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 752.203[1] (or procedures for similar matters which arise under other personnel systems). If a short suspension proves inadequate in encouraging an employee to

[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.

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 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

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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.