



MAYOR & COUNCIL MEMORANDUM

October 19, 2021

Subject: Proposed Revisions to Administrative Directive 2.03-7 Relating to Vaccination Requirements for City Employees; Discipline for Failure to Comply; and Other Mitigation Measures and Administrative Requirements (City Wide)

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Issue – This item is before you per your direction, coming out of Item 2 on the October 5 Study Session Agenda, that the City Manager return to the Mayor and Council on the meeting of October 19, 2021, with a plan for additional consequences, up to and including termination, for employees who remain noncompliant with the requirements of Administrative Directive (A.D.) 2.03-7 relating to vaccination requirements for City employees.

City Manager's Office Recommendation – It is recommended that the Mayor and Council review, discuss and approve amendments to A.D. 2.03-7 and the policies incorporated within that A.D. in order to implement additional consequences for employees who remain non-compliant with its requirements.

Background – On August 13, 2021, the Mayor and Council approved Ordinance No. 11869 and its associated attachment, A.D. 2.03-7. The Ordinance and A.D. as approved are attached for your reference as Attachment A to this Memorandum. Together, the Ordinance and A.D. included components that:

- Authorized and directed the City Manager to implement policies to incentivize and in fact require City employees to get vaccinated against COVID-19 (unless otherwise exempt or eligible for accommodation);
- Provided for legally appropriate exemptions and accommodations related to those requirements, specifically including medical exemptions and accommodations for sincerely held religious beliefs;
- Established penalties for failure to comply with the imposed requirements. The penalty as approved at that time was limited to the imposition of a 5-day suspension without pay;
- Approved certain leave and benefit incentives and other policies to encourage all City employees to get vaccinated against COVID-19;
- Reaffirmed that the COVID-19 pandemic constitutes a continuing local emergency that requires local measures to mitigate its impacts; and
- Authorized the City Manager to amend the A.D. to establish additional requirements for employees who fail to comply, and to amend the A.D. for the purpose of carrying out its intent and as may be needed or convenient for its efficient administration and/or to satisfy legal requirements.

Following the Mayor and Council's approval of the Ordinance, various legal proceedings delayed the imposition of discipline (i.e., the 5-day suspensions) for employees who failed to come into compliance with the requirements of the A.D. by the established deadlines. However, the City Manager and staff continued to administer the policy and completed the processing of submitted requests for medical exemptions and accommodations for sincerely held religious beliefs and

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disabilities. On September 30, the employees who submitted these requests were notified whether their request was approved or denied. Employees whose requests were denied were directed to secure at least their first vaccine shot not later than 5:00 p.m. on October 5, 2021, and to update their attestation form, or they would be out of compliance with the requirements of the A.D.

During the Study Session on October 5th, the Mayor and Council discussed the ongoing implementation of the approved A.D. and considered the legal advice of the City Attorney regarding the status of the various legal proceedings relevant to the administration of the A.D. and its requirements. At that time, the Mayor and Council approved the following motion:

“Mayor and Council direct the City Manager and City Attorney to proceed as discussed in Executive Session and to continue to carry out the direction of the Mayor and Council as provided on September 14 and 28. The City Attorney is also authorized and directed to participate as amicus in the *ASBA vs. State* case now pending in front of the Arizona Supreme Court. In addition, the City Manager is authorized and directed to enforce the administrative directive, and the associated policies, previously approved by the Mayor and Council on August 13, to include the implementation of the 5-day suspensions for non-compliance. And finally, the Manager is directed to return to the Mayor and Council at the meeting of October 19, 2021, with a plan for additional consequences, for employees who remain non-compliant, up to and including termination.”

Present Consideration(s) – The City Manager now provides recommended revisions to the discipline and associated provisions of Administrative Directive 2.03-7, as directed by the Mayor and Council. At the present time, the effect of the previously approved policy is that all City employees are either in a state of compliance or non-compliance with the A.D., as follows:

Employees are in COMPLIANCE if:

- The employee received at least the first shot of either the Pfizer or the Moderna vaccine, or the single shot of the Johnson and Johnson vaccine, on or before August 24, 2021. Of course, employees are also compliant if they are fully vaccinated with both doses of the Pfizer or Moderna vaccines by that date.
- Alternatively, the employee timely submitted a request for a Medical Exemption or Religious or Disability Accommodation (on or before August 24, 2021); and that request was thereafter approved.
- For those employees who timely submitted an exemption or accommodation request, but that request was denied, the employee is in compliance if they received the first shot of either the Pfizer or Moderna vaccine, or the single shot of the Johnson and Johnson vaccine, on or before October 5, 2021.
- Note: There are case-specific instances where an individual employee may be deemed to be in compliance with the requirements of the A.D. despite missing one or more of the above compliance deadlines. For example, an employee may have been off-shift or on

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vacation at the time of the deadline and achieved compliance within a reasonable amount of time upon return to work.

Employees are NONCOMPLIANT if:

- The employee did not receive any vaccination shot on or before August 24, 2021 and did not submit any request for an available exemption or accommodation by that same date; or
- The employee's request for an exemption or accommodation was denied, and the employee failed to receive at least the first vaccine dose on or before October 5, 2021.
- The employee failed to provide any attestation regarding vaccination status.

Under the current policy, employees that are non-compliant as defined above are subject to a five-day suspension without pay. The number of employees that have chosen to be in non-compliance is currently estimated as approximately 300. Of these, **73** are noncompliant because they did not receive any vaccination shot by August 24th and did not request any exemption or accommodation. Approximately 50 employees failed to provide any attestation describing their vaccination status. The balance of noncompliant employees (approximately 180) are noncompliant because they failed to receive any vaccination shot by October 5th after their accommodation and/or exemption request was denied. Per the Mayor and Council's direction, the City Manager has directed the Department Directors to move forward with the specified discipline (5-day suspension) for these employees. All five-day suspensions are to be served before December 31, 2021.

The City Manager now proposed to amend the discipline provisions of the A.D. and its related policies and provisions to address those employees that remain non-compliant after October 19, 2021. Specifically, the City Manager recommends amending the A.D. to provide that:

- The employees who already face the 5-day suspensions for their existing noncompliance (approximately 300 employees) will face additional discipline, in the form of termination from employment, unless they come into compliance by fixed deadlines;
- The deadline for compliance is recommended to be **December 1, 2021, at 5:00 p.m.**
- Employees who remain noncompliant on **December 1, 2021**, will be served with a Notice of Intent to Terminate not later than **December 3, 2021**. The Notice of Intent will provide the employee with the required pre-discharge meeting with their appointing authority on **December 10, 2021**. Following that pre-discharge meeting, the appointing authority will issue the final discipline decision not later than **December 17, 2021**.

This discipline policy is subject to further amendment in the future to address two other emerging issues:

1) There are some employees that achieved compliance by receiving their first shot of the Pfizer or Moderna vaccine but have yet to receive their second dose for full vaccination. The City Manager will discuss this issue with the Mayor and Council at this Study Session

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2) It is expected that booster vaccine doses will be required in the future. Staff will consult with Mayor and Council to address the issue of required boosters at a future date.

Financial Considerations – The potential financial and human costs of inaction in the face of the continuing pandemic cannot be easily estimated. During the discussion of this item, the City Manager will provide information relating to the possible impacts of the proposed modifications to the policy, together with any other relevant costs and expenditures.

Legal Considerations – Subsequent to the adoption of Ordinance No. 11869 and the implementation of A.D. 2.03-7, various legal proceedings have occurred relating to the City's authority to establish a vaccine requirement for its employees, and to enforce those requirements as an employer. At this time, the City can in fact enforce the requirements described in this Memorandum and can establish additional consequences and penalties for City employees who fail to come into compliance with the vaccination policy. The state law (A.R.S. Sec. 36-681) that was adopted by the Legislature under Senate Bill 1824 and that would otherwise prohibit the City from requiring any person to be vaccinated against COVID-19 has been declared void and unenforceable by order of the Maricopa County Superior Court. The appeal from this order is now pending in front of the Arizona Supreme Court, with oral arguments scheduled for November 2, 2021. The City of Tucson is participating in those proceedings as *amicus curiae*.

Additionally, implementation of the City Manager's recommendations as described in this Memorandum will not require the consideration of an Ordinance or Resolution by the Mayor and Council. Through the adoption of Ordinance No. 11869, the Mayor and Council authorized the City Manager to revise and amend A.D. 2.03-7 for the purposes of carrying out its intent and to make any changes needed or convenient for its efficient administration and/or to satisfy legal requirements. If the Mayor and Council choose to direct the City Manager to proceed in a manner consistent with his recommendation, that direction can be accomplished by motion.

Respectfully submitted,



Michael J. Ortega, P.E.
City Manager

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City Manager's Office

Attachments: Attachment A – Ordinance 11869 and Vaccination AD