective vaccines and treatments against agents like anthrax, botulinum toxin, Ebola, and plague." *Address Before a Joint Session of the Congress on the State of the Union* (Jan. 28, 2003), 1 Pub. Papers of Pres. George W. Bush 82, 86 (2003). Among the principal components of the proposed Project BioShield legislation were provisions to enable FDA 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). At that time, the only alternative to ordinary FDA approval was 21 U.S.C. § 355(i), which authorizes FDA to exempt drugs from the ordinary approval requirements where the drug is "intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety and effectiveness of drugs." Such a cabined investigational new drug ("IND") exemption does not, however, allow the widespread dissemination of a drug for general public use in response to an emergency. *See* H.R. Rep. No. 108-147, pt. 1, at 2.

Congress enacted a version of the Project BioShield legislation's EUA provision in the National Defense Authorization Act for Fiscal Year 2004 as section 564 of the FDCA. *See* Pub. L. No. 108-136, § 1603(a), 117 Stat. 1392, 1684 (2003) (codified at 21 U.S.C. § 360bbb-3).[4] Section 564 authorizes the Secretary of Health and Human Services ("HHS")—who has delegated to FDA the authorities under the statute at issue here—to authorize the introduction into interstate commerce of a drug, device, or biological product intended for use in an actual or potential emergency even though the product has not yet been generally approved as safe and

[4] The statute has been amended since, including when Congress enacted the Project BioShield Act the following year. *See* Pub. L. No. 108-276, § 4(a), 118 Stat. 835, 853 (2004).

effective for its intended use. FDCA § 564(a)(1)–(2); *see also* FDA, *Emergency Use Authorization of Medical Products and Related Authorities: Guidance for Industry and Other Stakeholders* at 3 n.6 (Jan. 2017) ("EUA Guidance") (noting delegation of most of the Secretary's authorities under section 564 to FDA).[5]

The most pertinent part of section 564 for purposes of your question has remained materially the same since Congress first enacted the statute in 2003. Subsection (e)(1)(A),[6] titled "Required conditions," provides:

> With respect to the emergency use of an unapproved product, the Secretary, to the extent practicable given the applicable [emergency] circumstances . . . , 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 [certain specified conditions].

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[5] The current version of section 564(a)(1) provides in full:

> 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").

The "declaration under subsection (b)" refers to a declaration by the Secretary "that the circumstances exist justifying" an EUA, which must be made "on the basis" of one or more types of emergencies or threats. FDCA § 564(b)(1). FDA can grant an EUA where, "based on the totality of scientific evidence available to the Secretary, including data from adequate and well-controlled clinical trials, if available," FDA finds that "it is reasonable to believe," among other things, that "the product may be effective in diagnosing, treating, or preventing" a "serious or life-threatening disease or condition" caused by a "biological, chemical, radiological, or nuclear agent or agents" (a standard less onerous than for final approval of the product); 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 that "there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition." FDCA § 564(c).

[6] Subsection (e)(1) applies to a product that FDA has not approved as safe and effective for any intended use, whereas subsection (e)(2) applies to an unapproved use of an otherwise approved product. The COVID-19 vaccines fall under the former category, but the statute applies the condition at issue here to the latter category as well. *See* FDCA § 564(e)(2)(A).

The statute then lists a number of such conditions, including "[a]ppropriate conditions designed to ensure that individuals to whom the product is administered are informed" of certain information. FDCA § 564(e)(1)(A)(ii). This information includes the fact that FDA "has authorized the emergency use of the product," "the significant known and potential benefits and risks of such use," and "the extent to which such benefits and risks are unknown." *Id.* § 564(e)(1)(A)(ii)(I)–(II). Most relevant here, section 564(e)(1)(A)(ii)(III) directs FDA to impose conditions on an EUA "designed to ensure that individuals to whom the product is administered are informed . . . 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."

In the same section of the 2004 National Defense Authorization Act, Congress also enacted another provision, codified as 10 U.S.C. § 1107a, which is specific to the U.S. military and which expressly refers to the "option to accept or refuse" condition described in section 564(e)(1)(A)(ii)(III). Pub. L. No. 108-136, sec. 1603(b)(1), § 1107a, 117 Stat. at 1690. Subsection (a) of this law provides that when an EUA product is administered to members of the armed forces, "the condition described in section 564(e)(1)(A)(ii)(III) . . . and required under paragraph (1)(A) or (2)(A) of such section 564(e), designed to ensure that individuals are informed of an option to accept or refuse administration of a product, may be waived only by the President" and "only if the President determines, in writing, that complying with such requirement is not in the interests of national security." 10 U.S.C. § 1107a(a)(1).

B.

In the years after Congress enacted section 564, FDA issued dozens of EUAs in response to various public-health emergencies. *See, e.g.*, Authorization of Emergency Use of the Antiviral Product Peramivir Accompanied by Emergency Use Information; Availability, 74 Fed. Reg. 56,644 (Nov. 2, 2009) (antiviral drug to treat swine flu). The agency's use of EUAs increased dramatically with the onset of the COVID-19 pandemic in 2020. As of January 2021, the agency had issued more than 600 EUAs for products to combat COVID-19, including drugs, tests, personal protective equipment, and ventilators. *See* FDA, *FDA COVID-19 Pandemic*

Recovery and Preparedness Plan (PREPP) Initiative: Summary Report at 6 (Jan. 2021); *cf. id.* at 24 (noting that FDA issued 65 EUAs prior to COVID-19). More importantly for present purposes, the agency has granted EUAs for three COVID-19 vaccines manufactured by Pfizer, Moderna, and Janssen, respectively. *See* Authorizations of Emergency Use of Certain Biological Products During the COVID-19 Pandemic; Availability, 86 Fed. Reg. 28,608 (May 27, 2021) (Janssen); Authorizations of Emergency Use of Two Biological Products During the COVID-19 Pandemic; Availability, 86 Fed. Reg. 5200 (Jan. 19, 2021) (Pfizer and Moderna).

As we have explained, section 564 of the FDCA contemplates that each EUA will be subject to various conditions. For the three COVID-19 vaccines, FDA implemented the "option to accept or refuse" condition described in section 564(e)(1)(A)(ii)(III) in the following manner: In each letter granting the EUA, FDA established as a "condition[] of authorization" that FDA's "Fact Sheet for Recipients and Caregivers" be made available to potential vaccine recipients. *See, e.g.*, Letter for Pfizer Inc. from RADM Denise M. Hinton, Chief Scientist, FDA at 6, 9 (updated June 25, 2021), https://www.fda.gov/media/150386/download ("Pfizer EUA Letter"). The Fact Sheet in question states (to take the Pfizer vaccine as an example): "It is your choice to receive or not receive the Pfizer-BioNTech COVID-19 Vaccine. Should you decide not to receive it, it will not change your standard medical care." Pfizer Fact Sheet at 5. We understand that this approach is consistent with FDA's general practice for EUAs. *See* EUA Guidance at 24–25 (discussing the use of fact sheets to inform recipients of EUA products "[t]hat they have the option to accept or refuse the EUA product and of any consequences of refusing administration of the product").

As access to the COVID-19 vaccines has become widespread, numerous educational institutions, employers, and other entities across the United States have announced that they will require individuals to be vaccinated against COVID-19 as a condition of employment, enrollment, participation, or some other benefit, service, relationship, or access.[7] For

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[7] *See, e.g.*, Rukmini Callimachi, *For Colleges, Vaccine Mandates Often Depend on Which Party Is in Power*, N.Y. Times (May 22, 2021), https://www.nytimes.com/2021/05/22/us/college-vaccine-universities.html; Tracy Rucinski, *Delta will require COVID-19*

instance, certain schools will require vaccination in order for students to attend class in person, and certain employers will require vaccination as a condition of employment.

Some have questioned whether such entities can lawfully impose such requirements in light of the fact that section 564 instructs that potential vaccine recipients are to be informed that they have the "option to accept or refuse" receipt of the vaccine.[8] In the past few months, several lawsuits have also been filed challenging various entities' vaccination requirements on the same theory.[9] The only judicial decision to have addressed this issue so far summarily rejected the challenge. *See Bridges v. Houston Methodist Hosp.*, No. 4:21-cv-01774, 2021 WL 2399994, at *1–2 (S.D. Tex. June 12, 2021), *appeal docketed*, No. 21-20311 (5th Cir. June 14, 2021).

II.

A.

We conclude that section 564(e)(1)(A)(ii)(III) concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for vaccines that are subject to EUAs. By its terms, the provision directs only that potential vaccine recipients be "informed" of certain information, including "the option to accept or refuse administration of the product."

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vaccine for new employees, Reuters (May 14, 2021, 9:16 AM), https://www.reuters.com/world/us/delta-will-require-covid-19-vaccine-new-employees-2021-05-14/.

[8] *See, e.g.*, Letter for Thomas C. Galligan Jr., Interim President, Louisiana State University, from Jeff Landry, Attorney General of Louisiana (May 28, 2021); *see also* Advisory Committee on Immunization Practices, Summary Report at 56 (Aug. 26, 2020), https://www.cdc.gov/vaccines/acip/meetings/downloads/min-archive/min-2020-08-508.pdf (reporting a CDC official as saying that EUA vaccines are not allowed to be mandatory).

[9] *See, e.g.*, Defendant's Notice of Removal, *Bridges v. Methodist Hosp.*, No. 4:21-cv-01774 (S.D. Tex. June 1, 2021), 2021 WL 2221293 (referencing complaint); Complaint, *Neve v. Birkhead*, No. 1:21-cv-00308 (M.D.N.C. Apr. 16, 2021), 2021 WL 1902937; Complaint, *Cal. Educators for Med. Freedom v. L.A. Unified Sch. Dist.*, No. 21-cv-2388 (C.D. Cal. Mar. 17, 2021), 2021 WL 1034618; Complaint, *Legaretta v. Macias*, No. 2:21-cv-00179 (D.N.M. Feb. 28, 2021), 2021 WL 909707; *see also* Complaint, *Health Freedom Defense Fund v. City of Hailey*, No. 1:21-cv-00212-DCN (D. Idaho May 14, 2021), 2021 WL 1944543 (making a similar argument about a face-mask requirement).

FDCA § 564(e)(1)(A)(ii)(III). In the sense used here, the word "inform" simply means to "give (someone) facts or information; tell." *New Oxford American Dictionary* 891 (3d ed. 2010); *see also, e.g.*, *Webster's Third New International Dictionary* 1160 (2002) (similar). Consistent with this understanding, the conditions of authorization that FDA imposed for the COVID-19 vaccines require that potential vaccine recipients receive FDA's Fact Sheet, *see, e.g.*, Pfizer EUA Letter at 6, 9, which states that recipients have a "choice to receive or not receive" the vaccine, *see, e.g.*, Pfizer Fact Sheet at 5. Neither the statutory conditions of authorization nor the Fact Sheet itself purports to restrict public or private entities from insisting upon vaccination in any context. *Cf. Bridges*, 2021 WL 2399994, at *2 (explaining that section 564 "confers certain powers and responsibilities to the Secretary of [HHS] in an emergency" but that it "neither expands nor restricts the responsibilities of private employers").[10]

The language of another provision of section 564 reflects the limited scope of operation of section 564(e)(1)(A)(ii)(III). Section 564(*l*) provides that "this section [i.e., section 564] only has legal effect on a person who carries out an activity for which an authorization under this section is issued." This provision expressly forecloses any limitation on the activities of the vast majority of entities who would insist upon vaccination requirements, because most do not carry out any activity for which an EUA is issued.

To be sure, the EUA conditions effectively require parties administering the products to do so in particular ways—including that they only administer the products to individuals after providing them the informational Fact Sheets that FDA prescribes—and some of those entities,

[10] Earlier-introduced versions of section 564(e)(1)(A)(ii)(III) in 2003 referred to "*any* option to accept or refuse administration of the product" (as opposed to "the" option), a formulation that might have even more clearly conveyed the informational nature of the condition. *See, e.g.*, S. 15, 108th Cong. § 204 (Mar. 11, 2003) (emphasis added). We have not found any explanation for why Congress revised the provision to refer to "the option," so we ascribe little significance to the change—either for or against our reading of the statute. *See Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); *Trainmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947) ("The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers."). In 10 U.S.C. § 1107a(a), moreover, Congress used the alternative formulation "*an* option to accept or refuse" in referring to the condition in section 564(e)(1)(A)(ii)(III) as it relates to the armed forces. (Emphasis added.) This discrepancy counsels further against assigning interpretive weight to the change from "any" to "the" in the legislative development of section 564.

such as universities, might also impose vaccination requirements (e.g., on their students and employees). There is no indication, however, that Congress intended to regulate such entities except with respect to the circumstances of their administration of the product itself. *See, e.g.*, FDCA § 564(e)(1)(B)(ii) (authorizing FDA to establish "[a]ppropriate 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*" (emphasis added)). And it would have been odd for Congress to have done so, for in that case the entities choosing to administer EUA products would be limited in their relations with third parties (e.g., students, employees) in ways that analogous entities that did not administer the products were not.

This reading of the "option to accept or refuse" condition to be informational follows not only from the plain text of the provision, but also from the surrounding requirements in section 564(e)(1)(A)(ii). *See, e.g.*, *Lagos v. United States*, 138 S. Ct. 1684, 1688–89 (2018) (relying on the canon of "*noscitur a sociis*, the well-worn Latin phrase that tells us that statutory words are often known by the company they keep"). In addition to requiring that potential recipients be informed of "the option to accept or refuse administration of the product," the statute also requires that they be informed 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." FDCA § 564(e)(1)(A)(ii)(III). Similarly, the two other provisions in subsection (e)(1)(A)(ii) require that individuals be informed of the fact that FDA "has authorized the emergency use of the product" and of "the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown." *Id.* § 564(e)(1)(A)(ii)(I)–(II). These provisions all appear to require only that certain factual information be conveyed to those who might use the product.

Indeed, if Congress had intended to restrict entities from imposing EUA vaccination requirements, it chose a strangely oblique way to do so, embedding the restriction in a provision that on its face requires only that individuals be provided with certain information (and grouping that requirement with other conditions that are likewise informational in nature). Congress could have created such a restriction by simply stating that persons (or certain categories of persons) may not require others to

use an EUA product. *See Kloeckner v. Solis*, 568 U.S. 41, 52 (2012) (rejecting a statutory interpretation positing that Congress took a "roundabout way" and an "obscure path" to reach "a simple result"); *cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes").

Our reading of section 564(e)(1)(A)(ii)(III) does not fully explain why Congress created a scheme in which potential users of the product would be informed that they have "the option to accept or refuse" the product. The legislative history of the 2003 statute does not appear to offer any clear explanation. Perhaps Congress viewed section 564(e)(1)(A)(ii)(III) as a variation on the "informed consent" requirement that applies to human subjects in "investigational drug" settings,[11] the only other context in which FDA may (in a limited fashion) authorize the introduction of unapproved drugs into interstate commerce. Or perhaps Congress included this condition to ensure that potential users of an EUA product would not misunderstand what the likely impact of declining to use that product would be.

The information conveyed pursuant to the "option" clause continues to be a true statement about a material fact of importance to potential vac-

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[11] Section 355(i)(4) of title 21 provides that an IND exemption to the premarket approval requirement may only apply if the manufacturer or sponsor of an expert investigation requires the experts in question to certify

> 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.

Congress did not include this same "informed consent" requirement as part of the EUA provision in 2003, perhaps out of concern that it would not be practicable in emergency situations. *See Project BioShield: Contracting for the Health and Security of the American Public: Hearing Before the H. Comm. on Gov't Reform*, 108th Cong. 33 (Apr. 4, 2003) (statement of Mark B. McClellan, Commissioner, FDA, and Anthony S. Fauci, Director, National Institute of Allergy and Infectious Diseases) ("Because urgent situations may require mass inoculations and/or drug treatments, such informed consent requirements may prove impossible to implement within the necessary time frame when trying to achieve the public health goal of protecting Americans from the imminent danger."); *see also infra* note 15 (explaining that the informed consent requirements contained in 21 U.S.C. § 355(i)(4) do not apply to EUA products).

cine recipients—virtually all such persons continue to have the "option" of refusing the vaccine in the sense that there is no direct legal requirement that they receive it. *See Bridges*, 2021 WL 2399994, at *2 (noting that an employer's vaccination policy was not "coercive" because an employee "can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else"); Wen W. Shen, Cong. Research Serv., R46745, *State and Federal Authority to Mandate COVID-19 Vaccination* at 4 (Apr. 2, 2021) ("[E]xisting vaccination mandates—as they are typically structured—generally do not interfere with . . . an individual's right to refuse in that context. Rather, they impose secondary consequences—often in the form of exclusion from certain desirable activities, such as schools or employment—in the event of refusal." (footnote omitted)); *Black's Law Dictionary* 1121 (7th ed. 1999) (defining "option" as relevant here as "[t]he right or power to choose; something that may be chosen"); *The American Heritage Dictionary of the English Language* 1235 (4th ed. 2000) (similar); *cf.* FDCA § 564(e)(1)(A)(ii)(III) (directing that potential vaccine recipients be informed not only of "the option to accept or refuse administration of the product" but also of "the *consequences*, if any, of refusing administration of the product" (emphasis added)).

Importantly, however, and consistent with FDA's views, we also read section 564 as giving FDA some discretion to modify or omit "the option to accept or refuse" notification, or to supplement it with additional information, if and when circumstances change. As noted above, the statute directs FDA to establish the section 564(e)(1)(A) conditions "to the extent practicable given the applicable [emergency] circumstances" and "as the [agency] finds necessary or appropriate to protect the public health." FDCA § 564(e)(1)(A). Both of these phrases—"to the extent practicable" and "as the [agency] finds necessary or appropriate"—are generally understood to confer discretion on an agency. *See, e.g.*, *Gallegos-Hernandez v. United States*, 688 F.3d 190, 195 (5th Cir. 2012) (per curiam) ("to the extent practicable"); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1128 (6th Cir. 1996) (collecting cases on "necessary" and "appropriate"). Moreover, the portion of section 564 that deals specifically with informational conditions provides that FDA should establish "[a]ppropriate" conditions designed to ensure that potential vaccine recipients are informed of the "option to accept or refuse" an EUA product. FDCA § 564(e)(1)(A)(ii). These qualifiers indicate that FDA's responsibility to

impose the "option to accept or refuse" condition is not absolute and that the agency has some discretion to modify or omit the condition when the agency finds the notification would not be "practicable" given the emergency circumstances, or to determine that changes to the notification are "necessary or appropriate to protect the public health." *See* EUA Guidance at 24 n.46 (noting circumstances in which the "option to accept or refuse" notification might not be practicable).[12] In addition, section 564 gives FDA the authority to supplement the information that is conveyed to potential vaccine recipients, including information about "the consequences, if any, of refusing administration of the product." FDCA § 564(e)(1)(A)(ii)(III); *see also id.* § 564(e)(1)(B) (noting that FDA has the authority to impose additional conditions as the agency "finds necessary or appropriate to protect the public health"); EUA Guidance at 22 n.40, 26–27 (noting this point). Together, then, these provisions of section 564 give FDA the authority to adapt to changing circumstances and to ensure that the information conveyed to potential users of EUA products is accurate.[13]

Although many entities' vaccination requirements preserve an individual's ultimate "option" to refuse an EUA vaccine, they nevertheless impose sometimes-severe adverse consequences for exercising that option (such as not being able to enroll at a university). Under such circumstances, FDA could theoretically choose to supplement the conditions of authorization to notify potential vaccine recipients of the possibility of such consequences (or to make it even clearer that the consequences described

[12] Indeed, FDA has recently exercised its discretion not to require certain of the statutorily specified conditions with respect to the current COVID-19 pandemic. We understand that FDA has amended or plans to amend the EUAs for the COVID-19 vaccines so as not to require compliance with several of the conditions—including the "option to accept or refuse" notification—when the vaccines are exported to other countries. *See, e.g.*, Pfizer EUA Letter at 10.

[13] Congress's use of the phrase "Required conditions" in the title of subsection (e)(1)(A) and its specification of certain conditions in the statute suggest that Congress may have presumed that FDA would generally find that the specified conditions are "necessary or appropriate" and thus impose them. As we discuss above, however, the operative text of section 564 indicates that FDA has some discretion to modify, omit, or supplement the conditions in some circumstances. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021) ("[A] title or heading should never be allowed to override the plain words of a text." (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 222 (2012)) (alteration in original)).

in the Fact Sheets are limited to consequences related to medical care). As we have noted, however, section 564 does not limit the ability of entities to impose vaccination requirements, and FDA would not be required to change the Fact Sheets in order to allow them to impose such requirements.[14]

* * * * *

As noted above, FDA agrees with our interpretation of section 564. On a few occasions, however, FDA has made statements that could be understood as saying that the condition described in section 564(e)(1)(A)(ii)(III) prohibits entities (particularly the U.S. military) from requiring the use of EUA products. In 2005, for instance, FDA issued an EUA that permitted the use of a vaccine for the prevention of inhalation anthrax by individuals between 18 and 65 years of age who were deemed by the Department of Defense ("DOD") to be at heightened risk of exposure due to an attack with anthrax. As a condition of that authorization, the agency required DOD to inform potential vaccine recipients "of the option to accept or refuse administration of [the vaccine]." Authorization of Emergency Use of Anthrax Vaccine Adsorbed for Prevention of Inhalation Anthrax by Individuals at Heightened Risk of Exposure Due to Attack With Anthrax; Availability, 70 Fed. Reg. 5452, 5455 (Feb. 2, 2005). That EUA continued:

> With respect to [the] condition . . . relating to the option to accept or refuse administration of [the vaccine], the [immunization program] will be revised to give personnel the option to refuse vaccination. Individuals who refuse anthrax vaccination will not be punished. Refusal may not be grounds for any disciplinary action under the Uniform Code of Military Justice. Refusal may not be grounds for any adverse personnel action. Nor would either military or civilian personnel be considered non-deployable or processed for separation

[14] FDA further informs us that, wholly apart from FDA's own authority to change the Fact Sheet, nothing in the FDCA would prohibit an administrator of the vaccine who also has a relationship with the individuals to whom the vaccine is offered (e.g., students in a university that offers the vaccine) from supplementing the FDA Fact Sheet at the point of administration with factually accurate information about the possible nonmedical consequences of the person choosing not to use the product (e.g., that she might not be permitted to enroll).

> based on refusal of anthrax vaccination. There may be no penalty or loss of entitlement for refusing anthrax vaccination.

Id.; *see also id.* (allowing DOD to inform recipients that "military and civilian leaders strongly recommend anthrax vaccination, but . . . individuals [subject to the vaccination program] may not be forced to be vaccinated" and that "the issue of mandatory vaccination will be reconsidered by [DOD] after FDA completes its administrative process."). FDA included the same information in its later extension of that EUA. *See* Authorization of Emergency Use of Anthrax Vaccine Adsorbed for Prevention of Inhalation Anthrax by Individuals at Heightened Risk of Exposure Due to Attack With Anthrax; Extension; Availability, 70 Fed. Reg. 44,657, 44,659–60 (Aug. 3, 2005).

In addition, although it is less than clear, certain FDA guidance could be read as saying that section 564 confers an affirmative "option" or "opportunity" to refuse EUA products. *See* EUA Guidance at 24 n.46 (implying that the condition in section 564(e)(1)(A)(ii)(III)—which is subject to waiver for the armed forces under 10 U.S.C. § 1107a—protects "the option for members of the armed forces to accept or refuse administration of an EUA product"); *Guidance Emergency Use Authorization of Medical Products*, 2007 WL 2319112, at *15 (July 1, 2007) (stating that "[r]ecipients must have an opportunity to accept or refuse the EUA product").

These statements do not affect our conclusion. Neither the 2005 anthrax vaccine EUA nor the later FDA guidance articulated a legal interpretation of section 564(e)(1)(A)(ii)(III)'s text. And FDA appears to have insisted upon the voluntariness requirement for DOD in the anthrax vaccine EUA because of then-recent litigation in which a court enjoined DOD from implementing a mandatory vaccination program based upon a different statutory provision that is inapplicable to EUAs. *See Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004) (relying on 10 U.S.C. § 1107); *Doe v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C. 2003) (same); *see also* 70 Fed. Reg. at 44,660 (requiring DOD to tell vaccine recipients the following: "On October 27, 2004, the U.S. District Court for the District of Columbia issued an Order declaring unlawful and prohibiting mandatory anthrax vaccinations to protect against inhalation anthrax, pending further FDA action. The *Court's injunction* means you have the right to refuse to take the vaccine without fear of retaliation." (emphasis added)); 70 Fed. Reg.

at 5454 (discussing litigation); *see also infra* note 15 (explaining that 10 U.S.C. § 1107(f) is inapplicable to EUAs).

B.

Section 564(e)(1)(A)(ii)(III) also raises a question about how to understand its cognate provision regarding the use of EUA products by the armed forces. As we noted above, in the same 2003 legislation that first created section 564, Congress also added the following provision to title 10 of the United States Code:

> In the case of the administration of [an EUA] product . . . to members of the armed forces, the condition described in section 564(e)(1)(A)(ii)(III) . . . and required under paragraph (1)(A) or (2)(A) of such section 564(e), designed to ensure that individuals are informed of an option to accept or refuse administration of a product, may be waived only by the President only if the President determines, in writing, that complying with such requirement is not in the interests of national security.

10 U.S.C. § 1107a(a)(1).[15] On its own terms, this provision appears to be consistent with—and even to support—our reading of section 564, as it likewise describes the "option to accept or refuse" condition in purely informational terms. The language refers to the President's authority to

[15] Section 1107(f) of title 10—an earlier-enacted provision—contains a similar, but importantly different, waiver authority. Specifically, that provision authorizes the President, "[i]n the case of the administration of an [IND] or a drug unapproved for its applied use to a member of the armed forces in connection with the member's participation in a particular military operation," to waive "the prior consent requirement imposed under [21 U.S.C. § 355(i)(4)]." 10 U.S.C. § 1107(f)(1). That "prior consent requirement," which is imposed for purposes of the human clinical trials for which FDA authorizes "investigational" use of unapproved drugs, *see* 21 U.S.C. § 355(i)(4), does not apply to EUA products, which typically are more widely available, *see* FDCA § 564(k); EUA Guidance at 24 ("informed consent as generally required under FDA regulations is not required for administration or use of an EUA product" (footnote omitted)). Thus, the waiver provision in section 1107(f) is inapplicable to EUA products. *See* 10 U.S.C. § 1107(f)(2) (explaining that this waiver authority applies only in cases in which "prior consent for administration of a particular drug is required" because the Secretary of HHS determines that the drug "is subject to the [IND] requirements of [21 U.S.C. § 355(i)]"); *see also id.* § 1107(f)(4) (defining the relevant consent requirements as those in 21 U.S.C. § 355(i)).

waive a requirement to provide certain information, not to waive any right or affirmative "option" to refuse administration of the product itself.

On the other hand, the conference report on the legislation that created both section 564 of the FDCA and section 1107a of title 10 described the latter provision in the following way:

> [This provision] would authorize the President to waive *the right of service members to refuse administration of a product* if the President determines, in writing, that affording service members the right to refuse the product is not feasible, is contrary to the best interests of the members affected, or is not in the interests of national security.

H.R. Rep. No. 108-354, at 782 (2003) (Conf. Rep.) (emphasis added). This language indicates that the conferees may have believed that section 1107a concerns some "right" of members of the armed forces to refuse the use of EUA products. And that belief may help to explain why section 1107a allows only the President to exercise the waiver authority.

Consistent with this legislative history and the vesting of the waiver authority in the President, DOD informs us that it has understood section 1107a to mean that DOD may not require service members to take an EUA product that is subject to the condition regarding the option to refuse, unless the President exercises the waiver authority contained in section 1107a. *See* DOD Instruction 6200.02, § E3.4 (Feb. 27, 2008) ("In the event that an EUA granted by the Commissioner of Food and Drugs includes a condition that potential recipients *are provided an option* to refuse administration of the product, the President may . . . waive *the option* to refuse for administration of the medical product to members of the armed forces." (emphasis added)). Moreover, we understand that DOD's position reflects the concern that service members, unlike civilian employees, could face serious criminal penalties if they refused a superior officer's order to take an EUA product. *See* 10 U.S.C. § 890; *see also United States v. Kisala,* 64 M.J. 50 (C.A.A.F. 2006) (upholding a soldier's punishment for refusing to take a vaccine). In this way, service members do not have the same "option" to refuse to comply with a vaccination requirement as other members of the public.

As noted above, it does appear that certain members of Congress thought that section 1107a concerned a prohibition against requiring service members to take an EUA product—perhaps on the view that the

waiver authority in section 1107a paralleled the one in 10 U.S.C. § 1107(f), which does effectively prohibit the administration of an IND product in a clinical trial without first obtaining the individual's affirmative, informed *consent*. *See supra* note 15 (distinguishing these waiver authorities).[16] As explained, however, that intent or expectation is not realized in the text of section 564(e)(1)(A)(ii)(III), which section 1107a expressly cross-references. *Cf. Steinle v. City & Cty. of San Francisco*, 919 F.3d 1154, 1164 n.11 (9th Cir. 2019) ("[T]he plain and unambiguous statutory text simply does not accomplish what the Conference Report says it was designed to accomplish."); *Goldring v. Dist. of Columbia*, 416 F.3d 70, 75 (D.C. Cir. 2005) ("A sentence in a conference report cannot rewrite unambiguous statutory text[.]").[17] We therefore conclude that section 1107a does not change our interpretation of section 564 of the FDCA.

As for DOD's concern about service members who would lack a meaningful option to refuse EUA products because of the prospect of sanction, including possibly prosecution, we note that any difference between our view and the assumption reflected in the conference report should have limited practical significance. Given that FDA has imposed the "option to accept or refuse" condition for the COVID-19 vaccines by requiring

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[16] It is possible the conferees assumed that the new EUA legislation would, in effect, carry over from the earlier IND provision of the FDCA, *see supra* Part I.A and note 11, the condition that a covered product may not be administered to an individual without that person's express, informed consent—a condition that applies to the military when it undertakes the sort of clinical trial with an IND that 21 U.S.C. § 355(i) governs, *see supra* note 11. Congress did not include such a consent requirement in section 564, however, perhaps because EUA products are not limited, as INDs are, to use in human clinical trials, but are instead authorized for more widespread use in the case of a declared emergency. *See supra* Part I.A and notes 11 & 15.

[17] Moreover, the legislative history as a whole is not uniform on this point. The earlier House report, for instance, described the condition in purely informational terms. *See* H.R. Rep. No. 108-147, pt. 3, at 33 (2003) ("New section 564(k) [an earlier but similarly worded version of what became 10 U.S.C. § 1107a] pertains to members of the Armed Forces and, among other things, it specifies that the President may waive requirements designed to ensure that such members are *informed* of the option to accept or refuse administration of an emergency use product, upon certain findings[.]" (emphasis added)); *see also Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (noting that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it," and thus, "[w]hen presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language").

distribution of its Fact Sheet containing the "[i]t is your choice to receive or not receive" language, DOD is required to provide service members with the specified notification unless the President waives the condition pursuant to 10 U.S.C. § 1107a. And because DOD has informed us that it understandably does not want to convey inaccurate or confusing information to service members—that is, telling them that they have the "option" to refuse the COVID-19 vaccine if they effectively lack such an option because of a military order—DOD should seek a presidential waiver before it imposes a vaccination requirement.

III.

For the reasons set forth above, we conclude that section 564 of the FDCA does not prohibit public or private entities from imposing vaccination requirements, even when the only vaccines available are those authorized under EUAs.

DAWN JOHNSEN
Acting Assistant Attorney General
Office of Legal Counsel

Published on *The National Law Review* (http://www.natlawreview.com)

U.S. Department of Justice Gives Go-Ahead to Mandatory COVID-19 Vaccines in the Workplace

Article By:
Natalie D. Fluker
John A. Rubin

As employers nationwide have begun to implement mandatory COVID-19 vaccine requirements in the workplace, legal questions have been presented as to whether these vaccine requirements are legally permissible under various laws. While the EEOC has issued guidance that generally permits mandatory vaccine requirements in the workplace so long as reasonable accommodations are offered for those with disabilities or sincerely held religious beliefs, questions still remained as to whether mandatory workplace vaccine requirements were permissible under other laws, such as the Food, Drug and Cosmetic Act (FDCA), given the Emergency Use Authorization (EUA) process.

DOJ's July 6, 2021, Memorandum Opinion now opines that mandatory workplace vaccine policies are permissible under the FDCA. Specifically, Section 564 of the FDCA permits employers to impose the COVID-19 vaccination as a condition of employment even when the vaccine is subject to EUA. This opinion applies to both public and private employers outside of the context of the armed forces.

The DOJ emphasized that vaccine mandates are not coercive: They do not strip employees of their rights to refuse a vaccine or not. Although Section 564 states that recipients must be informed of "the option to accept or refuse administration" of the vaccine, Section 564's mandates are merely informational. As with other conditions of employment, discipline up to termination can be an acceptable consequence for employee refusal to adhere to an otherwise valid employer vaccination policy. Employees can freely choose to accept or refuse a COVID-19 vaccine but will need to work elsewhere if they refuse vaccination against the employer's policy.

It is important to note that DOJ's opinion is narrow, only addressing the permissibility of the COVID-19 vaccine under one federal statute. Many other state and local laws may apply, such as state and local equal employment opportunity laws and regulations. In addition, there are a multitude of practical considerations in mandating vaccination.

Practical Considerations for Employers:

Employers must decide how to ensure a safe and compliant workplace while considering employee rights and concerns about COVID-19 vaccinations. The following are some considerations that are important for employers to address in light of the DOJ guidance:

1. Determine whether to mandate the COVID-19 vaccine or implement other avenues for increasing vaccination rates, such as incentivization;
2. Consider instituting or updating company-wide COVID-19 vaccination policies;
3. Review prior EEOC guidance to determine how to accommodate employees with disabilities or religious objections to the vaccine;
4. Review current policies and procedures to ensure proper handling of any accommodation requests;

5. Keep employee vaccination status as confidential medical information;
6. Monitor CDC and OSHA websites to keep current with guidance;
7. Update COVID-19 policies to determine which employees will be subject to masking and social distancing in light of the CDC Guidance;
8. Keep informed of any local public health rules and regulations requiring masking;
9. Employers maintaining workplaces with employees subject to collective bargaining agreements must consider any bargaining obligations with the Union prior to instituting or modifying vaccination policies;
10. Train supervisors and managers on COVID-19 policies.

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National Law Review, Volume XI, Number 214
Source URL: https://www.natlawreview.com/article/us-department-justice-gives-go-ahead-to-mandatory-covid-19-vaccines-workplace

PROCLAMATION OF EXISTENCE OF A COUNTY EMERGENCY

WHEREAS, ordinance 99 of Milwaukee County and State Statute 323, empowers the Director of Emergency Management to proclaim the existence or threatened existence of local emergency when said county is affected or likely to be affected by an extraordinary disturbance and/or civil unrest and the County Board is not in session; and

WHEREAS, the Director of Emergency Management of Milwaukee County does hereby find:

Milwaukee County sustained flooding and major damage to its shoreline, infrastructure and recreational areas caused by the severe weather event occurring Friday, January 10th through Sunday, January 13th 2020.

; now, therefore,

IT IS HEREBY PROCLAIMED, that a local emergency now exists throughout Milwaukee County; and

IT IS FURTHER PROCLAIMED AND ORDERED that during the existence of said local emergency the powers, functions and duties of the emergency management organization of this County shall be those prescribed by State law, and by ordinances and resolutions of this County, and by the Milwaukee County Comprehensive Emergency Management Plan, as approved by the Milwaukee County Board of Supervisors.

DECLARATION OF A MAJOR DISASTER

WHEREAS, the County of Milwaukee has sustained losses of a major proportion, caused by

Sustained strong easterly fetch winds at 50-60 mph producing large waves and flooding, resulting in lakeshore damage to property, infrastructure and erosion of bluffs. Lake Michigan water levels are at near record levels at approximately four feet over normal heights.

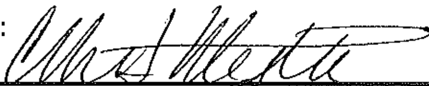
and;

WHEREAS, substantial damage has been incurred to public and private property; now, therefore,

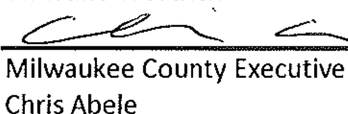
BE IT RESOLVED, that the County Executive, for and on behalf of the citizens of Milwaukee County, requests the Governor to provide state disaster relief for Milwaukee County to alleviate the damages, and, if necessary, to request a declaration by the President of the United States that a major disaster exists in order to secure Public Assistance and Human Services Programs as offered through PL 100-707, and the Hazard Mitigation Program, as offered through PL 100-707.

BE IT FURTHER RESOLVED, that the County Emergency Management Director is authorized to assist in the response and administration of the disaster recovery process and to coordinate damage assessment survey teams with local units of government and, as needed.

Adopted this 17th day of January, 2020.

Signed: 

Milwaukee County Office of Emergency Management, Director
Christine Westrich



Milwaukee County Executive
Chris Abele

Milwaukee County

Signature Copy

Action Report: 20-144

File Number: 20-144

From the Director, Milwaukee County Office of Emergency Management, requesting ratification of the Proclamation of Existence of a County Emergency, dated January 17,2020, requesting the Governor to provide state disaster relief for Milwaukee County and if necessary, to request a declaration by the President of the United States in order to secure public assistance as offered through the Robert T. Stafford Act

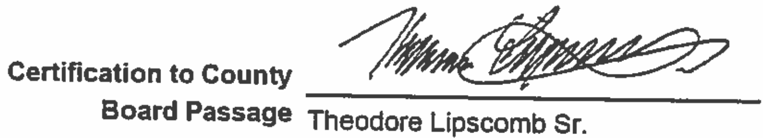
See Attachments

The attached resolution or ordinance was adopted by the Milwaukee County Board of Supervisors on 2/6/2020 by the following vote:

Ayes: 17 Alexander, Cullen, Dimitrijevic, Haas, Johnson Jr., Logsdon, Moore Omokunde, Nicholson, Ortiz-Velez, Schmitt, Sebring, Shea, Staskunas, Taylor , Wasserman, Weishan Jr., and Lipscomb Sr.

Excused: 1 Martin

Certification to County Board Passage



Theodore Lipscomb Sr. Date FEB 10 2020

Certification of County Board Passage

George Christenson Date FEB 10 2020

I approve the attached resolution or ordinance.

Chris Abele Date 2/27/2020

Received by County Clerk's Office

George Christenson Date FEB 28 2020