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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 22-5154

[Filed March 21, 2023]

JASON PAYNE,)
APPELLANT)
)
v.)
)
JOSEPH R. BIDEN, JR., PRESIDENT, ET AL.,)
APPELLEES)

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-03077)

Argued November 2, 2022
Decided March 21, 2023

Gene P. Hamilton argued the cause for appellant. On the brief was *Reed D. Rubinstein*. *Andrew Block* entered an appearance.

Daniel Winik, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant

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Attorney General, and *Charles W. Scarborough* and *Casen Ross*, Attorneys.

Before: WILKINS and WALKER, *Circuit Judges*, and ROGERS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

WILKINS, *Circuit Judge*: In 1978, Congress enacted the Civil Service Reform Act (“CSRA”) to provide a subset of federal employees with access to administrative and judicial review to contest certain adverse employment actions. The Supreme Court has confirmed, as recently as 2012, that Congress intended this statutory scheme to preclude district court jurisdiction over certain claims. *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 5 (2012). In practice, such preclusion does not obstruct an employee’s access to judicial review, but instead redirects the avenue through which the employee may proceed.

In September 2021, President Biden issued Executive Order No. 14,043, mandating that all executive branch employees obtain the COVID-19 vaccination, subject to medical or religious exception. Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sept. 9, 2021). This Order also directs the Safer Federal Workforce Task Force to provide guidance as to how the vaccine mandate should be implemented. *Id.* at 50,989–90; *see* Exec. Order No. 13,991, 86 Fed. Reg. 7045, 7046 (Jan. 20, 2021) (establishing the Safer Federal Workforce Task Force). In doing so, the Task Force outlined certain disciplinary measures to which noncompliant federal employees may be subject.

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Petitioner Jason Payne is a civilian employee of the Department of the Navy who contests the vaccine mandate and has declined to comply.

On November 22, 2021—the day federal employees were required to be vaccinated—Mr. Payne filed suit in District Court, challenging the mandate’s constitutionality. Characterizing Mr. Payne’s suit as a “workplace dispute involving a covered federal employee,” the District Court found Mr. Payne’s claims were precluded under the CSRA and dismissed the suit for lack of subject matter jurisdiction. *Payne v. Biden*, 602 F. Supp. 3d 147, 151 (D.D.C. 2022). On appeal, Mr. Payne insists that he challenges the vaccine mandate’s constitutionality, as opposed to contesting a workplace dispute under the CSRA. According to his complaint, however, he alleges that the vaccine mandate is unconstitutional—at least in part—*because* it requires that he obtain the vaccine to avoid adverse employment action. For the reasons discussed below, Mr. Payne’s claims contesting such adverse employment action necessarily fall under the CSRA’s statutory scheme. Accordingly, we affirm the District Court.

I.

The sole issue before us is whether the District Court correctly found it lacked subject matter jurisdiction to adjudicate Mr. Payne’s claims. This jurisdictional determination rises and falls with the CSRA’s construction.

A.

The CSRA is an “integrated scheme of administrative and judicial review’ for aggrieved federal employees [] designed to replace an ‘outdated patchwork of statutes and rules’ that afforded employees the right to challenge employing agency actions in district courts across the country.” *Elgin*, 567 U.S. at 13–14 (quoting *United States v. Fausto*, 484 U.S. 439, 444–45 (1988)). The previous system gave rise to inconsistent decisions concerning similar issues and “a double layer of judicial review” that the Supreme Court has repeatedly described as “wasteful and irrational.” *Elgin*, 567 U.S. at 14 (citing *Fausto*, 484 U.S. at 445). In response, the CSRA “prescribe[d] in great detail the protections and remedies” available to federal employees challenging adverse personnel actions and also outlined “the availability of administrative and judicial review.” *Fausto*, 484 U.S. at 443.

The CSRA has three primary sections regulating adverse personnel action, two of which are relevant here: Chapter 23 and Chapter 75. *See* 5 U.S.C. §§ 4301 *et seq*; *Fausto*, 803 U.S. at 445–47.

Chapter 23 outlines the “merit system principles” agencies must uphold. 5 U.S.C. § 2301(b). Violations of these principles constitute “prohibited personnel practices,” and Chapter 23 establishes the process through which employees may contest such practices. *Id.* § 2302(a). Under this process, an employee alleging a personnel practice violation has the option of first filing charges with the Office of Special Counsel (“OSC”), and if the employee has “reasonable grounds

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to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action,” Chapter 12, governing the investigation of prohibited personnel practices, provides that the OSC “shall report the determination together with any findings or recommendations” to the Merits Systems Protection Board (“MSPB”). *id.* § 1214(b)(2)(B). Should the violation continue, the OSC “may petition the Board,” *Id.* § 1214(b)(2)(C), and the MSPB may at that point issue corrective action. The OSC may also “bring petitions for stays, and petitions for corrective action[.]” *Id.* § 1212(a)(2)(A). Importantly, the CSRA grants the United States Court of Appeals for the Federal Circuit jurisdiction to review the MSPB’s final orders. *See id.* §§ 1214(c), 7703(b)(1)(A).

Chapter 75 addresses major adverse actions against employees. The first subchapter governs suspensions of fourteen days or less, *see id.* §§ 7501–04, and the second subchapter governs more serious actions— involving removal, suspensions over fourteen days, grade reduction, pay reduction, and furlough up to thirty days, *see id.* §§ 7511–15. Subchapter II provides that a covered employee “against whom an action is proposed is [generally] entitled to[:]” a minimum of “30 days’ advance written notice[:]” the opportunity to respond orally and in writing; representation; and “a written decision and the specific reasons therefor at the earliest practicable date.” *Id.* § 7513(b). Decisions under Subchapter II are appealable, first to the MSPB, *id.* § 7513(d), and then to the Federal Circuit, *id.* § 7703(b). And if successful, relief under either chapter may include reinstatement, back pay, and attorneys’

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fees. *See id.* §§ 1204(a)(2), (m), 5596(b); *see also Elgin*, 567 U.S. at 6.

Thus, while both chapters require a covered employee to first challenge certain action before an administrative body, as opposed to a district court, both chapters also prescribe that it is the Federal Circuit, not this Court, that must handle any potential judicial review. With this understanding, we turn to the facts and consider whether the claims at issue could be adjudicated under either chapter.

B.

In September 2021, President Biden issued Executive Order No. 14,043 as part of the Executive’s response to COVID-19. Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sept. 9, 2021). The Order requires that all federal employees be vaccinated subject to “exceptions only as required by law.” *Id.* at 50,990. President Biden also created a Safer Federal Workforce Task Force to help guide the implementation process. According to the Task Force, employees should have received a “final vaccination dose by November 8, 2021,” so they would be “fully vaccinated by November 22, 2021,” and enforcement against noncompliant employees could begin on November 9, 2021. J.A. 49–51. “Progressive enforcement actions” may include “[a] 5-day period of counseling and education;” a short suspension of up to 14 days without pay; and removal “for failing to follow a direct order.” J.A. 63–64. As for legally required exemptions—provided “on the basis of a medical condition or circumstance or a sincerely held religious belief, practice or observance”—the Task Force advises agencies to abstain from implementing disciplinary

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measures against employees with pending exemption requests. J.A. 64. And in the case of denial, the employee should be provided two weeks to obtain vaccination if they so choose.

At the motion to dismiss stage, we must treat the following well-pleaded allegations in the complaint as true. *See Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017). Mr. Payne is a civilian employee with the Department of the Navy, serving as an engineer for the Office of Naval Research. He claims to have gained “natural immunity” against COVID-19 after having contracted and recovered from the disease. Compl. ¶ 7. Accordingly, Mr. Payne informed his supervisors of his decision to decline vaccination.

On November 22, 2021, the day that all non-exempt federal employees were required to be fully vaccinated, Mr. Payne sued President Biden and several other federal officials and agencies. Seeking both declaratory and injunctive relief, Mr. Payne claims the vaccine mandate violates the separation of powers and his Fifth Amendment right to privacy, and places an unconstitutional condition on his employment.

The government contested Mr. Payne’s suit on jurisdictional grounds, arguing that Congress divested district courts of subject matter jurisdiction over claims challenging an Executive Order, such as these, when it enacted the CSRA. The District Court agreed and granted the government’s Motion to Dismiss. In its view, the claims could be characterized as a challenge to either “working conditions” under Chapter 23 of the CSRA, or a termination decision under Chapter 75 of the CSRA. *Payne*, 602 F. Supp. 3d at 157–59.

Because Mr. Payne could obtain administrative and judicial review under either chapter, the District Court held that the CSRA applies and dismissed the case for lack of jurisdiction. This timely appeal followed.

II.

We review *de novo* a district court's dismissal of a suit for lack of subject matter jurisdiction. *See RICU LLC v. HHS*, 22 F.4th 1031, 1034 (D.C. Cir. 2022). In doing so, we construe the complaint in the plaintiff's favor and grant him the benefit of all reasonable inferences. *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011). Applying these principles here, we come to the same conclusion as the District Court.

As a general matter, the power of the federal courts stems from constitutional and statutory authorization. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Congress, thus, may determine certain jurisdictional bounds. *See Bowles v. Russell*, 551 U.S. 205, 212–13 (2007). And when Congress establishes a specific statutory review scheme, “it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies.” *Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015) (citing *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979)). To ensure that this is the case, however, reviewing courts employ a two-part inquiry put forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). First, we determine whether Congress's intent to replace district court jurisdiction with an alternative process of review is “fairly discernible in the statutory scheme.” *Id.* at 207. Second, we analyze whether the

“claims are of the type Congress intended to be reviewed within this statutory structure.” *Id.* at 212.

A.

Proceeding to step one under *Thunder Basin*, we begin by identifying Congress’s intent. “To determine whether it is fairly discernible that Congress precluded district court jurisdiction over [Mr. Payne’s] claims, we examine the CSRA’s text, structure, and purpose.” *Elgin*, 567 U.S. at 10 (internal quotation marks omitted). The Supreme Court acknowledges that it has examined the congressional intent behind the CSRA multiple times. *See Elgin*, 567 U.S. at 10. And as the Fourth Circuit recently noted when deciding a similar case, such Supreme Court precedent resolves this first step. *See Rydie v. Biden*, No. 21-2359, 2022 WL 1153249, at *4 (4th Cir. Apr. 19, 2022) (“Thus, *Elgin* resolves step one. It’s ‘fairly discernible’ that Congress intended the CSRA to foreclose judicial review in at least some circumstances.”) (quoting *Elgin*, 567 U.S. at 23).

In *Elgin*, the Supreme Court considered whether the CSRA precluded district court jurisdiction such that petitioners—federal employees who were discharged for failing to register for the Selective Service as required by statute—had to challenge the statute pursuant to the CSRA. Under this first step, the *Elgin* Court found that the CSRA’s “elaborate framework” clearly “demonstrates Congress’ intent to entirely foreclose judicial review to employees to whom the CSRA denies statutory review.” 567 U.S. at 11 (internal quotation marks and emphasis omitted). Thus, *Elgin* instructs that given “the painstaking detail

with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court.” *Id.* at 11–12. To further clarify, the *Elgin* Court explained that the “only one situation” in which an otherwise covered employee could proceed before the district court, and thus outside the statutory scheme, occurs when the employee alleges discrimination through a violation of an enumerated federal employment law. *Id.* at 13.

Accordingly, the *Elgin* Court rejected the petitioners’ attempt to carve out an exception based on the type of constitutional challenge raised, and ultimately held that “the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional.” *Id.* at 5. In reviewing the same statutory scheme here, we apply *Elgin* and find it “fairly discernible” that Congress intended to preclude judicial review over claims falling within the CSRA’s purview.

B.

Continuing to the second step of the *Thunder Basin* framework, we consider whether Mr. Payne’s constitutional challenge is the type of claim Congress planned to be assessed under the CSRA. A claim generally falls outside of the special statutory scheme only when: “(1) a finding of preclusion might foreclose all meaningful judicial review; (2) the claim is wholly collateral to the statutory review provisions; and (3) the claim[] [is] beyond the expertise of the agency.” *Arch*

Coal, Inc. v. Acosta, 888 F.3d 493, 500 (D.C. Cir. 2018); *see AFGE, AFL-CIO v. Trump*, 929 F.3d 748, 755 (D.C. Cir. 2019) (same). These three points function as “general guideposts,” as opposed to a strict formula, and each one helps shape our analysis. *Jarkesy*, 803 F.3d at 17. As applied here, all three factors direct us to find the CSRA precludes Mr. Payne’s claims.

1.

Under the first factor, we consider whether Mr. Payne has access to meaningful judicial review. It is important to note that the availability of meaningful judicial review is not so strictly defined as to require that every legal question related to a litigant’s claim be decided in the first instance. Rather, a statutory scheme, precluding district court jurisdiction in favor of an administrative body that cannot adjudicate constitutional questions pertaining to federal law, may still satisfy this factor when such determinations are reviewable before a court of appeals. *See Elgin*, 567 U.S. at 17.

Mr. Payne’s primary argument is that the CSRA deprives him of meaningful judicial review because it does not allow him to challenge the vaccine mandate through a pre-enforcement claim. In practice, Mr. Payne contends that this means he must continue declining vaccination until adverse employment action is enforced against him. He argues that such a requirement would unfairly obligate him to “bet the farm” and “violate a rule before challenging the rule’s validity.” Appellant Br. at 32 (citing *Free Enter. Fund. v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490–91 (2010)); *see MedImmune, Inc. v. Genentech, Inc.*, 549

U.S. 118, 134 (2007) (finding that a plaintiff need not “bet the farm” by destroying a building and risking 80 percent of business prior to seeking a legal declaration of its rights). Mr. Payne takes issue with the District Court’s characterization of his claims as contesting a proposed adverse personnel action because, as he explains on appeal, he is challenging an unconstitutional vaccine mandate. *See* Appellant Br. at 33. But such re-framing is inconsistent with his overarching argument and does not alter the jurisdictional outcome.

At the same time that Mr. Payne hinges his standing to challenge the vaccine mandate on the promised termination that will follow his continued noncompliance, he also maintains that the CSRA cannot offer him meaningful review because he is not challenging any proposed personnel action. Again, the jurisdictional question before the Court is whether Mr. Payne may challenge the vaccine mandate under the CSRA in district court. Whether Mr. Payne characterizes his claims as challenging the immediate injury he faces under the vaccine mandate, or the vaccine mandate’s existence in general, we find that either Chapter 23 or Chapter 75 provides him with a path forward. Because Mr. Payne’s argument on appeal is more focused on the threat of termination, we begin with Chapter 75.

As previously explained, Chapter 75 entitles “an employee against whom an action [including removal] is proposed” to notice, reasonable time to answer and present supporting evidence, representation, and a reasoned written decision. 5 U.S.C. § 7513(b); *see id.*

§§ 7511 (defining which employees are covered under the subchapter), 7512 (outlining the actions covered under the subchapter). If action is taken, the employee “is entitled to appeal” to the MSPB where the employee is entitled to a hearing and legal representation. *Id.* § 7513(d); *see id.* § 7701(a). And once the MSPB issues its decision, the employee may appeal this final order to the Federal Circuit. *Id.* § 7703(b)(1)(A).

The CSRA therefore covers pre-enforcement removal challenges like Mr. Payne’s because while he has not yet been terminated, Chapter 75 provides meaningful review for employees “against whom an action is *proposed*.” *Id.* § 7513(b) (emphasis added). And although the CSRA does not define “proposed,” we agree with the Fourth Circuit that the nature of these claims makes such a definition unnecessary to deciding this jurisdictional issue. *See Rydie*, 2022 WL1153249, at *7. Mr. Payne argues that the government “threaten[s]” disciplinary action, and under the alleged facts, the government could not have threatened the action without having proposed it. Appellant Br. at 30 n.3. The Complaint reinforces such a finding because Mr. Payne alleges that “[D]efendants have promised [Mr. Payne] will lose his job,” the defendants are implementing the vaccine mandate, and given that the vaccine mandate has been “declared a condition of federal employment, Mr. Payne . . . will be disciplined, suspended without pay, and removed from Federal service for failing to follow a direct order.” Compl. ¶¶ 2, 58 (cleaned up).

The second way Mr. Payne may obtain judicial review is by challenging a “prohibited personnel

practice” under Chapter 23. 5 U.S.C. § 2302. An example of “personnel action,” as defined by statute, includes the “significant change in duties, responsibilities, or working conditions[.]” *Id.* § 2302(a)(2)(A)(xii). Chapter 23 prohibits supervisory employees from participating in any act constituting a “prohibited personnel practice.” *Id.* § 2302(a), (b). One of the enumerated prohibited practices includes “tak[ing] or fail[ing] to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301[.]” *Id.* § 2302(b)(12). And one such merit system principle involves the failure to accord “proper regard for [the covered employee’s] privacy and constitutional rights.” *Id.* § 2301(b)(2).

While Mr. Payne does not dispute that he is a covered employee, he maintains that his claims do not qualify as prohibited personnel practices because he challenges the mandate as opposed to challenging the masking or testing requirements. Furthermore, Mr. Payne’s counsel also represented at oral argument that the mask requirement has since been withdrawn. Oral Arg. Tr. 8:23–25. But even without the mask requirement—or any of the other COVID-19 related requirements initially alleged and relied upon by the District Court—Mr. Payne still has the option of filing a complaint before the OSC, arguing that the vaccine mandate, and the disciplinary action he faces for his continued noncompliance, constitute personnel practices taken without “proper regard for [his] . . . constitutional rights.” *Id.* § 2301(b)(2); *see id.* § 2302(b)(12).

Thus, Mr. Payne may access meaningful review by following the procedures described under either Chapter 75, covering proposed removal, or Chapter 23, covering prohibited personnel practices. In so finding, we note that to the extent that Mr. Payne finds support in our pre-1994 precedent identifying certain exceptions to a statutory scheme's preclusive effect, *see* Appellant Br. 23 (citing *Nat'l Fed'n of Fed. Emps. v. Weinberger*, 818 F.2d 935, 938–40 (D.C. Cir. 1987); *Harmon v. Thornburgh*, 878 F.2d 484, 485–87 (D.C. Cir. 1989); *Spagnola v. Mathis*, 859 F.2d 223, 229–30 (D.C. Cir. 1988) (en banc) (per curiam)), such exceptions cannot survive the Supreme Court's subsequent decisions in *Thunder Basin* and *Elgin*—clarifying that a statutory scheme may exclusively preclude jurisdiction when Congress's intent to do so is “fairly discernible.” *Thunder Basin*, 510 U.S. at 207; *Elgin*, 567 U.S. at 12; *see also See Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 929 F.3d 748, 758 (D.C. Cir. 2019) (“We once suggested in a footnote [citing *Weinberger*, 818 F.2d at 940 n.7] that the Statute would not allow us to review constitutional claims that the FLRA could not consider,” but such a “suggestion cannot survive the Supreme Court's decision in *Thunder Basin*”).

2.

We next consider whether the claims are “wholly collateral to a statute's review provisions.” *Thunder Basin*, 510 U.S. at 212 (internal quotation marks and citation omitted). Claims are not wholly collateral if they serve as the “vehicle by which [the plaintiff] seek[s] to reverse” the adverse employment action.

Jarkesy, 803 F.3d at 23 (citing *Elgin*, 567 U.S. at 22). As we have emphasized, “an exception to an otherwise exclusive scheme for constitutional challenges in general, or facial attacks on a statute in particular, or some other as-yet-undefined category of constitutional claims, would encourage respondents in administrative enforcement proceedings to frame their challenges to the [agency’s] actions in those terms and thereby earn access to another forum” for review. *Jarkesy*, 803 F.3d at 25. Such gamesmanship would be inconsistent with Congress’s intent to set the boundaries of an exclusive avenue for review.

By arguing that his claims are wholly collateral, Mr. Payne seeks an exception to the CSRA’s exclusivity. Indeed, he attempts to circumvent the CSRA’s procedure and proceed in district court because his challenge pertains to the Constitution rather than CSRA-covered personnel action. But while Mr. Payne certainly alleges that the vaccine mandate is unconstitutional, he does so—at least in part—because of the mandate’s “promis[e] to deprive [him] of public employment unless” he complies. Compl. ¶ 86. Adopting Mr. Payne’s theory would thus enable scores of litigants challenging an employment requirement to skip over the CSRA’s process by characterizing the requirement as unconstitutional. “Such suits would reintroduce the very potential for inconsistent decisionmaking and duplicative judicial review that the CSRA was designed to avoid.” *Elgin*, 567 U.S. at 14.

All attempts to characterize his argument as anything but a challenge to adverse employment action fail for jurisdictional purposes, because Mr. Payne

himself admits that his standing to challenge the vaccine mandate is rooted in the looming disciplinary action he now faces as a result of his continued noncompliance. In other words, Mr. Payne challenges the vaccine mandate to maintain his employment while continuing to defy the mandate that he views as unlawful. And while his constitutional arguments are relevant to the merits, they do not change the fact that one of Mr. Payne's interests in this suit is to avoid the impending adverse employment action. Mr. Payne's claims are not wholly collateral because challenges to adverse employment actions are the type of claims that the MSPB regularly adjudicates.

3.

Like the first two factors, the third factor—agency expertise—is interpreted broadly. Courts may find this factor satisfied by considering “the many threshold questions that may accompany a constitutional claim and to which the MSPB can apply its expertise.” *Elgin*, 567 U.S. at 22. Mr. Payne argues that his claims fall outside the agency's expertise because, again, he frames his claims as constitutional challenges unrelated to the CSRA's procedures. We reject this argument because the MSPB's expertise remains applicable to the various threshold questions attached to the claims and any preliminary issues particular to the employment context. *See id.* at 22–23 (noting preliminary issues such as those involving a statute that MSPB often interprets; “statutory or constitutional claims that the MSPB routinely considers[;]” or “a constitutional challenge to a federal statute”). Also, it remains possible that the MSPB finds

the promised disciplinary action violates the statutory requirement that major adverse employment action “promote the efficiency of the service.” 5 U.S.C. §§ 7503(a), 7513(a). If so, the MSPB could issue a ruling in Mr. Payne’s favor, possibly rendering his constitutional claims moot.

Based on the foregoing, all three factors weigh in the government’s favor and Mr. Payne’s claims fall within the CSRA’s framework. We thus conclude that Congress precluded the District Court from reviewing Mr. Payne’s claims.

III.

There is but one permissible conclusion given our well-established precedent guiding jurisdictional preclusion issues of this nature. By reframing the issue as “whether the CSRA *removes* district court jurisdiction” as opposed to “whether it *permits* it,” Mr. Payne attempts to introduce nuance where none exists. Appellant Reply Br. at 4 (emphases in original). The law is clear that where the CSRA provides judicial review, it does so exclusively. Thus, in finding that Mr. Payne *may* proceed through the CSRA’s scheme, we necessarily find that should Mr. Payne choose to continue challenging the vaccine mandate, he *must* do so through the CSRA’s scheme. Such is the nature of an “exclusive avenue to judicial review.” *Elgin*, 567 U.S. at 5.

* * *

For the foregoing reasons, we affirm the District Court’s judgment.

So ordered.

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APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 22-5154

[Filed March 21, 2023]

JASON PAYNE,)
APPELLANT)
)
v.)
)
JOSEPH R. BIDEN, JR., PRESIDENT, ET AL.,)
APPELLEES)

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-03077)

September Term, 2022
FILED ON: MARCH 21, 2023

Before: WILKINS and WALKER, *Circuit Judges*, and
ROGERS, *Senior Circuit Judge*

J U D G M E N T

This cause came on to be heard on the record on
appeal from the United States District Court for the

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District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

Date: March 21, 2023

Opinion for the court filed by Circuit Judge Wilkins.

APPENDIX C

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 21-3077 (JEB)

[Filed May 12, 2022]

JASON PAYNE,)
Plaintiff,)
)
v.)
)
JOSEPH R. BIDEN, JR., <i>et al.</i> ,)
Defendants.)

MEMORANDUM OPINION

A jab or a job? Plaintiff Jason Payne is a federal civilian employee who claims that the Executive Order requiring COVID-19 vaccination for covered federal employees unlawfully puts him to this choice. Last fall, President Joseph Biden issued Executive Order 14,043, which mandates vaccinations for executive-branch employees, subject to a medical or religious exception. Payne, who works for the Navy, refuses to be vaccinated and has not applied for an exception. He instead filed this lawsuit against a number of federal agencies and officials, alleging that the Executive Order and the associated agency actions are unconstitutional for several reasons. After Plaintiff

moved for summary judgment, the Government filed a Motion to Dismiss. The Court will grant the Government's Motion because the Civil Service Reform Act deprives the Court of subject-matter jurisdiction over this workplace dispute involving a covered federal employee.

I. Background

A. Legal Background

In September 2021, President Biden issued Executive Order 14,043, which announced a COVID-19 vaccination requirement for many federal employees. See Exec. Order No. 14,043, 86 Fed. Reg. 50,989, 50,989 (Sept. 9, 2021). The Order, which was designed to “ensur[e] the health and safety of the Federal workforce and the efficiency of the civil service,” directs the Safer Federal Workforce Task Force to issue guidance on implementation of the vaccination requirement. Id. at 50,989–90; see Exec. Order No. 13,991, 86 Fed. Reg. 7045, 7046 (Jan. 25, 2021) (establishing Task Force).

The Task Force guidance recognizes, consistent with the Executive Order, that federal employees may be entitled to exceptions from the vaccination requirement based on disabilities, including medical conditions, or religious objections. See Safer Federal Workforce, Vaccinations, Limited Exceptions to Vaccination Requirement (last visited May 12, 2022), <https://bit.ly/37Ectq2>. The guidance further states that federal employees who have not requested an exception should be fully vaccinated by November 22, 2021. See Safer Federal Workforce, Vaccinations, Vaccination

Requirement for Federal Employees (last visited May 12, 2022), <https://bit.ly/37Ectq2>. If an employee refuses to get vaccinated and either has not requested an exception or has had a request denied, then the guidance from the Task Force and the Office of Personnel Management recommends a procedure of progressive discipline, ranging from education and counseling to suspension and termination if the noncompliance persists. See Safer Federal Workforce, Vaccinations, Enforcement of Vaccination Requirement for Employees (last visited May 12, 2022), <https://bit.ly/37Ectq2>.

B. Factual and Procedural History

Taking the facts alleged in Payne’s Complaint as true, he is a federal civilian employee who works as an engineer for the Office of Naval Research, a component of the Department of the Navy. See ECF No. 1 (Compl.), ¶ 6. He has been a member of the civil service for over two decades. Id., ¶ 2. Plaintiff alleges that, at some unspecified time in the past, he contracted COVID-19 and recovered. Id., ¶ 7. In his view, he thereby “acquir[ed] natural immunity against the disease.” Id. Payne now “refuses to accept the COVID-19 vaccination mandated by . . . [D]efendants” pursuant to the Executive Order. Id., ¶ 76. He has not alleged that he applied for or intends to apply for a medical or religious exception, nor that he so qualifies. Id.

On October 1, 2021, in keeping with the guidance described above, OPM issued a memorandum directing agencies to require non-excepted employees to be fully vaccinated by November 22, 2021. See ECF No. 1-5

(Guidance on Enforcement of Coronavirus Disease 2019 Vaccination Requirement for Federal Employees) at 1. The memorandum also advised that covered employees’ “failure to comply will result in disciplinary action up to and including removal or termination.” Id. That same day, the Defense Department issued a memorandum requiring civilian employees to be “fully vaccinated” by November 22, 2021. See ECF No. 1-6 (Memorandum for Senior Pentagon Leadership) at 1. A month later, the Navy issued a memorandum clarifying that “[e]vidence of COVID-19 anti-bodies as a result of previous infection(s) does not satisfy this vaccination requirement; these individuals must also be fully vaccinated.” ECF No. 1-9 (COVID-19 Mandatory Vaccination Plan for Civilian Employees) at 3. The memorandum reiterated that all civilian employees must be fully vaccinated by November 22, and that they may be disciplined for failure to do so unless the employee has applied for or received an exception. Id. at 10–11. By that date, Payne had neither submitted the required form to his supervisors indicating his vaccination status nor applied for an exception, and he had “advised his direct supervisors that he declines vaccination.” Compl., ¶¶ 53–54.

On November 22, 2021 — the day that Plaintiff was required to be fully vaccinated — he filed this lawsuit against Defendants President Biden and a number of other federal officials and agencies. The Complaint alleges that he has already suffered a number of consequences in his job “for refusing vaccination,” such as “being forced to wear a mask when those who are vaccinated did not have to wear one,” having his official travel subjected to additional scrutiny, being subject to

additional COVID-19 testing requirements, and more. Id., ¶ 56. He also alleges that “[D]efendants have promised he will lose his job” for failing to comply with the vaccination requirement. Id., ¶ 2.

Payne’s three-count Complaint contends that Executive Order 14,043 and the associated Task Force and agency actions violate the separation of powers and his Fifth Amendment right to privacy, as well as impose an unconstitutional condition on his employment. Id., ¶¶ 60–86. He seeks declaratory and injunctive relief. Id. at 26.

Just two days after filing this lawsuit, Plaintiff filed a Motion for Summary Judgment on each of his three claims. See ECF No. 4 (Pl. MSJ). After Defendants indicated that they planned to file a Motion to Dismiss, the Court ordered them to file a combined Motion to Dismiss and Opposition to Motion for Summary Judgment. See Minute Order of Jan. 3, 2022. The briefing is now complete on these dueling Motions.

II. Legal Standard

As the Court need address only Defendants’ Motion, it sets out that standard alone. That Motion discusses dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). When a defendant seeks dismissal under Rule 12(b)(1), the plaintiff must demonstrate that the court has subject-matter jurisdiction to hear his claims. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992); US Ecology, Inc. v. U.S. Dep’t of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000). “Because subject-matter jurisdiction focuses on the court’s power to hear the plaintiff’s claim,” the court

has “an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority.” Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). “Absent subject matter jurisdiction over a case, the court must dismiss it.” Bell v. U.S. Dep’t of Health & Human Servs., 67 F. Supp. 3d 320, 322 (D.D.C. 2014).

In policing its jurisdictional borders, the court must scrutinize the complaint, granting the plaintiff the benefit of all reasonable inferences that can be derived from the alleged facts. See Jerome Stevens Pharms., Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005). The court need not rely “on the complaint standing alone,” however, but may also look to undisputed facts in the record or resolve disputed ones. See Herbert v. Nat’l Acad. of Scis., 974 F.2d 192, 197 (D.C. Cir. 1992). Nor need the court accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint or merely amount to legal conclusions. See Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002).

Under Federal Rule of Civil Procedure 12(b)(6), meanwhile, a court must dismiss a suit when the complaint “fail[s] to state a claim upon which relief can be granted.” In evaluating a motion to dismiss, the Court must “treat the complaint’s factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged.” Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000) (citation and internal quotation marks omitted); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A court need not accept as true, however, “a

legal conclusion couched as a factual allegation,” nor an inference unsupported by the facts set forth in the complaint. Trudeau v. FTC, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)). Although “detailed factual allegations” are not necessary to withstand a Rule 12(b)(6) motion, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007), “a complaint must contain sufficient factual matter, [if] accepted as true, to state a claim to relief that is plausible on its face.” Iqbal, 556 U.S. at 678 (internal quotation omitted). A plaintiff may survive a Rule 12(b)(6) motion even if “recovery is very remote and unlikely,” but the facts alleged in the complaint “must be enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555–56 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

III. Analysis

In his Complaint and Motion for Summary Judgment, Payne argues that Executive Order 14,043 and the agency actions implementing it are unconstitutional for several reasons. The Government, for its part, contends that because the Court lacks subject-matter jurisdiction over Plaintiff’s claims, it should not reach the merits. More specifically, Defendants’ lead position is that the CSRA divests the Court of jurisdiction. See ECF No. 16-1 (MTD) at 12. Because subject-matter jurisdiction must “be considered when fairly in doubt,” Iqbal, 556 U.S. at 671, the Court begins by examining that issue. Agreeing with both the Fourth and Fifth Circuits — the only two Courts of Appeals to weigh in on the issue — the Court concludes that it does indeed lack subject-

matter jurisdiction because the CSRA precludes challenges of this kind to the Executive Order. See Rydie v. Biden, No. 21-2359, 2022 WL 1153249, at *1 (4th Cir. Apr. 19, 2022); Feds for Med. Freedom v. Biden, 30 F.4th 503, 511 (5th Cir. 2022). In the analysis that follows, the Court first examines the relevant background of the CSRA and then explains why the statute forecloses subject-matter jurisdiction here. Given that result, the Court need not take up Plaintiff's Motion for Summary Judgment.

A. Background on CSRA

“[T]he CSRA ‘comprehensively overhauled the civil service system.’” United States v. Fausto, 484 U.S. 439, 443 (1988) (quoting Lindhahl v. OPM, 470 U.S. 768, 773 (1985)). Congress designed the statute “to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the outdated patchwork of statutes and rules built up over almost a century that was the civil service system.” Id. at 444 (internal quotation marks and citations omitted). The CSRA thus “established a comprehensive system for reviewing personnel action taken against federal employees.” Id. at 455. Indeed, it created “an elaborate new framework for evaluating adverse personnel actions against federal employees,” which sets forth “in great detail the protections and remedies applicable to such action[s], including the availability of administrative and judicial review.” Id. at 443 (cleaned up). Two main sections of the CSRA are particularly relevant to this case. The Court will introduce those sections here and then discuss them in more depth in its analysis of Plaintiff's claims.

First, Chapter 23 governs less severe personnel practices against executive-branch employees. See 5 U.S.C. § 2301 *et seq.* Under that section, covered employees who believe that they have been subjected to a “prohibited personnel practice” can file an allegation with the Office of Special Counsel. Id. §§ 1214(a), 2302. If the OSC finds “reasonable grounds to believe” that a prohibited personnel practice occurred, the practice must be reported to the Merit Systems Protection Board, the employing agency, and OPM. Id. § 1214(b)(2)(B). If the issue is not remedied by the relevant agency, the OSC may petition to the MSPB, which can order corrective action, including attorney fees, back pay, and other compensatory damages. Id. § 1214(b), (g). Judicial review of final orders of the MSPB is available in the U.S. Court of Appeals for the Federal Circuit. Id. §§ 1214(c), 7703(b)(1)(A).

The other section of the CSRA of primary relevance here, Chapter 75, governs more severe personnel actions against covered federal employees. Id. § 7501 *et seq.* This section addresses the applicable procedures when an employee challenges a suspension, reduction in pay or grade, or removal. Id. § 7512(1)–(5). Employees challenging a personnel action under this section are afforded a number of procedural rights, including notice, representation by counsel, the opportunity to respond, and a reasoned decision from the agency. Id. §§ 7503(b), 7513(b). Under this Chapter, as under Chapter 23, appeal is generally available to the MSPB, and then from the MSPB to the Federal Circuit. Id. §§ 7503(c), 7513(d), 7703(b)(1)(A).

The critical point is that the CSRA, while providing for review in the Federal Circuit under many circumstances, does not allow review of such personnel actions in federal district court.

B. Application

Against that backdrop, the Court turns to the core issue: does the CSRA divest the Court of subject-matter jurisdiction over this lawsuit? “Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.” Bowles v. Russell, 551 U.S. 205, 212 (2007). While federal courts ordinarily have jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States,” 28 U.S.C. § 1331, when “a special statutory review scheme exists,” “it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies.” Jarkesy v. SEC, 803 F.3d 9, 15 (D.C. Cir. 2015) (internal quotation marks and citation omitted). Indeed, the Supreme Court has supplied “a framework for determining when a statutory scheme of administrative and judicial review forecloses parallel district-court jurisdiction.” Id. at 12 (citing Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994)). “Under Thunder Basin’s framework, courts determine that Congress intended that a litigant proceed exclusively through a statutory scheme of administrative and judicial review when (i) such intent is ‘fairly discernible in the statutory scheme,’ and (ii) the litigant’s claims are ‘of the type Congress intended to be reviewed within [the] statutory structure.’” Id. at 15 (quoting Thunder Basin, 510 U.S. at 207).

The Court addresses these two steps in turn, concluding that both “support the conclusion that Congress intended the statutory scheme to be exclusive.” *Id.* at 16. As a result, Plaintiff must follow the CSRA’s remedial scheme and cannot proceed here.

1. *Step One*

As the Fourth Circuit recognized in concluding that the district court lacked jurisdiction over an essentially identical challenge to Executive Order 14,403, “The Supreme Court has spoken on step one” of this inquiry, holding that it is fairly discernible that the CSRA is intended to foreclose direct judicial review in at least some circumstances. *Rydie*, 2022 WL 1153249, at *4. More specifically, in *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012), the Court addressed “whether the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional.” *Id.* at 5. Relying on *Thunder Basin*, the Court answered in the affirmative, concluding that it was “fairly discernible that the CSRA review scheme was intended to preclude district court jurisdiction over petitioners’ claims.” *Id.* at 23. Looking first at the text and structure of the CSRA, the Court explained that the “painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions” established that “Congress intended to deny such employees an additional avenue of review in district court.” *Id.* at 11–12. The Court went on to state that “[t]he purpose of the CSRA also supports our conclusion that the statutory review scheme is

exclusive, even for employees who bring constitutional challenges to federal statutes.” Id. at 13. Here, Plaintiff does not contend, nor does the Court see any basis for believing, that the rule stated in Thunder Basin should be different just because a challenge is to an Executive Order, as opposed to a statute.

Elgin thus controls the first part of the jurisdictional inquiry. Rydie, 2022 WL 1153249, at *4 (“Thus, Elgin resolves step one.”); see also Jarkesy, 803 F.3d at 16.

2. *Step Two*

The next question, therefore, is whether the circumstances here qualify. Or, to use the language from Thunder Basin, are Plaintiff’s claims “of the type Congress intended to be reviewed within this statutory structure”? See 510 U.S. at 212. At this step, “the Supreme Court has provided three factors to consider: (i) whether a finding that jurisdiction is precluded would ‘foreclose all meaningful judicial review,’ (ii) whether the suit is ‘wholly collateral to a statute’s review provisions,’ and (iii) whether the claims are ‘outside the agency’s expertise.’” Miriyeva v. U.S. Citizenship & Immigr. Servs., 9 F.4th 935, 940 (D.C. Cir. 2021) (quoting Thunder Basin, 510 U.S. at 212–13). The D.C. Circuit has clarified that those considerations do not “form three distinct inputs into a strict mathematical formula. Rather, the considerations are general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design.” Jarkesy, 803 F.3d at 17. While the issue is certainly more involved than the first part

of the Thunder Basin analysis, the Court similarly concludes that the second part points toward a lack of subject-matter jurisdiction over this suit.

a. Availability of Meaningful Review

Payne initially contends that “preclusion [of district-court jurisdiction] could foreclose all meaningful judicial review.” ECF No. 20 (Pl. Opp.) at 4. The Court disagrees. Plaintiff’s challenge can reasonably be characterized in one of two ways, and under either classification, a finding that this Court lacks jurisdiction would not foreclose all meaningful review.

First, to the extent that his challenge is to a change in his working conditions, the CSRA plainly provides for meaningful judicial review. As referenced, 5 U.S.C. § 2302 defines a “prohibited personnel practice” as any one of fourteen acts that supervisory employees may not take against an employee in a “covered position.” Id. § 2302(a), (b). A “covered position” includes “any position in the competitive service,” id. § 2302(a)(2)(B), and the competitive service includes “all civil service positions in the executive branch,” subject to certain exceptions not relevant here. Id. § 2102(a)(1). Payne works in the executive branch and is thus in a covered position—a conclusion that he does not dispute. See Compl., ¶ 6; Pl. Opp. at 4–13. Nor does he dispute that the vaccination requirement has been dictated by a supervisory employee, who has the “authority to take, direct others to take, recommend, or approve any personnel action.” 5 U.S.C. § 2302(b). Of particular relevance here, one such enumerated “personnel action” is a “significant change in duties,

responsibilities, or working conditions.” Id. § 2302(a)(2)(A)(xii).

There is good reason to think that Plaintiff is bringing a challenge to his working conditions. The Supreme Court has explained, in interpreting Title VII of the CSRA, that the term “working conditions” refers “to the ‘circumstances’ or ‘state of affairs’ attendant to one’s performance of a job.” Fort Stewart Sch. v. FLRA, 495 U.S. 641, 645 (1990). The Fifth Circuit recently relied on this language from Fort Stewart to conclude that “Executive Order 14043 qualifies as a significant change to the circumstances attending the job performance of federal employees.” Feds for Med. Freedom, 30 F.4th at 510 n.4. Here, Payne’s own allegations indicate that he is challenging a covered change in his working conditions. In addition to alleging that he “will be disciplined, suspended without pay, and removed from Federal service” because of the Executive Order, see Compl., ¶ 58, Plaintiff further alleges:

[F]or refusing vaccination he has been improperly stigmatized by being forced to wear a mask when those who are vaccinated did not have to wear one; his official travel is subject to extra scrutiny and additional levels of approval; he is unable to have unrestricted access to his workplace and must produce a negative COVID-19 test for entry when vaccinated workers do not; he was forced to sign an acknowledgement that his failure to be fully vaccinated against COVID-19 by 22 November 2021, or to provide proof of vaccination, “negatively affects the

agency's ability to carry out its mission"; and he must personally bear the cost of COVID-19 testing.

Id., ¶ 56. Consistent with the Supreme Court and the Fifth Circuit's understanding of the term in the CSRA, Payne can thus be understood to challenge a "significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(A)(xii).

As a result, the CSRA empowers him to attack such a personnel action by filing an allegation with the OSC. Id. § 1214(a)(3). In such a proceeding, the OSC must provide employees "fair and equitable treatment . . . with proper regard for their privacy and constitutional rights." Id. § 2301(b)(2). "The CSRA thus empowers the [OSC] to hear constitutional claims." Rydie, 2022 WL 1153249, at *5; accord Ferry v. Hayden, 954 F.2d 658, 661 (11th Cir. 1992). Then, as outlined, an employee's claims may be presented to the MSPB and eventually to the Federal Circuit. As the Supreme Court has recognized, "[T]he CSRA does not foreclose all judicial review of . . . constitutional claims" when it "directs that judicial review shall occur in the Federal Circuit." Elgin, 567 U.S. at 10. On the contrary, "the Federal Circuit is fully capable of providing meaningful review of [such] claims." Id. In short, insofar as Payne is challenging a change in working conditions, he could avail himself of meaningful judicial review under the CSRA.

Before moving on from Chapter 23 of the Act, it is worth noting that another provision of § 2302 may well provide a separate avenue by which Plaintiff could obtain meaningful judicial review. More specifically, an

additional enumerated prohibited practice under that section is “tak[ing] or fail[ing] to take any [] personnel action if the taking or failure to take such action violates any law, rule, or regulation.” Id. § 2302(b)(12). As a result, to the extent that the Executive Order requires supervisory employees to take action that violates the Constitution, meaningful judicial review is also available under the procedures previously described. See Rydie, 2022 WL 1153249, at *5 (“So even if Executive Order 14,043 required covered employees to engage in a prohibited practice, § 2302(b)(12) provides for meaningful review.”); cf. Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1432 (D.C. Cir. 1996) (interpreting § 2302 to conclude that “it is a ‘prohibited personnel practice’ to take a personnel action that unconstitutionally burdens an employee’s speech”) (citations omitted).

The second main way Plaintiff’s suit could be characterized is as a challenge to a termination decision. Here, too, meaningful review is available, this time under Chapter 75 of the CSRA. As discussed, that section — which applies to Payne for the same reasons that Chapter 23 does, see 5 U.S.C. § 7511(a)(1)(A) — governs the procedures applicable to removals. Id. §§ 7512, 7513. Under Chapter 75, “[a]n employee against whom an action [including removal] is proposed is entitled to” notice, reasonable time to present evidence, legal representation, and a written reasoned decision. Id. § 7513(b). Notice must be provided in writing at least thirty days before the agency acts and must describe the charges against the employee. Id. § 7513(b)(1); see Brook v. Corrado, 999 F.2d 523, 526 (Fed. Cir. 1993). Once the adverse personnel action is

taken, moreover, the employee “is entitled to appeal” to the MSPB. Id. § 7513(d). In such an appeal, the employee has the right to a hearing and an attorney. Id. § 7701(a). Next, as under Chapter 23, the MSPB’s final orders may be appealed to the Federal Circuit. Id. § 7703(b)(1)(A).

There can thus be little doubt that, for the same reasons explained in reference to Chapter 23, Chapter 75 of the CSRA provides for meaningful judicial review when an employee is challenging a removal that has already occurred. See Rydie, 2022 WL 1153249, at *6 (“Like that for prohibited personnel practices, the process for challenging termination under § 7513 poses only the risks associated with traditional litigation.”). In fact, Payne admits, as he must, that the MSPB “may handle a constitutional challenge to an employee-specific termination.” Pl. Opp. at 4. He contends, however, that the CSRA nonetheless does not provide him an avenue for meaningful judicial review because there has been no “predicate personnel action” in this case, and “neither the CSRA nor the MSPB are designed to deal with pre-enforcement constitutional challenges.” Id. at 4–5. He is mistaken.

As the Fourth Circuit concluded, Chapter 75 “provides an adequate vehicle to mount a pre-enforcement challenge to termination.” Rydie, 2022 WL 1153249, at *6. That is because the statute provides the rights and processes afforded to “[a]n employee against whom an action is proposed.” 5 U.S.C. § 7513(b) (emphasis added). The Court concurs with that Circuit’s conclusion that “[t]hese processes allow for

meaningful review.” Rydie, 2022 WL 1153249, at *6. In addition, while § 7513(b) does not define the scope of a “proposed” action, Payne never argues that no such action looms. On the contrary, he alleges that “[D]efendants have promised he will lose his job,” and that because the mandate has been “declared a condition of [federal] employment, Mr. Payne . . . will be disciplined, suspended without pay, and removed from Federal service for failing to follow a direct order.” Compl., ¶¶ 2, 58 (internal quotation marks omitted). Those allegations suffice to establish that a covered action has been proposed, and he can thus obtain meaningful review before a removal transpires.

Plaintiff’s additional attempts to circumvent the CSRA are unpersuasive. For example, he contends that “[b]inding precedent holds that pre-enforcement challenges to government-wide policies do not fall within the CSRA’s exclusive jurisdiction.” Pl. Opp. at 6. Here, he relies on several decades-old D.C. Circuit cases, which reasoned that while “[it] is one thing to say that when [the CSRA] provides a detailed scheme of administrative protection for defined employment rights, less significant employment rights of the same sort are implicitly excluded,” “[it] is quite different to suggest . . . that a detailed scheme of administrative adjudication impliedly precludes pre-enforcement judicial review of rules.” Nat’l Treasury Emps. Union v. Devine, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984); see also Nat’l Treasury Emps. Union v. Horner, 854 F.2d 490, 497 (D.C. Cir. 1988); Nat’l Fed’n of Fed. Emps. v. Weinberger, 818 F.2d 935, 940 (D.C. Cir. 1987). These cases, however, predate both Thunder Basin and Elgin, which held that a statutory scheme bars review when

Congress's intention to do so is "fairly discernible." 567 U.S. at 8–10; see 510 U.S. at 207. Indeed, the D.C. Circuit has reasoned in the FLRA context that a related suggestion put forth in Weinberger "cannot survive the Supreme Court's decision in Thunder Basin." Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, 929 F.3d 748, 758 (D.C. Cir. 2019); see Am. Fed'n of Gov't Emps. v. Sec'y of Air Force, 716 F.3d 633, 639 (D.C. Cir. 2013) (indicating in post-Elgin case that CSRA applies to "systemwide challenge to an agency policy interpreting a statute just as it does to the implementation of such a policy in a particular case") (internal quotation marks omitted).

In any event, regardless of the precise scope of the D.C. Circuit's more recent pronouncements about the continued validity of Devine and its progeny, it is well established that "[c]ontrolling precedent may be 'effectively overruled' . . . if a later Supreme Court decision 'eviscerates' its reasoning." Brookens v. Acosta, 297 F. Supp. 3d 40, 47 (D.D.C. 2018), aff'd sub nom. Brookens v. Dep't of Lab., No. 18-5129, 2018 WL 5118489 (D.C. Cir. Sept. 19, 2018) (internal quotation marks and citation omitted). Such is the case here for the reasons previously discussed. See Rydie, 2022 WL 1153249, at *6 (declining to apply Devine in light of Thunder Basin and Elgin).

Payne next argues that denying jurisdiction here would run afoul of the Supreme Court's pronouncement that "[w]e normally do not require plaintiffs to bet the farm . . . by taking the violative action before testing the validity of the law, and we do not consider this a meaningful avenue of relief." Free Enter. Fund v. Pub.

Co. Acct. Oversight Bd., 561 U.S. 477, 490–91 (2010) (internal quotation marks and citations omitted); see Pl. Opp. at 10–12. The CSRA compels no such thing, however. First off, Payne’s ability to challenge a change in his working conditions via the OSC allows him to raise his constitutional claims before termination is even proposed. Relatedly, the procedures afforded to a covered employee facing a proposed termination similarly insulate him from having to bet the farm, the ranch, or anything else in order to obtain review. See Rydie, 2022 WL 1153249, at *6. In short, concluding that the Court lacks subject-matter jurisdiction here would not contravene the principle set forth in Free Enterprise. See Jarkesy, 803 F.3d at 20 (“The oddities that led the Supreme Court [in Free Enterprise] to believe that Congress could not possibly have intended the accounting firm to proceed through the administrative route are not present in this case.”).

Last, in positing that it would be illogical to have to raise a pre-enforcement challenge via the CSRA’s review scheme, Payne gets things exactly backwards. Under his view, a plaintiff who would indisputably have to proceed under the CSRA after suffering an adverse personnel action could circumvent this process and obtain immediate federal-court review by filing suit once the action is proposed but before it is executed. If this were the case, however, the plaintiffs in Elgin could have avoided the CSRA entirely if they had just sued while their adverse personnel actions were proposed or pending. The Court is highly skeptical that Congress “exhaustively detail[ed] the system of review before the MSPB and the Federal Circuit” only to leave such a conspicuous (and

unexplained) loophole. See Elgin, 567 U.S. at 11. Indeed, permitting such suits “would reintroduce the very potential for inconsistent decisionmaking and duplicative judicial review that the CSRA was designed to avoid,” as well as “create the possibility of parallel litigation regarding the same agency action before the MSPB and a district court.” Id. at 14.

In sum, this Court agrees with the Fourth and Fifth Circuits that, under the circumstances of these challenges, finding that jurisdiction is precluded does not foreclose all meaningful judicial review. See Rydie, 2022 WL 1153249, at *7; Feds for Med. Freedom, 30 F.4th at 510.

b. Wholly Collateral

The second Thunder Basin factor looks at whether a challenge is “wholly collateral to a statute’s review provisions.” 510 U.S. at 212 (internal quotation marks and citation omitted). This consideration similarly militates against the Court’s subject-matter jurisdiction here. Payne contends that his challenge is wholly collateral to the CSRA’s review provisions because he is bringing a pre-enforcement “structural” constitutional challenge. See Pl. Opp. at 4. The Court believes otherwise.

In Elgin, the Supreme Court concluded that the plaintiff-employees’ challenges were not wholly collateral because their “constitutional claims are the vehicle by which they seek to reverse the removal decisions, to return to federal employment, and to receive the compensation they would have earned but for the adverse employment action.” Elgin, 567 U.S. at

22. The Court also found it significant that “[a] challenge to removal is precisely the type of personnel action regularly adjudicated by the MSPB and the Federal Circuit within the CSRA scheme.” Id. Although Payne is not challenging a termination that has already occurred, he is in essence “preemptively challeng[ing] [his] termination” or at least challenging a change in his working conditions. Rydie, 2022 WL 1153249, at *7. In other words, “this case is ‘the vehicle by which [he] seek[s] to’ avoid imminent ‘adverse employment action.’” Feds for Med. Freedom, 30 F.4th at 511 (quoting Elgin, 567 U.S. at 22). Regardless of whether Plaintiff labels his challenge “structural” in nature, at bottom he seeks to avoid being terminated or otherwise disciplined at work for failing to comply with the Executive Order. “Far from a suit wholly collateral to the CSRA scheme, the case before us is a challenge to CSRA-covered employment action brought by [a] CSRA-covered employee[] requesting relief that the CSRA routinely affords.” Elgin, 567 U.S. at 22.

As the Fourth and Fifth Circuits similarly concluded, this type of challenge is thus not wholly collateral to the CSRA’s review provisions. See Rydie, 2022 WL 1153249, at *7; Feds for Med. Freedom, 30 F.4th at 510–11.

c. Agency Expertise

The third and final Thunder Basin consideration — agency expertise — points in the same direction as the first two. On this score, Payne again relies on Free Enterprise and contends that his constitutional claims do not present “the sort of agency fact-bound inquiries” that implicate agency expertise. See Pl. Opp. at 5

(citing Free Enter., 561 U.S. at 491). This argument fares no better than his other attempts to draw parallels with Free Enterprise.

Plaintiff is correct that Free Enterprise reasoned that the “[p]etitioners’ constitutional claims are . . . outside the Commission’s competence and expertise” in part because the “questions involved do not require technical considerations of [agency] policy.” 561 U.S. at 491 (internal quotation marks and citation omitted). That was not the final word on the topic, however, as Elgin proves. See 567 U.S. at 22–23. Yet Payne neglects to grapple with Elgin’s discussion of this factor, which cuts strongly against his position. Indeed, as the D.C. Circuit expressly recognized in reconciling the discussions of agency expertise in Free Enterprise and Elgin, “Elgin later clarified . . . that an agency’s relative level of insight into the merits of a constitutional question is not determinative.” Jarkesy, 803 F.3d at 28.

In Elgin itself, the Supreme Court rejected the federal-employee plaintiffs’ argument that their constitutional challenges fell outside of the Board’s expertise. See 567 U.S. at 22. The Court explained that the employees’ expertise-based arguments “overlook[ed] the many threshold questions that may accompany a constitutional claim and to which the MSPB can apply its expertise.” Id. For instance, “preliminary questions unique to the employment context may obviate the need to address the constitutional challenge.” Id. at 22–23. The Court observed, moreover, that the “challenged statute may be one that the MSPB regularly construes,” or a case

may involve “statutory or constitutional claims that the MSPB routinely considers.” Id. at 23. In sum, “because the MSPB’s expertise can otherwise be ‘brought to bear’ on employee appeals that challenge the constitutionality of a statute,” the Court saw “no reason to conclude that Congress intended to exempt such claims from exclusive review before the MSPB and the Federal Circuit.” Id.

The same result obtains here. The relevant agencies likely have experience and expertise relevant to at least some of Payne’s challenges. After all, employing agencies and the MSPB no doubt have experience adjudicating employee challenges to a range of personnel actions. As the Fourth Circuit observed in Rydie, it is also possible that the employing agency could moot some of Plaintiff’s claims during its review. Relatedly, that agency could determine that taking “action against [Plaintiff] wouldn’t ‘promote the efficiency of the service.’” Rydie, 2022 WL 1153249, at *8 (quoting 5 U.S.C. § 7513(a)). And if an appeal reaches the MSPB, it could reach the same conclusion, in which case it could order corrective action and obviate the need for federal court intervention. See Feds for Med. Freedom, 30 F.4th at 511.

In light of Elgin’s clarification about how to assess whether agency expertise may be brought to bear on a given case, consequently, this factor does not supply a reason to conclude that Plaintiff’s claims should proceed outside of the CSRA’s review scheme. The Court thus does not have subject-matter jurisdiction over this suit, which it will dismiss.

IV. Conclusion

For the foregoing reasons, the Court will grant Defendants' Motion to Dismiss. A separate Order so stating will issue this day.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: May 12, 2022

APPENDIX D

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 21-3077 (JEB)

[Filed May 12, 2022]

JASON PAYNE,)
Plaintiff,)
)
v.)
)
JOSEPH R. BIDEN, JR., <i>et al.</i> ,)
Defendants.)

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Defendants' Motion to Dismiss is GRANTED;
2. Plaintiff's Motion for Summary Judgment is DENIED AS MOOT; and
3. The case is DISMISSED WITHOUT PREJUDICE.

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/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: May 12, 2022

APPENDIX E

5 U.S.C. § 1214: Investigation of prohibited personnel practices; corrective action

Text contains those laws in effect on July 5, 2022

§1214. Investigation of prohibited personnel practices; corrective action

(a)(1)(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(B) Within 15 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall provide written notice to the person who made the allegation that-

(i) the allegation has been received by the Special Counsel; and

(ii) shall include the name of a person at the Office of Special Counsel who shall serve as a contact with the person making the allegation.

(C) Unless an investigation is terminated under paragraph (2), the Special Counsel shall-

(i) within 90 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by the Office of the Special Counsel since the filing of the allegation;

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(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under clause (i); and

(iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.

(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.

(2)(A) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of-

(i) the termination of the investigation;

(ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person;

(iii) the reasons for terminating the investigation; and

(iv) a response to any comments submitted under paragraph (1)(D).

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(B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) from the Special Counsel and-

(A)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and

(ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or

(B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

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(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

(6)(A) Notwithstanding any other provision of this section, not later than 30 days after the date on which the Special Counsel receives an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel may terminate an investigation of the allegation without further inquiry if the Special Counsel determines that-

(i) the same allegation, based on the same set of facts and circumstances, had previously been-

(I)(aa) made by the individual; and

(bb) investigated by the Special Counsel; or

(II) filed by the individual with the Merit Systems Protection Board;

(ii) the Special Counsel does not have jurisdiction to investigate the allegation; or

(iii) the individual knew or should have known of the alleged prohibited personnel practice on or before the date that is 3 years before the date on which the Special Counsel received the allegation.

(B) Not later than 30 days after the date on which the Special Counsel terminates an investigation under subparagraph (A), the Special Counsel shall provide a written notification to the individual who submitted the allegation of a prohibited personnel practice that states the basis of the Special Counsel for terminating the investigation.

(b)(1)(A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate.

(iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

(B)(i) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

(ii) If the Board lacks the number of members appointed under section 1201 required to constitute a quorum, any remaining member of the Board may, upon request by the Special Counsel, extend the period of any stay granted under subparagraph (A).

(C) The Board shall allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

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(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board-

(i) on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or

(ii) on motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.

(E) If the Board grants a stay under subparagraph (A), the head of the agency employing the employee who is the subject of the action shall give priority to a request for a transfer submitted by the employee.

(2)(A)(i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.

(B) If, in connection with any investigation, the Special Counsel determines that there are reasonable

grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

(C) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.

(D) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

(E) A determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.

(3) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for-

(A) oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management; and

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(B) written comments by any individual who alleges to be the subject of the prohibited personnel practice.

(4)(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, other than one described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), has occurred, exists, or is to be taken.

(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against the individual.

(ii) Corrective action under clause (i) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(c)(1) Judicial review of any final order or decision of the Board under this section may be obtained by any employee, former employee, or applicant for employment adversely affected by such order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(d)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless-

(A) the alleged violation has been reported to the Attorney General; and

(B) the Attorney General is pursuing an investigation, in which case the Special Counsel, after consultation with the Attorney General, has discretion as to whether to proceed.

(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the

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agency, a certification by the head of the agency which states-

(1) that the head of the agency has personally reviewed the report; and

(2) what action has been or is to be taken, and when the action will be completed.

(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

(g) If the Board orders corrective action under this section, such corrective action may include-

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).

(h) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(i) The Special Counsel may petition the Board to order corrective action, including fees, costs, or

damages reasonably incurred by an employee due to an investigation of the employee by an agency, if the investigation by an agency was commenced, expanded, or extended in retaliation for a disclosure or protected activity described in section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9), without regard to whether a personnel action, as defined in section 2302(a)(2)(A), is taken.

(Added Pub. L. 101–12, §3(a)(13), Apr. 10, 1989, 103 Stat. 23; amended Pub. L. 103–424, §§3(c), (d), 8(a), Oct. 29, 1994, 108 Stat. 4362, 4364; Pub. L. 112–199, title I, §§101(b)(1)(A), (2)(A), 104(c)(1), 107(b), 114(a), Nov. 27, 2012, 126 Stat. 1465, 1468, 1469, 1472; Pub. L. 115–42, §1, June 27, 2017, 131 Stat. 883; Pub. L. 115–73, title I, §102(a), Oct. 26, 2017, 131 Stat. 1236; Pub. L. 115–91, div. A, title X, §1097(c)(3)(A), (4), (f), (j), Dec. 12, 2017, 131 Stat. 1619, 1622, 1625.)

EDITORIAL NOTES

AMENDMENTS

2017-Subsec. (a)(6). Pub. L. 115–91, §1097(f), added par. (6).

Subsec. (b)(1)(B). Pub. L. 115–42 designated existing provisions as cl. (i) and added cl. (ii).

Subsec. (b)(1)(B)(ii). Pub. L. 115–91, §1097(j), struck out “who was appointed, by and with the advice and consent of the Senate,” after “member of the Board”.

Subsec. (b)(1)(E). Pub. L. 115–91, §1097(c)(3)(A), added subpar. (E) and struck out former subpar. (E) which read as follows: “If the Merit Systems Protection Board grants a stay under this subsection, the head of

the agency employing the employee shall give priority to a request for a transfer submitted by the employee.”

Pub. L. 115–73 added subpar. (E).

Subsec. (i). Pub. L. 115–91, §1097(c)(4), added subsec. (i).

2012-Subsecs. (a)(3), (b)(4)(A). Pub. L. 112–199, §101(b)(1)(A), inserted “or section 2302(b)(9)(A)(i), (B), (C), or (D)” after “section 2302(b)(8)”.

Subsec. (b)(4)(B)(i). Pub. L. 112–199, §101(b)(1)(A), (2)(A), inserted “or section 2302(b)(9)(A)(i), (B), (C), or (D)” after “section 2302(b)(8)” in two places and inserted “or protected activity” after “disclosure”.

Subsec. (b)(4)(B)(ii). Pub. L. 112–199, §114(a), inserted “, after a finding that a protected disclosure was a contributing factor,” after “ordered if”.

Subsec. (g)(2). Pub. L. 112–199, §107(b), substituted “any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).” for “and any other reasonable and foreseeable consequential damages.”

Subsec. (h). Pub. L. 112–199, §104(c)(1), added subsec. (h).

1994-Subsec. (a)(1)(D). Pub. L. 103–424, §3(c)(1), added subpar. (D).

Subsec. (a)(2)(A)(iv). Pub. L. 103–424, §3(c)(2), added cl. (iv).

Subsec. (b)(2). Pub. L. 103–424, §3(d), added subpars. (A) and (E) and redesignated former subpars. (A) to (C) as (B) to (D), respectively.

Subsec. (g). Pub. L. 103–424, §8(a), added subsec. (g).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF 2012 AMENDMENT

Amendment by Pub. L. 112–199 effective 30 days after Nov. 27, 2012, see section 202 of Pub. L. 112–199, set out as a note under section 1204 of this title.

TERMINATION STATEMENT

Pub. L. 103–424, §12(b), Oct. 29, 1994, 108 Stat. 4367, provided that: “The Special Counsel shall include in any letter terminating an investigation under section 1214(a)(2) of title 5, United States Code, the name and telephone number of an employee of the Special Counsel who is available to respond to reasonable questions from the person regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the person’s allegations.”

5 U.S.C. § 2301: Merit system principles

Text contains those laws in effect on July 5, 2022

§2301. Merit system principles

- (a) This section shall apply to-
- (1) an Executive agency; and
 - (2) the Government Publishing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

- (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to

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achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be-

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(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences-

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter-

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel

management is based on and embodies the merit system principles.

(Added Pub. L. 95–454, title I, §101(a), Oct. 13, 1978, 92 Stat. 1113; amended Pub. L. 101–474, §5(c), Oct. 30, 1990, 104 Stat. 1099; Pub. L. 113–235, div. H, title I, §1301(b), Dec. 16, 2014, 128 Stat. 2537.)

5 U.S.C. § 2302: Prohibited personnel practices

Text contains those laws in effect on July 5, 2022

§2302. Prohibited personnel practices

(a)(1) For the purpose of this title, “prohibited personnel practice” means any action described in subsection (b).

(2) For the purpose of this section-

(A) “personnel action” means-

- (i) an appointment;
- (ii) a promotion;
- (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
- (iv) a detail, transfer, or reassignment;
- (v) a reinstatement;
- (vi) a restoration;
- (vii) a reemployment;
- (viii) a performance evaluation under chapter 43 of this title or under title 38;
- (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

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(x) a decision to order psychiatric testing or examination;

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

(xii) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) “covered position” means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action-

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

(C) “agency” means an Executive agency and the Government Publishing Office, but does not include-

(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D);

(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or

(iii) the Government Accountability Office; and

(D) “disclosure” means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences-

(i) any violation of any law, rule, or regulation;

or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-

(1) discriminate for or against any employee or applicant for employment-

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

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(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of-

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

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(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of-

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required

by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences-

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

(C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is-

(i) not classified; or

(ii) if classified-

(I) has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and

(II) does not reveal intelligence sources and methods.

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of-

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation-

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

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(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) refusing to obey an order that would require the individual to violate a law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement;

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title;

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement-

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(A) does not contain the following statement: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”; or

(B) prohibits or restricts an employee or applicant for employment from disclosing to Congress, the Special Counsel, the Inspector General of an agency, or any other agency component responsible for internal investigation or review any information that relates to any violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or any other whistleblower protection; or

(14) access the medical record of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in paragraphs (1) through (13).

This subsection shall not be construed to authorize the withholding of information from Congress or the

taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

(c)(1) In this subsection-

(A) the term “new employee” means an individual-

(i) appointed to a position as an employee on or after the date of enactment of this subsection; and

(ii) who has not previously served as an employee; and

(B) the term “whistleblower protections” means the protections against and remedies for a prohibited personnel practice described in paragraph (8) or subparagraph (A)(i), (B), (C), or (D) of paragraph (9) of subsection (b).

(2) The head of each agency shall be responsible for-

(A) preventing prohibited personnel practices;

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(B) complying with and enforcing applicable civil service laws, rules, and regulations and other aspects of personnel management; and

(C) ensuring, in consultation with the Special Counsel and the Inspector General of the agency, that employees of the agency are informed of the rights and remedies available to the employees under this chapter and chapter 12, including-

(i) information with respect to whistleblower protections available to new employees during a probationary period;

(ii) the role of the Office of Special Counsel and the Merit Systems Protection Board with respect to whistleblower protections; and

(iii) the means by which, with respect to information that is otherwise required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, an employee may make a lawful disclosure of the information to-

(I) the Special Counsel;

(II) the Inspector General of an agency;

(III) Congress (including any committee of Congress with respect to information that is not classified or, if classified, has been classified by the head of an agency that is not an element of the intelligence community and does not reveal intelligence sources and methods); or

(IV) another employee of the agency who is designated to receive such a disclosure.

(3) The head of each agency shall ensure that the information described in paragraph (2) is provided to each new employee of the agency not later than

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180 days after the date on which the new employee is appointed.

(4) The head of each agency shall make available information regarding whistleblower protections applicable to employees of the agency on the public website of the agency and on any online portal that is made available only to employees of the agency, if such portal exists.

(5) Any employee to whom the head of an agency delegates authority for any aspect of personnel management shall, within the limits of the scope of the delegation, be responsible for the activities described in paragraph (2).

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under-

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

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(e)(1) For the purpose of this section, the term “veterans’ preference requirement” means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f), 7281(e), and 7802(5) of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans’ preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

(f)(1) A disclosure shall not be excluded from subsection (b)(8) because-

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(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty;

(F) the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or

(G) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing (referred to in this paragraph as the "disclosing employee"), the disclosure shall not be excluded from subsection (b)(8) if the disclosing employee demonstrates that an employee who has the authority to take, direct other individuals to take, recommend, or approve any personnel action with respect to the disclosing employee took, failed to take, or threatened to take or fail to take a personnel action with respect to the disclosing employee in reprisal for the disclosure made by the disclosing employee.

(Added Pub. L. 95-454, title I, §101(a), Oct. 13, 1978, 92 Stat. 1114; amended Pub. L. 101-12, §4, Apr. 10, 1989, 103 Stat. 32; Pub. L. 101-474, §5(d), Oct. 30,

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1990, 104 Stat. 1099; Pub. L. 102–378, §2(5), Oct. 2, 1992, 106 Stat. 1346; Pub. L. 103–94, §8(c), Oct. 6, 1993, 107 Stat. 1007; Pub. L. 103–359, title V, §501(c), Oct. 14, 1994, 108 Stat. 3429; Pub. L. 103–424, §5, Oct. 29, 1994, 108 Stat. 4363; Pub. L. 104–197, title III, §315(b)(2), Sept. 16, 1996, 110 Stat. 2416, Pub. L. 104–201, div. A, title XI, §1122(a)(1), title XVI, §1615(b), Sept. 23, 1996, 110 Stat. 2687, 2741; Pub. L. 105–339, §6(a), (b), (c)(2), Oct. 31, 1998, 112 Stat. 3187, 3188; Pub. L. 108–271, §8(b), July 7, 2004, 118 Stat. 814; Pub. L. 110–417, [div. A], title IX, §931(a)(1), Oct. 14, 2008, 122 Stat. 4575; Pub. L. 112–199, title I, §§101(a), (b)(1) (B), (2)(B), (C), 102–104(b)(1), 105, 112, Nov. 27, 2012, 126 Stat. 1465–1468, 1472; Pub. L. 112–277, title V, §505(a), Jan. 14, 2013, 126 Stat. 2478; Pub. L. 113–235, div. H, title I, §1301(b), Dec. 16, 2014, 128 Stat. 2537; Pub. L. 114–113, div. J, title II, §238, Dec. 18, 2015, 129 Stat. 2700; Pub. L. 115–40, §2, June 14, 2017, 131 Stat. 861; Pub. L. 115–73, title I, §§103, 107(a)(1), Oct. 26, 2017, 131 Stat. 1236, 1238; Pub. L. 115–91, div. A, title X, §1097(b)(1)(B), (c)(1), Dec. 12, 2017, 131 Stat. 1616, 1618; Pub. L. 116–92, div. E, title LVII, §5721, Dec. 20, 2019, 133 Stat. 2175; Pub. L. 116–283, div. A, title XI, §1138, Jan. 1, 2021, 134 Stat. 3905.)

EDITORIAL NOTES

REFERENCES IN TEXT

Section 1308(b) of the Alaska National Interest Lands Conservation Act, referred to in subsec. (e)(1)(C), is classified to section 3198(b) of Title 16, Conservation.

Section 301(c) of the Foreign Service Act of 1980, referred to in subsec. (e)(1)(D), is classified to

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section 3941(c) of Title 22, Foreign Relations and Intercourse.

Section 106(f) of title 38, referred to in subsec. (e)(1)(E), was enacted subsequent to the enactment of subsec. (e) of this section.

Section 7802(5) of title 38, referred to in subsec. (e)(1)(E), was redesignated section 7802(e) of title 38 by Pub. L. 108–170, title III, §304(b)(3), Dec. 6, 2003, 117 Stat. 2059.

AMENDMENTS

2021-Subsec. (b)(13). Pub. L. 116–283 substituted “agreement-” for “agreement”, designated remainder of existing provisions as subpar. (A), inserted “or the Office of Special Counsel” after “Inspector General”, and added subpar. (B).

2019-Subsec. (b)(8)(C). Pub. L. 116–92, §5721(1), added subpar. (C).

Subsec. (c)(2)(C)(iii)(III). Pub. L. 116–92, §5721(2), inserted “(including any committee of Congress with respect to information that is not classified or, if classified, has been classified by the head of an agency that is not an element of the intelligence community and does not reveal intelligence sources and methods)” after “Congress”.

2017-Subsec. (b)(9)(C). Pub. L. 115–91, §1097(c)(1)(A), inserted “(or any other component responsible for internal investigation or review)” after “Inspector General”.

Subsec. (b)(9)(D). Pub. L. 115–40 struck out “for” after “(D)” and inserted “, rule, or regulation” after “a law”.

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Subsec. (b)(14). Pub. L. 115–73, §103, added par. (14).

Subsecs. (c) to (f). Pub. L. 115–91, §1097(b)(1)(B), added subsec. (c) and redesignated former subsecs. (c) to (e) as (d) to (f), respectively.

Pub. L. 115–73, §107(a)(1), redesignated subsecs. (d) to (f) as (c) to (e), respectively, and struck out former subsec. (c) which read as follows: “The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General

5 U.S.C. § 7502: Actions covered

Text contains those laws in effect on July 5, 2022

§7502. Actions covered

This subchapter applies to a suspension for 14 days or less, but does not apply to a suspension under section 7521 or 7532 of this title or any action initiated under section 1215 of this title.

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(Added Pub. L. 95–454, title II, §204(a), Oct. 13, 1978, 92 Stat. 1135; amended Pub. L. 101–12, §9(a)(2), Apr. 10, 1989, 103 Stat. 35.)

EDITORIAL NOTES

AMENDMENTS

1989-Pub. L. 101–12 substituted “1215” for “1206”.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101–12, set out as a note under section 1201 of this title.

EFFECTIVE DATE

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95–454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

5 U.S.C. § 7503: Cause and procedure

Text contains those laws in effect on July 5, 2022

§7503. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor’s report of four such instances

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within any one-year period or any other pattern of discourteous conduct).

(b) An employee against whom a suspension for 14 days or less is proposed is entitled to-

(1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting¹ the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

(Added Pub. L. 95-454, title II, §204(a), Oct. 13, 1978, 92 Stat. 1135.)

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as an Effective

¹ *So in original. Probably should be "affecting".*

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Date of 1978 Amendment note under section 1101 of this title.

INFORMATION ON APPEAL RIGHTS

Pub. L. 115–91, div. A, title X, §1097(b)(2), Dec. 12, 2017, 131 Stat. 1617, provided that:

“(A) IN GENERAL.-Any notice provided to an employee under section 7503(b)(1), section 7513(b)(1), or section 7543(b)(1) of title 5, United States Code, shall include detailed information with respect to-

“(i) the right of the employee to appeal an action brought under the applicable section;

“(ii) the forums in which the employee may file an appeal described in clause (i); and

“(iii) any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file an appeal.

“(B) DEVELOPMENT OF INFORMATION.-The information described in subparagraph (A) shall be developed by the Director of the Office of Personnel Management, in consultation with the Special Counsel, the Merit Systems Protection Board, and the Equal Employment Opportunity Commission.”

5 U.S.C. § 7512: Actions covered

Text contains those laws in effect on July 5, 2022

§7512. Actions covered

This subchapter applies to-

- (1) a removal;
- (2) a suspension for more than 14 days;
- (3) a reduction in grade;

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- (4) a reduction in pay; and
- (5) a furlough of 30 days or less;

but does not apply to-

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title,

(E) an action initiated under section 1215 or 7521 of this title, or

(F) a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.

(Added Pub. L. 95-454, title II, §204(a), Oct. 13, 1978, 92 Stat. 1136; amended Pub. L. 101-12, §9(a)(2), Apr. 10, 1989, 103 Stat. 35; Pub. L. 114-92, div. A, title X, §1086(f)(9), Nov. 25, 2015, 129 Stat. 1010.)

EDITORIAL NOTES

PRIOR PROVISIONS

A prior section 7512, Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 528, related to adverse action against a preference eligible employee and procedures applicable

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to such adverse action, prior to repeal by Pub. L. 95–454, §204(a).

AMENDMENTS

2015-Par. (F). Pub. L. 114–92 added par. (F).

1989-Par. (E). Pub. L. 101–12 substituted “1215” for “1206”.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101–12, set out as a note under section 1201 of this title.

EFFECTIVE DATE

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95–454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

5 U.S.C. § 7513: Cause and procedure

Text contains those laws in effect on July 5, 2022

§7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to-

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(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

(Added Pub. L. 95-454, title II, §204(a), Oct. 13, 1978, 92 Stat. 1136.)

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

5 U.S.C. § 7701: Appellate procedures

Text contains those laws in effect on July 5, 2022

§7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right-

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall

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make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless-

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

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(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision-

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment-

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which-

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction

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of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless-

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not

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apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may-

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

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(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the

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number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

5 U.S.C. § 7703: Judicial review of decisions of the Merit Systems Protection Board

Text contains those laws in effect on July 5, 2022

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

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or

decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

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

(B) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and

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section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

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

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

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

(3) unsupported by substantial evidence;

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

(d)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial

impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) This paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision,

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and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

(Added Pub. L. 95–454, title II, §205, Oct. 13, 1978, 92 Stat. 1143; amended Pub. L. 97–164, title I, §144, Apr. 2, 1982, 96 Stat. 45; Pub. L. 101–12, §10, Apr. 10, 1989, 103 Stat. 35; Pub. L. 105–311, §10(a), Oct. 30, 1998, 112 Stat. 2954; Pub. L. 112–199, title I, §108, Nov. 27, 2012, 126 Stat. 1469; Pub. L. 113–170, §2, Sept. 26, 2014, 128 Stat. 1894; Pub. L. 115–195, §2(a), (b), July 7, 2018, 132 Stat. 1510.)

EDITORIAL NOTES

AMENDMENTS

2018-Subsec. (b)(1)(B). Pub. L. 115–195, §2(a), substituted “A petition” for “During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition”.

Subsec. (d)(2). Pub. L. 115–195, §2(b), substituted “This paragraph” for “During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, this paragraph”.

2014-Subsecs. (b)(1)(B), (d)(2). Pub. L. 113–170 substituted “5-year” for “2-year”.

2012-Subsec. (b)(1). Pub. L. 112–199, §108(a), added par. (1) and struck out former par. (1) which read as follows: “Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States

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Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.”

Subsec. (d). Pub. L. 112–199, §108(b), amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: “The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board’s decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.”

1998-Subsec. (b)(1). Pub. L. 105–311, §10(a)(1), substituted “within 60 days” for “within 30 days”. Subsec. (d). Pub. L. 105–311, §10(a)(2), in first sentence, inserted “, within 60 days after the date the

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Director received notice of the final order or decision of the Board,” after “filing”.

1989-Subsec. (a)(2). Pub. L. 101–12 amended par. (2) generally. Prior to amendment, par. (2) read as follows: “The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.”

1982-Subsec. (b)(1). Pub. L. 97–164, §144(1), substituted “United States Court of Appeals for the Federal Circuit” for “Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively, of title 28”.

Subsec. (c). Pub. L. 97–164, §144(2), substituted “Court of Appeals for the Federal Circuit” for “Court of Claims or a United States court of appeals”.

Subsec. (d). Pub. L. 97–164, §144(3), substituted “United States Court of Appeals for the Federal Circuit” for “United States Court of Appeals for the District of Columbia”.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF 2018 AMENDMENT

Pub. L. 115–195, §2(c), July 7, 2018, 132 Stat. 1510, provided that: “The amendments made by this section [amending this section] shall take effect as if enacted on November 26, 2017.”

8 U.S.C. § 1182: Excludable Aliens

Text contains those laws in effect on January 4, 1995

§1182. Excludable aliens

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

(1) Health-related grounds

(A) In general

Any alien—

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

(ii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

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(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is excludable.

(B) Waiver authorized

For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g) of this section.

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is excludable.

* * *

10 U.S.C. § 1580a: Emergency essential employees: notification of required participation in anthrax vaccine immunization program

Text contains those laws in effect on July 7, 2022

§1580a. Emergency essential employees: notification of required participation in anthrax vaccine immunization program

The Secretary of Defense shall-

(1) prescribe regulations for the purpose of ensuring that any civilian employee of the Department of Defense who is determined to be an emergency essential employee and who is required to participate in the anthrax vaccine immunization program is notified of the requirement to participate in the program and the consequences of a decision not to participate; and

(2) ensure that any individual who is being considered for a position as such an employee is notified of the obligation to participate in the program before being offered employment in such position.

(Added Pub. L. 106-398, §1 [[div. A], title VII, §751(c)(1)], Oct. 30, 2000, 114 Stat. 1654, 1654A-194.)

29 U.S.C. § 651: Congressional statement of findings and declaration of purpose and policy

Text contains those laws in effect on July 7, 2022

§651. Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources-

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce,

and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and

enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

(Pub. L. 91-596, §2, Dec. 29, 1970, 84 Stat. 1590.)

EDITORIAL NOTES

REFERENCES IN TEXT

This chapter, referred to in subsec. (b)(3), (11), and (12), was in the original “this Act”, meaning Pub. L. 91-596, Dec. 29, 1970, 84 Stat. 1590. For complete classification of this Act to the Code, see Short Title note set out under this section and Tables.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Pub. L. 91-596, §34, Dec. 29, 1970, 84 Stat. 1620, provided that: “This Act [enacting this chapter and

section 3142-1 of Title 42, The Public Health and Welfare, amending section 553 of this title, sections 5108, 5314, 5315, and 7902 of Title 5, Government Organization and Employees, sections 633 and 636 of Title 15, Commerce and Trade, section 1114 of Title 18, Crimes and Criminal Procedure, and section 1421 of former Title 49, Transportation, and enacting provisions set out as notes under this section and section 1114 of Title 18] shall take effect one hundred and twenty days after the date of its enactment [Dec. 29, 1970].”

SHORT TITLE OF 1998 AMENDMENT

Pub. L. 105-197, §1, July 16, 1998, 112 Stat. 638, provided that: “This Act [amending section 670 of this title] may be cited as the ‘Occupational Safety and Health Administration Compliance Assistance Authorization Act of 1998’.”

SHORT TITLE

Pub. L. 91-596, §1, Dec. 29, 1970, 84 Stat. 1590, provided: “That this Act [enacting this chapter and section 3142-1 of Title 42, The Public Health and Welfare, amending section 553 of this title, sections 5108, 5314, 5315, and 7902 of Title 5, Government Organization and Employees, sections 633 and 636 of Title 15, Commerce and Trade, section 1114 of Title 18, Crimes and Criminal Procedure, and section 1421 of former Title 49, Transportation, and enacting provisions set out as notes under this section and section 1114 of Title 18] may be cited as the ‘Occupational Safety and Health Act of 1970’.”

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5 C.F.R.

§ 752.203 Procedures.

(a) *Statutory entitlements.* An employee under this subpart whose suspension is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7503(b).

(b) *Notice of proposed action.* The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

(c) *Employee's answer.* The employee must be given a reasonable time, but not less than 24 hours, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

(d) *Representation.* An employee covered by this subpart is entitled to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from his or her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(e) *Agency decision.* (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official.

(2) The agency must specify in writing the reason(s) for the decision and advise the employee of any grievance rights under paragraph (f) of this section. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

(f) *Grievances.* The employee may file a grievance through an agency administrative grievance system (if applicable) or, if the suspension falls within the coverage of an applicable negotiated grievance procedure, an employee in an exclusive bargaining unit may file a grievance only under that procedure. Sections 7114(a)(5) and 7121(b)(1)(C) of title 5, U.S. Code, and the terms of any collective bargaining agreement, govern representation for employees in an exclusive bargaining unit who grieve a suspension under this subpart through the negotiated grievance procedure.

(g) *Agency records.* The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the employee upon their request, the following documents:

- (1) Notice of the proposed action;
- (2) Employee's written reply, if any;
- (3) Summary of the employee's oral reply, if any;
- (4) Notice of decision; and
- (5) Any order effecting the suspension, together with any supporting material.

(h) *Settlement agreements.* (1) An agency shall not agree to erase, remove, alter, or withhold from another

agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(2) The requirements described in paragraph (h)(1) of this section should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

(3) Corrective action based on discovery of material information prior to final agency action. When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (h)(1) of this section would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65985, Oct. 16, 2020]

Subpart C [Reserved]

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

§ 752.401 Coverage.

(a) *Adverse actions covered.* This subpart applies to the following actions:

(1) Removals;

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(2) Suspensions for more than 14 days, including indefinite suspensions;

(3) Reductions in grade;

(4) Reductions in pay; and

(5) Furloughs of 30 days or less.

(b) *Actions excluded.* This subpart does not apply to:

(1) An action imposed by the Merit Systems Protection Board under the authority of 5 U.S.C. 1215;

(2) The reduction in grade of a supervisor or manager who has not completed the probationary period under 5 U.S.C. 3321(a)(2) if such a reduction is to the grade held immediately before becoming a supervisor or manager;

(3) A reduction-in-force action under 5 U.S.C. 3502;

(4) A reduction in grade or removal under 5 U.S.C. 4303;

(5) An action against an administrative law judge under 5 U.S.C. 7521;

(6) A suspension or removal under 5 U.S.C. 7532;

(7) Actions taken under any other provision of law which excepts the action from subchapter II of chapter 75 of title 5, United States Code;

(8) Action that entitles an employee to grade retention under part 536 of this chapter, and an action to terminate this entitlement;

(9) A voluntary action by the employee;

(10) Action taken or directed by the Office of Personnel Management under part 731 of this chapter;

(11) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made;

(12) Action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different

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position of equivalent grade and pay, if the agency informed the employee that it was to be of limited duration;

(13) Cancellation of a promotion to a position not classified prior to the promotion;

(14) Placement of an employee serving on an intermittent or seasonal basis in a temporary nonduty, nonpay status in accordance with conditions established at the time of appointment;

(15) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation, including a reduction necessary to comply with the amendments made by Public Law 108-411, regarding pay-setting under the General Schedule and Federal Wage System and regulations implementing those amendments; or

* * *

Code, who is an alien or noncitizen occupying a position outside the United States;

(11) A nonpreference eligible employee serving a probationary or trial period under an initial appointment in the excepted service pending conversion to the competitive service, unless he or she meets the requirements of paragraph (c)(5) of this section;

(12) An employee whose agency or position has been excluded from the appointing provisions of title 5, United States Code, by separate statutory authority in the absence of any provision to place the employee within the coverage of chapter 75 of title 5, United States Code; and

(13) An employee in the competitive service serving a probationary or trial period, unless he or she meets the requirements of paragraph (c)(2) of this section.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65986, Oct. 16, 2020]

§ 752.404 Procedures.

(a) *Statutory entitlements.* An employee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7513(b).

(b) *Notice of proposed action.* (1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. However, to the extent an agency in its sole and exclusive discretion deems practicable, agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7513(b)(1) of title 5, United States Code. Advance notices of greater than 30 days must be reported to the Office of Personnel Management. The notice must state the specific reason(s) for the proposed action and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115–91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

(2) When some but not all employees in a given competitive level are being furloughed, the notice of

proposed action must state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough.

(3) Under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed will remain in a duty status in his or her regular position during the advance notice period. In those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:

(i) Assigning the employee to duties where he or she is no longer a threat to safety, the agency mission, or to Government property;

(ii) Allowing the employee to take leave, or carrying him or her in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the employee has absented himself or herself from the worksite without requesting leave;

(iii) Curtailing the notice period when the agency can invoke the provisions of paragraph (d)(1) of this section; or

(iv) Placing the employee in a paid, nonduty status for such time as is necessary to effect the action. After publication of regulations for 5 U.S.C. 6329b, and the subsequent agency implementation period in accordance with 5 U.S.C. 6329b, an agency may place the employee in a notice leave status when applicable.

(c) *Employee's answer.* (1) An employee may answer orally and in writing except as provided in

paragraph (c)(2) of this section. The agency must give the employee a reasonable amount of official time to review the material relied on to support its proposed action, to prepare an answer orally and in writing, and to secure affidavits, if the employee is in an active duty status. The agency may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the answer, within such time as would be reasonable, but not less than 7 days.

(2) The agency will designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides for such hearing in its regulations. Under 5 U.S.C. 7513(c), the agency may, in its regulations, provide a hearing in place of or in addition to the opportunity for written and oral answer.

(3) If the employee wishes the agency to consider any medical condition which may contribute to a conduct, performance, or leave problem, the employee must be given a reasonable time to furnish medical documentation (as defined in § 339.104 of this chapter) of the condition. Whenever possible, the employee will supply such documentation within the time limits allowed for an answer.

(d) *Exceptions.* (1) Section 7513(b) of title 5, U.S. Code, authorizes an exception to the 30 days' advance written notice when the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension, including

indefinite suspension. This notice exception is commonly referred to as the “crime provision.” This provision may be invoked even in the absence of judicial action.

(2) The advance written notice and opportunity to answer are not required for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(e) *Representation.* Section 7513(b)(3) of title 5, U.S. Code, provides that an employee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an employee’s representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from his or her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(f) *Agency review of medical information.* When medical information is supplied by the employee pursuant to paragraph (c)(3) of this section, the agency may, if authorized, require a medical examination under the criteria of § 339.301 of this chapter, or otherwise, at its option, offer a medical examination in accordance with the criteria of § 339.302 of this chapter. If the employee has the requisite years of service under the Civil Service Retirement System or the Federal Employees’ Retirement System, the agency must provide information concerning disability retirement. The agency must be aware of the affirmative obligations of the provisions of 29 CFR

1614.203, which require reasonable accommodation of a qualified individual with a disability.

(g) *Agency decision.* (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official and any medical documentation reviewed under paragraph (f) of this section.

(2) The notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under § 752.405 of this part. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond under paragraph (c) of this section.

(h) *Applications for disability retirement.* Section 831.1204(e) of this chapter provides that an employee's application for disability retirement need not delay any other appropriate personnel action. Section 831.1205 and § 844.202 of this chapter set forth the basis under which an agency must file an application for disability retirement on behalf of an employee.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65986, Oct. 16, 2020]

§ 752.405 Appeal and grievance rights.

(a) *Appeal rights.* Under the provisions of 5 U.S.C. 7513(d), an employee against whom an action is taken

under this subpart is entitled to appeal to the Merit Systems Protection Board.

(b) *Grievance rights.* As provided at 5 U.S.C. 7121(e)(1), if a matter covered by this subpart falls within the coverage of an applicable negotiated grievance procedure, an employee may elect to file a grievance under that procedure or appeal to the Merit Systems Protection Board under 5 U.S.C. 7701, but not both. Sections 7114(a)(5) and 7121(b)(1)(C) of title 5, U.S. Code, and the terms of an applicable collective bargaining agreement, govern representation for employees in an exclusive bargaining unit who grieve a matter under this subpart through the negotiated grievance procedure.

§ 752.406 Agency records.

The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the employee upon his or her request, the following documents:

- (a) Notice of the proposed action;
- (b) Employee's written reply, if any;
- (c) Summary of the employee's oral reply, if any;
- (d) Notice of decision; and
- (e) Any order effecting the action, together with any supporting material.

§ 752.407 Settlement agreements.

(a) *Agreements to alter official personnel records.* An agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an

employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(b) *Corrective action based on discovery of agency error.* The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action, should it come to light, including during or after the issuance of an adverse personnel action that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

(c) *Corrective action based on discovery of material information prior to final agency action.* When

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persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action.

* * *

APPENDIX F

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No.: 1:21-cv-03077

[Filed November 22, 2021]

JASON PAYNE,)
3057 Nutley Street #131)
Fairfax, VA 22031)
Plaintiff,)
)
v.)
)
JOSEPH R. BIDEN, Jr.)
President of the United States)
1600 Pennsylvania Avenue, NW)
Washington, DC 20500)
)
UNITED STATES OFFICE OF)
PERSONNEL MANAGEMENT)
1900 E Street NW)
Washington, DC 20415)
)
KIRAN AHUJA, Director)
United States Office of Personnel Management)
1900 E Street NW)
Washington, DC 20415)
)

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GENERAL SERVICES ADMINISTRATION)
1800 F Street NW)
Washington, DC 20405)
)
ROBIN CARNAHAN, Administrator)
General Services Administration)
1800 F Street NW)
Washington, DC 20405)
)
OFFICE OF MANAGEMENT AND BUDGET)
725 17th Street NW)
Washington, DC 20503)
)
SHALANDA YOUNG, Acting Director)
Office of Management and Budget)
725 17th Street NW)
Washington, DC 20503)
)
SAFER FEDERAL WORKFORCE TASK FORCE)
c/o the General Services Administration)
1800 F. Street NW)
Washington, DC 20405)
)
JEFFREY ZIENTS, Co-Chair)
Safer Federal Workforce Task Force and)
COVID-19 Response Coordinator)
c/o the General Services Administration)
1800 F. Street NW)
Washington, DC 20405)
)
UNITED STATES DEPARTMENT OF DEFENSE)
1400 Defense Pentagon)
Washington, DC 20301)
)

LLOYD J. AUSTIN, III, Secretary of the)
United States Department of Defense)
1400 Defense Pentagon)
Washington, DC 20301)
)
UNITED STATES DEPARTMENT OF)
THE NAVY)
1000 Navy Pentagon)
Washington, DC 20350)
)
and)
)
CARLOS DEL TORO, Secretary of the Navy)
1000 Navy Pentagon)
Washington, DC 20350)
Defendants.)
_____)

COMPLAINT

1. In the wake of his Administration’s inability to end the COVID-19 pandemic, President Joseph R. Biden has decreed COVID-19 vaccination to be a condition of federal civilian employment, even for workers who have natural immunity to the virus. However, the Constitution does not give him this power, and no law passed by the Congress authorizes it.

2. The plaintiff, Jason Payne, is a federal civilian worker. He has been a dedicated member of the civil service for more than two decades. Mr. Payne has recovered from COVID-19 and has natural immunity. He refuses vaccination. As a result, the defendants have promised he will lose his job.

3. A vaccine mandate exceeds the President's lawful powers. Facially and as applied, it also violates Mr. Payne's fundamental Due Process rights and liberty interests, including his right to privacy and his right to be free from the forcible injection of unwanted and unnecessary medication. Accordingly, Mr. Payne brings this action to enjoin the defendants and to protect the rule of law.

JURISDICTION AND VENUE

4. This Court has jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702. Plaintiff has a cause of action in equity and under 28 U.S.C. § 1651 to declare unlawful and to enjoin Executive Branch action violating the Constitution. Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in this District under 28 U.S.C. § 1391(b)(2).

PARTIES

6. The plaintiff Jason Payne is a federal civilian employee and resident of the Commonwealth of Virginia. In 2001, after earning a Bachelor of Science degree in Physics with a minor in Mathematics from Longwood College, and then a Master of Engineering degree from the Mechanical Engineering department at the University of Virginia, Mr. Payne joined the federal civil service working for the Department of the Navy. He is currently employed as an engineer with the Office of Naval Research. Mr. Payne reasonably expects to continue working in this Office.

7. Mr. Payne contracted COVID-19 and recovered, thereby acquiring natural immunity against the disease. According to a summary of clinical studies published on September 21, 2021, and subsequently cited by the Centers for Disease Control and Prevention, “natural immunity in COVID-recovered individuals is, at least, equivalent to the protection afforded by full vaccination of COVID-naïve populations”, “vaccination of COVID-recovered individuals should be subject to clinical equipoise and individual preference”, and “National policy should reflect the need for clinical equipoise and restraint in the decision to vaccinate [COVID-recovered] individuals by mandate.” Mahesh B. Shenai, et al, *Equivalency of Protection from Natural Immunity in COVID-19 Recovered Versus Fully Vaccinated Persons: A Systematic Review and Pooled Analysis*, medRxiv, 2, 18 (2021) <https://www.medrxiv.org/content/10.1101/2021.09.12.21263461v1.full-text>; Centers for Disease Control and Prevention, *Science Brief: SARS-CoV-2 Infection-induced and Vaccine-induced Immunity* at fn.79 (Oct. 29, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/vaccine-induced-immunity.html#print>.

8. Defendant Joseph R. Biden is the President of the United States. He is sued in his official capacity. Without legal authority and in violation of Mr. Payne’s constitutional rights, he has mandated vaccination as a condition of federal civilian employment.

9. Defendant the United States Office of Personnel Management (“OPM”) is a federal agency. The OPM serves as the federal government’s chief

human resources and personnel policy manager. Without legal authority and in violation of Mr. Payne's constitutional rights, it is implementing defendant Biden's vaccine mandate.

10. Defendant Kiran Ahuja is Director of the OPM and co-chair of defendant Safer Federal Workforce Task Force. Without legal authority and in violation of Mr. Payne's constitutional rights, she is implementing defendant Biden's vaccine mandate. She is sued in her official capacities.

11. Defendant the General Services Agency ("GSA") is a federal agency established to manage and support the basic functioning of federal agencies. Without legal authority and in violation of Mr. Payne's constitutional rights, it is implementing defendant Biden's vaccine mandate.

12. Defendant Robin Carnahan is the Administrator of the GSA and a co-chair of defendant Safer Federal Workforce Task Force. Without legal authority and in violation of Mr. Payne's constitutional rights, she is implementing defendant Biden's vaccine mandate. She is sued in her official capacities.

13. Defendant the Office of Management and Budget ("OMB") is the largest office within the Executive Office of the President of the United States. Without legal authority and in violation of Mr. Payne's constitutional rights, it is implementing defendant Biden's vaccine mandate.

14. Defendant Shalanda Young is the Acting Director of OMB. Without legal authority and in violation of Mr. Payne's constitutional rights, she is

implementing defendant Biden's vaccine mandate. She is sued in her official capacity.

15. Defendant the Safer Federal Workforce Task Force ("Task Force") was established January 20, 2021, by Executive Order 13,991, 86 Fed. Reg. 7045 (Jan. 20, 2021). Without legal authority and in violation of Mr. Payne's constitutional rights, the Task Force is implementing defendant Biden's vaccine mandate. Although Executive Order 13,991 cited 5 U.S.C. § 7902(c) as authorizing the Task Force's creation and activities, the statute does not do so, and all its activities are *ultra vires* and unlawful.

16. Defendant Jeffrey Zients is co-chair of defendant Task Force and defendant Biden's COVID-19 "Response Coordinator." Without legal authority and in violation of Mr. Payne's constitutional rights, he is implementing defendant Biden's vaccine mandate. He is sued in his official capacity.

17. Defendant the United States Department of Defense ("DOD") is a federal agency. Without legal authority and in violation of Mr. Payne's constitutional rights, it is implementing defendant Biden's vaccine mandate.

18. Defendant Lloyd J. Austin, III is the Secretary of DOD. Without legal authority and in violation of Mr. Payne's constitutional rights, he is implementing defendant Biden's vaccine mandate. He is sued in his official capacity.

19. Defendant the United States Department of the Navy ("Navy") is a military department within the DOD under the National Security Act Amendments of

1949, 63 Stat. 578. Without legal authority and in violation of Mr. Payne's constitutional rights, it is implementing defendant Biden's vaccine mandate.

20. Defendant Carlos Del Toro is the Secretary of the Navy. Without legal authority and in violation of Mr. Payne's constitutional rights, he is implementing defendant Biden's vaccine mandate. He is sued in his official capacity.

FACTS

21. Before entering office, then-candidate Biden rejected the idea of mandatory vaccinations: "No I don't think [vaccines] should be mandatory." *See, e.g.*, Jacob Jarvis, *Fact Check: Did Joe Biden Reject Idea of Mandatory Vaccines in December 2020*, Newsweek (Sept. 10, 2021), <https://www.newsweek.com/fact-check-joe-biden-no-vaccines-mandatory-december-2020-1627774>.

22. On January 20, 2021, defendant Biden issued Executive Order 13,991, 86 Fed. Reg. 7045 (Jan. 20, 2021) attached as Exhibit 1.

23. Executive Order 13,991 established the Safer Federal Workforce Task Force ("Task Force"). It included the OPM Director (Co-Chair); the GSA Administrator (Co-Chair); the COVID-19 Response Coordinator (Co-Chair); the OMB Director; the Federal Protective Service Director; the United States Secret Service Director; the Federal Emergency Management Agency Administrator; the Centers for Disease Control and Prevention Director; and any other agency heads that the Co-Chairs jointly or individually invite. Defendant GSA had funding and administrative

support responsibilities. “[S]ection 7902(c) of title 5, United States Code” was the sole specific legal authority cited to support its creation and activities.

24. This section, 5 U.S.C. § 7902(c), provides the President may: (1) “establish by Executive order a safety council composed of representatives of the agencies and of labor organizations representing employees to serve as an advisory body to the Secretary in furtherance of the safety program carried out by the Secretary [of Labor] under subsection (b) of this section” and (2) “undertake such other measures as he considers proper to prevent injuries and accidents to employees of the agencies.”

25. “[S]ubsection (b),” that is, 5 U.S.C. § 7902(b), authorizes the Secretary of Labor to carry out a “safety program” under 33 U.S.C. § 941(b)(1).

26. Section 941(b)(1) authorizes the Secretary of Labor “to make studies and investigations with respect to safety provisions and the causes and prevention of injuries in employments covered by this chapter, and in making such studies and investigations to cooperate with any agency of the United States or with any State agency engaged in similar work.”

27. The referenced “chapter” is chapter 18 of title 33, United States Code. Chapter 18, title 33, United States Code is titled “Longshore and Harbor Workers’ Compensation”, and all its sections address this topic.

28. In July 2021, the Biden Administration said that imposing a vaccine mandate was not the role of the federal government. (@Quicktake), Twitter (Jul. 23, 2021, 2:16 PM), <https://mobile.twitter.com/Quicktake/status/1418636102643167235>.

29. But then President Biden changed his mind.

30. On September 9, 2021, he said that his “patience [wa]s wearing thin,” and told unvaccinated Americans that “your refusal [to get vaccinated] has cost us all.” Morgan Chalfant, *Biden Blames Unvaccinated for COVID-19 Slog*, The Hill (Sept. 9, 2021), <https://thehill.com/policy/healthcare/571593-biden-blames-unvaccinated-for-covid-19s-slog>. On that day, he issued Executive Order No. 14,043, 86 Fed. Reg. 50989 (Sep. 14, 2021) attached as Exhibit 2.

31. Executive Order 14,043 required all federal agencies to “implement . . . a program to requir[e] COVID-19 vaccinations for all of its federal employees, with exceptions only as required by law.” It directed “the Task Force [to] issue guidance within 7 days of the date of this order on agency implementation of this requirement for all agencies covered by this order.” However, this was *ultra vires* overreach and contrary to the express terms of 5 U.S.C. § 7902(c), the supposed authority for the Task Force’s formation and operations under Executive Order 13,991.

32. The Task Force was not a “safety council” under 5 U.S.C. § 7902(c)(1).

33. The President did not have authority under 5 U.S.C. § 7902(c)(2) to order the Task Force to issue “guidance” for a vaccine mandate, his authority

narrowly extended only to “injuries and accidents” within the federal workplace.

34. In any event, Executive Order 14,043 did not cite 5 U.S.C. § 7902(c)(2), as authority for the federal civilian employee vaccine mandate. Rather, it cited only 5 U.S.C. §§ 3301, 3302, and 7301.

35. Section 3301, titled “Civil Service; generally”, does not clearly authorize a vaccine mandate. It provides:

The President may—(1) *prescribe such regulations for the admission of individuals into the civil service* in the executive branch as will best promote the efficiency of that service; (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

5 U.S.C. § 3301 (emphasis added).

36. Section 3302, titled “Competitive service; rules,” does not clearly authorize a vaccine mandate by Executive Order. It provides:

The President may *prescribe rules governing the competitive service*. The rules shall provide, as nearly as conditions of good administration warrant, for—(1) necessary exceptions of positions from the competitive service; and (2) necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, and 7203 of this title. Each officer and individual employed

in an agency to which the rules apply shall aid
in *carrying out the rules*.

5 U.S.C. § 3302 (emphasis added).

37. Section 7301, titled “Presidential regulations,” does not clearly authorize a vaccine mandate. It provides “The President may *prescribe regulations for the conduct of employees in the executive branch*.” 5 U.S.C. § 7301 (emphasis added).

38. Executive Order 14,043 was an unprecedented exercise of Executive authority. The Government had not previously claimed authority to mandate vaccines for all federal civilian employees as a condition of employment.

39. On September 13, 2021, the Task Force published model “Safety Principles” setting November 22, 2021, as a deadline for federal employees to be “fully vaccinated.” See Safer Federal Workforce, *COVID-19 Workplace Safety: Agency Model Safety Principles*, White House (Sept. 13, 2021) <https://www.saferfederalworkforce.gov/downloads/updates%20to%20model%20safety%20principles%209.13.21.pdf> attached as Exhibit 3. It did not cite competent or specific statutory authority for this action.

40. On September 24, 2021, defendant Biden again attacked and stigmatized unvaccinated individuals for not “doing the right thing” and “causing a lot of damage” and alleged that their “refusal to get vaccinated has cost all of us.” Counterfactually, defendant Biden said “this is a pandemic of the unvaccinated. And it’s caused by the fact that[] . . . we

still have over 70 million Americans who have failed to get a single shot.” *Remarks by President Biden on the COVID-19 Response and the Vaccination Program*, WH.gov (Sept. 24, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/24/remarks-by-president-biden-on-the-covid-19-response-and-the-vaccination-program-8/>.

41. On or about October 1, 2021, the OPM issued *Memorandum for Heads of Executive Departments and Agencies, Guidance on Applying Coronavirus Disease 2019 Vaccination Requirements to New Hires – Executive Order 14043* (Oct. 1, 2021) <https://www.opm.gov/policy-data-oversight/covid-19/director-memo-on-hiring-guidance-vaccine-requirements.pdf> attached as Exhibit 4. The OPM’s cited legal authority was “Executive Order (EO) 14043, titled, “Requiring Coronavirus Disease 2019 Vaccination for Federal Employees”, and “guidance” issued by “the Safer Federal Workforce Task Force, established by EO 13991 (January 20, 2021) ... [specifying] that agencies should require all of their employees, with exceptions only as required by law, to be fully vaccinated by November 22, 2021.”

42. Although styled as guidance for new hires, under the heading “Current Federal Employees” the OPM specified a vaccination schedule. Pfizer-BioNTech vaccine subjects were to get their first dose by October 18 and their second dose by November 8; Moderna vaccine subjects were to get their first dose by October 11 and their second dose by November 8; and Johnson & Johnson/Janssen vaccine subjects were to get their one-and-only shot by November 8.

43. For new hires, the OPM urged agencies to “require all new employees to be fully vaccinated prior to entering on duty” and to “clearly describe in their job opportunity the COVID-19 vaccination requirement”, providing sample language for the agencies to use. The OPM advised unvaccinated people were subject to “action up to and including rescinding the offer for an applicant or termination from service of a new employee (or removal for an employee who has accrued adverse action rights).”

44. Also, on or about October 1, 2021, the OPM issued enforcement guidance “to assist agencies in implementing” Executive Order 14,043. *Guidance on Enforcement of Coronavirus Disease 2019 Vaccination Requirement for Federal Employees – Executive Order 14,043* at ¶ 1, <https://www.opm.gov/policy-data-oversight/covid-19/enforcement-guidance-faqs.pdf> attached as Exhibit 5.

45. Here, the OPM directed agencies, as “part of the education process”, to advise their workers that “failure to comply will result in disciplinary action up to and including removal or termination.” *Id.* at ¶ 4. The given justification for discipline was “If an employee receives a direct order to receive a vaccine as required under EO 14043 and refuses, this is an act of misconduct.” *Id.* at ¶ 9.

46. Also on October 1, 2021, as “directed” by Executive Order 14,043, the DOD issued a vaccine mandate by memorandum. It required civilian employees, including Mr. Payne, to be “fully vaccinated” by November 22, 2021. It said, “Those with previous COVID-19 infection(s) or previous serology

are not considered fully vaccinated on that basis for the purposes of this mandate.” See Dep’t of Defense, *Memorandum for Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency and DOD Field Activity Directors* at 1, 2 (Oct. 1, 2021) <https://media.defense.gov/2021/Oct/04/2002867430/-1/-1/0/MANDATORY-CORONAVIRUS-DISEASE-2019-VACCINATION-OF-DOD-CIVILIAN-EMPLOYEES-OSD008990-21-RESP-FINAL.PDF> attached as Exhibit 6.

47. On October 7, 2021, staff from the OPM, the OMB, and the GSA briefed Congress. The defendants told Congress there would be only an extremely few exceptions to or exemptions from the mandate. Specifically:

[A]s represented to our staff, the Biden Administration may intend to allow medically-related exemptions only for those already proven to be allergic to available vaccines and those under other exemptions yet to be specified by the Centers for Disease Control and Prevention (CDC). The possibility of exemptions for those already possessing natural immunity to COVID-19 was not adequately addressed by the President’s orders, and it was likewise inadequately addressed by the briefing. Yet, science is emerging that natural immunity may be as or more effective than vaccine-induced immunity. The scope of religious exemptions also was insufficiently addressed, and there as yet seems to be no room for exemptions based on personal reasons like those that would validly

lead an employee, in consultation with their doctor, to decline vaccination.

See Letter from Rep. James Comer, Ranking Member, House Committee on Oversight and Reform, and Rep. Jody Hice, Ranking Member, House Subcommittee on Government Operations, to Director Kiran Ahuja, Administrator Robin Carnahan, and the Hon. Shalanda Young at 2 (Oct. 27, 2021) (*available at* <https://republicans-oversight.house.gov/wp-content/uploads/2021/10/Letter-to-OPM-OMB-and-GSA-vaccine-mandate.pdf>).

48. The DOD’s vaccine mandate generated “grave” Congressional concern and opposition. *See* Letter from Sen. James M. Inhofe, Ranking Member Senate Committee on Armed Services, to Sec. Lloyd J. Austin III (Oct. 18, 2021) (*available at* <https://www.inhofe.senate.gov/newsroom/press-releases/inhofe-urges-dod-to-suspend-vaccine-mandate>).

49. On October 18, 2021, the DOD issued “Force Health Protection Guidance.” *See* Dep’t of Defense, *Memorandum for Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency and DOD Field Activity Directors: Force Health Protection Guidance* at 4-7, 17 (Oct. 18, 2021) <https://media.defense.gov/2021/Oct/18/2002875550/-1/-1/1/FORCE-HEALTH-PROTECTION-GUIDANCE-SUPPLEMENT%2023-REVISION-1-DEPARTMENT-OF-DEFENSE-GUIDANCE-FOR-CORONAVIRUS-DISEASE-2019-VACCINATION-ATTESTATION-SCREENING-TESTING-AND-VACCINATION-VERIFICATION>. PDF attached as Exhibit 7. Citing

Executive Order 14,043 and the Task Force *Safety Principles*, it reaffirmed the vaccine mandate; decreed “Those with previous COVID-19 infection(s) or antibody test results are not considered fully vaccinated on that basis for the purposes of this memorandum”; and, complying with the OPM’s enforcement guidance, promised “DoD civilian employees who refuse to be vaccinated, or to provide proof of vaccination, are subject to disciplinary measures, up to and including removal from Federal service” for failing to obey a direct order.

50. On October 29, 2021, the DOD provided updated guidance, this time “for implementing additional force health protection and workplace safety measures directed by the White House Safer Federal Workforce Task Force.” *See Memorandum for Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency and DOD Field Activity Directors: Force Health Protection Guidance* at 2, 7 (Oct. 29, 2021) [https://media.defense.gov/2021/Nov/15/2002892852/-1/-1/0/FHP-GUIDANCE-\(SUPPLEMENT-23\)-REV-2-DOD-GUIDANCE-FOR-COVID-19-VACCINATION-ATTESTATION-SCREENING-TESTING-AND-VACCINATION-VERIFICATION-CORRECTED-COPY.PDF](https://media.defense.gov/2021/Nov/15/2002892852/-1/-1/0/FHP-GUIDANCE-(SUPPLEMENT-23)-REV-2-DOD-GUIDANCE-FOR-COVID-19-VACCINATION-ATTESTATION-SCREENING-TESTING-AND-VACCINATION-VERIFICATION-CORRECTED-COPY.PDF) attached as Exhibit 8. Again, the DOD decreed “Those with previous COVID-19 infection(s) or antibody test results are not considered fully vaccinated on that basis for the purposes of this memorandum”; declared “*all DoD civilian employees must now be vaccinated against COVID-19 as a condition of employment*, [and] exemptions will be granted in limited circumstances and only where legally required” (emphasis added); and

authorized discipline for employees, including Mr. Payne, to commence on November 22, 2021.

51. On November 5, 2021, the Assistant Secretary of the Navy issued a memorandum directing supervisors to “follow the process outlined” in an attachment titled *COVID-19 Mandatory Vaccination Plan for Civilian Employees* (Nov. 5, 2021) (*Mandatory Vaccination Plan*) attached as Exhibit 9.

52. Citing Executive Order 14,043 as authority, the November 5, 2021, memorandum requires all civilian employees to be fully vaccinated by November 22, 2021. It provides employee discipline may begin as soon as November 22, 2021, unless the employee has received an exemption, or the agency is considering an exemption request. Exemptions are limited to “a medical condition or circumstance, or a sincerely held religious belief, practice, or observance.” However, the November 5 memorandum does not provide employees with fair notice of the standards that will be used to grant or deny an exemption. Full time employees working remotely are not exempt. Natural immunity is not a basis for an exemption.

53. Mr. Payne has not submitted the required form to his employer (DD 3175) indicating his vaccination status.

54. Instead, he has advised his direct supervisors that he declines vaccination.

55. Because of his natural immunity, Mr. Payne is at least similarly situated to vaccinated employees with respect to health risk and transmission. Shenai, at 2, 18; NIH Research Matters, *Lasting immunity*

found after recovery from COVID-19 (Jan. 26, 2021) (“The results provide hope that people receiving SARS-CoV-2 vaccines *will develop similar lasting immune memories after vaccination*”) (emphasis added) <https://www.nih.gov/news-events/nih-research-matters/lasting-immunity-found-after-recovery-covid-19>.

56. However, for refusing vaccination he has been improperly stigmatized by being forced to wear a mask when those who are vaccinated did not have to wear one; his official travel is subject to extra scrutiny and additional levels of approval; he is unable to have unrestricted access to his workplace and must produce a negative COVID-19 test for entry when vaccinated workers do not; he was forced to sign an acknowledgement that his failure to be fully vaccinated against COVID-19 by 22 November 2021, or to provide proof of vaccination, “negatively affects the agency’s ability to carry out its mission”; and he must personally bear the cost of COVID-19 testing.

57. On or about Thursday, November 18, 2021, “dozens” of United States Department of State diplomats and workers in a cable to the agency’s Director of Policy Planning, reportedly protested the vaccine mandate, objected to leadership’s toleration both for shunning, bullying, and discrimination against unvaccinated colleagues and the failure to protect personally identifiable and health information, and warned that “The enforcement of this mandate will result in the loss of trained and experienced personnel throughout the federal government. Consequently, the progress of our mission will be impeded, [and] our

national security will be at greater risk” Lazar Berman, *U.S. diplomats blast Biden vaccine mandate in internal cable*, The Times of Israel (Nov. 19, 2021) <https://www.timesofisrael.com/us-diplomats-blast-biden-vaccine-mandate-in-internal-cable/>.

58. Because the vaccine mandate has been unlawfully declared a “condition of [federal] employment, Mr. Payne and other similarly situated federal civilian employees will be disciplined, suspended without pay, and removed from Federal service for failing to follow a direct order.

59. Facially and as applied, the vaccine mandate violates Mr. Payne’s fundamental Fifth Amendment Due Process privacy and bodily integrity rights and liberty interests.

CLAIMS FOR RELIEF

First Claim for Relief

Violation of the Separation of Powers

60. Mr. Payne repeats paragraphs 1-59.

61. The Constitution of the United States “divide[s] the federal government’s powers into “three defined categories, Legislative, Executive, and Judicial.” *INS v. Chadha*, 462 U.S. 919, 951 (1983). Congress holds the power to make laws as enumerated in Article I, while Article II vests the President with “[t]he executive Power” and assigns him the solemn responsibility to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, §§ 1, 3.

62. Defendants may not impose a vaccine mandate on Mr. Payne and other federal civilian employees without a clear Congressional delegation of authority. Courts “expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance’.” *Alabama Assoc. of Realtors v. Dep’t of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

63. The “economic and political significance” of the vaccine mandate is unmistakable. *Id.* The OPM estimates that the federal workforce comprises 2.1 million civilian employees. See Julie Jennings & Jared C. Nagel, *Federal Workforce Statistics Sources: OPM and OMB*, Cong. Research Serv., at 1 (June 24, 2021). The mandate prescribed by Executive Order 14,043 falls on all of them—along with their families and dependents. Only a few employees legally entitled to an exception based on medical condition or religious objection escape its force. See 86 Fed. Reg. at 50,990 (declaring that “[e]ach [federal] agency shall implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees, with exceptions only as required by law.”). And the mandate is a matter of serious political controversy.

64. The significance of the vaccine mandate is also manifest by its “intru[sion] into an area that is the particular domain of state law,” *id.*, since “[o]ur Constitution principally entrusts [t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” *South Bay*

United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)).

65. The Government’s “claim of expansive authority” over the personal medical decisions of civilian personnel is literally “unprecedented.” *Alabama Assoc. of Realtors*, 141 S. Ct. at 2489. Never has it claimed authority to compel non-emergency essential federal civilian workers to submit to the forcible injection of medication against their will as a condition of federal employment. And none of the laws cited in Executive Order 14,043, 5 U.S.C. §§ 3301, 3302, and 7301, clearly or otherwise, delegate the President authority to require COVID-19 vaccination (or any other vaccination) as a condition of employment in the federal civil service. *Alabama Assoc. of Realtors*, 141 S. Ct. at 2489.

66. Congress has authorized mandatory vaccination for federal civilian employees who are deemed “emergency essential employees” with a duty to provide immediate and continuing support for combat operations or to support maintenance and repair of combat essential systems of the armed forces. *See* 10 U.S.C. §§ 1580, 1580a. It knows how to delegate vaccination authority. But while Congress has legislated, repeatedly and massively, in response to the COVID-19 pandemic, it has declined to delegate the defendants the authority to mandate vaccination as a condition of federal civilian employment. *Alabama Assoc. of Realtors*, 141 S. Ct. at 2489.

67. Also, Executive Order 14,043 directed the Task Force to issue “guidance” on agency

implementation of the vaccine mandate for all agencies. But even if Executive Order 14,043 was itself lawful, which it was not, the Task Force had no legal authority to do so.

68. The Task Force’s “guidance”—the *Safety Principles*—cited no legal authority other than Executive Order No. 13,391 and Executive Order No. 14,043.

69. Executive Order 13,391, the Task Force’s origin document, cites only 5 U.S.C. § 7902(c) for authority. Section 7902(c) has two subparagraphs. Neither one authorizes, clearly or otherwise, a “Task Force” with the power to issue “guidance” imposing a vaccine mandate as a condition of federal civilian employment.

70. Section 7902(c)(1) provides “[t]he President may establish by Executive order a safety council.” 5 U.S.C. § 7902(c)(1). But the Task Force cannot be such a safety council for three reasons. First, a safety council must be “composed of representatives of the agencies and of labor organizations representing employees” while the Task Force consists only of agency heads. Second, a safety council only “serve[s] as an advisory body to the Secretary [of Labor]” while the Task Force “provide[s] ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic.” Third, a safety council exists to advise the Secretary of Labor “in furtherance of the safety program carried out by the Secretary” “under section 941(b)(1) of title 33.” That section authorizes the Secretary of Labor “to make

studies and investigations with respect to safety provisions and the causes and prevention of injuries in employments covered by this chapter”, that is, chapter 18 of title 33, which regulates longshore and harbor workers’ compensation. 33 U.S.C. 941(b)(1). The Task Force is not assisting, and has never assisted, the Secretary of Labor in making studies and investigations under chapter 18 of title 33, the Occupational and Health Safety Act, or anything else.

71. Section 7902(c)(2) authorizes the President to “undertake such other measures as he considers proper to prevent injuries and accidents to employees of the agencies.” But a virus is neither an “injury” nor an “accident” according to those terms’ ordinary public meaning at the time of enactment. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep’t of Lab.*, 2021 WL 5279381 (5th Cir. 2021). And the President’s statutory power to “undertake such other measures as he considers proper to prevent injuries and accidents to employees of the agencies” is cabined by a Secretary of Labor “safety program” for federal workers under 33 U.S.C. § 941(b)(1). *Yates v. United States*, 574 U.S. 528, 537-38 (2015) (Ginsburg, J.). Congress does not hide an elephant the size of a vaccine mandate in a mousehole of this nature. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001); *Banks v. Booth*, 3 F.4th 445, 449 (D.C. Cir. 2021).

72. The defendants cite Executive Order 14,043 and the Task Force guidance as their authority for the vaccine mandate, and for the punishments promised to

Mr. Payne and other federal civilian workers. However, neither is a competent and lawful authority. Therefore, the federal civilian employee vaccine mandate imposed by Executive Order 14,043 and the Task Force and agency actions in furtherance thereof, all as described herein, are *ultra vires* and violate the separation of powers under Article I, § 1 and Article II, §§ 1 and 3 of the Constitution.

Second Claim for Relief
Violation of Mr. Payne's
Constitutional Privacy Rights

73. Mr. Payne repeats paragraphs 1-72.

74. The Fifth Amendment Due Process Clause guarantees Mr. Payne's right to and fundamental liberty interest in privacy and bodily integrity. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Rochin v. California*, 342 U.S. 165 (1952); *see also Planned Parenthood of SE Penn. v. Casey*, 505 U.S. 833, 849 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

75. The forcible injection of unwanted and unnecessary medication into Mr. Payne's body against his will is a substantial interference with his liberty. *Washington v. Harper*, 494 U.S. 210, 229 (1990).

76. Mr. Payne refuses to accept the COVID-19 vaccination mandated by the defendants because he has natural immunity. As a result, plaintiffs have promised he will be disciplined and ultimately discharged from the federal civil service.

77. The vaccine mandate imposed by Executive Order 14,043 and the agency actions in furtherance

thereof, as described herein, violate Mr. Payne's fundamental Due Process rights and liberty interest of privacy and bodily integrity.

Third Claim for Relief

*For Imposing an Unconstitutional Condition on
Fundamental Constitutional Rights*

78. Mr. Payne repeats paragraphs 1-77.

79. The defendants may not coerce Mr. Payne into giving up his constitutional rights, including his right to privacy and his fundamental liberty interest in bodily integrity, by unlawfully threatening to terminate his federal civilian employment. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983).

80. This principle vindicates constitutional rights “by preventing the government from coercing people into giving them up.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

81. Among other things, it prevents the defendants from placing an unconstitutional condition on Mr. Payne's employment. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947).

82. Courts have applied the unconstitutional conditions doctrine to safeguard constitutional rights under the First Amendment, *see Perry*, 408 U.S. at 597, and the Fifth Amendment, *see Koontz*, 570 U.S. at 604–05.

83. The Fifth Amendment Due Process Clause guarantees Mr. Payne's fundamental right to bodily integrity, *see Glucksberg*, 521 U.S. at 720, including the freedom from the forcible injection of medication. *See Harper*, 494 U.S. at 229.

84. Mr. Payne also has a significant property interest in his federal employment and benefits and in his professional reputation. *McCabe v. Barr*, 490 F.Supp.3d 98, 220-222 (D.D.C. 2020) (Moss, J.).

85. Because of defendant Biden's campaign to wrongly stigmatize and smear unvaccinated individuals, including Mr. Payne, as the persons responsible for the COVID-19 pandemic, and because of the unconstitutional and *ultra vires* Executive Order 14,043 and the Task Force and agency actions taken to implement same, all as described herein, Mr. Payne faces reputational harm, discrimination, and discipline, up to and including removal from federal service, unless he submits to vaccination.

86. The defendants' federal civilian employee vaccine mandate thus violates the unconstitutional conditions doctrine by promising to deprive Mr. Payne of public employment unless he gives up his fundamental rights to and liberty interests in privacy and bodily integrity.

RELIEF REQUESTED

Wherefore, Mr. Payne respectfully requests the following relief.

A. A declaration that the federal civilian employee vaccine mandate imposed by Executive Order 14,043

and the various Task Force and agency actions taken in response thereto, all as described herein, are *ultra vires* and unenforceable.

B. Permanent injunctive relief.

C. Reasonable costs and attorney fees.

E. Any other relief that the Court deems just and proper.

November 22, 2021

Respectfully submitted,

/s/ Reed D. Rubinstein

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**Federal Register/Vol. 86, No. 175/
Tuesday, September 14, 2021/
Presidential Documents**

Presidential Documents

Executive Order 14043 of September 9, 2021

**Requiring Coronavirus Disease 2019 Vaccination
for Federal Employees**

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

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

COVID-19 and to prevent infection by the Delta variant or other variants is to be vaccinated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

/s/

THE WHITE HOUSE,
September 9, 2021.

[FR Doc. 2021-19927
Filed 9-13-21; 8:45 am)
Billing code 3295-F1-P

**Federal Register/Vol. 86, No. 14/
Monday, January 25, 2021/
Presidential Documents 7045**

Presidential Documents

Executive Order 13991 of January 20, 2021

**Protecting the Federal Workforce and Requiring
Mask-Wearing**

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

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

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

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

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

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

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

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

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

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

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

(b) The COVID-19 Response Coordinator, in coordination with the Secretary of HHS, the Secretary of Homeland Security, and the heads of other relevant agencies, shall promptly identify and inform agencies of options to incentivize, support, and encourage

widespread mask-wearing consistent with CDC guidelines and applicable law.

Sec. 4. Safer Federal Workforce Task Force.

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

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

(i) the Director of OPM, who shall serve as Co-Chair;

(ii) the Administrator of General Services, who shall serve as Co-Chair;

(iii) the COVID-19 Response Coordinator, who shall serve as Co-Chair;

(iv) the Director of OMB;

(v) the Director of the Federal Protective Service;

(vi) the Director of the United States Secret Service;

(vii) the Administrator of the Federal Emergency Management Agency;

(viii) the Director of CDC; and

(ix) the heads of such other agencies as the Co-Chairs may individually or jointly invite to participate.

(c) *Organization.* A member of the Task Force may designate, to perform the Task Force functions of the member, a senior-level official who is a full-time officer or employee of the member's agency. At the direction of the Co-Chairs, the Task Force may establish subgroups consisting exclusively of Task Force members or their designees, as appropriate.

(d) *Administration.* The General Services Administration shall provide funding and administrative support for the Task Force to the extent permitted by law and within existing appropriations. The Co-Chairs shall convene regular

meetings of the Task Force, determine its agenda, and direct its work.

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

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

with CDC guidelines, such as for mission-critical purposes.

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

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

Sec. 6. *Research and Development.* The Director of the Office of Science and Technology Policy, in consultation with the Secretary of HHS (through the National Science and Technology Council), the Director of OMB, the Director of CDC, the Director of the National Institutes of Health, the Director of the National Science Foundation, and the heads of any other appropriate agencies, shall assess the availability of Federal research grants to study best practices for implementing, and innovations to better implement, effective mask-wearing and physical distancing policies, with respect to both the Federal workforce and the general public.

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

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

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

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

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

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

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

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

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

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

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

/s/

THE WHITE HOUSE,
January 20, 2021.

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Safer Federal Workforce Task Force
COVID-19 Workplace Safety: Agency Model
Safety Principles

**Last Updated September 13, 2021 (Previously
Updated July 29, 2021)**

Recent Updates

- Federal Executive Branch employees must be fully vaccinated, except in limited circumstances where an employee is legally entitled to a reasonable accommodation. Agencies must work expeditiously so that their employees are fully vaccinated as quickly as possible and by no later than November 22, 2021.
- With the government-wide adoption and implementation of these vaccination requirements, agencies are no longer required to establish a screening testing program for employees or onsite contractor employees who are not fully vaccinated, although they may do so.
- The President has announced that Federal contractor employees will be required to be vaccinated. Prior to being contractually required to be vaccinated, onsite contractor employees who are not fully vaccinated and are not part of an agency testing program must provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a Federal building.

Purpose

The purpose of this document is to provide model safety principles for executive departments and agencies (hereafter, “agency” and collectively, “agencies”) for their COVID-19 workplace safety plans. In Executive Order No. 13991, President Biden established the Safer Federal Workforce Task Force to oversee the development and implementation of agency COVID-19 workplace safety plans across the Federal Government. In his Executive Order on *Requiring Coronavirus Disease 2019 Vaccination for Federal Employees* and his Executive Order on *Ensuring Adequate COVID Safety Protocols for Federal Contractors*, President Biden directed the Task Force to issue guidance on implementation of the requirements in those Orders.

Agencies should incorporate these model safety principles into their existing COVID-19 workplace safety plans.

Agencies with onsite contractor employees should address how the protocols below are applied to those individuals to promote Federal workplace safety in the context of COVID-19.

Overview of Model Principles

The Federal Government is committed to addressing essential work requirements consistent with best public health practices. The Administration’s paramount concern is the health and safety of all Federal employees, onsite contractor employees, and individuals interacting with the Federal workforce.

The principles presented here are aligned with the latest guidance from the Centers for Disease Control and Prevention (CDC) for employers and for fully vaccinated people and the Occupational Safety and Health Administration (OSHA) on protecting workers, based on evolving understanding of the pandemic. These principles will be reassessed over time, as conditions warrant and as CDC guidelines are updated.

Where a locality has imposed additional pandemic-related requirements more protective than those set forth in these model safety principles, those requirements should be followed in Federal buildings and on Federal land in that locality.

Goal

The health and safety of the Federal workforce is the Administration's highest priority.

Health and Safety

Vaccination

To ensure the safety of the Federal workforce, Federal employees must be fully vaccinated, except in limited circumstances where an employee is legally entitled to a reasonable accommodation. Agencies must work expeditiously so that their employees are fully vaccinated as quickly as possible and by no later than November 22, 2021.

When a Federal employee is required to be vaccinated, the time the employee spends obtaining any COVID-19 vaccination (including travel time) is duty time; thus, there is no need for the employee to take

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administrative leave for such time during the employee's basic tour of duty. Employees may not be credited with administrative leave for time spent getting a vaccination. If, due to unforeseen circumstances, the employee is unable to obtain the vaccine during basic tour of duty hours the normal overtime hours of work rules apply.

Employees will receive paid time off to address any side effects. Employees will also receive paid time off to accompany a family member being vaccinated. For this purpose, a "family member" is an individual who meets the definition of that term in OPM's leave regulations (see 5 CFR 630.201).

Some contractor employees may not yet be subject to a contractual requirement to be vaccinated, and some visitors may not be fully vaccinated or decline to provide information on their vaccination status. Given the different safety protocols for individuals who are fully vaccinated and those who are not fully vaccinated, agencies need to ask about the vaccination status of visitors to Federal buildings and onsite contractor employees who are not yet contractually required to be vaccinated. Individuals must attest to the truthfulness of the response they provide. When an individual discloses that they are not fully vaccinated or declines to provide information on their vaccination status, agencies should treat that individual as not fully vaccinated for purposes of implementing safety measures, including with respect to mask wearing and physical distancing.

Onsite contractor employees who are not yet contractually required to be vaccinated and who are not

fully vaccinated or who decline to provide information about their vaccination status must provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a Federal building— as noted below, if a contractor employee is regularly tested pursuant to an agency testing program, they do not need to provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a Federal building unless required to by the agency testing program.

Visitors to Federal buildings who are not fully vaccinated or who decline to provide information about their vaccination status must provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a Federal building. See the section below on Meetings, Events, and Conferences for how visitor requirements apply to in-person participants in meetings, events, and conferences hosted by agencies.

These requirements related to the provision of information about vaccination and provision of proof of a recent negative COVID-19 test do not apply to members of the public entering a Federal building or Federal land to obtain a public service or benefit. If they are not fully vaccinated, these visitors must comply with all relevant CDC guidance, including wearing a mask and physically distancing from other people.

Levels of Community Transmission

For purposes of this guidance, when determining levels of community transmission in a given area, agencies

should reference the CDC COVID-19 Data Tracker County View. Agencies can use discretion in determining the counties relevant to the determination of the level of community transmission in a given area for a given Federal facility. For example, agencies may consider the county in which an agency facility is located as well as the transmission levels of surrounding local counties from which employees commute to the facility.

Telework and Remote Work

Agencies should utilize telework and remote work consistent with the principles set forth in OMB Memorandum M-21-25 and agency plans for reentry and post-reentry.

COVID-19 Coordination Team

Each agency should maintain its COVID-19 Coordination Team, as detailed in OMB Memorandum M-21-15. This team should, at a minimum, include a representative from: each component agency (if applicable); the appropriate human resources office(s); occupational safety and health experts; executive leadership; legal counsel; and a public health expert. If such a public health expert does not exist at the agency, the Safer Federal Workforce Task Force will designate someone. The team should meet regularly to review compliance with agency COVID-19 workplace safety plans and protocols, consider potential revisions to agency COVID-19 workplace safety plans and protocols pursuant to guidance from the Safer Federal Workforce Task Force and current CDC guidelines, and evaluate any other operational needs related to

COVID-19 workplace safety. The team should coordinate all decisions with Facility Security Committees, as appropriate. For privately owned facilities leased by the Federal Government, the team must coordinate with the General Services Administration (GSA), where appropriate, and the lessor's designated representative.

Face Masks and Physical Distancing

Federal employees must be fully vaccinated, except in limited circumstances where an employee is legally entitled to a reasonable accommodation. In addition, some contractor employees may not yet be subject to a contractual requirement to be vaccinated, and some visitors may not be fully vaccinated or decline to provide information on their vaccination status.

Individuals who are not fully vaccinated must wear a mask regardless of community transmission level. In areas of high or substantial transmission, fully vaccinated people must wear a mask in public indoor settings, except for limited exceptions discussed in this section.

In areas of low or moderate transmission, in most settings, fully vaccinated people generally do not need to wear a mask or physically distance in Federal buildings or on Federal land, except where required by Federal, State, local, Tribal, or territorial laws, rules, or regulations. Fully vaccinated individuals might choose to wear a mask regardless of the level of transmission for a variety of reasons. Nothing in CDC guidance precludes an employee from wearing a mask, if the employee so chooses. CDC's guidance for mask

wearing and physical distancing in specific settings, including healthcare, transportation, correctional and detention facilities, and schools, should be followed, as applicable.

Individuals who are not fully vaccinated or who decline to provide their vaccination status—or who are in an area of substantial or high transmission—must wear a mask that covers their nose and mouth, and that is in accordance with current CDC guidance. CDC recommends the following: disposable masks, masks that fit properly (snugly around the nose and chin with no large gaps around the sides of the face), masks made with breathable fabric (such as cotton), masks made with tightly woven fabric (i.e., fabrics that do not let light pass through when held up to a light source), masks with two or three layers, and masks with inner filter pockets. Agencies should not allow novelty or non-protective masks, masks with ventilation valves, or face shields as a substitute for masks.

In addition to properly wearing a mask, individuals who are not fully vaccinated or who decline to provide information about their vaccination status must maintain distance. To the extent practicable, individuals who are not fully vaccinated or who decline to provide information about their vaccination status should maintain a distance of at least six feet from others at all times, consistent with CDC guidelines, including in offices, conference rooms, and all other communal and work spaces.

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For individuals who are required to wear a mask:

- Appropriate masks should be worn consistently and correctly (over mouth and nose).
- Appropriate masks should be worn in any common areas or shared workspaces (including open floorplan office space, cubicle embankments, and conference rooms).
- In general, people do not need to wear masks when outdoors. However, consistent with CDC guidance, those who are not fully vaccinated should wear a mask in crowded outdoor settings or during outdoor activities that involve sustained close contact with other people who are not fully vaccinated.
- Agencies may provide for exceptions consistent with CDC guidelines, for example, when an individual is alone in an office with floor to ceiling walls and a closed door, or for a limited time when eating or drinking and maintaining distancing in accordance with CDC guidelines.

Masked individuals may be asked to lower their masks briefly for identification purposes in compliance with safety and security requirements.

Masks do not provide the same level of protection as respirators and should not replace personal protective equipment required or recommended at the workplace.

Testing

Agencies may establish a program to test Federal employees who are not fully vaccinated for COVID-19.

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Agencies may also test contractor employees working onsite who are not fully vaccinated as part of a testing program—if contractor employees are tested as part of an agency testing program, they do not need to provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a Federal building unless required to by the agency testing program.

Agencies must have a process in place for employee diagnostic testing after a workplace exposure.

Contact Tracing

The agency's COVID-19 Coordination Team will collaborate with and support the contact tracing programs of local health departments to help identify, track, and manage contacts of COVID-19 cases.

The team will engage in coordination with facilities staff to implement infection control and workplace safety efforts once informed of a known or suspected case of COVID-19 (due either to specific symptoms or a positive test).

The team should ensure that the agency makes disclosures to local public health officials, as required or necessary, to provide for the health and safety of Federal employees, contractor employees, and the general public, in accordance with local public health mandates. If COVID-19 cases occur within a specific building or work setting, it will be the responsibility of that agency's COVID-19 Coordination Team (or a field office or agency component designee) to determine—in consultation with local public health officials—appropriate next steps. Agencies should be transparent in communicating related information to the workforce,

as relevant and appropriate; disclosures must be consistent with Federal, State, and local privacy and confidentiality laws and regulations.

Travel

Federal employees should adhere strictly to CDC guidelines before, during, and after travel.

For Federal employees who are fully vaccinated, there are no Government-wide restrictions on travel (although agency travel policies still apply).

For the limited number of Federal employees who are not fully vaccinated, agencies should generally observe the following guidance, unless it is contrary to a reasonable accommodation to which an employee is legally entitled. Official domestic travel should be limited to only necessary mission-critical trips. International travel should also be avoided, if at all possible, unless it is mission critical (e.g., military deployments, COVID-19 response deployments or activities, diplomats traveling, high-level international negotiations that cannot occur remotely). Heads of agencies should issue specific guidance to account for the particulars of their agency's mission.

Meetings, Events, and Conferences

Should an agency intend to host an in-person meeting, conference, or event that will be attended by more than 50 participants—regardless of whether participants include members of the public—the agency must first seek the approval of its agency head, in consultation with the agency's COVID-19 Coordination Team.

In-person attendees at any meetings, conferences, and events hosted by an agency, regardless of size, must be asked to provide information about vaccination status. In requesting this information, agencies should comply with any applicable Federal laws, including requirements under the Privacy Act and the Paperwork Reduction Act. In-person attendees who are not fully vaccinated or decline to provide information about their vaccination status must provide proof of a negative COVID-19 test completed no later than the previous 3 days and comply with masking and physical distancing requirements for individuals who are not fully vaccinated consistent with the requirements for visitors in the Face Masks and Physical Distancing section above. In-person attendees in areas of high or substantial transmission must wear a mask in public indoor settings regardless of vaccination status.

Symptom Monitoring

If Federal employees, onsite contractors, or visitors have symptoms consistent with COVID-19, they should not enter a Federal workplace.

Federal employees and contractor employees working on site should regularly complete virtual or in-person health checks (ask about symptoms, close contact with someone with SARS-CoV-2 infection, and SARS-CoV-2 testing and diagnosis status). The agency will use this information to assess the individual's risk level and to determine whether the individual should be allowed entry to the workplace. Visitors may be asked to complete symptom screening before entering a Federal facility. In developing these tools, agencies may adapt the one developed by CDC.

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Any individual, regardless of vaccination status, who develops any symptoms consistent with COVID-19 during the workday must immediately isolate, wear a mask (if the individual is not already doing so and one is available), notify their supervisor, and promptly leave the workplace. Agencies should have processes in place to provide advice and support to supervisors on any related reporting or human resources requirements.

Quarantine, Isolation, and Steps for Fully Vaccinated Individuals Following Exposure to Someone with Suspected or Confirmed COVID-19

Any individual with a suspected or confirmed case of COVID-19 will be advised to isolate, pursuant to CDC guidelines, and in compliance with State, local, and Tribal laws and regulations. Personnel who are not fully vaccinated and who have had a close contact with someone who has tested positive for COVID-19 should follow CDC and State, local, and Tribal guidance for quarantine.

Individuals who have been fully vaccinated and have had close contact with someone with suspected or confirmed COVID-19 should get tested 3-5 days after exposure, even if they do not have symptoms. They should also wear a mask indoors in public for 14 days following exposure or until their test result is negative. If their test result is positive, they should isolate for 10 days.

Confidentiality and Privacy

All medical information collected from individuals, including vaccination information, test results, and any

other information obtained as a result of testing and symptom monitoring, will be treated in accordance with applicable laws and policies on confidentiality and privacy, and will be accessible only to those with a need to know. Agencies should consult their Senior Agency Officials for Privacy on matters related to the handling of personally identifiable information and identify a point of contact for all questions relating to personal medical information.

Workplace Operations

Occupancy

Agencies may establish occupancy limits for specific workplaces as a means of facilitating physical distancing. Note that by reducing the number of people in a space, occupancy limits also increase the heating, ventilation, and air conditioning delivery of outdoor air per person.

Environmental Cleaning

Agencies should ensure regular cleaning of common use, high-touch, and high-density spaces, such as lobbies, restrooms, elevators, and stairwells. Office space that is in regular use is to be cleaned regularly, and in accordance with CDC guidelines. Wipes and other Environmental Protection Agency-approved disinfectants will be made available for use by individuals to wipe down workstations and related personal property. Physical barriers, such as plexiglass shields, may be installed, where appropriate.

In the event of a suspected or confirmed case of COVID-19 in the workplace, agencies should ensure

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enhanced environmental cleaning of the spaces that the individual occupied or accessed in accordance with CDC and, where applicable, GSA guidance, which provides as follows:

- If fewer than 24 hours have passed since the person who is sick or diagnosed with COVID-19 has been in the space, clean and disinfect the space.
- If more than 24 hours have passed since the person who is sick or diagnosed with COVID-19 has been in the space, cleaning is enough. You may choose to also disinfect depending on certain conditions or everyday practices required by your facility.
- If more than 3 days have passed since the person who is sick or diagnosed with COVID-19 has been in the space, no additional cleaning (beyond regular cleaning practices) is needed.

If enhanced cleaning is required, wait as long as possible (at least several hours) before cleaning and disinfecting. Extended wait periods allow increased opportunity for viral deactivation to occur naturally, while also allowing time for aerosols to settle, prior to surface disinfection.

The agency's COVID-19 Coordination Team will determine the appropriate scope of workplace closures needed—in some cases, it may be a suite or individual offices or part of a floor, in other cases, it may include an entire building.

Hygiene

Hand sanitizer stations are to be available at the building entrance and throughout workspaces. Hand sanitizers should contain at least 60% alcohol and be manufactured in accordance with the requirements of the U.S. Food and Drug Administration (FDA). Ingredients should be listed on a “Drug Facts” label. Agencies should ensure the hand sanitizer is not on the FDA’s do not use list.

Ventilation and Air Filtration

Modifications to ventilation systems should be considered in accordance with CDC guidance, especially as building population density increases. To the maximum extent feasible, indoor ventilation will be optimized to increase the proportion of outdoor air and improve filtration. Deployment of portable high-efficiency particulate air (HEPA) cleaners should be considered for higher-risk spaces (e.g., health clinics).

Collective Bargaining Obligations

Consistent with President Biden’s policy to support collective bargaining, agencies are reminded to satisfy applicable collective bargaining obligations under 5 U.S.C. Chapter 71 when implementing workplace safety plans, including on a post-implementation basis where necessary. Agencies are also strongly encouraged to communicate regularly with employee representatives on workplace safety matters.

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**UNITED STATES OFFICE OF PERSONNEL
MANAGEMENT**

Washington, DC 20415

October 1, 2021

[SEAL]

**MEMORANDUM FOR HEADS OF EXECUTIVE
DEPARTMENTS AND AGENCIES**

FROM: Kiran A. Ahuja
Director

SUBJECT: Guidance on Applying Coronavirus
Disease 2019 Vaccination
Requirements to New Hires –
Executive Order 14043

On September 9, 2021, President Biden signed Executive Order (EO) 14043, titled, “Requiring Coronavirus Disease 2019 Vaccination for Federal Employees.” As stated in Section 1 of the EO, the President has determined that in order to promote the health and safety of the workforce and the efficiency of the civil service, it is necessary for all agencies to require COVID–9 vaccination for Federal employees covered by EO 14043, subject only to such exceptions as required by law.

As directed in the EO, the Safer Federal Workforce Task Force, established by EO 13991 (January 20, 2021) (“Task Force”), has issued guidance to assist agencies with implementing the vaccination requirement. That guidance specifies that agencies should require all of their employees, with exceptions

only as required by law, to be fully vaccinated by November 22, 2021.

The U.S. Office of Personnel Management (OPM) is issuing this guidance on hiring actions to assist agencies in implementing the Executive Order and Task Force's guidance.

Current Federal Employees

People are considered fully vaccinated two weeks after their second shot in a two-dose series, or two weeks after a single-shot series. In order to have covered Federal employees vaccinated by November 22, 2021, agencies should inform employees of the following scheduling considerations, based on the type of vaccine they obtain:

- For Pfizer-BioNTech COVID-19 vaccine, individuals should get their second shot 3 weeks (or 21 days) after the first. This means that in order for Federal employees to meet a November 22 deadline, they should receive their first vaccination no later than October 18, and their second dose no later than November 8.
- For Moderna COVID-19 vaccine, individuals should get their second shot 4 weeks (or 28 days) after their first. This means that in order for Federal employees to meet a November 22 deadline, they should receive their first vaccination dose no later than October 11, and their second dose no later than November 8.
- Because the Johnson & Johnson/Janssen vaccine only has one shot, Federal employees must get

that dose by November 8, in order to meet a November 22, 2021 deadline to be fully vaccinated.

Of course, it is advisable not to leave vaccinations to the last possible date, as other events often interfere with even well-laid plans.

New Employees

Agencies are urged to require all new employees to be fully vaccinated prior to entering on duty, subject to such exceptions as required by law. Agencies should address the vaccination requirement in their job opportunity announcements and in tentative and final offers of employment.

1. Job Opportunity Announcements

When advertising vacancies, agencies should clearly describe in their job opportunity announcements the COVID-19 vaccination requirement and, for positions with a duty location having an official government worksite, information about the agency's reentry plan, to the extent that plan has been finalized. Here is sample language agencies may wish to use or revise:

- As required by Executive Order 14043, Federal employees are required to be fully vaccinated against COVID-19 regardless of the employee's duty location or work arrangement (e.g., telework, remote work, etc.), subject to such exceptions as required by law. If selected, you will be required to be vaccinated against COVID-19 and submit documentation of proof of vaccination by November 22, 2021 or before

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appointment or onboarding with the agency, if after November 22. The agency will provide additional information regarding what information or documentation will be needed and how you can request of the agency a legally required exception from this requirement.

- Due to COVID-19, the agency is currently in an expanded telework posture. If selected, you may be expected to temporarily telework, even if your home is located outside the local commuting area. Once employees are permitted to return to the office, you will be expected to report to the duty station listed on this announcement within [X] days. At that time, you may be eligible to request to continue to telework one or more days a pay period depending upon the terms of the agency's telework policy.

When an individual fails to meet a requirement stated in the job opportunity announcement, the agency may take action up to and including rescinding the offer for an applicant or termination from service of a new employee (or removal for an employee who has accrued adverse action rights). Should an agency identify an urgent, mission-critical hiring need to onboard new staff prior to those new staff becoming fully vaccinated, the agency head may delay the vaccination requirement for selected job applicants, such that they do not need to be fully vaccinated against COVID-19 and submit documentation of proof of vaccination before appointment or onboarding with the agency. In the case of such limited delays, agencies are expected to require new hires to be fully vaccinated within

60 days of their start date and to follow safety protocols for not fully vaccinated individuals until they are fully vaccinated.

2. Tentative and Final Offer Letters

Agencies should make offers of employment contingent on submission of documentation demonstrating compliance with the vaccination requirement in EO 14043. Agencies should provide information about the vaccination requirement in tentative and final offer letters. Here is sample language you may wish to use or revise in tentative and final offer letters:

- **Tentative Offer** – This is a tentative offer of employment. If you receive a final offer, it will be contingent on you providing appropriate documentation of proof of COVID-19 vaccination by the date set in the final offer letter. You can provide a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card, a copy of medical records documenting the vaccination, a copy of immunization records from a public health or state immunization information system, or a copy of any other official documentation containing required data points (type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s)). The agency will provide additional information regarding how you can request of the agency a legally required exception from this requirement.

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- Final Offer – Documentation of proof of COVID-19 vaccination must be received by [insert date -November 22, 2021 or before EOD, if after November 22]. You can provide a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card, a copy of medical records documenting the vaccination, a copy of immunization records from a public health or state immunization information system, or a copy of any other official documentation containing required data points (type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s)). The agency will provide additional information regarding how you can request of the agency a legally required exception from this requirement.

For hiring actions currently underway, agencies should issue revised tentative and final offer letters to advise candidates of the new vaccination requirement. You may wish to use the above sample language in such revised offer letters.

Additional Information

Guidance from the Task Force is available at: <https://www.saferfederalworkforce.gov/overview/>.

For more information, agency headquarters-level human resources offices may contact Ms. Roseanna Ciarlante by email at employ@opm.gov. Component-level human resources offices must contact their agency headquarters for assistance. Employees

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must contact their agency human resources for further information on this memorandum.

cc: Chief Human Capital Officers (CHCOs)
Deputy CHCOs
Human Resources Directors

Guidance on Enforcement of Coronavirus Disease 2019 Vaccination Requirement for Federal Employees – Executive Order 14043

1) Why is OPM issuing this guidance?

On September 9, 2021, the President signed Executive Order (EO) 14043, titled, “Requiring Coronavirus Disease 2019 Vaccination for Federal Employees.” As reflected in Section 1 of the EO, the President has determined that in order to promote the health and safety of the workforce and the efficiency of the civil service, it is necessary to require COVID–19 vaccination for Federal employees, subject to such exceptions as are required by law. The U.S. Office of Personnel Management (OPM) is issuing this guidance to assist agencies in implementing this requirement for Federal employees subject to EO 14043 requirements.

2) What agencies and employees are covered by the EO 14043 vaccination requirement?

Section 3 of EO 14043 defines which agencies and employees are covered by the vaccination requirement. Agencies should consult with their legal offices to determine agency and employee coverage under EO 14043.

3) What is the deadline for federal employees to be fully vaccinated?

Safer Federal Workforce Task Force guidance specifies that agencies should require all of their employees, with exceptions only as required by

law, to be fully vaccinated by November 22, 2021. That means employees must complete required vaccination dose(s) by November 8, as they will not become “fully vaccinated” until 2 weeks after their final dose (the second of 2 doses for Pfizer and Moderna, and the first dose for Johnson and Johnson). The only exception is for individuals who receive a legally required exception approved under established agency processes.

4) What should an agency do to inform employees about the requirement to be fully vaccinated?

OPM recommends an agency should not delay in providing employees with information regarding the benefits of vaccination and ways to obtain the vaccine. Such information is available on the Centers for Disease Control and Prevention website. Agencies should consider a variety of methods to educate employees, such as providing information in employee town halls, posting of information on agency intranet sites, email communications directly to employees, and providing information in regular staff meetings.

As part of the education process, agencies should inform employees of the requirement to be fully vaccinated in compliance with EO 14043 and that failure to comply will result in disciplinary action up to and including removal or termination. In addition, it is advisable for agencies to send to their workforce periodic reminders of this requirement and the

consequences for non-compliance. To be fully vaccinated by November 22, 2021, employees must receive their final vaccination dose by November 8, 2021.

5) When can an agency initiate the enforcement process for failure to comply with the requirement to be fully vaccinated?

Agencies may initiate the enforcement process as soon as November 9, 2021, for employees who have not received their required vaccination dose by November 8, 2021, unless the employee has received an exception or the agency is considering an exception request from the employee.

6) Is there a recommended approach to enforcement?

Agencies must comply with all statutory, regulatory, and collective bargaining agreement requirements (where applicable). If the employee has not provided proof of vaccination by November 8, 2021, and has not received an exception and the agency is not considering an exception request from the employee, OPM recommends agencies initiate the enforcement process with counseling and education. Agencies should use the counseling period to remind the employee again of the vaccination requirement, emphasize that failure to comply will lead to discipline up to and including removal or termination, address any questions, and inform

the employee that they will have a short period of time (e.g., 5 days) to submit documentation establishing either the initiation or completion of vaccination, as applicable, or request an exception.

If, after the recommended counseling and education period ends, the individual continues to refuse to comply, the agency should pursue disciplinary measures, up to and including removal or termination from Federal service. In pursuing any disciplinary action, the agency must provide the required procedural rights to an employee and follow normal processes, including any agency policies or collective bargaining agreement requirements concerning disciplinary matters. Employees generally should not be placed on administrative leave while the agency pursues disciplinary action for refusal to be vaccinated but will be required to follow safety protocols for employees who are not fully vaccinated when reporting to agency worksites. Agencies may wish to consult with counsel as to any other mechanisms that might be available to address the situation.

Agencies are reminded that generally the objective of discipline is to correct deficiencies in employee conduct. Discipline can deter misconduct and correct situations interfering with the efficiency of civil service. While the law and OPM adverse action regulations do not require progressive discipline, this is the preferred approach in the instance of

non-compliance with the requirement to be vaccinated. With this in mind, agencies are strongly encouraged to consider whether lesser disciplinary penalties are adequate, as an initial matter, to encourage an employee to be vaccinated, such as a short suspension of 14 days or less under procedures established under 5 CFR 752.203¹ (or procedures for similar matters which arise under other personnel systems). If a short suspension proves inadequate in encouraging an employee to become vaccinated, agencies should then consider a greater disciplinary penalty, such as removal or termination from the Federal service, under procedures established under 5 CFR 752.404,² 5 CFR part 315, subpart H (for probationers), or procedures for similar matters which arise under other personnel systems.

Agencies should strive for similar penalties for similarly situated employees, where appropriate, within the same work unit. To facilitate this for

¹ 5 CFR 752.203 does not apply to actions against Administrative Law Judges (ALJs) or employees in the Senior Executive Service (SES). Please refer to Subchapter III, Chapter 75 of Title 5, United States Code, for adverse action procedures for ALJs and Subpart F of 5 CFR Part 752 for adverse action procedures for SES. Please note that suspensions of 14 days or less are not available for SES.

² 5 CFR 752.404 does not apply to actions against Administrative Law Judges (ALJs) or employees in the Senior Executive Service (SES). Please refer to Subchapter III, Chapter 75 of Title 5, United States Code, for adverse action procedures for ALJs and Subpart F of 5 CFR Part 752 for adverse action procedures for SES. Please note that suspensions of 14 days or less are not available for SES.

larger organizations where actions may be necessary for multiple employees, an agency should consider designating one management official to be a proposing official and designating another management official to be a deciding official for all actions in the work unit.

7) What should an agency do if, after initiating the disciplinary process by proposing to take an action, the agency is informed by the employee that the employee has received a vaccination?

If, after November 8, 2021, and prior to the issuance of a decision during the disciplinary process, such as suspension or removal, an employee provides an agency with appropriate documentation that the employee is now fully vaccinated, the disciplinary process should end. If an employee provides an agency with appropriate documentation after November 8, 2021, that the employee has received the first dose in a 2-dose series vaccine, an agency may hold any disciplinary action in abeyance pending receipt of appropriate documentation that the employee has received the second dose within the designated 3 or 4-week interval depending on the vaccine received by the employee, even if this means the employee will not be fully vaccinated until after November 22, 2021. In these instances, the employee will be required to follow all appropriate safety protocols if reporting to an agency worksite. The employee should be provided a deadline for receiving the

final dose of the vaccine and providing appropriate documentation.

- 8) **What should an agency do if an employee is serving a suspension and provides documentation to the agency that they are now fully vaccinated or have received the first dose in a 2-dose series vaccine?**

If, during the time period a suspension is being served by an employee, the employee provides an agency with appropriate documentation that the employee is now fully vaccinated, the agency may end the suspension. If, during the time period a suspension is being served by an employee, the employee provides an agency with appropriate documentation that the employee has received the first dose in a 2-dose series vaccine, an agency may hold the balance of the suspension in abeyance. The employee should be provided a deadline of no more than 5 weeks from the date of receiving the first dose for receiving the final dose of the vaccine and providing appropriate documentation. Additionally, the agency should advise employees that the suspension will continue and they may be subject to removal or termination if they fail to receive the final dose of the vaccine or fail to provide appropriate documentation by the new deadline.

9) **Why can an employee be disciplined for refusing to get vaccinated or refusing to provide documentation of vaccination?**

If an employee receives a direct order to receive a vaccine as required under EO 14043 and refuses, this is an act of misconduct. Any adverse actions for misconduct taken under 5 CFR Part 752 are taken for such cause as will promote the efficiency of the service. When taking an action under 5 CFR Part 752, agencies should consider relevant aggravating and mitigating factors when determining the penalty. See *Douglas v. Veterans Administration*, 5 MSPR 280 (1981). Agencies should consult with their human resources and legal offices in making these determinations.

There is precedent for taking an adverse action against a Federal employee for disobeying an order to be vaccinated. In *Mazares v. Department of Navy*, 302 F.3d 1382 (2002), for instance, two civilian Navy employees challenged their removals for refusing to receive an anthrax vaccination. The court found there was a clear and unjustified refusal to obey a lawful order of a superior.

10) What should an agency do if the employee claims they are legally entitled to be excepted from the vaccination requirement?

An agency should not initiate discipline if the employee claims a legally required exception as the reason proffered for not being vaccinated or providing proof of vaccination. If an employee claims a legally required exception, an agency should follow its ordinary process to review and consider what, if any, accommodation it must offer. All agency personnel designated to receive requests for accommodations should know how to handle requests consistent with any Federal employment nondiscrimination laws that may apply.

An employee whose request for an accommodation is denied should receive their first (or, if a one-dose series, only) dose within two weeks of the final determination to deny the accommodation. If receiving a two-dose series, the employee should receive the second dose within 6 weeks of receiving the first dose.

If the employee received a first dose of a two-dose series prior to seeking an accommodation, and their request for an accommodation is denied, they should receive their second dose within two weeks of the final determination to deny the accommodation or within a week of the earliest day by which they can receive their second dose, whichever is later.

If the employee does not comply with the requirement to become fully vaccinated, and has not been granted an exception and does not have a request under consideration, the agency may pursue disciplinary action, up to and including removal or termination from Federal service. If the accommodation request is denied, employees should be reminded again of the benefits of getting a COVID-19 vaccine and reminded that failure to comply with the vaccination requirement will result in disciplinary action, up to and including removal or termination from Federal service.

- 11) **How should agencies enforce the vaccination requirement of Executive Order 14043 for employees on extended leave of absence (e.g., due to a serious health condition of themselves or a family member, or due to utilizing paid parental leave)?**

Agencies should require employees on extended leave of absence (e.g., utilizing annual leave, sick leave, donated annual leave, military leave, leave without pay, paid parental leave, or unpaid leave under Family and Medical Leave) to submit documentation establishing that they are fully vaccinated (or request a legally required exception) prior to the employee returning to duty. Agencies should not require such employees to be vaccinated by a November 22, 2021 deadline, as long as they are

on extended leave of absence and will not return to work until a later date.

- 12) How should agencies enforce the vaccination requirement of Executive Order 14043 for employees on extended leave of absence due to receiving workers compensation as a result of sustaining an on-the-job injury or illness?**

Agencies should require employees on extended leave of absence due to receiving workers compensation to submit documentation establishing that they are fully vaccinated (or request a legally required exception) prior to the employee returning to duty. Agencies should not require such employees to be vaccinated by a November 22, 2021 deadline, as long as they are on extended leave of absence due to receiving workers compensation and will not return to duty until a later date.

- 13) How should agencies enforce the vaccination requirement of Executive Order 14043 for seasonal employees who are not currently working for an agency under their seasonal appointment?**

Agencies should require seasonal employees to submit documentation establishing that they are fully vaccinated (or request a legally required exception) prior to the employee returning to duty. Agencies should not require such employees to be vaccinated by a November 22,

2021 deadline, as long as they will not return to duty until a later date.

- 14) **How should agencies enforce the vaccination requirement of Executive Order 14043 for student volunteers, interns, or other employees who are on an extended break in service (e.g., interns who worked for an agency this past summer, returned to school, and are expected to return to work for the agency after the school year ends)?**

Agencies should require student volunteers, interns, and other employees who are on an extended break to submit documentation establishing that they are fully vaccinated (or request a legally required exception) prior to returning to Federal service. Agencies should not require such persons to be vaccinated by a November 22, 2021 deadline, as long as they will not be reemployed until a later date.

- 15) **How should agencies enforce the vaccination requirement of Executive Order 14043 for employees who are on detail?**

Agencies should require employees who are on detail to another executive branch agency covered by EO 14043 to comply with the vaccination requirement of EO 14043. In accordance with the guidance issued by the Safer Federal Workforce Task Force, agencies should require detailed employees to be fully

vaccinated by November 22, 2021. Detailed employees should follow the procedures of their home agency for submitting documentation to demonstrate their compliance with the vaccination requirement.

Agencies should require employees who are detailed to positions outside of an executive branch agency covered by EO 14043 to submit documentation establishing that they are fully vaccinated (or request a legally required exception) prior to the employee returning to duty at their home agency.

- 16) How should agencies enforce the vaccine requirement of Executive Order 14043 for employees who are running down their leave in advance of departing federal service and do not intend to return to duty before leaving?**

If an employee has provided notice that they are leaving their position in the Executive Branch and are on leave until the date they depart, the agency should not enforce the vaccine requirement of EO 14043.

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**DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON , DC 20301-1010**

October 1, 2021

[SEAL]

MEMORANDUM FOR SENIOR PENTAGON
LEADERSHIP

COMMANDERS OF THE COMBATANT
COMMANDS DEFENSE AGENCY AND DOD
FIELD ACTIVITY DIRECTORS

SUBJECT: Mandatory Coronavirus Disease 2019
Vaccination of DoD Civilian Employees

To defend the Nation and protect the American people, we need a healthy and ready Total Force. To accomplish this, the Secretary of Defense directed the mandatory vaccination of Service members against the coronavirus disease 2019 (COVID-19) by signing the memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members," on August 24, 2021.

On September 9, 2021, the President of the United States directed Executive Branch agencies to implement a COVID-19 vaccination requirement for Federal employees to ensure the health and safety of the Federal workforce and members of the public with whom they interact by signing Executive Order 14043, "Requiring Coronavirus Disease 2019 Vaccination for Federal Employees."

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All DoD civilian employees must be fully vaccinated by November 22, 2021, subject to exemptions as required by law. Employees are considered fully vaccinated 2 weeks after completing the second dose of a two-dose COVID-19 vaccine or 2 weeks after receiving a single dose of a one-dose COVID-19 vaccine.

New DoD civilian employees must be fully vaccinated by their entry on duty (start) date or November 22, 2021, whichever is later.

To meet this requirement, individuals must be vaccinated with vaccines that are either fully licensed or authorized for emergency use by the Food and Drug Administration (FDA) (e.g., Comirnaty/Pfizer-BioNTech, Moderna, Johnson & Johnson/Janssen); listed for emergency use on the World Health Organization Emergency Use Listing (e.g., AstraZeneca/Oxford); or approved for use in a clinical trial vaccine for which vaccine efficacy has been independently confirmed (e.g., Novavax). Those with previous COVID-19 infection(s) or previous serology are not considered fully vaccinated on that basis for the purposes of this mandate.

Those who are not currently fully vaccinated must meet the following deadlines, if using vaccines that are fully licensed or authorized for emergency use by the FDA, in order to be fully vaccinated by November 22, 2021:

- October 11: first dose deadline (if receiving the Moderna vaccine);
- October 18: first dose deadline (if receiving the Comirnaty/Pfizer-BioNTech vaccine);

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- November 8: second dose deadline (if receiving the Moderna and Comirnaty/Pfizer-BioNTech vaccines); and
- November 8: first (only) dose deadline (if receiving the Johnson & Johnson/Janssen vaccine).

In accordance with Deputy Secretary of Defense Memorandum, “Coronavirus Disease 2019 Vaccine Guidance,” December 7, 2020, DoD civilian employees are eligible to receive the COVID-19 vaccine at any DoD vaccination site, including military medical treatment facilities. They may also opt to receive the COVID-19 vaccine at locations other than DoD vaccination sites, including retail stores, private medical practices, and/or local and State public health department sites. Employees, including those who have already received COVID-19 vaccines, must be prepared to provide a copy of their COVID-19 vaccine record in order to meet forthcoming procedures for DoD COVID-19 vaccination verification.

Additional guidance, including procedures for processing vaccination exemption requests, will be published by the Under Secretary of Defense for Personnel and Readiness (USD(P&R)). The USD(P&R) is authorized to rescind this memorandum as necessary for purposes of providing updated guidance.

Vaccinating DoD civilian employees against COVID-19 will save lives and allow for the defense of our Nation. Thank you for your focus on this critical mission.

/s/

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

October 18, 2021

[SEAL]

MEMORANDUM FOR SENIOR PENTAGON
LEADERSHIP

COMMANDERS OF THE COMBATANT
COMMANDS DEFENSE AGENCY AND DOD
FIELD ACTIVITY DIRECTORS

SUBJECT: Force Health Protection Guidance
(Supplement 23) Revision 1 – Department
of Defense Guidance for Coronavirus
Disease 2019 Vaccination Attestation,
Screening Testing, and Vaccination
Verification

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

In accordance with references (c), (d), and (e), DoD civilian employees are now required to be fully vaccinated by November 22, 2021, subject to exemptions as required by law. For purposes of this guidance, “DoD civilian employee,” includes foreign

¹ References are listed in Attachment 8.

nationals employed by DoD outside the United States, to the maximum extent possible while respecting host nation agreements and laws. It also includes DoD civilian employees who are engaged in full-time telework or remote work. Additional information about the requirements for DoD civilian employees can be found in Attachment 1.

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

These vaccination and physical access requirements do not apply to personnel receiving ad hoc access to DoD facilities (e.g., delivery personnel, taxi services); to individuals who have access to the grounds of, but not the buildings on, DoD installations (e.g., contract groundskeepers, fuel delivery personnel, household

goods transportation personnel); to personnel accessing DoD buildings unrelated to the performance of DoD business (e.g., residential housing); or to personnel accessing DoD facilities to receive a public benefit (e.g., commissary; exchange; public museum; air show; military medical treatment facility; Morale, Welfare, and Recreation resources).

In accordance with reference (f), Service members (members of the Armed Forces under DoD authority on Active Duty or in the Ready Reserve, including members of the National Guard) are required to be fully vaccinated against COVID-19. Service members' vaccination status will be validated utilizing their Military Service-specific Individual Medical Readiness (IMR) system. If a Service member has been vaccinated against COVID-19 outside the Military Health System, that Service member must show official proof of his or her COVID-19 vaccination status to update the IMR system. Once the applicable mandatory vaccination date has passed, COVID-19 screening testing as described in Attachment 5 is required at least weekly for Service members who are not fully vaccinated, including those who have an exemption request under review, or who are exempted from COVID-19 vaccination and are entering a DoD facility. Service members who are not on Active Duty and who also are DoD civilian employees or DoD contractor personnel must follow the applicable requirements in this memorandum for DoD civilian employees or DoD contractor personnel.

Individuals are considered fully vaccinated 2 weeks after completing the second dose of a two-dose COVID-

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

All medical and other information collected from individuals will be maintained in a manner meeting the privacy requirements in Attachment 7.

Heads of DoD Components and the Director of Administration and Management (for the Office of the Secretary of Defense Components, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Defense Agencies, and DoD Field Activities) will publish any necessary supplemental instructions and ensure that all contract and associated funding implications are considered.

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

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

Please direct any questions or comments to the following email address: [REDACTED]

/s/ Gilbert R. Cisneros, Jr.
Gilbert R. Cisneros, Jr.

Attachments:

1. ATTACHMENT 1: Vaccination Requirements for DoD Civilian Employees
2. ATTACHMENT 2: Requirements for DoD Contractor Personnel, Official Onsite Visitors, and Others Seeking Access to Facilities
3. ATTACHMENT 3: DD Form 3175 – “DoD Civilian Employee Certification of Vaccination”
4. ATTACHMENT 4: DD Form 3150 – “Contractor and Visitor Certification of Vaccination”
5. ATTACHMENT 5: COVID-19 Screening Testing Requirements
6. ATTACHMENT 6: Requirements for Obtaining Self-Collection Kits and Self-Tests
7. ATTACHMENT 7: Privacy Requirements
8. ATTACHMENT 8: References

ATTACHMENT 1
Vaccination Requirements for
DoD Civilian Employees

1. Vaccination Requirement

- a. DoD civilian employees who are not currently fully vaccinated must meet the following deadlines, if using vaccines that are fully licensed or authorized for emergency use by the FDA, in order to be fully vaccinated by November 22, 2021:
 - i. October 11: first dose deadline (if receiving the Moderna vaccine);
 - ii. October 18: first dose deadline (if receiving the Pfizer-BioNTech/COMIRNATY vaccine);
 - iii. November 8: second dose deadline (if receiving the Moderna and PfizerBioNTech/COMIRNATY vaccines);
 - iv. November 8: first (only) dose deadline (if receiving the Johnson & Johnson/Janssen vaccine); and
 - v. If DoD civilian employees use an authorized vaccine other than those listed above, they are responsible for being fully vaccinated by November 22, 2021.

- b. DoD civilian employees who are not fully vaccinated must comply with all DoD requirements for individuals who are not fully vaccinated, including those requirements related to masking, physical distancing, and travel. Regular COVID-19 testing is not required prior

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to November 22, 2021. After November 22, 2021, weekly COVID-19 testing is required for those DoD civilian employees who are not fully vaccinated, including those who have medical or religious exemptions. DoD civilian employees who telework or work remotely on a full-time basis are not subject to weekly testing, but must provide a negative result from a test performed within the prior 72 hours for entry into a DoD facility.

- c. DoD civilian employees are eligible to receive the COVID-19 vaccine at any DoD vaccination site, including military medical treatment facilities. They may also opt to receive the COVID-19 vaccine at locations other than DoD vaccination sites, such as retail stores, private medical practices, and/or local and State public health department sites.
- d. New DoD civilian employees must be fully vaccinated by their entry on duty (start) date or November 22, 2021, whichever is later.
 - i. The DoD or Office of the Secretary of Defense (OSD) Component head may approve temporary exemptions in writing for up to 60 days after a DoD civilian employee's start date for urgent, mission-critical hiring needs in circumstances in which a DoD civilian employee could not have been fully vaccinated between the time the job opportunity announcement closes and the DoD civilian employee's start date. This authority may be

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delegated in writing to the DoD or OSD Component head's Principal Deputy (or equivalent) but no lower.

- ii. DoD Components must address the COVID-19 vaccination requirement in job opportunity announcements and tentative and final offer letters. For hiring actions currently underway, DoD Components must issue revised tentative and final offer letters. Sample language can be found in reference (g).
- e. DoD civilian employees are authorized official duty time to receive vaccination doses. For employees who are unable to receive a COVID-19 vaccination within their duty hours, regular overtime rules are applicable.
- f. DoD civilian employees are authorized administrative leave for purposes of taking a family member to get a vaccination and to recover from vaccination. Employees who experience an adverse reaction to a COVID-19 vaccination should be granted no more than 2 workdays of administrative leave for recovery associated with a single COVID-19 vaccination dose. DoD civilian employees should use the time and attendance code for "physical fitness" to record administrative leave for COVID-19 vaccination recovery time that prevents the employee from working or for taking a family member to be vaccinated for COVID-19. The type hour code is "LN" and the environmental/hazard/other code is "PF." Non-appropriated

fund employers should code administrative leave related to COVID-19 in a way that can be easily reported.

2. Verification of Vaccination

- a. DoD civilian employees who have received a dose of a one-dose vaccine, or both doses of a two-dose vaccine, must provide proof of vaccination to their supervisors. For purposes of the verification requirement, “supervisor” includes authorized human resources officials. Proof of vaccination may be submitted in hard copy or in an electronic format, and the proof may be a photocopy or photograph of the vaccination record, if it legibly displays the data points to be verified by supervisors. DoD civilian employees who are not fully vaccinated must provide proof of vaccination to their supervisors upon receipt of each required dose. Acceptable proof includes:
 - i. A copy of the record of immunization from a health care provider or pharmacy;
 - ii. A copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813 _r, published on September 3, 2020);
 - iii. A copy of medical records documenting the vaccination;
 - iv. A copy of immunization records from a public health or State immunization information system; or
 - v. A copy of any other official documentation containing the data points required to be verified by the supervisor.

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- b. In addition to providing proof of vaccination to their supervisors, DoD civilian employees also will complete Section A of DD Form 3175 (Attachment 3). DoD civilian employees with access to milConnect (**<https://milconnect.dmdc.osd.mil/>**) will complete the DD Form 3175 via milConnect; otherwise use of a hard copy² is acceptable. DoD civilian employees using a hard copy will provide the hard copy to their supervisor. DoD civilian employees are required to complete the DD Form 3175 even if they already completed the DD Form 3150 (Attachment 4).
- c. Upon receiving proof of vaccination, a DoD civilian employee's supervisor will verify that the information provided contains the following data points:
 - i. Type of vaccine administered
 - ii. Number of doses received
 - iii. Date(s) of administration; and
 - iv. Name of the health care professional(s) or clinic site(s) administering the vaccine(s).
- d. In addition to verifying that a DoD civilian employee's proof of vaccination includes the required data points, supervisors also will complete Section B of DD Form 3175 beginning on or about October 21, 2021 (or when activation of the form is completed for supervisor use).

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

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Supervisors with access to milConnect (<https://milconnect.dmdc.osd.mil/>) will complete the DD Form 3175 via milConnect using the DoD civilian employee's Employee Identification Number; otherwise use of a hard copy is acceptable.

- e. Supervisors will retain DoD civilian employees' proof of vaccination in accordance with their DoD Component's recordkeeping requirements for DoD civilian employee medical records and the privacy requirements contained in Attachment 7.
- f. DoD civilian employees may not be required to use their own personal equipment for the purpose of submitting proof of vaccination or DD Form 3175. DoD civilian employees who submit proof of vaccination or the DD Form 3175 in an electronic format are encouraged to use encrypted email or password protected files with DoD SAFE file transfer (<https://safe.apps.mil/>).

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

- a. DoD civilian employees who refuse to be vaccinated, or to provide proof of vaccination, are subject to disciplinary measures, up to and including removal from Federal service, unless the DoD civilian employee has received an exemption or the DoD civilian employee's timely request for an exemption is pending a decision. DoD Components should generally follow the

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recommended guidelines in reference (h), subject to any applicable Component policy and collective bargaining agreements.

- b. Progressive enforcement actions include, but are not limited, to:
 - i. A 5-day period of counseling and education;
 - ii. A short suspension without pay, of 14 days or less, with an appropriate notice period. Senior Executive Service members may only be suspended for more than 14 days;
 - iii. Removal from Federal service for failing to follow a direct order.
- c. During notice periods, DoD civilian employees generally should not be placed on administrative leave. DoD Components should require DoD civilian employees to continue to telework or report to the worksite and follow all mitigation measures applicable to unvaccinated DoD civilian employees when reporting to the worksite.
- d. DoD Components will designate officials, at the appropriate organizational level, to handle the disciplinary process to ensure consistent application of disciplinary measures. Such officials will decide each case with due regard to the facts and circumstances of that case. DoD Components may begin enforcement action as soon as November 22, 2021, for DoD civilian employees who are not fully vaccinated and who

do not have an exemption request approved or pending decision.

- e. Supervisors should contact their servicing human resources and legal offices to discuss options available to address individual situations regarding enforcement of this requirement.
- f. DoD Components are encouraged to identify an occupational health office, medical office, or other resource with whom a DoD civilian employee may consult during the period of counseling and education.

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

DoD civilian employees may request an exemption on the basis of a medical condition or circumstance or a sincerely held religious belief, practice or observance. Exemptions will be granted in limited circumstances and only where legally required. Further guidance on processing exemptions will be forthcoming from the Under Secretary of Defense for Personnel and Readiness. In the meantime, DoD Components should take no action on any exemption requests received from DoD civilian employees.

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

1. DoD Contractor Personnel

- a. For DoD contractor personnel, the DoD civilian vaccination deadline of November 22, 2021, does not apply. Vaccination requirements for DoD contractor personnel will be in accordance with reference (i), as implemented by reference (j), as directed under Executive Order 14042 (reference (k)).
- b. DoD contractor personnel will complete the DD Form 3150, “Contractor and Visitor Certification of Vaccination” (Attachment 4), maintain a current completed DD Form 3150, and show it to authorized DoD personnel upon request. Failure to complete the DD Form 3150 may result in denying DoD contractor personnel access to the DoD facility to which access is sought.
- c. DoD contractor personnel who are not fully vaccinated against COVID-19 because they are not performing under a covered contract that requires COVID-19 vaccination, due to a legally required accommodation, or who decline to attest to their COVID-19 vaccination status will be subject to COVID-19 screening testing at least weekly as set forth in this guidance (Attachment 5). DoD contractor personnel who refuse required screening testing will be denied access to DoD facilities.

- d. In accordance with applicable contracts, DoD contractor personnel may be offered, but are not required to receive, COVID-19 vaccines at their DoD worksites.

2. Official Onsite Visitors

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

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

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

3. Others Seeking Access to Facilities

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

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ATTACHMENT 3
DD Form 3175 – “DoD Civilian Employee
Certification of Vaccination”
CUI (when filled in)

[See Fold-out Exhibit, next 2 pages]

ATTACHMENT 3
DD Form 3175 – “DoD Civilian Employee Certification of Vaccination”
 CUI (when filled in)

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

CUI (when filled in)

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

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ATTACHMENT 4
DD Form 3150 – “Contractor Personnel and
Visitor Certification of Vaccination”
CUI (when filled in)

[See Fold-out Exhibit, next page]

ATTACHMENT 4 DD Form 3150 – “Contractor Personnel and Visitor Certification of Vaccination”

CUI (when filled in)

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

ATTACHMENT 5
COVID-19 Screening Testing Requirements

1. To establish COVID-19 screening testing for individuals for whom screening testing is required, DoD Components will:
 - a. Execute the screening testing requirement with COVID-19 self-collection kits or self-tests at least weekly (depending on the type of test kit used) that can be performed primarily onsite at the installation or facility with proper supervision and documentation of testing results. If onsite COVID-19 screening testing is not feasible, as an alternative self-testing can be performed at home or in other locations (Note: these COVID-19 self-tests do not require a health care provider's clinical care order and are, therefore, considered an over-the-counter test and do not require medical support to complete). Screening testing will be conducted using an FDA-authorized or approved test; and
 - b. Procure and provide these COVID-19 self-tests and establish guidance for where and how these tests will be distributed and conducted and how results are to be reported.
 - i. DoD civilian employees are responsible for providing documentation of negative COVID-19 test results, upon receipt, to the appropriate supervisor or authorized human resources official. DoD civilian employees may not be required to use their own personal equipment for the

purpose of documenting test results; offsite tests may not be used if there is not a means to document results using government equipment. The supervisor is responsible for maintaining any COVID-19 test results provided by DoD civilian employees in accordance with the privacy protection measures in Attachment 7.

- ii. DoD contractor personnel with CRA will maintain their most recent COVID-19 test result and show such results to authorized DoD personnel upon request.
2. After COVID-19 screening testing procedures are established, the personnel identified in this memorandum as subject to screening testing are required to have a COVID-19 screening test with an FDA-authorized or approved test, and receive a negative COVID-19 screening test result for entry into a DoD facility. If the COVID-19 screening test is administered offsite, the negative result must be from a test performed within the prior 72 hours. If a COVID-19 screening test is administered onsite, the test will be administered immediately before or upon entry into the workplace.
 3. DoD civilian employees and DoD contractor personnel with CRA who have positive COVID-19 screening tests will be required to remain away from the workplace in accordance with references (l) and (m). DoD civilian employees and DoD contractor personnel with CRA with positive COVID-19 screening tests will be offered, but not required to take, confirmatory laboratory-based

molecular (i.e., polymerase chain reaction) testing paid for by the relevant DoD Component. Contact tracing and mitigation measures will be conducted in accordance with references (l) and (m). If the confirmatory test is negative, the individual is not considered to be COVID-19 positive and will be allowed into the workplace.

4. For DoD civilian employees, COVID-19 screening testing is expected to take no more than 1 hour of regular duty time, per test, to complete required testing as directed by the DoD Component. This includes time for travel to the testing site, time to complete testing, and time to return to work. Laboratory-based confirmatory COVID-19 testing for initial positive screening test results is expected to take no more than 2 hours of duty time. Commanders and supervisors will monitor duty time usage and keep duty time used for testing within these parameters to the extent possible.
5. DoD Components may bar DoD civilian employees who refuse required screening testing from their worksites on the installation or facility to protect the safety of others, including while adverse action is pending. While barred from their worksites on the installation or facility, such employees may be required to telework, as appropriate.

ATTACHMENT 6
**Requirements for Obtaining Self-Collection
Kits and Self-Tests**

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

1. Cost reporting for the purchase of testing materials or reimbursement for member tests should be in accordance with reference (n).
2. Funding for COVID-19 testing – If self-collection kits or self-tests are not available:
 - a. Each DoD Component will establish procedures to reimburse Service members and DoD civilian employees for COVID-19 screening tests that require payment for purposes of meeting the screening testing requirement (e.g., if the screening test is not available through the DoD Component and must be administered by a facility who charges for the test).
 - b. For COVID-19 testing of DoD contractor personnel with CRA, DoD Components will offer, if available, COVID-19 testing similar to that offered to DoD civilian employees at the DoD Component's expense and at no cost to the contractor personnel or the contractor.

ATTACHMENT 7
Privacy Requirements

Medical and other information collected from individuals, including vaccination information, test results, and vaccine exemption requests, will be treated in accordance with applicable laws and policies on privacy, including the Privacy Act of 1974 and DoD Instruction 5400.11, “DoD Privacy and Civil Liberties Programs,” January 29, 2019 (reference (o)), the Rehabilitation Act of 1973, as amended (“Rehabilitation Act”), and 5 CFR part 293, subpart E. While such information may be sensitive and is to be safeguarded as described above, it is not covered by the Health Insurance Portability and Accountability Act (HIPAA) and the associated HIPAA Rules.

Medical information obtained from DoD civilian employees, including vaccination status, will be accessible only to those persons who have a need to access the information under the Rehabilitation Act, including immediate supervisors and authorized human resources officials who must access the information to implement the guidance in this memorandum. The Rehabilitation Act’s requirements on confidentiality of medical information apply whether or not a DoD civilian employee has a disability.

DoD Components are advised to consult their Component Privacy Officer and servicing legal office if there is a need to share medical information with DoD personnel other than immediate supervisors and authorized human resources officials or individuals outside of DoD.

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

ATTACHMENT 8
References

- (a) Under Secretary of Defense for Personnel and Readiness Memorandum, “Force Health Protection Guidance (Supplement 23) – Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation and Screening Testing for Unvaccinated Personnel,” September 7, 2021 (hereby rescinded)
- (b) Acting Under Secretary of Defense for Personnel and Readiness Memorandum, “Administrative Leave for Coronavirus Disease 2019 Vaccination of Department of Defense Employees,” April 14, 2021 (hereby rescinded)
- (c) Safer Federal Workforce Task Force, “COVID-19 Workplace Safety: Agency Model Safety Principles,” September 13, 2021
- (d) Executive Order 14043, “Requiring Coronavirus Disease 2019 Vaccination for Federal Employees,” September 9, 2021
- (e) Deputy Secretary of Defense Memorandum, “Mandatory Coronavirus Disease 2019 Vaccination of DoD Civilian Employees,” October 1, 2021
- (f) Secretary of Defense Memorandum, “Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members,” August 24, 2021
- (g) United States Office of Personnel Management Memorandum, “Guidance on Applying Coronavirus Disease 2019 Vaccination

- Requirements to New Hires – Executive Order 14043,” October 1, 2021
- (h) United States Office of Personnel Management Memorandum, “Guidance on Enforcing Coronavirus Disease 2019 Vaccination Requirement for Federal Employees – Executive Order 14043,” October 1, 2021
 - (i) Safer Federal Workforce Task Force, “COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors,” September 24, 2021
 - (j) Principal Director for Defense Pricing and Contracting Memorandum, “Class Deviation 2021-O0009—Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, October 1, 2021
 - (k) Executive Order 14042, “Ensuring Adequate COVID Safety Protocols for Federal Contractors,” September 9, 2021
 - (l) Acting Under Secretary of Defense for Personnel and Readiness Memorandum, “Force Health Protection Guidance (Supplement 15) Revision 2 – Department of Defense Guidance for Coronavirus Disease 2019 Laboratory Testing Services,” July 2, 2021
 - (m) Acting Under Secretary of Defense for Personnel and Readiness Memorandum, “Force Health Protection Guidance (Supplement 18) – Department of Defense Guidance for Protecting All Personnel in Department of Defense Workplaces During the Coronavirus Disease 2019 Pandemic,” March 17, 2021
 - (n) Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer of the

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Department of Defense, "DoD Response to the
Novel Coronavirus – Cost Reporting Guidance,"
April 13, 2020

- (o) Department of Defense Instruction 5400.11,
"DoD Privacy and Civil Liberties Programs,"
January 29, 2019 (as amended)

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

October 29, 2021

[SEAL]

MEMORANDUM FOR SENIOR PENTAGON
LEADERSHIP

COMMANDERS OF THE COMBATANT
COMMANDS DEFENSE AGENCY AND DOD
FIELD ACTIVITY DIRECTORS

SUBJECT: Force Health Protection Guidance
(Supplement 23) Revision 2 – Department
of Defense Guidance for Coronavirus
Disease 2019 Vaccination Attestation,
Screening Testing, and Vaccination
Verification

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

In accordance with references (b), (c), and (d), DoD civilian employees are now required to be fully vaccinated by November 22, 2021, subject to exemptions as required by law. For purposes of this guidance, “DoD civilian employee,” includes foreign

¹ References are listed in Attachment 10.

nationals employed by DoD outside the United States, to the maximum extent possible while respecting host nation agreements and laws. It also includes DoD civilian employees who are engaged in full-time telework or remote work. Additional information about the requirements for DoD civilian employees can be found in Attachment 1.

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

These vaccination and physical access requirements do not apply to personnel receiving ad hoc access to DoD facilities (e.g., delivery personnel, taxi services); to individuals who have access to the grounds of, but not the buildings on, DoD installations (e.g., contract groundskeepers, fuel delivery personnel, household

goods transportation personnel); to personnel accessing DoD buildings unrelated to the performance of DoD business (e.g., residential housing); or to personnel accessing DoD facilities to receive a public benefit (e.g., commissary; exchange; public museum; air show; military medical treatment facility; Morale, Welfare, and Recreation resources).

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

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

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

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

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

This memorandum and other COVID-19 guidance memoranda are centrally located at:

<https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/Latest-DOD-Guidance/>.

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

/s/ Gilbert R. Cisneros, Jr.
Gilbert R. Cisneros, Jr.

Attachments:

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

ATTACHMENT 1
Vaccination Requirements for DoD Civilian
Employees

1. Vaccination Requirement

- a. DoD civilian employees who are not currently fully vaccinated must meet or have met the following deadlines, if using vaccines that are fully licensed or authorized for emergency use by the FDA, in order to be fully vaccinated by November 22, 2021:
 - i. October 11: first dose deadline (if receiving the Moderna vaccine);
 - ii. October 18: first dose deadline (if receiving the Pfizer-BioNTech/COMIRNATY vaccine);
 - iii. November 8: second dose deadline (if receiving the Moderna and PfizerBioNTech/COMIRNATY vaccines);
 - iv. November 8: first (only) dose deadline (if receiving the Johnson & Johnson/Janssen vaccine); and
 - v. If DoD civilian employees use an authorized vaccine other than those listed above, they are responsible for being fully vaccinated by November 22, 2021.

- b. DoD civilian employees who are not fully vaccinated must comply with all DoD requirements for individuals who are not fully vaccinated, including those requirements related to masking, physical distancing, and travel. Regular COVID-19 testing is not required prior

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to November 22, 2021. On or after November 22, 2021, weekly COVID-19 testing is required for those DoD civilian employees who are not fully vaccinated, including those who have medical or religious exemptions. DoD civilian employees who telework or work remotely on a full-time basis are not subject to weekly testing, but must provide a negative result from a test performed within the prior 72 hours for entry into a DoD facility.

- c. DoD civilian employees are eligible to receive the COVID-19 vaccine at any DoD vaccination site, including military medical treatment facilities. They may also opt to receive the COVID-19 vaccine at locations other than DoD vaccination sites, such as retail stores, private medical practices, and/or local and State public health department sites.
- d. New DoD civilian employees must be fully vaccinated by their entry on duty (start) date or November 22, 2021, whichever is later.
 - i. The DoD or Office of the Secretary of Defense (OSD) Component head concerned may approve temporary exemptions in writing for up to 60 days after a DoD civilian employee's start date for urgent, mission-critical hiring needs in circumstances in which a DoD civilian employee could not have been fully vaccinated between the time the job opportunity announcement closes and the DoD civilian employee's start date. This

authority may be delegated in writing to the DoD or OSD Component head's Principal Deputy (or equivalent) but no lower.

- ii. DoD Components must address the COVID-19 vaccination requirement in job opportunity announcements and tentative and final offer letters. For hiring actions currently underway, DoD Components must issue revised tentative and final offer letters. Sample language can be found in reference (f).
- e. DoD civilian employees are authorized official duty time to receive vaccination doses. For DoD civilian employees who are unable to receive a COVID-19 vaccination within their duty hours, regular overtime rules are applicable.
- f. DoD civilian employees are authorized administrative leave for purposes of taking a family member to get a vaccination and for themselves to recover from vaccination. DoD civilian employees who experience an adverse reaction to a COVID-19 vaccination should be granted no more than 2 workdays of administrative leave for recovery associated with a single COVID-19 vaccination dose. DoD civilian employees should use the time and attendance code for "physical fitness" to record administrative leave for COVID-19 vaccination recovery time that prevents the employee from working or for taking a family member to be vaccinated for COVID-19. The type hour code is

“LN” and the environmental/hazard/other code is “PF”. Non-appropriated fund employers should code administrative leave related to COVID-19 in a way that can be easily reported.

2. Verification of Vaccination

- a. DoD civilian employees who have received a dose of a one-dose vaccine, or both doses of a two-dose vaccine, must provide proof of vaccination to their supervisors. For purposes of the vaccination data submission and verification requirements, “supervisor” includes authorized human resources officials. Proof of vaccination may be submitted in hard copy or in an electronic format, and the proof may be a photocopy or photograph of the vaccination record, if it legibly displays the data points to be verified by supervisors. DoD civilian employees who are not fully vaccinated must provide proof of vaccination to their supervisors upon receipt of each required dose. Acceptable proof includes:
 - i. A copy of the record of immunization from a health care provider or pharmacy;
 - ii. A copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813_r, published on September 3, 2020);
 - iii. A copy of medical records documenting the vaccination;
 - iv. A copy of immunization records from a public health or State immunization information system; or

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- v. A copy of any other official documentation containing the data points required to be verified by the supervisor.

- b. In addition to providing proof of vaccination to their supervisors, DoD civilian employees also will complete Section A of DD Form 3175 (Attachment 3). DoD civilian employees with access to milConnect (**<https://milconnect.dmdc.osd.mil/>**) will complete the DD Form 3175 via milConnect; otherwise use of a hard copy² is acceptable. DoD civilian employees who complete the DD Form 3175 via milConnect do not need to email or otherwise transmit a copy of the form to their supervisors. DoD civilian employees using a hard copy will provide the hard copy to their supervisor. DoD civilian employees are required to complete the DD Form 3175 even if they already completed the DD Form 3150 (Attachment 4).

- c. Upon receiving proof of vaccination, a DoD civilian employee's supervisor will verify that the proof of vaccination provided contains the following data points:
 - i. Type of vaccine administered;
 - ii. Number of doses received;
 - iii. Date(s) of administration; and
 - iv. Name of the health care professional(s) or clinic site(s) administering the vaccine(s).

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

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- d. In addition to verifying that a DoD civilian employee's proof of vaccination includes the required data points, supervisors also will complete Section B of DD Form 3175 beginning on or about November 7, 2021 (or when activation of the form is completed for supervisor use). Supervisors with access to milConnect (**<https://milconnect.dmdc.osd.mil/>**) will complete the DD Form 3175 via milConnect using the DoD civilian employee's Employee Identification Number; otherwise use of a hard copy is acceptable.
- e. Supervisors will retain DoD civilian employees' proof of vaccination and DD Form 3175 (for those DoD civilian employees not using milConnect) in accordance with their DoD Component's recordkeeping requirements for DoD civilian employee medical records and the privacy requirements contained in Attachment 9. Supervisors should not ask for copies of the DD Form 3175 from those employees who used milConnect to complete the form. Supervisors who receive completed copies of the DD Form 3175 from DoD civilian employees who completed the DD Form 3175 using milConnect shall not maintain the copy.
- f. DoD civilian employees may not be required to use their own personal equipment for the purpose of submitting proof of vaccination or DD Form 3175. DoD civilian employees who submit proof of vaccination or the DD Form 3175 in an electronic format are encouraged to use

encrypted email or password protected files with DoD SAFE file transfer (<https://safe.apps.mil/>).

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

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

leave. DoD Components should require DoD civilian employees to continue to telework or report to the worksite and follow all mitigation measures applicable to not fully vaccinated DoD civilian employees when reporting to the worksite.

- d. DoD Components will designate officials, at the appropriate organizational level, to handle the disciplinary process to promote consistent application of disciplinary measures. Such officials will decide each case with due regard to the facts and circumstances of that case. DoD Components may begin enforcement action as soon as November 22, 2021, for DoD civilian employees who are not fully vaccinated and who do not have an exemption request approved or a timely request pending decision.
- e. Supervisors should contact their servicing human resources and legal offices to discuss options available to address individual situations regarding enforcement of this requirement.
- f. DoD Components are encouraged to identify an occupational health office, medical office, or other resource with which a DoD civilian employee may consult during the period of counseling and education.

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

DoD civilian employees may request an exemption on the basis of a medical condition or circumstance or a

sincerely held religious belief, practice or observance. Because all DoD civilian employees must now be vaccinated against COVID-19 as a condition of employment, exemptions will be granted in limited circumstances and only where legally required. The information collected must be handled in accordance with the privacy requirements in Attachment 9.

- a. Decision Authority. In establishing exemption processes, the Secretaries of Military Departments and the Director of Administration and Management for all other DoD Components will ensure that the management official(s) who are designated to make decisions concerning requests for exemption from the COVID-19 vaccination requirement make such decisions in coordination with the organization's servicing legal office and are at an appropriate level within the organization to consider the impact, if any, of the volume of requests and to promote similar cases being handled in a consistent manner. Such officials will decide each case with due regard to the facts and circumstances of that case.
- b. Employee Notice. DoD Components will inform DoD civilian employees how to make a request for an exemption and notify them that requests must be submitted no later than November 8, 2021, absent extenuating circumstances, to be considered timely.
- c. Employee Requests. To make a request for exemption from vaccination, DoD civilian employees must provide an official statement

which describes the medical or religious reason the employee objects to vaccination against COVID-19. Generally, such requests should be submitted in writing. DoD civilian employees may use DD Form 3176 (Attachment 5) or DD Form 3177 (Attachment 6) to submit their request. DoD civilian employees who make oral requests may be provided a sample written request format and/or be interviewed to develop the basis for the request. While the use of the DD Form 3176 and DD Form 3177 is optional for DoD civilian employees, when DoD civilian employees make a request, they must provide the following information.

- i. Medical.
 - A description of the medical condition or circumstance that is the basis for the request for a medical exemption from the COVID-19 vaccination requirement;
 - An explanation of why the medical condition or circumstance prevents the employee from being safely vaccinated against COVID-19;
 - If it is a temporary medical condition or circumstance, a statement concerning when it will no longer be a medical necessity to delay vaccination against COVID-19; and
 - Any additional information, to include medical documentation that addresses the employee's particular medical condition or circumstance, which may

be helpful in resolving the employee's request for a medical exemption from the COVID-19 vaccination requirement.

ii. Religious.

- A description of the religious belief, practice, or observance that is the basis for the request for a religious exemption from the COVID-19 vaccination requirement;
- A description of when and how the DoD civilian employee came to hold the religious belief or observe the religious practice;
- A description of how the DoD civilian employee has demonstrated the religious belief or observed the religious practice in the past;
- An explanation of how the COVID-19 vaccine conflicts with the religious belief, practice, or observance;
- A statement concerning whether the DoD civilian employee has previously raised an objection to a vaccination, medical treatment, or medicine based on a religious belief or practice. If so, a description of the circumstances, timing, and resolution of the matter; and
- Any additional information that may be helpful in resolving the DoD civilian employee's request for a religious exemption from the COVID-19 vaccination requirement.

- d. Minimum Requirements for Exemption Procedures. The Secretaries of Military Departments and the Director of Administration and Management for all other DoD Components will ensure that exemption procedures require the following measures.
- i. Development of a written factual record that includes the following:
 - The basis for the claim;
 - The nature of the DoD civilian employee's job responsibilities; and
 - The reasonably foreseeable effects on the agency's operations, including protecting other agency employees and the public from COVID-19, if the civilian employee remains unvaccinated.
 - ii. Designation of the DoD civilian employee's supervisor for completing Section B of the DoD civilian employee's DD Form 3175, as the proper recipient for a DoD civilian employee's request for exemption. For purposes of exemption request procedures, "supervisor" includes authorized human resources officials. Upon receipt, the supervisor will update the DD Form 3175 to indicate a request for exemption determination is pending and forward the request to the office supporting the designated decision maker.
 - iii. A process for the decision maker to obtain any reasonably necessary additional

information (for example, medical documentation, an interview of the DoD civilian employee, or a supervisor statement) and to consult with, as appropriate, subject matter experts within DoD such as occupational health personnel, public health personnel, equal employment opportunity advisors, chaplains, and human resources personnel.

- iv. A written determination, including the reason(s) for that determination, by the decision maker. In cases where the exemption is temporary or denied, the determination must specify a date by which the DoD civilian employee must be fully vaccinated against COVID-19. In specifying that date, DoD civilian employees must be given a minimum period of 14 days to receive their first (or only) dose of a COVID-19 vaccine.
 - v. Provision of the written determination to the DoD civilian employee's supervisor, who, in turn, provides the DoD civilian employee with a copy of the written determination, updates the DD Form 3175, and informs the DoD civilian employee of next steps.
- e. Additional Guidance.
- i. Requests for medical exemption will be treated as medical records to be maintained separately from other

personnel files. Both medical and religious exemption requests will be maintained in accordance with the privacy requirements at Attachment 9.

- ii. A DoD civilian employee's failure to submit a timely request for exemption is not a basis to deny a request but may be relevant in evaluating the request.
- iii. Discipline for failure to meet the COVID-19 vaccination requirement will not be initiated against a DoD civilian employee while a timely request for a medical or religious exemption from the COVID-19 vaccination requirement is pending determination. If a DoD civilian employee submits a request after discipline is initiated, disciplinary measures may be held in abeyance where appropriate.
- iv. DoD civilian employees who are not fully vaccinated but who have a pending request for exemption from vaccination are required to comply with any mitigation measures that are applicable to all DoD civilian employees in the worksite who are not fully vaccinated (for example, screening testing (Attachment 7), masking, and physical distancing). Requests for reasonable accommodation related to those mitigation measures may be analyzed separately from requests for exemption from vaccination.
- v. A DoD civilian employee who receives an exemption from the vaccination

requirement may, because of the exemption, be unable to perform the duties and responsibilities of the position without a change in working conditions. Such matters will be referred to the reasonable accommodation process.

- vi. Requests for exemption from candidates for employment will be handled consistent with the provisions in this attachment, except for those in paragraph 4.b.
- vii. Unless responsibility is otherwise established in a written support agreement, the Combatant Command Support Agent identified in reference (h) is responsible for administration of exemption processes applicable to DoD employees assigned, detailed, or otherwise deployed to a Combatant Command area of responsibility.

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

1. DoD Contractor Personnel

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

- d. In accordance with applicable contracts, DoD contractor personnel may be offered, but are not required to receive, COVID-19 vaccines at their DoD worksites.

2. Official Onsite Visitors

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

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

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

3. Others Seeking Access to Facilities

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

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ATTACHMENT 3
DD Form 3175 – “DoD Civilian Employee
Certification of Vaccination”
CUI (when filled in)

[See Fold-out Exhibit, next 2 pages]

ATTACHMENT 3
DD Form 3175 – “DoD Civilian Employee Certification of Vaccination”

CUI (when filled in)

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

CUI (when filled in)

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

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ATTACHMENT 4
DD Form 3150 – “Contractor Personnel and
Visitor Certification of Vaccination”
CUI (when filled in)

[See Fold-out Exhibit, next page]

ATTACHMENT 4

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

CUI (when filled in)

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

DD FORM 3150, OCT 2021

CUI (when filled in)

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

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ATTACHMENT 5
**DD Form 3176 – “Request for a Medical
Exemption or Delay to the COVID-19
Vaccination Requirement”**
CUI (when filled in)

[See Fold-out Exhibit, next 2 pages]

ATTACHMENT 5

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

CUI (when filled in)

REQUEST FOR A MEDICAL EXEMPTION OR DELAY TO THE COVID-19 VACCINATION REQUIREMENT		OMB No. 0704-0619 Exp. 20220430
The public reporting burden for this collection of information is estimated to average 5 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, at whs.mc-alex.esd.mbx.dd-dod-informationcollections@mail.mil. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.		
PRIVACY ACT STATEMENT		
<p>Authority: DoD is authorized to collect the information on this form pursuant to 29 U.S.C. 794, 42 U.S.C. Chapter 21, Subch. VI; Executive Order (E.O.) 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees; E.O. 13163, Increasing the Opportunities for Individuals with Disabilities to be Employed in the Federal Government; E.O. 13164, Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation; 29 CFR 1614.203, Rehabilitation Act; DoD Directive 1020.1, Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of Defense; as well as 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 9013, 10 U.S.C. 2672, 5 U.S.C. chapter 79, and DoD Instruction 6200.03.</p> <p>Principal Purpose: The information on this form is being collected so that DoD may determine whether to grant your request for a medical exemption from the COVID-19 vaccination requirement for federal employees, pursuant to Executive Order 14043 and in furtherance of COVID-19 workplace safety plans.</p> <p>Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally. For example, disclosure of medical condition or history information to authorized government officials for the purpose of conducting an investigation into DoD's compliance with the Rehabilitation Act of 1973; disclosure of medical condition or history information to first aid and safety personnel in the event an employee's medical condition might require emergency treatment or special procedures; to Federal agencies/entities participating in the DoD Computer/Electronic Accommodations Program (CAP) to permit the agency to carry out its responsibilities under the program; A complete list of routine uses may be found in the applicable System of Records Notice (SORN) associated with the collection of this information: DoD 0007, Defense Reasonable Accommodations and Assistive Technology Records. 86 Fed. Reg. 38682 (July, 22, 2010) (available at https://www.govinfo.gov/content/pkg/FR-2021-07-22/pdf/2021-15601.pdf).</p> <p>Consequences of Failure to Provide Information: Providing this information is voluntary and use of this form is optional. Failure to provide the information requested on this form may impact DoD's ability to evaluate or act upon a request for a medical exemption from the COVID-19 vaccination requirement. Any intentional misrepresentation to the Federal Government may result in legal consequences, including termination or removal from Federal Service.</p>		
<p>Instructions: Part 1 is to be completed by DoD civilian employees. Part 2 is to be completed by a licensed health care provider. Provide narrative responses where applicable (Blocks 8-10, 15-17). If additional space is needed, proceed on the appropriate continuation block (Block 11 or 20) by annotating the Section and Line number and continue your narrative response. Signing this form constitutes a declaration that the information you provide is, to the best of your knowledge and ability, true and correct. Any intentional misrepresentation to the Federal Government may result in legal consequences, including removal from Federal Service.</p>		
PART 1. TO BE COMPLETED BY THE DOD CIVILIAN EMPLOYEE		
1. Employee Name (Last, First, Middle Initial)	2. DoD ID Number	
3. Office Symbol	4. Date of Request (YYYYMMDD)	
5. Position/Title	6. Supervisor Name	7. Supervisor Phone Number
8. Please provide a description of the medical condition or circumstance that is the basis for the request for a medical exemption from the COVID-19 vaccination requirement.		
9. Please provide an explanation of why the medical condition or circumstance prevents you from being vaccinated.		
10. Please provide any additional information, that addresses your particular medical condition or circumstance, which may be helpful in resolving your request for a medical exemption or delay from the COVID-19 vaccination requirement. If you have medical documentation (in addition to Part 2 of this Form) that addresses your particular medical condition or circumstance you may submit the documentation to your supervisor along with this form.		

CUI (when filled in)

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

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ATTACHMENT 6
DD Form 3177 – “Request for a Religious
Exemption to the COVID-19 Vaccination
Requirement”
CUI (when filled in)

[See Fold-out Exhibit, next 2 pages]

ATTACHMENT 6

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

CUI (when filled in)

REQUEST FOR A RELIGIOUS EXEMPTION TO THE COVID-19 VACCINATION REQUIREMENT		
PRIVACY ACT STATEMENT		
<p>Authority: DoD is authorized to collect the information on this form pursuant to Executive Order (E.O.) 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees; 42 U.S.C. Chapter 21, Subchapter VI; 42 U.S.C. Chapter 21B; as well as 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 9013, 10 U.S.C. 2672, 5 U.S.C. chapter 79, and DoD Instruction 6200.03.</p> <p>Principal Purpose: The information on this form is being collected so that DoD may determine whether to grant your request for a religious exemption from the COVID-19 vaccination requirement for federal employees, pursuant to Executive Order 14043 and in furtherance of COVID-19 workplace safety plans. Consistent with the Religious Freedom Restoration Act of 1993, 42 U.S.C. Chapter 21B, and Title VII of the Civil Rights Act, 42 U.S.C. Chapter 21, Subchapter VI, individuals seeking a religious exemption from the vaccination requirement will submit to DoD supporting information about their religious beliefs or practices in order for DoD to evaluate the exemption request.</p> <p>Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally. For example to disclose information to: a person, organization, or governmental entity as necessary and relevant to notify them of, respond to, or guard against a public health emergency or other similar crisis, including to comply with laws governing the reporting of communicable disease or other laws concerning health and safety in the work environment; adjudicative or administrative bodies or officials when the records are relevant and necessary to an adjudicative or administrative proceeding; contractors, grantees, experts, consultants, students, and others as necessary to perform their duties for the Federal government; agencies, courts, and persons as necessary and relevant in the course of litigation, and as necessary and in accordance with requirements for law enforcement; or to a person authorized to act on your behalf. A complete list of routine uses may be found in the applicable System of Records Notices (SORN) associated with the collection of this information: DPR 39 DoD, DoD Personnel Accountability and Assessment System of Records, 85 Fed. Reg. 17047 (Mar. 26, 2020) (also available at https://dpcid.defense.gov/Portals/49/Documents/Privacy/SORNs/OSDJS/OSDJS-DPR-39-DoD.pdf).</p> <p>Consequences of Failure to Provide Information: Providing this information is voluntary and use of this form is optional. Failure to provide the information requested on this form may impact DoD's ability to evaluate or act upon a request for a religious exemption from the COVID-19 vaccination requirement. Any intentional misrepresentation to the Federal Government may result in legal consequences, including removal from Federal Service.</p>		
<p>Instructions: To be completed by DoD civilian employees. Provide narrative responses where applicable (Blocks 8-11, 12.b, 12.c, 13). If additional space is needed, proceed on the continuation block (Block 14) by annotating the Section and Line number and continue your narrative response. Signing this form constitutes a declaration that the information you provide is, to the best of your knowledge and ability, true and correct. Any intentional misrepresentation to the Federal Government may result in legal consequences, including removal from Federal Service.</p>		
1. Employee Name (Last, First, Middle Initial)	2. DoD ID Number	
3. Office Symbol	4. Date of Request (YYYYMMDD)	
5. Position/Title	6. Supervisor Name	7. Supervisor Phone Number
8. Please describe the religious belief, practice, or observance that is the basis for your request for a religious exemption from the COVID-19 vaccination requirement.		
9. Please describe when and how you came to hold the religious belief or observe the religious practice.		
10. Please describe how you have demonstrated the religious belief or observed the religious practice in the past.		
11. Please explain how the COVID-19 vaccines conflict with your religious belief, practice, or observance.		

CUI (when filled in)

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

ATTACHMENT 7
COVID-19 Screening Testing Requirements

1. To establish COVID-19 screening testing for individuals for whom screening testing is required, DoD Components will:
 - a. Execute the screening testing requirement with COVID-19 self-collection kits or self-tests at least weekly (depending on the type of test kit used) that should be performed primarily onsite at the installation or facility with proper supervision and documentation of testing results. If onsite COVID-19 screening testing is not feasible, as an alternative self-testing may be performed at home or in other locations (Note: these COVID-19 self-tests do not require a health care provider's clinical care order and are, therefore, considered an over-the-counter test and do not require medical support to complete). Screening testing will use those tests authorized by Attachment 8; and
 - b. Procure and provide these COVID-19 self-tests and establish guidance for where and how these tests will be distributed and conducted and how results are to be reported.
 - i. DoD civilian employees are responsible for providing documentation of negative COVID-19 test results, upon receipt, to the appropriate supervisor. For purposes of screening testing requirements, "supervisor" includes authorized human resources officials. DoD civilian

employees may not be required to use their own personal equipment for the purpose of documenting test results; off site tests may not be used if there is not a means to document results using government equipment. The supervisor is responsible for maintaining any COVID-19 test results provided by DoD civilian employees in accordance with the privacy protection measures in Attachment 9.

- ii. DoD contractor personnel with CRA will maintain their most recent COVID-19 test result and show such results to authorized DoD personnel upon request.
2. After COVID-19 screening testing procedures are established, the personnel identified in this memorandum as subject to screening testing are required to have a COVID-19 screening test using a test authorized by Attachment 8, and receive a negative COVID-19 screening test result for entry into a DoD facility. If the COVID-19 screening test is administered off site, the negative result must be from a test performed within the prior 72 hours. If a COVID-19 screening test is administered onsite, the test will be administered before DoD civilian employees and contractor personnel go to their work areas. In accordance with reference (l) and CDC guidance, personnel who have recovered from a recent COVID infection and who remain asymptomatic are exempted from regular screening testing for 90 days following their

documented date of recovery. Documented proof of this recovery shall be provided upon request.

3. DoD civilian employees and DoD contractor personnel with CRA who have positive COVID-19 screening tests will be required to remain away from the workplace in accordance with references (l) and (m). DoD civilian employees and DoD contractor personnel with CRA with positive COVID-19 screening tests will be offered, but not required to take, confirmatory laboratory-based molecular (i.e., polymerase chain reaction) testing paid for by the relevant DoD Component. Contact tracing and mitigation measures will be conducted in accordance with references (l) and (m). If the confirmatory test is negative, the individual is not considered to be COVID-19 positive and will be allowed into the workplace.
4. For DoD civilian employees, COVID-19 screening testing is expected to take no more than one hour of regular duty time, per test, to complete required testing as directed by the DoD Component. Laboratory-based confirmatory COVID-19 testing for initial positive screening test results is expected to take no more than two hours of duty time. This includes time for travel to the testing site, time to complete testing, and time to return to work. Commanders and supervisors will monitor duty time usage and keep duty time used for testing within these parameters to the extent possible.

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5. DoD Components may bar DoD civilian employees who refuse required screening testing from their worksites on the installation or facility to protect the safety of others, including while any progressive disciplinary actions are pending. While barred from their worksites on the installation or facility, such DoD civilian employees may be required to telework, as appropriate.

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

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

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

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

ATTACHMENT 9
Privacy Requirements

Under this guidance memorandum, the DoD may collect and maintain sensitive and private information about individuals, including medical information. Consistent with the Religious Freedom Restoration Act of 1993, 42 U.S.C. chapter 21B, and Title VII of the Civil Rights Act, 42 U.S.C. chapter 21, subchapter VI, individuals seeking a religious exemption from the vaccination requirement will submit to DoD supporting information about their religious beliefs and practices in order for DoD to evaluate the exemption request. Information collected from individuals under this guidance, including vaccination information, test results, and medical or religious information supporting vaccine exemption requests, will be treated in accordance with applicable laws and policies on privacy, including the Privacy Act of 1974 and DoD Instruction 5400.11, “DoD Privacy and Civil Liberties Programs,” January 29, 2019 (reference (n)), the Rehabilitation Act of 1973, as amended (“Rehabilitation Act”), and 5 CFR Part 293, subpart E. While such information may be sensitive and is to be safeguarded, it is not covered by the Health Insurance Portability and Accountability Act (HIPAA) and the associated HIPAA Rules.

Information gathered under this guidance may be shared with immediate supervisors, authorized human resources officials, designated decision makers, and, in appropriate cases, subject matter experts, who must access the information to implement the guidance. DoD Components are advised to consult their Component

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

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

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Components are advised to refer to applicable internal guidance on the handling, storage, and disposition of DoD civilian employee medical records, and to consult their Component Privacy Officer as needed for further guidance.

ATTACHMENT 10
References

- (a) Under Secretary of Defense for Personnel and Readiness Memorandum, Force Health Protection Guidance (Supplement 23) Revision 1 – Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation, Screening Testing, and Vaccination Verification, October 18, 2021 (hereby rescinded)
- (b) Safer Federal Workforce Task Force, “COVID-19 Workplace Safety: Agency Model Safety Principles,” September 13, 2021
- (c) Executive Order 14043, “Requiring Coronavirus Disease 2019 Vaccination for Federal Employees,” September 9, 2021
- (d) Deputy Secretary of Defense Memorandum, “Mandatory Corona virus Disease 2019 Vaccination of DoD Civilian Employees,” October 1, 2021
- (e) Secretary of Defense Memorandum, “Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members,” August 24, 2021
- (f) United States Office of Personnel Management Memorandum, “Guidance on Applying Coronavirus Disease 2019 Vaccination Requirements to New Hires – Executive Order 14043,” October 1, 2021
- (g) United States Office of Personnel Management Memorandum, “Guidance on Enforcing Coronavirus Disease 2019 Vaccination Requirement for Federal Employees – Executive Order 14043,” October 1, 2021

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- (h) Department of Defense Directive 5100.03, “Support of the Headquarters of Combatant and Subordinate Unified Command” February 9, 2011, Incorporating Change 1, September 7, 2017
- (i) Safer Federal Workforce Task Force, “COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors,” September 24, 2021
- (j) Principal Director for Defense Pricing and Contracting Memorandum, “Class Deviation 2021-O0009—Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, October 1, 2021
- (k) Executive Order 14042, “Ensuring Adequate COVID Safety Protocols for Federal Contractors,” September 9, 2021
- (l) Acting Under Secretary of Defense for Personnel and Readiness Memorandum, “Force Health Protection Guidance (Supplement 18) – Department of Defense Guidance for Protecting All Personnel in Department of Defense Workplaces During the Coronavirus Disease 2019 Pandemic,” March 17, 2021
- (m) Acting Under Secretary of Defense for Personnel and Readiness Memorandum, “Force Health Protection Guidance (Supplement 15) Revision 2 – Department of Defense Guidance for Coronavirus Disease 2019 Laboratory Testing Services,” July 2, 2021
- (n) Department of Defense Instruction 5400.11, “DoD Privacy and Civil Liberties Programs,” January 29, 2019

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**THE ASSISTANT SECRETARY OF THE NAVY
(MANPOWER AND RESERVE AFFAIRS)
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000**

November 5, 2021

[SEAL]

MEMORANDUM FOR ASSISTANT SECRETARIES
OF THE NAVY
GENERAL COUNSEL
COMMANDANT OF THE MARINE CORPS
CHIEF OF NAVAL OPERATIONS

Subject: Mandatory Coronavirus Disease 2019
Vaccination of Department of Navy Civilian
Employees

Ref: (a) Force Health Protection (FHP) Guidance
(Supplement 23) Revision 2, October 29,
2021
(b) Department of the Navy (DON) COVID-
19 Mandatory Vaccination Plan for
Civilian Employees, November 2021

In support of the President's efforts to protect the health of the force and ensure warfighting readiness, the Department of Defense (DoD) published reference (a) on October 29, 2021. To ensure consistent implementation of the Force Health Protection, Supplement 23, Revision 2, across the DON, Commands and Organizations shall follow the process outlined in the DON COVID-19 Mandatory Vaccination Plan for Civilian Employees, issued November 5, 2021, a copy of which is attached to this guidance.

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Our goal is to ensure the guidance provides an overarching framework to safeguard our most important asset, our people, within federal facilities. The guide was established to ensure clear communication at every level, deliver flexibility when needed, and provide managers and supervisors with the tools they need to communicate effectively with employees during the compliance process.

While the DON COVID-19 Mandatory Vaccination Plan for Civilian Employees will serve to meet these goals, please recognize that we are operating in a dynamic environment. You should expect the plan to be adjusted as necessary to align with DoD or other relevant guidance as updates occur.

I appreciate the team effort and hard work everyone has invested during the rollout of the vaccination mandate. We still have a lot of work to do and questions to answer, but I am confident in the collective ability of our force to meet future challenges. Questions may be directed to Ms. Christina Lhamon, Director, Workforce Relations and Compensation, at christina.lhamon@navy.mil.

/s/ Robert D. Hogue
Robert D. Hogue
Acting

Subject: Mandatory Coronavirus Disease 2019
Vaccination of Department of Navy Civilian
Employees

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Attachment:
As Stated

Distribution:
ASN (EI&E)
ASN (FM&C)
ASN (M&RA)
ASN (RD&A)
GC
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DMCS
DNS
JAG
DON CIO
NAVIG
NCIS
OLA
OSBP
Echelon 1 and 2 Commands

**COVID-19 Mandatory Vaccination Plan
for Civilian Employees**

Department of the Navy

Updated: November 5, 2021

[SEAL]

COVID-19 CIVILIAN MANDATORY
VACCINATION PLAN

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References

- a) Deputy Secretary of Defense Memorandum, "Coronavirus Disease 2019 Vaccine Guidance" December 7, 2020
- b) DoD Instruction 5400.11, "DoD Privacy and Civil Liberties Programs," Change 1, December 8, 2020
- c) Executive Order 14043, "Requiring Coronavirus Disease 2019 Vaccination for Federal Employees" September 9, 2021
- d) DoD Coronavirus Task Force Diagnostics and Testing Lead Memorandum, "Optimization of

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- Coronavirus Disease 2019 (COVID-19) Testing Resources,” March 8, 2021
- e) Acting Under Secretary of Defense for Personnel and Readiness Memorandum, “Force Health Protection Guidance (Supplement 18) – Department of Defense Guidance for Protecting All Personnel in Department of Defense Workplaces During the Coronavirus Disease 2019 Pandemic,” March 17, 2021
 - f) Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer of the Department of Defense, “DoD Response to the Novel Coronavirus – Cost Reporting Guidance,” April 13, 2020
 - g) Acting Under Secretary of Defense for Personnel and Readiness Memorandum, “Force Health Protection Guidance (Supplement 15) Revision 2 – Department of Defense Guidance for Coronavirus Disease 2019 Laboratory Testing Services,” July 2, 2021
 - h) Acting Under Secretary of Defense for Personnel and Readiness Memorandum, “Force Health Protection Guidance (Supplement 22) – Department of Defense Guidance for Coronavirus Disease 2019 Surveillance and Screening Testing,” July 21, 2021
 - i) Safer Federal Workforce Task Force “COVID-19 Workplace Safety: Agency Model Safety Principles,” July 29, 2021
 - j) Secretary of Defense Memorandum, “Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members,” August 24, 2021

- k) Executive Order 14043, “Requiring Coronavirus Disease 2019 Vaccination for Federal Employees,” September 9, 2021
- l) Director, OPM Memorandum for the Heads of Executive Departments and Agencies, October 1, 2021
- m) OPM Guidance on Enforcement of Coronavirus Disease 2019 Vaccination Requirement for Federal Employees – Executive Order 14043, October 1, 2021
- n) Deputy Secretary of Defense Memorandum, “Mandatory Coronavirus Disease 2019 Vaccination of DoD Civilian Employees”, October 1, 2021
- o) Under Secretary of Defense for Personnel and Readiness Memorandum, “Force Health Protection Guidance (Supplement 23) Revision 2 – Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation and Screening Testing for Unvaccinated Personnel,” October 29, 2021

1. Background

On September 9, 2021, President Joseph R. Biden signed Executive Order 14043, mandating Coronavirus Disease 2019 (COVID-19) vaccination for all Federal employees, including Non-Appropriated Fund (NAF) employees. Due to the current and ongoing nationwide public health emergency, President Biden determined that to halt the spread of COVID-19, including the B.1.617.2 (Delta) variant, and to promote the health and safety of the Federal workforce, and the health and safety of members of the public with whom they

interact, and the efficiency of the civil service, it is necessary to require COVID-19 vaccination for all Federal employees, subject to exemptions, such as those based on medical or religious reasons, as required by law. Accordingly, the Department of the Navy (DON) is implementing a mandatory COVID-19 vaccination policy for civilians in accordance with E.O. 14043 and the DON's duty to provide and maintain a workplace that is free of known hazards. Not only will the vaccination requirement promote a safer workplace, it will also help to slow the spread of COVID-19 and assist in the prevention of infection from the highly contagious Delta variant or other emerging variants.

2. Applicability

DON civilian employees to include Foreign National (FN) employees in Bahrain, Cuba (Guantanamo Bay), and the British Indian Ocean Territory (Diego Garcia), must become fully vaccinated no later than **November 22, 2021**. Foreign national employees in other countries will not be subject to this policy until the conditions of a mandatory vaccination policy for their respective foreign labor systems have been negotiated with their host governments. Guidance for contract employees will be provided under separate cover.

DON employees on an extended leave of absence that is expected to continue beyond November 22, 2021, (e.g., utilizing annual leave, sick leave, donated annual leave, military leave, leave without pay, paid parental leave, unpaid leave under Family and Medical Leave, or workers compensation) are not required to be

vaccinated by the November 22, 2021, deadline. Seasonal employees, student volunteers, interns and other employees who are on an extended break and are not expected to return to duty prior to November 22, 2021, are not required to be vaccinated by November 22, 2021. In such situations, employees must submit documentation establishing that they are fully vaccinated (or request a legally required exemption) prior to the employee returning to duty.

3. Vaccinations

Employees are considered fully vaccinated two weeks after completing the second dose of a two-dose COVID-19 vaccine or two weeks after receiving a single dose of a one-dose COVID-19 vaccine. Vaccines must be either fully licensed or authorized for emergency use by the U.S. Food and Drug Administration (e.g., Pfizer, Moderna, Johnson & Johnson); listed for emergency use on the World Health Organization (WHO) Emergency Use Listing (e.g., AstraZeneca/Oxford); or an approved clinical trial vaccine for which vaccine efficacy has been independently confirmed (e.g., Novavax). Evidence of COVID-19 anti-bodies as a result of previous infection(s) does not satisfy this vaccination requirement; these individuals must also be fully vaccinated. Absent an approved legally required exemption, employees who are on maximum telework or working remotely are not excused from this mandate.

- a. COVID-19 vaccines are widely available. There are several ways employees can find vaccination providers within in the United States, including:

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- Visit [Vaccines.gov](https://www.vaccines.gov) to find vaccination providers.
 - Text ZIP code to 438829 or call 1-800-232-0233 to find the nearest vaccine locations in the United States.
 - Check local pharmacy's website to see if vaccination appointments are available. Find out which pharmacies are participating in the [Federal Retail Pharmacy Program](#).
 - Contact [state](#) health departments to find additional vaccination locations.
- b. Department of Defense (DoD) civilian employees are eligible to receive the COVID-19 vaccine at any DoD vaccination site, including military treatment facilities. Employees may also opt to receive the COVID-19 vaccine at other locations, to include retail stores, private medical practices, and/or local and state public health department sites. See Deputy Secretary of Defense Memorandum, "Coronavirus Disease 2019 Vaccine Guidance," December 7, 2020. Vaccine brand availability may vary based on employee location and other local conditions. The DON encourages employees to plan ahead and allow enough time to receive all required vaccine doses by the November 8, 2021, deadline listed below.

It is important to note that documented COVID-19 cases among immunized personnel are very infrequent and most cases have been mild to moderate. The rise of the highly transmissible Delta variant and the speed with which it transmits among individuals pose

increased risks to our workforce and the DON's mission. Employees are encouraged to visit the CDC's website at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html> to obtain information regarding the benefits of getting a COVID-19 vaccination.

4. Timelines

Employees are considered fully vaccinated two weeks after completing the second dose of a two-dose COVID-19 vaccine or two weeks after receiving a single dose of a one-dose COVID-19 vaccine. For example, those who are not currently fully vaccinated must meet the following deadlines in order to be fully vaccinated by November 22, 2021:

Vaccine	1st Dose Deadline	2nd Dose Deadline
Moderna	October 11	November 8
Pfizer-BioNTech/Comirnaty	October 18	November 8
Johnson & Johnson/Janssen	November 8	n/a

FN employees who are fully vaccinated with a WHO-approved vaccine (e.g. AstraZeneca/Oxford), are considered to meet the requirements of this policy. A list of WHO-approved vaccines is available at: <https://extranet.who.int/pqweb/vaccines/covid-19-vaccines>.

5. Leave - *Updated*

DON employees are not required to request leave to become vaccinated. To facilitate expeditious vaccination of the federal workforce, DON organizations must allow employees to undertake mandatory COVID-19 vaccination doses on regular duty time, during the course of their normally scheduled workday. In most circumstances, employees are authorized to take up to four hours to travel to the vaccination site, complete a vaccination dose, and return to work—for example, up to a total of eight hours of duty time for employees receiving two doses. (If an employee needs to spend less time getting the vaccine, only the needed amount of duty time should be granted.) DON organizations should require employees taking longer than four hours to document the reasons for the additional time (e.g., they may need to travel long distances to get the vaccine).

Since booster vaccinations are not required under the mandate, employees are not authorized to receive booster doses on duty time. However, to promote the safety of the Federal workforce and the public they serve, DON organizations must grant leave-eligible employees up to four hours of administrative leave to receive any authorized COVID-19 vaccine booster shot, if they are eligible to receive such a booster shot. Similarly, DON organizations must grant leave-eligible employees up to four hours of administrative leave to receive any authorized additional dose of COVID-19 vaccine. The administrative leave will cover the time it takes to travel to the vaccination site, receive the vaccination dose, and return to work.

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If an employee needs to spend less time getting the vaccine booster shot or additional dose, only the needed amount of administrative leave should be granted. Employees should obtain advanced approval from their supervisor before using administrative leave for purposes of obtaining a COVID-19 vaccine booster shot or additional dose. Employees may not be credited with administrative leave or overtime work for time spent getting a booster vaccine shot or additional dose outside their tour of duty.

In the case of booster shots, this policy may be applied retroactively to the time when authorized booster shots became available (i.e., no earlier than September 22, 2021, when the Food and Drug Administration (FDA) amended the emergency use authorization for the Pfizer-BioNTech COVID-19 vaccine to allow for the use of a single booster dose). In the case of additional doses, this policy may be applied retroactively to the time when authorized additional doses became available (i.e., no earlier than August 12, 2021, when the FDA amended the emergency use authorization for the Pfizer-BioNTech and Moderna COVID-19 vaccines to allow for the use of an additional dose in certain immunocompromised individuals).

DON organizations should grant up to two workdays of administrative leave if an employee has an adverse reaction to a COVID-19 vaccination dose that prevents the employee from working (i.e., no more than two workdays for reactions associated with a single dose). If an employee requests more than two workdays to recover the employee may request an other appropriate leave (e.g. sick leave) to cover any additional absence.

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This policy on granting administrative leave is specific to the current COVID-19 pandemic situation and is designed to support agencies' missions by promoting the health and safety of the Federal workforce.

Based on the President's direction that the Federal government should work aggressively to maximize the number of people receiving the COVID-19 vaccination, the Administration has determined that, going forward, agencies must grant up to four hours of administrative leave per dose, including booster doses, for each family member the employee accompanies when receiving any dose of a COVID-19 vaccination. (If an employee needs to spend less time accompanying a family member who is receiving the COVID-19 vaccine, only the needed amount of administrative leave should be granted.) Employees should obtain advance approval from their supervisor before being permitted to use administrative leave for COVID-19 vaccination purposes. Employees may not be credited with administrative leave or overtime work for time spent outside their tour of duty helping a family member get vaccinated. This policy applies to covered vaccinations received after July 29, 2021. For this purpose, a "family member" is "any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship" (see 5 CFR 630.201).

6. Documentation - *Pending Additional Guidance - Updated*

DON civilian employees are required to affirm and officially attest to their vaccination status. DD Form 3175 "Civilian Employee Certification of Vaccination",

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will be used for documenting employees' vaccination and includes a Privacy Act statement. Employees with access to milConnect (<https://milconnect.dmdc.osd.mil/>) will complete the DD Form 3175 via milConnect; otherwise use of a hard copy is acceptable. Employees using a hard copy will provide the completed form to their supervisor. The DD Form 3175 may be accessed at <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd3175.pdf>. DON civilian employees will be required to complete DD Form 3175 even if attestations (under previous guidance via a DD Form 3150 "Certification of Vaccination") have already been provided.

DoD civilian employees will complete Section A of DD Form 3175. They must indicate their status (checking all that apply):]

- 3a. I am fully vaccinated.
- 3b. I have received one or more doses, but I am not yet considered fully vaccinated.
- 3c. I have submitted proof of vaccination to my supervisor.
- 3d. I have not received any vaccination doses.
- 3e. I have submitted a request for an exemption from vaccination and a decision is still pending.
- 3f. I have an approved exemption from vaccination.

Supervisors should discuss vaccination status with each employee individually to determine when and if the employee will come into compliance with this mandate.

To comply with DD Form 3175, Section A, 3c, the employee will show proof of vaccination status to their

supervisor. **However, supervisors should not retain vaccination documentation at this time. Employees will be asked to submit documentation of vaccination for collection at a later date.** Supervisors are only required to keep the documentation long enough to examine the documentation provided by the employee to certify the DD Form 3175.

Supervisors will be required to review vaccination documentation to verify the employee's certification of vaccination on the DD Form 3175. For purposes of the verification requirement, "supervisor" includes authorized human resources officials. Acceptable vaccination documentation will include:

- Record of immunization from a health care provider or pharmacy including employee's name;
- COVID-19 Vaccination Record Card, a copy of medical records documenting the vaccination;
- Immunization records from a public health or state immunization information system; and
- Any other official documentation containing required data points.

Required data points:

- Type of vaccine administered;
- Number of doses received;
- Date(s) of administration; and
- Name of the health care professional(s) or clinic site(s) administering the vaccine(s).

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Employees may provide a hard copy or digital copy of vaccination documentation, including, for example, a digital photograph, scanned image, or PDF of such a record that clearly and legibly displays the information outlined above. Employees who are not fully vaccinated must provide proof of vaccination to their supervisor upon receipt of each required dose. Employees will be required to certify that the documentation they have provided is true and correct. Employees may not be required to use their own personal equipment for the purpose of submitting proof of vaccination or DD Form 3175. Employees who submit proof of vaccination or the DD Form 3175 in an electronic format are encouraged to use encrypted email or password protected files with DoD SAFE file transfer (<https://safe.apps.mil/>).

In addition to verifying that an employee's proof of vaccination includes the required data points, supervisors will complete Section B of DD Form 3175. Supervisors with access to milConnect (<https://milconnect.dmdc.osd.mil/>) will complete the DD Form 3175 via milConnect using the employee's Employee Identification Number; otherwise use of a hard copy is acceptable.

DON is developing an automation tool to assist with uploading hard copy DD 3175 forms for data reporting purposes. More information on the tool, will be released as soon as possible.

7. Confidentiality of Information

Information about an employee's COVID-19 vaccination is considered confidential medical

information under the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973, as amended, and 29 Code of Federal Regulations (CFR) 1630.14, Medical Examinations and Inquiries Specifically Permitted. The above regulation requires employers to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination, and that such information must be stored securely and separately from the employee's personnel files. These confidentiality requirements apply regardless of where the employee gets the vaccination.

The Privacy Act permits disclosure within the agency to employees "who have a need for the record in the performance of their duties" [5 U.S.C. 552a(b)(1)]. An employee's vaccination status will only be shared with appropriate agency officials who have a need to know to ensure effective implementation of the safety protocols, which, in many cases, will include supervisors in the employee's chain of command.

8. Prior to Being Fully Vaccinated

DON employees who are not fully vaccinated must comply with all requirements for individuals who are not fully vaccinated, including those requirements related to masking, physical distancing, and restrictions on official travel, as applicable. Regular COVID-19 testing is not required prior to November 22, 2021. After November 22, 2021, those DON employees who are not fully vaccinated, including those who have medical or religious exemptions (pending or granted), will be required to test weekly, once their Command has published guidance

establishing processes and procedures for doing so (see number 17, Testing).

9. Hiring

New DON civilian employees who start their government service on or after November 22, 2021 must be fully vaccinated prior to their start date, except in limited circumstances that includes the following:

- An exemption based on a medical condition or circumstance;
- An exemption based on a sincerely held religious belief, practice, or observance; or
- A temporary exemption approved by the SECNAV or designee of up to 60 days for urgent, mission-critical hiring needs in circumstances in which the selectee could not have been fully vaccinated between the time the vacancy announcement closes and the selectee's start date.

New DON civilian employees who begin their government service before November 22, 2021 must comply with the requirement to be vaccinated by that date. Servicing Human Resources Offices (HROs) must ensure that selectees onboarding on or before November 22, 2021, have been fully vaccinated or will be fully vaccinated by November 22, 2021, as verified by the command, prior to the establishment of an entrance on duty date. Statements regarding the requirement to be vaccinated will be included in

vacancy announcements and job offer letters. For hiring actions currently underway, revised tentative and final job offers must be provided to selectees.

**10. Exemptions - *Pending Additional Guidance*
- *Updated***

All DON employees are subject to the vaccination requirement, except as required by law. DON civilian employees may request an exemption on the basis of a medical condition or circumstance, or a sincerely held religious belief, practice, or observance. Exemptions will be granted in limited circumstances and only where legally required.

If employees would like to seek an exemption for medical or religious reasons, they may promptly submit a request. Employees seeking an exemption are asked to submit their request to the applicable supervisor or management official within their chain of command (typically, the employee's immediate supervisor) by November 8, 2021.

To make a request for exemption from vaccination, DON civilian employees must provide an official statement that describes the medical or religious reason the employee objects to vaccination against COVID-19. Generally, such requests should be submitted in writing.

- a. To request a medical exemption, employees will be asked to complete DD Form 3176. <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd3176.pdf>

- b. To request a religious exemption, employees will be asked to complete DD Form 3177. <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd3177.pdf>

DON civilian employees who make oral requests may be provided a sample written request format and/or be interviewed to develop the basis for the request. While the use of the DD Form 3176 and DD Form 3177 is optional for DON civilian employees, when DON civilian employees make a request, they must provide the following information.

- c. Medical.
- A description of the medical condition or circumstance that is the basis for the request for a medical exemption from the COVID-19 vaccination requirement;
 - An explanation of why the medical condition or circumstance prevents the employee from being safely vaccinated against COVID-19; If it is a temporary medical condition or circumstance, a statement concerning when it will no longer be a medical necessity to delay vaccination against COVID-19; and
 - Any additional information, to include medical documentation that addresses the employee's particular medical condition or circumstance, which may be helpful in resolving the employee's request for a medical exemption from the COVID-19 vaccination requirement.

d. Religious.

- A description of the religious belief, practice, or observance that is the basis for the request for a religious exemption from the COVID-19 vaccination requirement;
- A description of when and how the DON civilian employee came to hold the religious belief or observe the religious practice;
- A description of how the DON civilian employee has demonstrated the religious belief or observed the religious practice in the past;
- An explanation of how the COVID-19 vaccine conflicts with the religious belief, practice, or observance;
- A statement concerning whether the DON civilian employee has previously raised an objection to a vaccination, medical treatment, or a medicine based on a religious belief or practice. If so, a description of the circumstances, timing, and resolution of the matter; and
- Any additional information that may be helpful in resolving the DON civilian employee's request for a religious exemption from the COVID-19 vaccination requirement.

DON civilian employees who have already submitted written requests do not need to resubmit their request using DD Form 3176 or 3177. However, they may be asked to supplement their request if any of the above information is missing from their request.

Upon receipt, supervisors must provide a copy of any completed exemption request documents to their servicing Equal Employment Opportunity (EEO) office for tracking purposes. Further guidance on processing exemptions will be forthcoming from the DON. In the meantime, DON organizations should take no action on any exemption requests received from employees or applicants until such guidance is received.

11. Enforcement

DON organizations may initiate enforcement action as soon as November 22, 2021, unless the employee has received an exemption or the agency is considering an exemption request from the employee.

Enforcement actions include, but are not limited to:

- A 5-day period of counseling and education followed by
- A short suspension without pay, of 14 days or less, with an appropriate notice period. Senior Executive Service members may only be suspended for more than 14 days followed by
- Removal from Federal service for failing to follow a direct order.

By November 22, 2021, an employee must meet one of the three following conditions to avoid potential enforcement actions:

- 1) Employee has provided proof of vaccination and it has been validated by a supervisor or human resource representative;

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- 2) Employee has an exemption request submitted pending a decision;
- 3) Employee has received an approved exemption to the vaccination requirement.

Failure to meet any of the conditions outlined above may result in disciplinary action up to and including removal or termination from federal service in accordance with SECNAVINST 12752.1A and/or other disciplinary instructions, as applicable. DON organizations should not initiate enforcement actions while an employee's exemption request is pending adjudication.

DON organizations are reminded that the objective of discipline is to correct deficiencies in employee conduct. Discipline can deter misconduct and correct situations interfering with the efficiency of civil service. While the law and adverse action regulations do not require progressive discipline, particularly when dealing with probationary employees, this is the preferred approach in addressing non-compliance with the requirement to be vaccinated for tenured employees. With this in mind, DON organizations are strongly encouraged to consider relevant aggravating and mitigating factors when determining an appropriate penalty, including whether lesser disciplinary penalties are adequate to encourage employees to be vaccinated.

If an employee provides appropriate documentation demonstrating that they have come partially or fully into compliance with the vaccination requirement during the course of the disciplinary process, DON organizations should consider, depending on the

circumstances, holding actions in abeyance or ending the disciplinary process, as appropriate in consideration of this new information. Additional guidance regarding enforcement of the COVID-19 vaccination requirement may be found on the Office of Personnel Management's (OPM) website at <https://chcoc.gov/content/guidance-enforcing-coronavirus-disease-2019-vaccination-requirement-federal-employees-%E2%80%93>. Supervisors should contact their servicing HRO and Office of General Counsel to discuss options available to address individual situations regarding enforcement of this requirement.

12. Collective Bargaining

DON organizations should engage with exclusive representatives at their earliest opportunity regarding the requirement for agency employees to be vaccinated. The Safer Federal Workforce Task Force has published government-wide policy which covers specific implementation steps that agencies need to take, as well as a deadline for implementation. As such, agencies must implement Government-wide policy by the deadline; any bargaining that has not been completed by the time of implementation will be finished post-implementation.

Those unions with national consultation rights have been consulted on this policy.

DON organizations should engage with joint service and host nation representatives in Japan, Italy, Spain, Greece, South Korea, Singapore, Romania, and Poland at their earliest opportunity regarding the requirement

for agency employees to be vaccinated. Foreign national employees in these countries will not be subject to this policy until the conditions of a mandatory vaccination policy for their respective foreign labor systems have been negotiated with their host governments.

**13. Civilian Employee Assistance Program -
*Updated***

DON employees who are experiencing any personal issues or concerns that may be affecting them and/or their ability to comply with this mandatory vaccination requirement may obtain confidential counseling through the DON Civilian Employee Assistance Program (DONCEAP). For information concerning CEAP, please call 1-844-366-2327 or visit www.magellanascend.com. For MCCS and NEXCOM NAF employees please call 1-844-424-5988 or visit www.magellanascend.com. For CNIC NAF Employee Assistance Program, please call 1-800-932-0034 or visit www.acispecialtybenefits.com/. Use of this program does not exempt employees from meeting the vaccination requirement.

14. Facilities

DON employees (including local national employees and Service members not on active duty who are DoD civilian employees) who refused to receive, who are pending an exemption, or who are exempted from COVID-19 vaccination and are entering a DON facility may be required to undergo COVID-19 screening testing pending release of DoD guidance.

Non-DoD individuals must be vaccinated or provide proof of a negative COVID-19 test in order to gain

access to DON buildings or DON leased spaces in non-DON buildings in which official DON business takes place (referred to jointly from here on as “DON facilities”). This policy applies whether the non-DoD individual is seeking one-time or recurring access in association with the performance of official DON business (e.g., to attend a meeting).

Vaccination status for non-DoD individuals may be demonstrated by producing the type of documentation outlined in Section 6 of this document. Official visitors who are unvaccinated, or who decline to volunteer their vaccination status, must show an electronic or paper copy of negative results from a COVID-19 test, administered no earlier than three days prior to their visit. If an official visitor is unable to show a negative COVID-19 test result, the visitor will be denied access to DON facilities.

This policy does not apply to individuals receiving ad hoc access to DON facilities (e.g., delivery personnel, taxi services); to individuals accessing DON facilities unrelated to the performance of DON business (e.g., residential housing); or to individuals accessing DON facilities to receive a public benefit (e.g., commissary; exchange; public museum; air show; Morale, Welfare, and Recreation resources).

Visitors seeking access to facilities located on DON installations but operated by other Federal agencies or entities will follow the policies and procedures of the organization controlling that space. The Services may publish supplemental instructions, as necessary, to ensure facility access requirements are met. They may also implement more restrictive procedures or delegate

authority to implement more restrictive procedures to local Commanders.

15. Workers' Compensation - *Updated*

The Federal Employees' Compensation Act (FECA) covers injuries that occur in the performance of duty for DON appropriated fund employees. DON employees subject to the vaccination mandate who receive required COVID-19 vaccinations on or after September 9, 2021, be afforded coverage under the FECA for adverse reactions to the COVID-19 vaccination and injuries sustained as the direct result of receiving their mandated vaccination. Examples of such injuries include but are not limited to accidents while commuting a reasonable distance to and from the vaccination site and slip and fall injuries occurring at the vaccination site.

Because COVID-19 vaccination is a specific event occurring during a single day or work shift, any adverse reactions or injuries should be reported on Department of Labor Form CA-1, Notice of Traumatic Injury and Claim for Continuation of Pay/ Compensation. Where two vaccinations are required several weeks apart, reactions to each are considered separate claims. Employees seeking to file a claim under FECA should contact their supervisor and/or Injury Compensation Program Administrator (ICPA) in their servicing HRO.

NAF employees are covered by the Longshore and Harbor Workers' Compensation Act (LWHCA). Because COVID-19 vaccination is a specific event occurring during a single day or work shift, any adverse reactions

or injuries for NAF employees should be reported on Department of Labor Form LS-202, Employer's First Report of Injury or Occupational Illness. Where two vaccinations are required several weeks apart, reactions to each are considered separate claims. Employees seeking to file a claim under LHWCA should contact their supervisor and/or their servicing HRO.

16. Travel to Obtain Required Vaccination

If a civilian employee is unable to obtain a required vaccination at a Military Treatment Facility (MTF), then the standard travel and transportation allowances in the Joint Travel Regulations Chapter 2 may be authorized. If travel is required to obtain the vaccine at a MTF, employees may be reimbursed for local travel or temporary duty travel, as necessary in the execution of the travel to obtain the vaccine at the nearest MTF.

17. Testing - *Pending Additional Guidance - New*

The DON is working on the logistics supply and procedures to establish a testing program. Commands will be responsible for establishing policies and procedures for weekly testing of applicable employees. In the interim, commands/organizations should continue to implement safety protocols that have been in place throughout the pandemic.

POC: Questions should be referred to the DON Office of Civilian Human Resources.

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Appendix A: DD Form 3176, Medical Exemption

CUI (when filled in)

[See Fold-out Exhibit, next 2 pages]



COVID-19 CIVILIAN MANDATORY VACCINATION PLAN

Appendix A: DD Form 3176, Medical Exemption

CUI (when filled in)	
REQUEST FOR A MEDICAL EXEMPTION OR DELAY TO THE COVID-19 VACCINATION REQUIREMENT	OMB No. 0704-0619 Exp. 20220430
<p>The public reporting burden for this collection of information is estimated to average 5 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, at whs.mc-alex.esd.mbx.dd-dod-informationcollections@mail.mil. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.</p>	
PRIVACY ACT STATEMENT	
<p>Authority: DoD is authorized to collect the information on this form pursuant to 29 U.S.C. 794, 42 U.S.C. Chapter 21, Subch. VI; Executive Order (E.O.) 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees; E.O. 13163, Increasing the Opportunities for Individuals with Disabilities to be Employed in the Federal Government; E.O. 13164, Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation; 29 CFR 1614.203, Rehabilitation Act; DoD Directive 1020.1, Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of Defense; as well as 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 9013, 10 U.S.C. 2672, 5 U.S.C. chapter 79, and DoD Instruction 6200.03.</p> <p>Principal Purpose: The information on this form is being collected so that DoD may determine whether to grant your request for a medical exemption from the COVID-19 vaccination requirement for federal employees, pursuant to Executive Order 14043 and in furtherance of COVID-19 workplace safety plans.</p> <p>Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally. For example, disclosure of medical condition or history information to authorized government officials for the purpose of conducting an investigation into DoD's compliance with the Rehabilitation Act of 1973; disclosure of medical condition or history information to first aid and safety personnel in the event an employee's medical condition might require emergency treatment or special procedures; to Federal agencies/entities participating in the DoD Computer/Electronic Accommodations Program (CAP) to permit the agency to carry out its responsibilities under the program; A complete list of routine uses may be found in the applicable System of Records Notice (SORN) associated with the collection of this information: DoD 0007, Defense Reasonable Accommodations and Assistive Technology Records, 86 Fed. Reg. 38692 (July 22, 2010) (available at https://www.govinfo.gov/content/pkg/FR-2021-07-22/pdf/2021-15601.pdf).</p> <p>Consequences of Failure to Provide Information: Providing this information is voluntary and use of this form is optional. Failure to provide the information requested on this form may impact DoD's ability to evaluate or act upon a request for a medical exemption from the COVID-19 vaccination requirement. Any intentional misrepresentation to the Federal Government may result in legal consequences, including termination or removal from Federal Service.</p>	
<p>Instructions: Part 1 is to be completed by DoD civilian employees. Part 2 is to be completed by a licensed health care provider. Provide narrative responses where applicable (Blocks 8-10, 15-17). If additional space is needed, proceed on the appropriate continuation block (Block 11 or 20) by annotating the Section and Line number and continue your narrative response. Signing this form constitutes a declaration that the information you provide is, to the best of your knowledge and ability, true and correct. Any intentional misrepresentation to the Federal Government may result in legal consequences, including removal from Federal Service.</p>	
PART 1. TO BE COMPLETED BY THE DOD CIVILIAN EMPLOYEE	
1. Employee Name (Last, First, Middle Initial)	2. DoD ID Number
3. Office Symbol	4. Date of Request (YYYYMMDD)
5. Position/Title	6. Supervisor Name
	7. Supervisor Phone Number
8. Please provide a description of the medical condition or circumstance that is the basis for the request for a medical exemption from the COVID-19 vaccination requirement.	
9. Please provide an explanation of why the medical condition or circumstance prevents you from being vaccinated.	
10. Please provide any additional information, that addresses your particular medical condition or circumstance, which may be helpful in resolving your request for a medical exemption or delay from the COVID-19 vaccination requirement. If you have medical documentation (in addition to Part 2 of this Form) that addresses your particular medical condition or circumstance you may submit the documentation to your supervisor along with this form.	

DD FORM 3176, OCT 2021
PREVIOUS EDITION IS OBSOLETE.

CUI (when filled in)

Controlled by: OUSD(P&R)
CUI Category: HLTH, PRVVCY, OPSEC
LDC: DL(DoD Only)
POC: do3hra.mc-alex.dhra-hq.mbx.forms@mail.mil Page 1 of 2



COVID-19 CIVILIAN MANDATORY VACCINATION PLAN

CUI (when filled in)

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

DD FORM 3176, OCT 2021
PREVIOUS EDITION IS OBSOLETE.

CUI (when filled in)

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**Appendix B: DD Form 3177,
Religious Exemption**

CUI (when filled in)

[*See Fold-out Exhibit, next 2 pages*]



COVID-19 CIVILIAN MANDATORY VACCINATION PLAN

Appendix B: DD Form 3177, Religious Exemption

CUI (when filled in)

REQUEST FOR A RELIGIOUS EXEMPTION TO THE COVID-19 VACCINATION REQUIREMENT		
PRIVACY ACT STATEMENT		
<p>Authority: DoD is authorized to collect the information on this form pursuant to Executive Order (E.O.) 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees; 42 U.S.C. Chapter 21, Subchapter VI; 42 U.S.C. Chapter 21B; as well as 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 9013, 10 U.S.C. 2672, 5 U.S.C. chapter 79, and DoD Instruction 6200.03.</p> <p>Principal Purpose: The information on this form is being collected so that DoD may determine whether to grant your request for a religious exemption from the COVID-19 vaccination requirement for federal employees, pursuant to Executive Order 14043 and in furtherance of COVID-19 workplace safety plans. Consistent with the Religious Freedom Restoration Act of 1993, 42 U.S.C. Chapter 21B, and Title VII of the Civil Rights Act, 42 U.S.C. Chapter 21, Subchapter VI, individuals seeking a religious exemption from the vaccination requirement will submit to DoD supporting information about their religious beliefs or practices in order for DoD to evaluate the exemption request.</p> <p>Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally. For example to disclose information to: a person, organization, or governmental entity as necessary and relevant to notify them of, respond to, or guard against a public health emergency or other similar crisis, including to comply with laws governing the reporting of communicable disease or other laws concerning health and safety in the work environment; adjudicative or administrative bodies or officials when the records are relevant and necessary to an adjudicative or administrative proceeding; contractors, grantees, experts, consultants, students, and others as necessary to perform their duties for the Federal government; agencies, courts, and persons as necessary and relevant in the course of litigation, and as necessary and in accordance with requirements for law enforcement; or to a person authorized to act on your behalf. A complete list of routine uses may be found in the applicable System of Records Notices (SORN) associated with the collection of this information: DPR 39 DoD, DoD Personnel Accountability and Assessment System of Records, 85 Fed. Reg. 17047 (Mar. 26, 2020) (also available at https://dpcid.defense.gov/Portals/49/Documents/Privacy/SORNs/OSDJS/DPR-39-DoD.pdf).</p> <p>Consequences of Failure to Provide Information: Providing this information is voluntary and use of this form is optional. Failure to provide the information requested on this form may impact DoD's ability to evaluate or act upon a request for a religious exemption from the COVID-19 vaccination requirement. Any intentional misrepresentation to the Federal Government may result in legal consequences, including removal from Federal Service.</p>		
<p>Instructions: To be completed by DoD civilian employees. Provide narrative responses where applicable (Blocks 8-11, 12.b, 12.c, 13). If additional space is needed, proceed on the continuation block (Block 14) by annotating the Section and Line number and continue your narrative response. Signing this form constitutes a declaration that the information you provide is, to the best of your knowledge and ability, true and correct. Any intentional misrepresentation to the Federal Government may result in legal consequences, including removal from Federal Service.</p>		
1. Employee Name (Last, First, Middle Initial)	2. DoD ID Number	
3. Office Symbol	4. Date of Request (YYYYMMDD)	
5. Position/title	6. Supervisor Name	7. Supervisor Phone Number
8. Please describe the religious belief, practice, or observance that is the basis for your request for a religious exemption from the COVID-19 vaccination requirement.		
9. Please describe when and how you came to hold the religious belief or observe the religious practice.		
10. Please describe how you have demonstrated the religious belief or observed the religious practice in the past.		
11. Please explain how the COVID-19 vaccines conflict with your religious belief, practice, or observance.		

DD FORM 3177, OCT 2021
PREVIOUS EDITION IS OBSOLETE.

CUI (when filled in)

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



COVID-19 CIVILIAN MANDATORY VACCINATION PLAN

CUI (when filled in)

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

DD FORM 3177, OCT 2021
PREVIOUS EDITION IS OBSOLETE.

CUI (when filled in)

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CIVIL COVER SHEET

[See Fold-out Exhibit, next 2 pages]

CIVIL COVER SHEET

JS-44 (Rev. 11/2020 DC)

<p>I. (a) PLAINTIFFS JASON PAYNE</p> <p>(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF FAIRFAX, VA (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) REED D. RUBINSTEIN AMERICAN FIRST LEGAL FOUNDATION 600 14TH STREET, N.W. FIFTH FLOOR WASHINGTON, DC 20005 202 064 2724</p>	<p>DEFENDANTS JOSEPH R. BIDEN, JR.; UNITED STATES DEPARTMENT OF PERSONNEL MANAGEMENT; KIRAN AHUJA; GENERAL SERVICES ADMINISTRATION; ROBIN CARNAHAN: OFFICE OF MANAGEMENT AND BUDGET: +</p> <p>COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY)</p> <p><small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small></p> <p>ATTORNEYS (IF KNOWN)</p>																								
<p>II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)</p> <p><input type="radio"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="radio"/> 2 U.S. Government Defendant</p> <p><input type="radio"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) FOR DIVERSITY CASES ONLY!</p> <table style="width:100%; border: none;"> <thead> <tr> <th></th> <th>PTF</th> <th>DFT</th> <th></th> <th>PTF</th> <th>DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td><input type="radio"/> 1</td> <td><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td><input type="radio"/> 4</td> <td><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="radio"/> 2</td> <td><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td><input type="radio"/> 5</td> <td><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="radio"/> 3</td> <td><input type="radio"/> 3</td> <td>Foreign Nation</td> <td><input type="radio"/> 6</td> <td><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
	PTF	DFT		PTF	DFT																				
Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4																				
Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5																				
Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6																				

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<p><input checked="" type="radio"/> A. Antitrust</p> <p><input type="checkbox"/> 410 Antitrust</p>	<p><input type="radio"/> B. Personal Injury/Malpractice</p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel & Slander</p> <p><input type="checkbox"/> 330 Federal Employers Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p><input type="checkbox"/> 362 Medical Malpractice</p> <p><input type="checkbox"/> 365 Product Liability</p> <p><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Product Liability</p>	<p><input type="radio"/> C. Administrative Agency Review</p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><u>Social Security</u></p> <p><input type="checkbox"/> 861 HIA (1395ff)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p><u>Other Statutes</u></p> <p><input type="checkbox"/> 891 Agricultural Acts</p> <p><input type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)</p>	<p><input type="radio"/> D. Temporary Restraining Order/Preliminary Injunction</p> <p>Any nature of suit from any category may be selected for this category of case assignment.</p> <p>*(If Antitrust, then A governs)*</p>	
<p><input checked="" type="radio"/> E. General Civil (Other)</p>		<p>OR</p>	<p><input type="radio"/> F. Pro Se General Civil</p>	
<p><u>Real Property</u></p> <p><input type="checkbox"/> 210 Land Condemnation</p> <p><input type="checkbox"/> 220 Foreclosure</p> <p><input type="checkbox"/> 230 Rent, Lease & Ejectment</p> <p><input type="checkbox"/> 240 Torts to Land</p> <p><input type="checkbox"/> 245 Tort Product Liability</p> <p><input type="checkbox"/> 290 All Other Real Property</p> <p><u>Personal Property</u></p> <p><input type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input type="checkbox"/> 385 Property Damage Product Liability</p>	<p><u>Bankruptcy</u></p> <p><input type="checkbox"/> 422 Appeal 27 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p><u>Prisoner Petitions</u></p> <p><input type="checkbox"/> 535 Death Penalty</p> <p><input type="checkbox"/> 540 Mandamus & Other</p> <p><input type="checkbox"/> 550 Civil Rights</p> <p><input type="checkbox"/> 555 Prison Conditions</p> <p><input type="checkbox"/> 560 Civil Detainee – Conditions of Confinement</p> <p><u>Property Rights</u></p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 835 Patent – Abbreviated New Drug Application</p> <p><input type="checkbox"/> 840 Trademark</p> <p><input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 (DTSA)</p>	<p><u>Federal Tax Suits</u></p> <p><input type="checkbox"/> 870 Taxes (US plaintiff or defendant)</p> <p><input type="checkbox"/> 871 IRS-Third Party 26 USC 7609</p> <p><u>Forfeiture/Penalty</u></p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 690 Other</p> <p><u>Other Statutes</u></p> <p><input type="checkbox"/> 375 False Claims Act</p> <p><input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 430 Banks & Banking</p> <p><input type="checkbox"/> 450 Commerce/ICC Rates/etc</p> <p><input type="checkbox"/> 460 Deportation</p> <p><input type="checkbox"/> 462 Naturalization Application</p>	<p><input type="checkbox"/> 465 Other Immigration Actions</p> <p><input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization</p> <p><input type="checkbox"/> 480 Consumer Credit</p> <p><input type="checkbox"/> 485 Telephone Consumer Protection Act (TCPA)</p> <p><input type="checkbox"/> 490 Cable/Satellite TV</p> <p><input type="checkbox"/> 850 Securities/Commodities/Exchange</p> <p><input type="checkbox"/> 896 Arbitration</p> <p><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p> <p><input checked="" type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)</p>	

<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	<input type="radio"/> I. FOIA/Privacy Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran’s Benefits <input type="checkbox"/> 160 Stockholder’s Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN
 1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multi-district Litigation
 7 Appeal to District Judge from Mag. Judge
 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 This is a non-statutory claim challenging defendants' ultra vires and unconstitutional federal employee vaccine mandate.

VII. REQUESTED IN COMPLAINT	<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND \$	Check YES only if demanded in complaint YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
VIII. RELATED CASE(S) IF ANY	(See instruction)	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	If yes, please complete related case form

DATE: 11/22/2021	SIGNATURE OF ATTORNEY OF RECORD <u>Reed D. Rubinstein</u> Digitally signed by Reed D. Rubinstein Date: 2021.11.22 12:39:38 -05'00'
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INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk’s Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.