



# NATIONAL FRATERNAL ORDER OF POLICE

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## POLICY STATEMENT: COVID-19 Vaccines

*The National FOP will take every step and use every available approach to protect our members and their rights as these issues develop. We are prepared to bring to bear all of our resources—legislative, legal and others—in this effort.*

*It is the position of the National FOP that vaccinations work to prevent people from becoming infected by COVID-19. However, the National FOP asserts that whether or not to accept the vaccine is a personal decision that our members should make for themselves after consultation with their doctor or other medical professionals. We will continue to be engaged with the Administration, Governors, and other elected leaders on these matters as vaccine and testing policies are implemented at every level of government.*

*The National FOP takes our responsibilities to protect and inform our members about their rights very seriously, and we will be working diligently to ensure that while you protect the public, the FOP will protect YOU.*

### UPDATES AS OF 15 NOVEMBER:

- On 12 November, the Occupational Safety and Health Administration (OSHA) within the U.S. Department of Labor developed an Emergency Temporary Standard that would require all private employers with 100 or more employees to ensure their employees are “fully vaccinated” or that the employee produce a negative test result on “at least a weekly basis” before reporting for work. The rule was scheduled to take effect on 4 January 2022, but the U.S. Court of Appeals for the 5<sup>th</sup> Circuit has temporarily halted the “mandate” which the three-judge panel states “grossly exceeds OSHA’s statutory authority.” The 5<sup>th</sup> Circuit has ordered OSHA not to take any further steps to implement or enforce the mandate. Further legal challenges are likely to be consolidated into a single Federal case.
- On 29 October, the U.S. Food and Drug Administration (FDA) authorized the emergency use of the Pfizer-BioNTech COVID-19 Vaccine to include children from 5 through 11 years of age.
- In September, the FDA, acting on recommendations by the independent Advisory Committee on Immunization Practices (ACIP) within the Centers for Disease Control and Prevention (CDC) approved the use of COVID-19 booster shots, which are now widely available, for Americans ages 65 and older as well as people in certain “high-risk” categories:

- individuals 65 years of age and older;
- individuals 18 through 64 years of age at high risk of severe COVID-19; and
- individuals 18 through 64 years of age whose frequent institutional or occupational exposure to SARS-CoV-2 puts them at high risk of serious complications of COVID-19 including severe COVID-19.

### **Executive Orders Expanding COVID-19 Vaccination Requirements**

On 10 September 2021, President Joseph R. Biden, Jr. issued two new Executive Orders. The first requires all Federal agencies to implement programs requiring all executive branch employees to receive the COVID-19 vaccination, subject to exceptions required by law.

The second Executive Order requires that all Federal contractors and subcontractors be required to receive the COVID-19 vaccination, subject to exceptions required by law. The Task Force will issue guidance to all Federal agencies to ensure that any and all contract or contract-like instruments with components of the Federal government have a clause requiring vaccination.

The Safer Federal Workforce Task Force (Task Force) has issued guidance to all Federal agencies which implement both Executive Orders. All Federal employees must be fully vaccinated by 22 November 2021. This means that Federal employees must receive their final dose of the vaccine no later than 8 November, unless a reasonable accommodation is legally required because of “a disability or because of a sincerely held religious belief, practice, or observance.” Individual agencies and their offices of general counsel will make these determinations and set a date by which employees must notify their agency of their intention to seek a legally required exemption. The Task Force recommends that employees who are denied an exemption receive their first dose within two weeks of the final determination.

The employing agency will require employees to provide documentation proving that they have been fully vaccinated. This documentation will be treated like any other disclosed medical record and be subject to all Federal privacy rules and regulations.

Individual agencies will enforce the mandate and, if an employee refuses to be fully vaccinated, he or she may be subject to discipline, up to and including termination beginning as soon as 9 November.

The Task Force recommends Federal agencies work with their employees to encourage compliance. From the guidance:

*Accordingly, agencies should initiate the enforcement process with a brief period of education and counseling (5 days), including providing employees with information regarding the benefits of vaccination and ways to obtain the vaccine.*

*If the employee does not demonstrate progress toward becoming fully vaccinated through completion of a required vaccination dose or provision of required documentation by the end of the counseling and education period, it should be followed by a short suspension (14 days or less). Continued noncompliance during the suspension can be followed by proposing removal.*

The guidance further states: “In pursuing any adverse 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.”

The guidance also directs all agencies to engage with employee unions at “their earliest opportunity.” However, the guidance also states:

*bargaining over this Government-wide policy will be limited to impact and implementation issues not otherwise addressed in the guidance. Moreover, agencies must implement Government-wide policy by the deadline, so any bargaining that has not been completed by the time implementation must begin will have to be finished post-implementation.*

While we expect that there will be multiple legal challenges to the Executive Orders and to any executive actions taken at the agency level to implement them, we are not yet aware of a successful challenge to mandated vaccinations for public employees.

We will continue to be engaged with the Administration, Governors, and other elected leaders on these matters as vaccine and testing policies are implemented at every level of government. We will keep our members up to date as matters develop.

### **Other Executive Actions to Increase Vaccinations**

President Biden took additional steps to use the regulatory powers of the Federal government and other executive actions to “substantially increase the number of Americans covered by vaccination requirements” to provide that such requirements “become dominant in the workplace.”

These steps are as follows:

- The Occupational Safety and Health Administration (OSHA) within the U.S. Department of Labor developed an [Emergency Temporary Standard](#) that would require all private employers with 100 or more employees to ensure their employees are “fully vaccinated” or that the employee produce a negative test result on “at least a weekly basis” before reporting for work. The rule was scheduled to take effect on 4 January 2022, but the U.S. Court of Appeals for the 5<sup>th</sup> Circuit have temporarily halted the “mandate” which the three-judge panel

states “grossly exceeds OSHA’s statutory authority.” The 5<sup>th</sup> Circuit has ordered OSHA not to take any further steps to implement or enforce the mandate.

- The Centers for Medicare and Medicaid will take action to require COVID-19 vaccinations “for workers in most health care settings that receive Medicare or Medicaid reimbursements.” It is expected that these requirements will apply to approximately 50,000 providers and cover a majority of health care workers.
- The President called on “large entertainment venues” to require that patrons and attendees be required to be vaccinated or show a recent negative test or be denied admittance to the venue.
- The Food and Drug Administration (FDA), acting on recommendations by the independent Advisory Committee on Immunization Practices (ACIP) within the Centers for Disease Control and Prevention (CDC) approved the use of COVID-19 booster shots, which are now widely available, for Americans ages 65 and older as well as people in certain “high-risk” categories:
  - individuals 65 years of age and older;
  - individuals 18 through 64 years of age at high risk of severe COVID-19; and
  - individuals 18 through 64 years of age whose frequent institutional or occupational exposure to SARS-CoV-2 puts them at high risk of serious complications of COVID-19 including severe COVID-19.
- The President urged the parents of all children aged 12 and above to ensure that their child is vaccinated against COVID-19.
- On 29 October, the U.S. Food and Drug Administration (FDA) authorized the emergency use of the Pfizer-BioNTech COVID-19 Vaccine to include children from 5 through 11 years of age.
- The U.S. Department of Health and Human Services (HHS) will initiate a rulemaking to require teachers and other staff at Head Start, Early Head Start, and similar Federal education and youth programs across the Federal government to be vaccinated against COVID-19.
- The President urged States to adopt vaccine requirements for all school employees. The U.S. Department of Education (DoEd) will make funding available to any school that has adopted a vaccination requirement or CDC-recommended prevention strategy and, as a consequence, lost access to State funding.
- The DoEd will also take action and investigate States that have prohibited mask mandates in schools.
- The HHS is calling for all schools to implement regular testing for students, teachers, and staff consistent with CDC recommendations.
- Using the authorities of the Defense Production Act and the acquisition of \$2 billion in rapid tests and at-home tests, the Administration will work to ensure a broad industrial capacity for test production. With an agreement between the Federal government, Walmart, Amazon and Kroger, at-home tests will be available to all Americans at cost for the next three months. Free tests will be

made available to community health centers and food banks and the number of retail pharmacies providing free testing will be expanded.

- The Executive Order requiring masks to be worn on most public transportation has been extended to 18 January 2022 and fines for noncompliance have been doubled. Mask requirements remain in place on all Federal property.
- The Small Business Administration (SBA) will increase the maximum amount of funding that can be borrowed from \$500,000 to \$2 million. The COVID Economic Injury Disaster Loan (EIDL) program will be strengthened with this increase.
- The Administration is establishing a forgiveness program for those businesses that borrowed from the Paycheck Protection Program (PPP).
- The SBA will be selecting Community Navigators, as established in the American Recovery Act, in underserved communities by the fall.
- The U.S. Department of Defense has committed to doubling the number of its COVID-19 Surge Response teams, which will be deployed to areas of the country hardest hit by the Delta variant of COVID-19.
- The Federal government will accelerate and increase the number of free monoclonal antibody treatments. The Federal government will also expand its in-person technical assistance and virtual training for medical health professions to provide this treatment.

## **VACCINE MANDATES IN STATES AND LOCAL AGENCIES**

Across the country, State and local governments and some individual agencies are putting in vaccine mandates, enhanced testing protocols, and mask requirements for their employees.

While State and local laws vary, here is what you need to know:

- Public employers can mandate employees to be vaccinated against COVID-19 and its variants as long as they accommodate employees with medical conditions or religious beliefs against receiving the vaccination.
- It is likely, however, that the imposition of such a mandate must be subject to mandatory bargaining if the employees have a contract or collective bargaining agreement in place, as it represents a change in working conditions—especially if there are disciplinary considerations. Any changes in workplace conditions—vaccine mandates, testing, mask-wearing policies—should be subject to bargaining. ***This issue is in active litigation.***
- Public employers can mandate that employees who decline the vaccine be tested for COVID-19. The employer can determine the frequency of such tests and who incurs the cost of the test. The Federal government is working to expand the availability of at-home tests and free testing at local pharmacies. It

should also be noted that the OSHA guidelines to expand vaccination rates in the private sector will require employers to give employees paid time off to comply.

- If a public employee has an adverse reaction due to a mandated vaccination shot, the employee should have recourse through the workman's compensation program.
- Public employers that require employees to disclose their vaccination status **must** keep this information and records completely private, just like any other medical information. The same applies to any COVID-19 test.