CITY OF TUCSON
OFFICE OF THE CITY ATTORNEY

October 27, 2021

Beau Roysden
Solicitor General
Michael Catlett
Assistant Attorney General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Avenue
Phoenix, AZ 85004
Redacted @azag.gov
Redacted @az.gov

Sent Via Electronic Mail and U.S. Regular Mail

Re: Tucson Administrative Directive 2.03-7 and A.R.S. § 23-206 (Sen. Leach)

Dear Mr. Roysden and Mr. Catlett:

This letter is offered as the City of Tucson's ("City") response to Senator Leach's October 21, 2021 request for an Attorney General Investigation of an alleged state-law violation by the City (the "Complaint"). The Complaint relates to whether the City's vaccination policy for its own employees – and specifically how that policy accommodates employees with "sincerely held religious beliefs" – violates A.R.S. § 23-206, which was recently adopted by the Fifty-Fifth Arizona Legislature as a section of SB 1824. Please direct any questions you have about this response to me.

I. Introduction

Senator Leach's request for investigation arises from the City's lawful, Charter-authorized enactment of personnel policies that require the City's employees to make a choice: get vaccinated against COVID-19 or seek employment elsewhere. Of course, the City's policies include legally required exemptions (for medical conditions) and accommodations (for disabilities, and/or for those employees whose "sincerely held religious beliefs" prevent them from receiving the vaccine(s)). The City policies were initially enacted under the authority of Ordinance No. 11896, adopted by the City's Mayor and Council on August 13, 2021 (the "Ordinance").[1]

The City operates under the authority of the Tucson City Charter, which was adopted and ratified pursuant to Article 13, Sec. 2 of the Arizona Constitution. Under the

[1] At its public meeting on October 19, 2021 the Mayor and Council gave additional direction to the City Manager to revise the City's vaccination policies to include a final deadline (December 1, 2021) for compliance, and to specify that employees who fail to comply by that date face termination. The directed revisions do not alter the City's administration of accommodation requests based upon an employee's "sincerely held religious beliefs."

Tucson Charter, the City's Mayor and Council have express authority to adopt and implement measures that are necessary or convenient to prevent the spread of infectious disease in our community.[2] In adopting the Ordinance, the Mayor and Council made legislative findings citing to this authority, as well as to the City's legal obligation as an employer to provide and maintain a safe and healthy workplace for its employees. *See Exhibit A, Ordinance No. 11869.*

At issue in this investigation is whether the City's policies relating to the processing of employee requests for accommodations based upon a claimed "sincerely held religious belief" violate A.R.S. § 23-206, as adopted by the Legislature under a last-minute "budget reconciliation bill" (or "BRB"), namely SB 1824. The answer is no. First of all, A.R.S. § 23-206 does not apply to the City. The statute only applies to private employers engaged in a "business." Even if the statute applied to the City as a governmental employer, the City's policies already expressly provide for accommodations for "sincerely held religious beliefs" as required by law. Additionally, it is clear that A.R.S. § 23-206 was adopted by the Legislature and signed by the Governor in plain violation of the Arizona Constitution, and the Attorney General's Office should recognize the constitutional infirmity of the statute and SB 1824. Finally, the issue at hand involves a matter of purely local concern that is not subject to interference by the Legislature, but is instead controlled by the Ordinance and the City's Charter.

The City requests that the Office of the Attorney General issue a determination that the City has not acted in violation of Arizona law. The City asks that your Office refrain from taking any further actions described in SB 1487, including directing the withholding or redistribution of state-shared revenues. In the alternative, given the extraordinary time-sensitivity associated with the implementation of the City's vaccination policy, the associated public health concerns, and the pending resolution of related litigation that is already scheduled for consideration by the Arizona Supreme Court, I ask that you report a "may violate" determination so that this issue can be presented by way of special action directly to the highest court in our state, so we can get a final answer and move forward accordingly.[3]

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[2] Chapter IV, Section 1(10) of the Tucson Charter provides that the City has the power "to make regulations to prevent the spread of diseases;" and Chapter VII, Section 1(28) of the Tucson Charter provides that the Mayor and Council have the power to make all regulations that may be necessary or expedient for the preservation of the health and the suppression of disease; and to make regulations to prevent the introduction of contagious, infectious, or other diseases into the city.

[3]Attorney General Brnovich has made it very clear that he will oppose any attempt by any governmental agency to impose a COVID-19 vaccine "mandate." Given this, I believe that the result of this investigation may be influenced as much by politics as the law. However, I implore the Attorney General's Office to consider the *legal* merits of

II. Factual Background

This particular Complaint was prompted by a letter sent to me by Governor Ducey's General Counsel on October 20, 2021 (the "Foster Letter"). Sen. Leach's submittal makes this very clear. I won't attempt to summarize the Foster Letter or my response here. Instead, I attach them for your reference. *See attachments B (Foster Letter) and C (Rankin Response).* Here are some more facts to consider:

The City Policy:

On August 13, 2021, the City of Tucson Mayor and Council adopted the Ordinance, which authorized and directed the City Manager to implement and enforce a policy requiring all City employees not already fully vaccinated against COVID-19 to do one of the following on or before August 24, 2021:

1) Get at least their first dose of an approved COVID-19 vaccine, and submit a confirming attestation; **or**
2) Submit a request for a medical exemption or an accommodation for disability or for a sincerely held religious belief.

Under the Ordinance, employees who failed to comply with the vaccination policy by August 24th faced discipline in the form of a 5-day suspension without pay. By subsequent action (by motion approved at the Mayor and Council Study Session meeting held on October 19, 2021), the Mayor and Council have now directed the City Manager to carry out the vaccination policy by implementing a requirement under which non-compliant employees – i.e., those employees who have not been vaccinated and who have not secured an exemption or accommodation – face termination if they do not comply on or before December 1, 2021.[4]

From its inception and continuing to the present day, the Administrative Directive (A.D. 2.03-7) (the "A.D.") authorized by the Ordinance has provided for an accommodation from the vaccination requirement for all employees whose "sincerely held religious beliefs" prevent them from receiving the vaccine(s). *See A.D. 2.03-7, attached as*

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this response; and at the very least to put these issues in front of the judiciary, which is where the power to adjudicate legal issues is supposed to reside under our Constitution.

[4] See Legal Action Report, under Item 8 for the Study Session of October 19, 2021, available here:
https://tucsonaz.onbaseonline.com/1801AgendaOnline/Meetings/ViewMeeting?id=1534&doctype=2

Exhibit D.[5] Please keep in mind that the Ordinance and A.D. required compliance (in the form of vaccination OR by initial submittal of the exemption or accommodation request) on or before **August 24, 2021.**[6] Since the adoption of the Ordinance and the implementation of the A.D., the City has accepted, reviewed, and acted upon requests for accommodations for "sincerely held religious beliefs" in accordance with the guidance provided by EEOC under Title VII. To date, 319 City employees have submitted a "religious accommodation" request. Of these requests, 220 have been granted; 79 have been denied; 2 were withdrawn; and 18 are still being considered.

A.R.S. § 23-206:

A.R.S. § 23-206 was adopted as Section 3 of a last-minute "budget reconciliation bill" (or "BRB"), namely SB 1824. SB 1824 already has been the subject of litigation due to the Legislature's violation of the requirements of the Arizona Constitution in its adoption, resulting in the issuance of a court order declaring some of its provisions void and unenforceable.[7] Nonetheless, at this time, A.R.S. § 23-206 has gone into effect (as of September 29, 2021), and it provides as follows:

> ***23-206. Employers; accommodations required***
>
> If an employer receives notice from an employee that the employee's sincerely held religious beliefs, practices or observances prevent the employee from taking the COVID-19 vaccination, the employer shall provide a reasonable accommodation unless the accommodation would pose an undue hardship and more than a *de minimus* cost to the operation of the employer's business.

Prior Attorney General Opinions and Reports Relating to SB 1824:

As you consider the facts relevant to this investigation, you should certainly refer to the Opinions and Reports already issued by your Office relating to SB 1824 and its various provisions.

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[5] The A.D. as attached is the current version, as revised pursuant to the direction of the Mayor and Council on October 19th. As it relates to the accommodations for "sincerely held religious beliefs," the relevant provisions of the A.D. have not changed from the initial version.

[6] This date is important because even if you determine that A.R.S. § 23-206 applies to the City, you must conclude that the statute did not apply before its effective date of September 29, 2021.

[7] See *ASBA v. State., Maricopa County Superior Court Case No. CV2021-012741.* Please also see my response to you in our prior 1487 complaint investigation relating to the Tucson Ordinance.

On August 20, 2021, Attorney General Brnovich issued an Opinion directed to Sen. Townsend relating to vaccine "mandates" issued by Arizona employers.[8] In the portions of the Opinion that are relevant to this response, AG Brnovich determined that Section 13 of SB 1824, codified as A.R.S. § 36-681, prohibits local governmental jurisdictions (as distinct from private employers) from requiring any person – including its own employees - to get a COVID-19 vaccine, effective September 29, 2021.[9] Shortly thereafter, in its Report No. 21-003, your office doubled down on this finding, asserting that Section 13 of SB 1824 not only precluded the City from imposing a vaccination requirement on its own employees, but that somehow this new statute applied even in advance of its actual effective date. Your office based this conclusion not on any actual legal authority, but instead on your determination that the Legislature's "clear policy objective" somehow preempted the City's independent legal authority even though the law through which that intent was expressed was not adopted as an emergency measure.[10]

Of course, a court order later declared Section 13 of SB 1824 to be an obvious violation of the Arizona Constitution. Nonetheless, that court order does not change your office's conclusion that the Legislature intended, by enactment of Section 13/A.R.S. § 36-681, to preclude the City from imposing a COVID-19 vaccine requirement on its employees. This fact is very important to the resolution of this Complaint, as explained in Section 1 of the Legal Arguments below.

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[8] That Opinion (No. I21-007, dated 8/20/21) is available here: https://www.azag.gov/sites/default/files/docs/press-releases/2021/briefs/2021-08-20%20AG%20Opinion.pdf

[9] Section 13 of SB 1824, currently declared unconstitutional and void, attempted to create a new A.R.S. § 36-681 providing as follows:

36-681. COVID-19 vaccine passport; prohibitions

A. NOTWITHSTANDING ANY OTHER LAW, THIS STATE AND ANY CITY, TOWN OR COUNTY OF THIS STATE ARE PROHIBITED FROM ESTABLISHING A COVID-19 VACCINE PASSPORT OR REQUIRING EITHER OF THE FOLLOWING:

1. ANY PERSON TO BE VACCINATED FOR COVID-19.

2. A BUSINESS TO OBTAIN PROOF OF THE COVID-19 VACCINATION STATUS OF ANY PATRON ENTERING THE BUSINESS ESTABLISHMENT.

B. ANY LAW OR ORDINANCE ESTABLISHING A COVID-19 VACCINE PASSPORT IS VOID AND IS NOT ENFORCEABLE AGAINST ANY PERSON OR BUSINESS LOCATED IN THIS STATE.

[10] Your Report is available here: https://www.azag.gov/sites/default/files/docs/press-releases/2021/rulings/Tucson%20Vaccine%20Mandate%201487%20Report.pdf

III. Legal Arguments and Conclusion

1. *A.R.S. § 23-206 Does Not Apply to the City, or to any Arizona city, town, or county.*

Section 23-206 provides that an employer who requires its employees to get a COVID-19 vaccine must provide an accommodation for its employees whose sincerely held religious beliefs, practices or observances prevent the employee from taking the COVID-19 vaccination. The statute, consistent with parallel provisions of federal law, further provides that an accommodation is not required if the accommodation would "pose an undue hardship and more than a *de minimus* cost to the operation of the employer's business."

Neither § 23-206 nor any other provision in SB 1824 offers any definitions of "employer," "employee," "sincerely held religious beliefs," or any other term or phrase used in the statute.[11] Nonetheless, it is clear that this statute does **not** apply to a municipal government acting as an employer. Why? First of all, the statute says the employer need not provide an accommodation if doing so would pose an undue hardship or meaningful cost to the operation of the employer's "business." The City of Tucson – and any municipal or county government – is not engaged in a "business." Instead, the City is engaged in the operations of government. Under its own terms, it is clear that § 23-206 was intended to apply to private "business," and not to government employers.

Fortunately, to the extent there is any question about this point, the prior Opinion and Report that your Office issued relating to SB 1824 definitively resolve this matter. By its own terms, § 23-206 can only apply to "employers" legally entitled to require their employees to be vaccinated; after all, it assumes that the "employers" covered by its provisions have the authority to impose a vaccine "mandate" for their employees. In both your Opinion and your Report, you have already determined that the Legislature intended to take the City out of this category of employers. In other words, your Office already has determined that Section 13 of SB 1824 (A.R.S. § 36-681) was enacted in order to prohibit the City from requiring its employees to get a COVID-19 vaccine. How can the Legislature have intended A.R.S. § 23-206 to require the City to provide a religious accommodation for a requirement that, according to you, the Legislature intended to prohibit the City from imposing in the first place?

Let me be clear on this, at the risk of being redundant: § 23-206's religious-accommodation requirement can only apply to "employers" that have the authority to

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[11] A.R.S. § 23-211, which preexists SB 1824, does provide a definition of "employer" that includes political subdivisions, but that statute expressly provides that the definition is only for purposes of Title 23, Chapter 2, Article 2. That definition does not apply to the new A.R.S. § 23-206, which is in Article 1 of Title 23, Chapter 2.

impose an employee vaccination mandate to begin with. Therefore, if – as you have already concluded – the Legislature intended to strip the City of that authority, it necessarily means that the Legislature could not also have intended that § 23-206 apply to the City. If in your determination and report arising out of this Complaint you somehow determine that § 23-206 does in fact apply to the City as an "employer," then you will necessarily be concluding that the prohibition on vaccine mandates in Section 13/A.R.S. § 36-681 - *even if it is reinstated by the Arizona Supreme Court* - does NOT apply to the City in its role as an employer. You can't have it both ways.

2. *To the Extent it Applies, A.R.S. § 23-206 Merely Overlaps with Existing Federal Law Relating to Required Accommodations for Sincerely Held Religious Beliefs.*

If you determine that A.R.S. § 23-206 applies to the City – which again would require you to conclude that the City has the authority to require its employees to get vaccinated, even if A.R.S. § 36-681 is brought back to life by the Arizona Supreme Court – the fact of the matter is that the City Ordinance and A.D. do not violate this statute. First of all, the City's vaccination policy was adopted and implemented well in advance of the effective date of the statute. City employees who sought accommodations for "sincerely held religious beliefs" were required to apply for those accommodations on or before August 24, 2021. SB 1824 – or at least those portions of it that have not already been thrown out as constitutionally defective – did not go into effect until September 29, 2021.

Additionally, it is clear that § 23-206 really adds nothing new to an employer's obligations to reasonably accommodate an employee's "sincerely held religious beliefs." Attorney General Brnovich already has said as much, noting in his August 20th Opinion that this statute simply "overlaps with the federal standard for accommodation of sincerely-held religious beliefs. . ." *See Opinion, p. 28, fn. 16.* In that Opinion, Attorney General Brnovich describes the process and standards for an employer's evaluation and accommodation of an employee's claimed religious belief, citing to the applicable statutes under Title VII, the applicable EEOC Guidance, and relevant federal cases. *Id., pp. 26-28.* This is exactly the process, and the standards, that the City has applied in its administration of the A.D. Nothing in A.R.S. § 23-206 changes these laws or guidance – nor could it.

As noted above, nothing in A.R.S. § 23-206 or in any other section of SB 1824 attempts to define the key terms and phrases included in § 23-206, including but not limited to the phrase "sincerely held religious beliefs, practices or observances." But as Attorney General Brnovich clearly recognized in his Opinion, this phrase already has a meaning under federal code and associated case law. And while there is not a particularly high bar for establishing a claimed "sincerely held religious belief," it certainly requires something more than just sending a note to your employer that says "about that vaccine

requirement: no thanks. It's against my religion." Look at the language of A.R.S. § 23-206. It is clearly premised on the notion that the employee offers a claim of an actual "sincerely held religious belief;" *i.e.*, a belief held by the individual employee that is not just a personal preference or political belief, but an articulable belief arising out of religion and that is protected against discrimination under Title VII. The language of the statute also tracks the parallel federal law provisions relating to the fact that this is an *accommodation*, and that an employer can deny the claim in the case of *undue hardship* or excessive cost. This provision of state law adds nothing new to an employer's obligations that doesn't already exist under Title VII and EEOC guidance. And the EEOC guidance is exactly what the City has been using to review and administer all of the requests for accommodations for "sincerely held religious beliefs" since the inception of its vaccination policies, even prior to the September 29, 2021 effective date of A.R.S. § 23-206.

3. *A.R.S. § 23-206, and all of SB 1824, was Enacted in Violation of the Arizona Constitution and is Void Ab Initio*

As I did in my response to your prior investigation relating to the Ordinance, I will now ask your Office once again to recognize and acknowledge that SB 1824, in its entirety, was enacted in violation of the Arizona Constitution, and as a result is *void ab initio*. Specifically, I ask you to recognize and determine that the Arizona Legislature and Governor Ducey violated Article IV, Part II, Section 13 ("**Section 13**") and Article IV, Part II, Section 20 ("**Section 20**") of the Arizona Constitution by adopting and executing SB 1824, including its Section 13/A.R.S. § 23-206. I am well aware that the declaration of unconstitutionality in the *ASBA* case did not extend to Section 3/ § 23-206. But that was only because the plaintiff didn't ask for that declaration. The same reasoning that produced the court's orders relating to Sections 12 and 13 of SB 1824 is applicable to its Section 3. I'm confident that subsequent litigation of this issue, if it becomes necessary, will come to the same result.

4 *The legal matter at issue here is purely and uniquely a local issue, and is governed by the City Charter and the Ordinance, and not by the Legislature's attempt to interfere through the enactment of A.R.S. § 23-206 – or the Governor's attempts to interfere through Executive Orders.*

I appreciate that Sen. Leach's Complaint recognizes that legislator requests submitted pursuant to SB 1487/A.R.S. § 41-194.01 are limited to the question of whether a municipal action violates state law or the Arizona Constitution, and that the statute is not implicated by the question of whether a local action is inconsistent with an Executive Order issued by the Governor. However, since the subject matter of this Complaint also relates to certain Executive Orders (EO) of Governor Ducey (including

his most recent, EO 2021-19)[12] and because your Report in our prior case made some references to a conflict between the Ordinance and another EO, I'm asking that your report in this matter be very clear about the interplay between the City's actions and the Governor's EOs. Specifically, I'm asking that your Office repeat its earlier conclusion that Governor Ducey has absolutely no authority under his executive powers to preclude or preempt actions by the legislative body of a local jurisdiction – here, the Mayor and Council of the City of Tucson – to adopt local health and safety measures when those actions are independently authorized by law outside of Title 26 of the Arizona Revised Statutes.[13] This is not a gratuitous request. My goal is to deflect the unsupported threats of criminal sanctions for purported violations of the Governor's ineffectual and *ultra vires* EOs, as exemplified in the Foster Letter attached as Exhibit B.

Finally, I ask that your Office recognize and agree that the issue presented by this Complaint is purely and in fact uniquely a matter of local concern and is governed by local action and not by the Legislature's attempt to interfere. The matter at issue here involves an internal personnel policy enacted by the City in its role as an employer. The vaccine requirement in question, and more particularly the associated processing of employee requests for "religious belief" accommodations, is limited in application to employees of the City as a municipal employer. The City has not attempted to regulate businesses within (let alone without) the city limits. The policy impacts no person other that those employed by the City. The Ordinance and associated policy are uniquely "local" in that their application is limited to persons who choose to work for the City's municipal government. I struggle to think of an example of a city legislative or administrative act that is more of "purely local concern" than this policy that is specific to establishing an employment condition that applies exclusively to City of Tucson employees.[14]

You are well aware of our battles over the scope of a charter city's authority versus the interfering acts of the Arizona Legislature when it comes to issues of "local concern." You have won some of those battles. Tucson has won some as well. I won't even bother to cite the cases, since you know them as well as I do. In this case, I don't think it's a close call. The state legislation in question doesn't even attempt to make a declaration of "statewide concern" in connection with A.R.S. § 23-206, and for obvious reasons –

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[12] Please see Exhibit C, the Rankin Response to the Foster Letter, as it relates to EO 2021-19.

[13] https://www.azag.gov/opinions/i21-003-r21-004-r21-005

[14] I'm not in the habit of citing newspaper articles, but I think this opinion piece, by an author who probably doesn't often support City of Tucson Mayor and Council actions, is particularly on point:
https://www.azcentral.com/story/opinion/op-ed/robertrobb/2021/10/24/tucson-should-stand-its-ground-vaccine-mandate/6126670001/

first, it was never intended to apply to a municipal "employer;" and secondly, there is not any articulable statewide interest or concern in the personnel policies that a local governmental employer such as Tucson might establish for its own employees. At the same time, the City's Mayor and Council has cited to specific Charter authority for the local action that was enacted, noting that it was necessary to prevent the spread of infectious disease in our community and to satisfy the City's legal obligation as an employer to provide and maintain a safe and healthy workplace for its employees. Under these facts, the City's requirements plainly supersede any attempt by the Legislature to override them.

5. *Conclusion*

As always, with respect to SB 1487 complaints, I appreciate the opportunity to respond. In this case, I especially appreciate the professionalism of the Attorney General's Office and its individual attorneys in considering my request for a short extension of time to respond. I hope that this response allows you to close out your investigation of the Complaint. If you need or desire any further response or information from me, don't hesitate to reach out by phone (my cell is Redacted or email (Redacted@tucsonaz.gov).

Sincerely,

Mike Rankin
City Attorney

MR/dg

Atts. (4)

EXHIBIT A

City of Tucson
Ordinance No. 11869

ADOPTED BY THE
MAYOR AND COUNCIL

August 13, 2021

ORDINANCE NO. 11869

RELATING TO PUBLIC HEALTH AND SAFETY AND THE PREVENTION OF THE SPREAD OF INFECTIOUS DISEASE; FINDING AND REAFFIRMING THAT THE COVID-19 PANDEMIC CONSTITUTES A CONTINUING LOCAL AND CIVIL EMERGENCY; AUTHORIZING AND DIRECTING THE CITY MANAGER TO EXECUTE, ADMINISTER, IMPLEMENT AND ENFORCE AN ADMINISTRATIVE DIRECTIVE IN ORDER TO PROMOTE AND REQUIRE CITY EMPLOYEES TO GET VACCINATED AGAINST COVID-19, AND TO CARRY OUT ITS VARIOUS PROVISIONS IN ORDER TO MITIGATE AGAINST THE SPREAD OF COVID-19 IN OUR WORKFORCE AND IN OUR COMMUNITY AND REGION; ESTABLISHING CERTAIN EXEMPTIONS AND ACCOMMODATIONS; ESTABLISHING PENALTIES; AFFIRMING THAT THE REQUIREMENTS OF THIS POLICY ARE MANAGEMENT RIGHTS OF THE CITY OF TUCSON AS AN EMPLOYER; AUTHORIZING THE CITY MANAGER TO EXAMINE THE STRUCTURE OF HEALTH CARE PREMIUMS FOR EMPLOYEE PARTICIPANTS WHO DO NOT SUBMIT PROOF OF VACCINATION, TO THE EXTENT AUTHORIZED BY LAW; AND DECLARING AN EMERGENCY.

WHEREAS, the Mayor and Council of the City of Tucson make the following findings:

1) Chapter IV, Section 1(10) of the Tucson Charter provides that the City has the power "to make regulations to prevent the spread of diseases;" and Chapter VII, Section 1(28) of the Tucson Charter provides that the Mayor and Council have the power to make all regulations which may be necessary or expedient for the preservation of the health and the suppression of disease; and to make regulations to prevent the introduction of contagious, infectious, or other diseases into the city; and

2) the State of Arizona is under a continuing Declaration of Public Health Emergency, as ordered by Governor Douglas A. Ducey, due to the necessity to prepare for, prevent, respond to, and mitigate the spread of COVID-19; and

3) the City of Tucson is under a continuing Declaration of Emergency or Local and/or Civil Emergency, as proclaimed by Mayor Regina Romero and as supported by motions adopted by unanimous votes of the Mayor and Council on multiple dates, including but not limited to March 24, April 21, and June 9, 2020, due to the COVID-19 pandemic; and

4) the most current local data relating to COVID-19 as provided by Pima County (part of which is included in the agenda material for this August 13, 2021 Special Session meeting) show that Pima County and the City of Tucson are experiencing substantial and in fact now "high" community-based transmission of COVID-19, and an increasing pace of viral spread that constitutes another surge of this pandemic. This surge is largely attributable to the increasing spread of the Delta variant, and the increase in infections and serious illness/hospitalization is overwhelmingly attributable to transmission among persons who have chosen not to be vaccinated against the COVID-19 virus, despite the widespread (and free of cost) availability of the approved vaccines; and

5) hospitalization and death among the vaccinated population remains exceedingly rare, demonstrating that the vaccines are extraordinarily effective; but the instances of breakthrough infections (infection of vaccinated persons) are growing; and

6) vaccination remains the single most important tool that needs to be leveraged in our local community's pandemic response if we are to prevent needless hospitalizations and deaths in the City of Tucson and throughout Pima County; and

7) a recent survey of City employees demonstrates that it is reasonable to believe that an estimated 1,000 City employees remain unvaccinated against the COVID-19 virus; and

8) the City of Tucson, as an employer (and by and through its City Manager and ultimately through its legislative body), has a legal duty to provide and maintain a safe and healthy workplace for its employees; and

9) the actions included in this Ordinance and its attachments are reasonable and necessary to provide a safe workplace for City employees, the majority of whom have been vaccinated but who face increased threat of infection from unvaccinated coworkers; and these actions are reasonable and necessary to protect public health throughout our community and to ensure the City's ongoing capacity to provide essential services:

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA AS FOLLOWS:

SECTION 1. The Mayor and Council find and reaffirm that the COVID-19 pandemic constitutes a continuing emergency, local emergency and civil emergency that endangers life within the City of Tucson, and requires extraordinary measures to protect public health and safety, all as provided under the Tucson Charter, Arizona Revised Statutes and Tucson Code.

SECTION 2. The Mayor and Council authorize and direct the City Manager to execute, administer, implement, and enforce the provisions of the Administrative Directive attached hereto as Exhibit A, in order to promote and require City employees to get vaccinated against COVID-19, and to carry out its provisions in order to mitigate

against the spread of COVID-19 in our workforce and in our community and region. This authorization and direction supplements the authority already vested in the City Manager pursuant to the Tucson Charter and City Code, and does not limit or otherwise modify the authority that the City Manager holds under the Charter, Code, and other laws.

SECTION 3. The Mayor and Council authorize the City Manager to revise and amend the attached Administrative Directive, without need for further action by the Mayor and Council, 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.

SECTION 4. The Mayor and Council find that the requirements of City employees as approved under this Ordinance and as established under the attached Exhibit A are lawfully imposed under the scope of "management rights" as that term is used in Chapter 14 of the Tucson Code and elsewhere, and hereby declare that the requirements of this Ordinance and the attached Exhibit A are necessary, reasonable and expedient to promote public health and the suppression of disease; and to prevent the introduction and/or spread of contagious, infectious, or other diseases within the City.

SECTION 5. The Mayor and Council also authorize the City Manager to implement an incentive for City employees to submit proof that they have been vaccinated against the COVID-19 virus, under which qualifying employees may receive leave benefits as specified by the City Manager through a separate Administrative Directive or similar communication.

SECTION 6. The Mayor and Council further authorize the City Manager to examine the structure of employee premiums as part of his current review of the health coverage plan, and to keep the Mayor and Council informed about employee premiums and other plan issues as that process continues. Any premium changes must comply with all applicable federal and state laws and regulations.

SECTION 7. WHEREAS, it is necessary for the preservation of the peace, health, and safety of the City of Tucson that this Ordinance become immediately effective, an emergency is hereby declared to exist, and this Ordinance shall be effective immediately upon its passage and adoption.

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, August 13, 2021.

MAYOR

ATTEST:

CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY

REVIEWED BY:

CITY MANAGER

MR/dg
8/13/21

ADMINISTRATIVE DIRECTIVE

MANDATORY COVID-19 VACCINATION	NUMBER 2.03-7	PAGE 1 of 6
	EFFECTIVE DATE August 13, 2021	

I. PURPOSE

To provide and maintain a safe and healthy workplace for employees and their families; to promote and protect the health and safety of the public; to prevent or limit the spread of COVID-19; to mitigate the severity of illness from COVID-19 in the event of infection; to limit the hazards and enormous human and financial costs presented by the COVID-19 pandemic; and to preserve the ability and capacity of the City of Tucson (COT) to provide essential services to the residents, businesses and visitors of Tucson.

II. SCOPE AND EFFECTIVE DATE

Scope: This policy applies to all city employees, including but not limited to all employees in the classified service, all at-will/appointed employees and officers (including those outside the classified service), and all temporary, seasonal or other employees, including those who are employed by contract through temporary employment agencies or similar.

This policy also applies to all applicants and candidates for employment by the City, including those who are already involved in a job recruitment process on the effective date of this policy (August 13, 2021).

Employees who are subject to this policy will be deemed exempt or eligible for accommodation ONLY as provided in Section VI below.

Effective Date: The requirements of this policy, including specifically the Vaccination Requirement established in Section IV below, go into effect on August 20, 2021 unless on or before that date the COT receives proof of vaccination (as described below) from not fewer than 750 employees who were unvaccinated (that is, had not received even one dose of any of the approved vaccines) as of August 13, 2021. If this threshold is not met, this policy goes into effect on that date, including the Vaccination Requirement described below.

III. DEFINITIONS-

Disability Accommodation: is the process whereby the City of Tucson (COT) in accordance with Administrative Directive 2.05-2, Reasonable Accommodation of Applicants and Employees with Disabilities, provides reasonable accommodations, absent undue hardship, to qualified individuals with disabilities that enable them to perform their job duties. A reasonable accommodation may include adjustment or modification of policies, including this mandatory vaccination policy.

Fully vaccinated against COVID-19: has the same meaning as provided by the US Centers for Disease Control and Prevention, which as of the effective date of this policy means as follows:

People are considered fully vaccinated against COVID-19:

2 weeks after their second dose in a 2-dose series of an approved 2-dose vaccine, namely the Pfizer or Moderna vaccines, or

2 weeks after an approved single-dose vaccine, namely the Johnson & Johnson's Janssen vaccine.

Medical Exemption: means an exemption that is allowed when an individual has a medical condition that prevents them from receiving a vaccine. A medical exemption may be required when an individual has an allergy to a vaccine or a specific medical condition that precludes a vaccination. An employee may qualify for a medical exemption even if they do not have a condition that would qualify as a disability under federal, state, or local law.

Religious Accommodation: is the process where an employee may request the COT provide a reasonable accommodation, absent undue hardship to the COT, to an employee with sincerely held religious beliefs, observances or practices that conflict with getting vaccinated.

Sincerely held religious beliefs and practices: means those that are protected from religious discrimination under Title VII of the Civil Rights Act of 1964. They do not include social, political, or economic philosophies, or personal preferences or beliefs, that are not religious beliefs protected under Title VII.

IV. POLICY; DISCIPLINE FOR FAILURE TO COMPLY

A. **General Policy:** The policy of the City of Tucson is that all City employees subject to this policy must be fully vaccinated against COVID-19 as soon as reasonably possible following the effective date of this policy; and that City employees must submit proof to the City of vaccination as provided in this policy, all as a condition of continued employment, unless a reasonable accommodation or medical exemption is approved as provided in Section VI below; or unless voluntary vaccination by employees in the time frame between August 13 and August 20, 2021 satisfies the threshold established in Section 2 above. The time frame for vaccination established in this policy have been established with the goal of having all employees (other than those who are granted exemptions or accommodations) fully vaccinated by October 4, 2021. Accordingly, employees must submit proof of compliance with the imposed vaccination requirements within the time frames established below; or must submit their requests for available accommodations or exemption within the same time frames, also as described below. **Failure to comply with the requirements of this policy and the time limits as described constitutes just cause for discipline; and any employee who fails to comply with this policy is hereby put on notice that discipline will be administered as described in this policy.**

B. **Vaccination Requirement and Specific Time Frames for Compliance:** each employee who is subject to the requirements of this policy must submit proof of vaccination for COVID-19 (or submit a completed request for accommodation and/or exemption) to the City as follows:

On or before **4:00 p.m., August 24, 2021**, the employee must submit written proof (which may include an attestation signed by the employee, subject to subsequent written documentation upon the City's request) demonstrating that on or before that date the employee has received at least the first dose of the approved 2-dose vaccines (Pfizer or Moderna) or alternatively the single dose of the Johnson and Johnson vaccine.

C. **Employees' responsibility to schedule vaccination** - Each of the described vaccines is readily available at various locations throughout the City, and in fact throughout the United States; and they are free of charge. **It is the responsibility of each employee to schedule and secure his or her or their own vaccination(s).** Information about the vaccines and where to receive them is available here:

https://webcms.pima.gov/cms/One.aspx?portalId=169&pageId=669257

D. **Employees' responsibility to request a reasonable accommodation or medical exemption in a timely manner.**

1. **Accommodation** - If an employee believes they need an accommodation regarding this policy because of a disability or a sincerely held religious belief, they are responsible for requesting a reasonable accommodation from the Occupational and Health Leaves (OHL) division of Human Resources.

   OHL will engage in an interactive process with the employee to determine the precise limitations of his or her ability to comply with this mandatory vaccination policy and explore potential reasonable accommodations. The COT is not required to make the specific accommodation requested and may provide an alternative effective accommodation, to the extent any reasonable accommodation can be made without imposing an undue hardship on the COT or posing a direct threat to the employee or others in the workplace.

2. **Medical Exemption** - Exemptions for other medical reasons may be available on a case-by-case determination for conditions such as pregnancy, breastfeeding, or a history of certain allergic reactions, and any other medical condition that is a contraindication to the COVID -19 vaccination, even if they do not qualify as a disability under federal, state, or local law. The COT will engage in interactive dialogue to determine whether an exemption is appropriate and can be granted without imposing an undue hardship on the COT or pose a direct threat to the employee or others in the workplace. However, the COT reserves the right to take any necessary and appropriate steps, including imposing alternative COVID-19 prevention measures to ensure the individual does not pose a direct threat to the health or safety of others in the workplace.

3. **Time for Submittal** - Requests for Accommodation or Exemption as provided under this policy must be submitted on or before the date described in this policy for compliance with the Vaccination Requirement. In other words, to be in compliance with this policy and to avoid discipline for failure to comply through proof or attestation of vaccination, an employee must submit the request for accommodation or exemption on or before **AUGUST 24, 2021.**

E. **Discipline for Failure to Comply** - Failure to comply with the requirements of this policy and the time limits as described above constitutes just cause for discipline; and any

employee who fails to comply with this policy is hereby put on notice that progressive discipline will be administered as follows:

1. **Failure to Comply with the Vaccination Requirement:** *(i.e., proof of first vaccination shot or submittal of request for exemption/accommodation on or before August 24, 2021)*: the discipline shall be a five (5) day suspension, without pay. An employee can NOT use any accrued leave during the period of the suspension; the suspension will be imposed without pay.

In addition to the described discipline, the COT may establish other requirements for employees who do not satisfy the Vaccination Requirement, including but not limited to mandatory testing on a weekly or more frequent basis, enhanced mask wearing requirements, restrictions on eligibility for certain assignments, travel restrictions, and other requirements.

V. ADMINISTRATION; USE OF LEAVE

A. **Vaccination during work hours; leave usage; overtime** - Employees may schedule their vaccination shots/appointments during work hours and will not be required to use accrued vacation or sick leave to attend those appointments so long as the time away from work does not exceed ninety (90) minutes and the employee has secured prior department approval for the time away from work. Employees are required to contact their supervisor to coordinate the scheduling of these appointments to avoid disruption of work operations. The City will NOT pay overtime or comp time for an employee's time spent scheduling or securing a vaccination, unless first approved by the employee's department director. In the event that the City Manager provides for pandemic leave that can be used by employees for the purpose of securing a vaccination during non-work hours, then the employee may use that pandemic leave for that purpose subject to the terms and conditions related to that leave usage.

B. **Leave for vaccination side effects** - The City Manager may establish additional leave benefits, e.g., pandemic leave, that employees may use if they experience side effects from vaccination doses that prevent them from working in the hours/days after receiving the vaccination dose(s). Employees may use those leave benefits under the terms and conditions as separately established by the City Manager. Employees who may experience prolonged side effects that require them to miss work beyond any leave periods that might be eligible for pandemic (or similar) leave may request to use other accrued leave (e.g. sick leave) for that time off from work.

C. **Proof of vaccination:**

1. Proof of vaccination as required under this policy must be submitted to the City's Human Resources Director. The City will accept the following documentation ONLY:

   a. Written proof of vaccination from a vaccine administrator or as provided via CDC-issued vaccination card or photo image of such documentation. This

documentation must include vaccination place, date(s) and your name. This documentation may be submitted digitally/electronically (e.g. by photo image); **or**

b. An attestation signed by the employee that confirms that the employee has been vaccinated against the COVID-19 virus, in a form as approved by the COT; **or**

c. Other documentation or employee attestation ONLY if separately provided by written amendment to this policy.

Any employee who submits a false or fraudulent document or attestation in an attempt to show proof of vaccination as required under this policy will be terminated from employment, and may be subject to prosecution for any related criminal offenses (including but not limited to false swearing).

2. Proof of vaccination must be provided to the Human Resources Director by the dates as provided under this policy.

D. Confidentiality - Documentation that is submitted in compliance with this policy – including specifically any proof of vaccination - will be maintained by the City as confidential information in the same manner as a confidential medical record and will be maintained separately from any personnel files. HR will serve as depository for all confidential information related to this policy.

VI. REQUESTS FOR EXEMPTION/ACCOMMODATION

To assist any employee who is disabled or who has a qualifying medical condition that contraindicates the vaccination, or who objects to being vaccinated on the basis of *sincerely held religious beliefs and practices,* the City will engage in an interactive process to determine if a reasonable exemption and/or accommodation can be provided so long as it does not create an undue hardship for the City and/or does not pose a direct threat to the health or safety of others in the workplace and/or to the employee. To request an exemption/accommodation for one of the above reasons and avoid the vaccination requirement described above as the Initial Requirement, an employee must notify Human Resources in writing and submit the request form (using the form approved by the City and provided as an attachment to this policy) **NOT LATER THAN AUGUST 24, 2021.** Once the City is aware of a timely request for an accommodation, the City will engage in an interactive process to identify possible accommodations that do not create an undue hardship for the City and/or a threat to the health or safety of others in the workplace and/or to the employee. An employee may request an accommodation without fear of retaliation, as further provided below.

Requests for exemption or accommodation that are submitted AFTER AUGUST 24, 2021, will still be processed and reviewed for approval, but will NOT relieve employees from discipline for failure to comply with the Vaccination Requirement as described above. Any employee who desires to avoid discipline for failure to comply with the Vaccination Requirement must submit the request for exemption or accommodation NOT LATER THAN August 24, 2021

ADMINISTRATIVE DIRECTIVE

MANDATORY COVID-19 VACCINATION	NUMBER 2.03-7	PAGE 6 of 6
	EFFECTIVE DATE August 13, 2021	

VII. RETALIATION PROHIBITED

An employee may request exemption and accommodation from the requirements of this policy as provided under Section VI above without fear of retaliation. No employee who submits a timely request for exemption/accommodation as provided under Section VI above shall be subject to retaliation.

VIII. VIOLATIONS; AMENDMENTS TO POLICY

Failure to provide proof of vaccination or to seek an exemption or accommodation in a timely manner will be a violation of this mandatory policy. Any violation of this policy will result in discipline as described in this policy and in accordance with Civil Service Rules and applicable Administrative Directives.

This policy may be amended, and additional requirements and penalties for noncompliance may be established, by the City Manager.

Form

COVID-19 AD Acknowledgement Form

COVID-19 Vaccination Attestation Form

COVID-19 Medical Exemption Form

COVID-19 Religious Accommodation Form Request

References

AD 2.05-2 Reasonable Accommodation of Applicants and Employees with Disabilities

Review Responsibility and Frequency

The HR Director will review this directive as needed.

Authorized

_____ _____

City Manager
Michael J. Ortega

Date

EXHIBIT B

Ammi L. Foster
General Counsel
Office of the Governor, State of Arizona
Letter dated October 20, 2021

STATE OF ARIZONA
OFFICE OF THE GOVERNOR

DOUGLAS A. DUCEY
GOVERNOR

EXECUTIVE OFFICE

October 20, 2021

Mike G. Rankin
City Attorney
City of Tucson
P.O. Box 27210
Tucson, AZ 85726

Via email mailto:mike.rankin@tucsonaz.gov and U.S. Mail

Dear Mr. Rankin,

I write to bring information to your attention regarding the recent Tucson City Council study session held on October 19, 2021 and more specifically agenda item 8, *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.*.

As part of agenda item 8 a memo from City Manager Michael Ortega to the Mayor and City Council outlines that a majority of employees who are being considered for termination under the City's mandatory vaccine policy requested exemptions or accomodations and were denied. Additionally, the Legal Considerations section on page 4 states:

> 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.

Although the information concerning A.R.S. § 36-681 and the pending litigation at the Arizona Supreme Court is correct, there is relevant information that is missing from these legal considerations that affects the city's ability to take action under such a policy.

First, only sections 12 and 13 of Senate Bill 1824 were deemed unconstitutional. Section 3 is still in effect and establishes A.R.S. § 23-206, which states:

> *If an employer receives notice from an employee that the employee's sincerely held religious beliefs, practices or observances prevent the employee from taking the COVID-19 vaccination, the employer* ***shall*** *provide a reasonable accommodation unless the accommodation would pose an undue hardship and more than a de minimus cost to the operation of the employer's business.*

This statute does not say when the employee must provide a notice of a sincerely held religious belief, practice or observance, only that if provided, an employer is required to provide a reasonable accommodation. Based on the documentation from the City Council meeting, it is unclear if the Mayor and Council were made aware of this new legal requirement that became effective on the general effective date, whether any denials of exemptions or accomodations violated this provision or whether City of Tucson employees were made aware of this new legal provision. Additionally, Tucson Administrative Directive 2.03-7, *Mandatory COVID-19 Vaccination*, violates this new law by stating that an employee may "request" a religious accommodation rather than the notice provision that A.R.S. 23-206 provides. Further, Directive 2.03-7, states that an "interactive process" will be engaged in to "determine precise limitations." However, no such process exists under A.R.S. § 23-206 as it only requires an employee to provide notice. Unlike other laws in the employment context, this statute does not provide for an employer to question the employee's "sincerely held religious beliefs, practices or observances" prior to providing the accommodation from a COVID-19 vaccine. It merely requires notice to the employer. Finally, as it seems that the City has clearly provided some accommodations for religious and disability reasons, it is unclear how there would be any "undue hardship" for others that provided notice under A.R.S. § 23-206.

In addition to A.R.S. § 23-206, it also seems that the Council was not notified of section 3 of Executive Order 2021-19, which was issued on October 7, 2021. This section states, "*No person shall be required by this state, or* ***any city****, town or county to obtain a COVID-19 vaccine but a health care institution licensed pursuant to A.R.S. Title 36, Chapter 4 may require the institution's employees to be vaccinated.*"

This provision would apply to all employees, not just those that requested an accommodation. Thus, it seems based on the documentation publicly available, this information was not presented to the Mayor and Council and would have been relevant to their discussion prior to action being considered or taken. As you, the Mayor and Council are well aware, violation of state law implicates A.R.S. § 41-194.01 and violation of an executive order issued under the authority of an emergency declaration carries a criminal penalty.

Sincerely,

Anni L. Foster
General Counsel

EXHIBIT C

Mike Rankin
City Attorney, City of Tucson
Response letter dated October 21, 2021

CITY OF
TUCSON
OFFICE OF THE
CITY ATTORNEY

October 21, 2021

Anni L. Foster
General Counsel
STATE OF ARIZONA
OFFICE OF THE GOVERNOR
1700 W. Washington Street
Phoenix, Arizona 85007

Sent Via Electronic Mail to afoster@az.gov and U.S. Mail

Dear Ms. Foster,

First, I'd like to thank you for your professional courtesy in leaving me a voice-mail message on Wednesday letting me know that you were about to send me a letter that was shortly thereafter released to the press by the Governor's Office, and which immediately became the subject of "tweets" from the Governor. I appreciate the heads up.

I'll admit that I'm puzzled why I would be getting a letter from you, since the Governor's General Counsel is not a statutory office and is a position that lacks any duties or responsibilities relating to the actions of municipal corporations in Arizona. As I understand it, the full scope of your role as the Governor's personally appointed staff attorney is to provide legal counsel and advice to the Governor relating to his official duties and actions. That's an extremely important and demanding job, especially over the past 18 months. But it is not a public office with duties that include the issuance of legal opinions to state agencies or political subdivisions, or the authority to require explanations from municipal attorneys about the legality of actions taken by their local legislative body. If I'm mistaken about this, please let me know.

Regardless, I'm providing this brief response as a professional courtesy.

In your letter, you describe two ways in which you believe that the City of Tucson's policies relating to COVID-19 vaccination requirements for its employees violate Arizona law. First, you cite to the newly effective A.R.S. § 23-206, relating to required accommodations for employees with "sincerely held religious beliefs." You question whether I was aware of this provision before my client adopted the vaccination policies.

I can assure you that I am well aware of the various provisions of HB 1824, having co-authored an *amicus* brief that helped produce the court order declaring its constitutional violations. Your reading of A.R.S. § 23-206, however – and in particular its application to the Tucson policies – is simply wrong.

Though you seem to understand that § 23-206 did not go into effect until September 29, 2021, you fail to appreciate the import of that date. The Tucson policy establishing a process for considering religious-accommodation requests relates to requests submitted not later than August 24, 2021 – a full month before the statute even went into effect. You also fail to recognize that the subject matter of the statute – accommodations for "sincerely held religious beliefs" – is already governed by applicable federal law, and that this new Arizona law really adds nothing to the obligations of Arizona employers who choose to require COVID-19 vaccination as a condition of employment. Fortunately, the Arizona Attorney General has already addressed this issue in a published Opinion, to which you may want to direct the Governor's attention in your role as his General Counsel.[1] In short, the Tucson policy has a process for reasonably accommodating City employees whose "sincerely held religious beliefs" prevent them from receiving the COVID-19 vaccine(s), in compliance with all applicable federal and state law requirements.

Secondly, you cite the Governor's newest Executive Order, EO 2021-19, issued on October 7, 2021, and question whether my client has been advised about the impact of that order. Again, I can assure you that I have advised my client about the scope of the Governor's actual legal authority under the Arizona Constitution and Titles 26 and 36 of the Arizona Revised Statutes as they relate to his Executive Orders. In fact, I have publicly advised them that the Governor has absolutely no legal authority to use an Executive Order to preempt or preclude the Mayor and Council's exercise of their independent legislative authority under the Tucson Charter, the Arizona Constitution, or other Arizona law, to enact and enforce policies that they determine are necessary and appropriate to promote and protect the health and safety of City employees and our local community.[2]

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[1] See Arizona Attorney General Opinion I21-007, dated 8/20/21, available here: https://www.azag.gov/sites/default/files/docs/press-releases/2021/briefs/2021-08-20%20AG%20Opinion.pdf
See pages 24-28, and in particular Footnote 16, which notes that the new Arizona statute simply overlaps existing federal law.

[2] Obviously, under Arizona law I cannot share with you or the public any legal advice I have provided to my client in Executive Sessions. The legal advice that I describe in this letter is limited to that which I have provided in public meetings, public communications, and pleadings filed in court that are available for public inspection. These public

I would hope that, in your role as the Governor's General Counsel, you have provided him the same advice regarding the limitations on his authority, since it is quite clearly the law. Presumably you reminded him, prior to his issuance of EO 2021-19, that the Arizona Attorney General has already opined that the Governor has no authority under Title 26 to "preempt" a local legislative act relating to COVID-19 mitigation that is authorized by law outside of that Title.[3] Presumably you also advised him that the provision he inserted into paragraph 3 of that EO, relating to city-required vaccines, plainly exceeds the scope of his authority when issuing an Enhanced Surveillance Advisory under the authority of A.R.S. § 36-782.[4]

If you would like to talk about these issues, don't hesitate to call me.

Sincerely,

Mike Rankin
City Attorney
City of Tucson

MR/dg

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communications are not subject to the attorney-client privilege or the confidentiality requirements of executive sessions under the Arizona Open Meetings Law.

[3] https://www.azag.gov/opinions/i21-003-r21-004-r21-005

[4] EO 2021-19 is entitled "Enhanced Surveillance Advisory," and was issued under the authority of A.R.S. § 36-782. That statute is quite specific about the lawful scope of such an order, which is limited to directing public health agencies and health providers regarding public health surveillance and reporting. The Governor's attempt to use an Enhanced Surveillance Advisory under A.R.S. § 36-782 as a vehicle to preempt a City of Tucson employment policy is painfully absurd, and I hope you would advise him accordingly.

EXHIBIT D

City of Tucson
Administrative Directive (A.D.) 2.03-7

ADMINISTRATIVE DIRECTIVE

MANDATORY COVID-19 VACCINATION	NUMBER 2.03-7	PAGE 1 of 7
	EFFECTIVE DATE August 13, 2021 (revised October 27, 2021)	

I. PURPOSE

To provide and maintain a safe and healthy workplace for employees and their families; to promote and protect the health and safety of the public; to prevent or limit the spread of COVID-19; to mitigate the severity of illness from COVID-19 in the event of infection; to limit the hazards and enormous human and financial costs presented by the COVID-19 pandemic; and to preserve the ability and capacity of the City of Tucson (COT) to provide essential services to the residents, businesses and visitors of Tucson.

II. SCOPE AND EFFECTIVE DATE

Scope: This policy applies to all city employees, including but not limited to all employees in the classified service, all at-will/appointed employees and officers (including those outside the classified service), and all temporary, seasonal or other employees, including those who are employed by contract through temporary employment agencies or similar.

This policy also applies to all applicants and candidates for employment by the City, including those who are already involved in a job recruitment process on the effective date of this policy (August 13, 2021).

Employees who are subject to this policy will be deemed exempt or eligible for accommodation ONLY as provided in Section VI below.

Effective Date: The requirements of this policy, including specifically the Vaccination Requirement established in Section IV below, initially went into effect on August 20, 2021; and the revisions establishing the Phase III Vaccination Requirement are effective on and after October 27, 2021.

III. DEFINITIONS-

Disability Accommodation: is the process whereby the City of Tucson (COT) in accordance with Administrative Directive 2.05-2, Reasonable Accommodation of Applicants and Employees with Disabilities, provides reasonable accommodations, absent undue hardship, to qualified individuals with disabilities that enable them to perform their job duties. A reasonable accommodation may include adjustment or modification of policies, including this mandatory vaccination policy.

Fully vaccinated against COVID-19: has the same meaning as provided by the US Centers for Disease Control and Prevention, which as of the effective date of this policy means as follows:

People are considered fully vaccinated against COVID-19:

2 weeks after their second dose in a 2-dose series of an approved 2-dose vaccine, namely the Pfizer or Moderna vaccines, or

2 weeks after an approved single-dose vaccine, namely the Johnson & Johnson's Janssen vaccine.

Medical Exemption: means an exemption that is allowed when an individual has a medical condition that prevents them from receiving a vaccine. A medical exemption may be required when an individual has an allergy to a vaccine or a specific medical condition that precludes a vaccination. An employee may qualify for a medical exemption even if they do not have a condition that would qualify as a disability under federal, state, or local law.

Religious Accommodation: is the process where an employee may request the COT provide a reasonable accommodation, absent undue hardship to the COT, to an employee with sincerely held religious beliefs, observances or practices that conflict with getting vaccinated.

Sincerely held religious beliefs and practices: means those that are protected from religious discrimination under Title VII of the Civil Rights Act of 1964. They do not include social, political, or economic philosophies, or personal preferences or beliefs, that are not religious beliefs protected under Title VII.

IV. POLICY; DISCIPLINE FOR FAILURE TO COMPLY

A. **General Policy:** The policy of the City of Tucson is that all City employees subject to this policy must be fully vaccinated against COVID-19 as soon as reasonably possible following the effective date of this policy; and that City employees must submit proof to the City of vaccination as provided in this policy, all as a condition of continued employment, unless a reasonable accommodation or medical exemption is approved as provided in Section VI below. The time frame for vaccination established in this policy have been established with the goal of having all employees (other than those who are granted exemptions or accommodations) fully vaccinated by December 15, 2021. Accordingly, employees must submit proof of compliance with the imposed vaccination requirements within the time frames established below; or must submit their requests for available accommodations or exemption within the same time frames, also as described below. **Failure to comply with the requirements of this policy and the time limits as described constitutes just cause for discipline; and any employee who fails to comply with this policy is hereby put on notice that discipline will be administered as described in this policy.**

B. **Vaccination Requirement and Specific Time Frames for Compliance:** each employee who is subject to the requirements of this policy must submit proof of vaccination for COVID-19 (or submit a completed request for accommodation and/or exemption) to the City as follows:

Phase I. On or before **4:00 p.m., August 24, 2021**, the employee must submit written proof (which may include an attestation signed by the employee, subject to subsequent written documentation upon the City's request) demonstrating that on or before that date the employee has received at least the first dose of the approved 2-dose vaccines (Pfizer or Moderna) or alternatively the single dose of the Johnson and Johnson vaccine.

Phase II. For employees who timely submitted a request for a medical exemption, an accommodation for a disability, or an accommodation for a sincerely held religious belief, and that request was denied, the employee is in compliance only if they received the first dose of either the Pfizer or Moderna vaccine, or the single dose of the Johnson and Johnson vaccine, on or before **October 5, 2021**.

Phase III. Effective **October 27, 2021**, each employee who has not been granted an exemption or accommodation must have received **both** doses of either the Pfizer or Moderna vaccine or the single dose of the Johnson and Johnson vaccine on or before **December 1, 2021** to avoid termination (IV.E.2 below).

C. **Employees' responsibility to schedule vaccination** - Each of the described vaccines is readily available at various locations throughout the City, and in fact throughout the United States; and they are free of charge. **It is the responsibility of each employee to schedule and secure his or her or their own vaccination(s).** Information about the vaccines and where to receive them is available here:

https://webcms.pima.gov/cms/One.aspx?portalId=169&pageId=669257

D. **Employees' responsibility to request a reasonable accommodation or medical exemption in a timely manner.**

1. **Accommodation** - If an employee believes they need an accommodation regarding this policy because of a disability or a sincerely held religious belief, they are responsible for requesting a reasonable accommodation from the Occupational and Health Leaves (OHL) division of Human Resources.

   OHL will engage in an interactive process with the employee to determine the precise limitations of his or her ability to comply with this mandatory vaccination policy and explore potential reasonable accommodations. The COT is not required to make the specific accommodation requested and may provide an alternative effective accommodation, to the extent any reasonable accommodation can be made without imposing an undue hardship on the COT or posing a direct threat to the employee or others in the workplace.

2. **Medical Exemption** - Exemptions for other medical reasons may be available on a case-by-case determination using the process and forms established by Human Resources for conditions such as pregnancy, breastfeeding, or a history of certain allergic reactions, and any other medical condition that is a contraindication to the COVID -19 vaccination, even if they do not qualify as a disability under federal, state, or local law. The COT will engage in interactive dialogue to determine whether an exemption is appropriate and can be granted without imposing an undue hardship on the COT or pose a direct threat to the employee or others in the workplace.

However, the COT reserves the right to take any necessary and appropriate steps, including imposing alternative COVID-19 prevention measures to ensure the individual does not pose a direct threat to the health or safety of others in the workplace.

3. **Time for Submittal** - Requests for Accommodation or Exemption as provided under this policy must be submitted on or before the date described in this policy for compliance with the Vaccination Requirement. Specifically, to be in compliance with this policy and to avoid discipline for failure to comply through proof or attestation of vaccination for each of the 3 Phases described in Section IV(B) above, an employee must:

    a. For Phase I compliance: submit the request for accommodation or exemption on or before **AUGUST 24, 2021.**
    b. Since Phase II specifically involves employees whose requests for accommodation or exemption were denied, Phase II compliance required proof the first dose of either the Pfizer or Moderna vaccine, or the single dose of the Johnson and Johnson vaccine, on or before October 5, 2021.
    c. For Phase III compliance: to avoid termination for failure to comply through proof or attestation of vaccination through the employee's receipt of **both** doses of either the Pfizer or Moderna vaccine or the single dose of the Johnson and Johnson vaccine, the employee must submit a **completed** request for an exemption or accommodation on or before **November 23, 2021**.

E. **Discipline for Failure to Comply** - Failure to comply with the requirements of this policy and the time limits as described above constitutes just cause for discipline; and any employee who fails to comply with this policy is hereby put on notice that progressive discipline will be administered as follows:

1. **Failure to Comply with the Phase I and/or Phase II Vaccination Requirement:** *(i.e., proof of first vaccination shot or timely submittal of request for exemption/accommodation)*: the discipline shall be a five (5) day suspension, without pay. An employee can NOT use any accrued leave during the period of the suspension; the suspension will be imposed without pay.

2. **Noncompliance with the Phase III Vaccine Requirement at 5:00 p.m. on DECEMBER 1, 2021:** Employees who have not come into compliance with the Phase III Vaccine Requirement on or before **5:00 p.m. on December 1, 2021**, will be terminated.

In addition to the described discipline, the COT may establish other requirements for employees who do not satisfy the Phase I and/or Phase II Vaccination Requirements, including but not limited to mandatory testing on a weekly or more frequent basis, enhanced

mask wearing requirements, restrictions on eligibility for certain assignments, travel restrictions, and other requirements.

V. ADMINISTRATION; USE OF LEAVE

A. Vaccination during work hours; leave usage; overtime - Employees may schedule their vaccination shots/appointments during work hours and will not be required to use accrued vacation or sick leave to attend those appointments so long as the time away from work does not exceed ninety (90) minutes and the employee has secured prior department approval for the time away from work. Employees are required to contact their supervisor to coordinate the scheduling of these appointments to avoid disruption of work operations. The City will NOT pay overtime or comp time for an employee's time spent scheduling or securing a vaccination, unless first approved by the employee's department director. In the event that the City Manager provides for pandemic leave that can be used by employees for the purpose of securing a vaccination during non-work hours, then the employee may use that pandemic leave for that purpose subject to the terms and conditions related to that leave usage.

B. Leave for vaccination side effects - The City Manager may establish additional leave benefits, e.g., pandemic leave, that employees may use if they experience side effects from vaccination doses that prevent them from working in the hours/days after receiving the vaccination dose(s). Employees may use those leave benefits under the terms and conditions as separately established by the City Manager. Employees who may experience prolonged side effects that require them to miss work beyond any leave periods that might be eligible for pandemic (or similar) leave may request to use other accrued leave (e.g. sick leave) for that time off from work.

C. Proof of vaccination:

1. Proof of vaccination as required under this policy must be submitted to the City's Human Resources Director. The City will accept the following documentation ONLY:

   a. Written proof of vaccination from a vaccine administrator or as provided via CDC-issued vaccination card or photo image of such documentation. This documentation must include vaccination place, date(s) and your name. This documentation may be submitted digitally/electronically (e.g. by photo image); **or**

   b. An attestation signed by the employee that confirms that the employee has been vaccinated against the COVID-19 virus, in a form as approved by the COT; **or**

   c. Other documentation or employee attestation ONLY if separately provided by written amendment to this policy.

Any employee who submits a false or fraudulent document or attestation in an attempt to show proof of vaccination as required under this policy will be terminated from employment, and may be subject to prosecution for any related criminal offenses (including but not limited to false swearing).

2. Proof of vaccination must be provided to the Human Resources Director by the dates as provided under this policy.

D. Confidentiality - Documentation that is submitted in compliance with this policy – including specifically any proof of vaccination - will be maintained by the City as confidential information in the same manner as a confidential medical record and will be maintained separately from any personnel files. HR will serve as depository for all confidential information related to this policy.

VI. REQUESTS FOR EXEMPTION/ACCOMMODATION

To assist any employee who is disabled or who has a qualifying medical condition that contraindicates the vaccination, or who objects to being vaccinated on the basis of *sincerely held religious beliefs and practices,* the City will engage in an interactive process to determine if a reasonable exemption and/or accommodation can be provided so long as it does not create an undue hardship for the City and/or does not pose a direct threat to the health or safety of others in the workplace and/or to the employee. To request an exemption/accommodation for one of the above reasons and avoid the vaccination requirements as described above, an employee must notify Human Resources in writing and submit the request form (using the form approved by the City and provided as an attachment to this policy) **NOT LATER THAN DATES AS DESCRIBED ABOVE.** Once the City is aware of a timely request for an accommodation, the City will engage in an interactive process to identify possible accommodations that do not create an undue hardship for the City and/or a threat to the health or safety of others in the workplace and/or to the employee. An employee may request an accommodation without fear of retaliation, as further provided below.

Requests for exemption or accommodation that are submitted AFTER AUGUST 24, 2021, will still be processed and reviewed for approval, but will NOT relieve employees from discipline for failure to comply with the Phase I Vaccination Requirement as described above. Any employee who desires to avoid discipline for failure to comply with the Phase I Vaccination Requirement must submit the request for exemption or accommodation NOT LATER THAN August 24, 2021. Any employee who desires to avoid termination for failure to comply with the Phase III Vaccination Requirement must submit a **completed** exemption or accommodation request NOT LATER THAN **November 23, 2021**.

VII. RETALIATION PROHIBITED

ADMINISTRATIVE DIRECTIVE

MANDATORY COVID-19 VACCINATION	NUMBER 2.03-7	PAGE 7 of 6
	EFFECTIVE DATE August 13, 2021 (revised October 27, 2021)	

An employee may request exemption and accommodation from the requirements of this policy as provided under Section VI above without fear of retaliation. No employee who submits a timely request for exemption/accommodation as provided under Section VI above shall be subject to retaliation.

VIII. VIOLATIONS; AMENDMENTS TO POLICY

Failure to provide proof of vaccination or to seek an exemption or accommodation in a timely manner will be a violation of this mandatory policy. Any violation of this policy will result in discipline as described in this policy and in accordance with Civil Service Rules and applicable Administrative Directives.

This policy may be amended, and additional requirements and penalties for noncompliance may be established, by the City Manager.

Forms

COVID-19 AD Acknowledgement Form

COVID-19 Vaccination Attestation Form

COVID-19 Medical Exemption Form

COVID-19 Religious Accommodation Form Request

References

AD 2.05-2 Reasonable Accommodation of Applicants and Employees with Disabilities

Review Responsibility and Frequency

The HR Director will review this directive as needed.

Authorized

City Manager
Michael J. Ortega

Date 10/27/21