



CITY OF
TUCSON
OFFICE OF THE
CITY ATTORNEY

August 30, 2021

Michael S. Catlett
Deputy Solicitor General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
Government Accountability Unit
2005 N. Central Avenue
Phoenix, AZ 85004
Michael.Catlett@azag.gov

Re: Request for Written Response; City of Tucson Ordinance No. 11869, and Governor Ducey's EO 2021-18

Dear Mr. Catlett:

Thank you for the opportunity to respond to your letter dated August 18, 2021 (attached as Exhibit A). In your letter, you ask me to respond to Senator Kelly Townsend's request for investigation (pursuant to A.R.S. 41-194.01, a/k/a SB 1487) of the City of Tucson's Mayor and Council's enactment of Ordinance No. 11869 (the "**Ordinance**") on August 13, 2021 (the "**Complaint**"). The Complaint alleges that the Ordinance violates Governor Ducey's Executive Order 2021-18 (the "**EO**"), and the various statutes he cites in it -- namely A.R.S. §§ 36-787, 36-114, 36-681, and 36-184.

After you sent your letter, Arizona Attorney General Mark Brnovich issued an Opinion that I believe disposes of the issues in the Complaint and establishes that the Ordinance is lawful and enforceable. That Opinion (No. I21-007, dated 8/20/21, the "**Opinion**") is available here:

<https://www.azag.gov/sites/default/files/docs/press-releases/2021/briefs/2021-08-20%20AG%20Opinion.pdf>

Nonetheless, since this Complaint remains open, I am providing this response to help you close your investigation and issue an unambiguous determination that the Ordinance does **NOT** violate Arizona law or the Arizona Constitution.



Facts

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 face discipline in the form of a 5-day suspension without pay. The executed and conformed copy of the Ordinance is attached as Exhibit B for your information.

On August 16, 2021, Governor Ducey issued the EO, a copy of which is attached to this letter as Exhibit C. Obviously, this EO was issued in direct response to the Ordinance. In the EO, Governor Ducey offered his opinion that any city that enacts a vaccine mandate for its employees is in violation of A.R.S. §§ 36-114 and 36-184, and that implementation of such a mandate is punishable as a Class 3 misdemeanor. Through this EO, Governor Ducey also attempted to suggest that A.R.S. § 36-681, section 13 of SB 1824¹ (which bill was passed by the Legislature without an emergency clause), is somehow already in effect and precludes the type of vaccine requirement adopted by Tucson because “the Arizona Legislature. . . have spoken on the issue.”

On August 17, 2021, Sen. Townsend filed her Complaint. The Complaint asked your Office to investigate whether the Ordinance violates the EO, and more specifically whether it violates A.R.S. §§ 36-114, 36-681, and 36-184 (the statutes cited by the Governor in the EO).²

¹ Please note that SB 1824 is already the subject of litigation due to the fact that it was adopted by the Legislature and signed by the Governor in clear violation of the Arizona Constitution. See *Arizona School Boards Association, Inc., et al., v. State of Arizona*, Maricopa County Superior Court Case No. CV2021-012741.

² The Complaint also references § 36-787, but this statute was merely the statute on which the Governor relied for his authority to issue his Order. AG Brnovich, in July, issued an informal opinion – discussed later in this letter – that the Governor does not in fact have authority, under that statute, to preempt local public health measures.

On August 20, 2021, Attorney General Brnovich issued his Opinion, which was directed to Sen. Townsend. In the portions of the Opinion that are relevant to this response³, AG Brnovich determined as follows:

- 1) SB 1824, and specifically A.R.S. § 36-681, which prohibits local jurisdictions from requiring any person to get a COVID-19 vaccine, is not effective until September 29, 2021.⁴
- 2) The other statutes cited by the Governor in the EO don't apply to municipal entities. Instead, A.R.S. § 36-114 applies only to the state – specifically, the Arizona Department of Health Services (AZ DHS) – while § 36-184 applies only to the various county boards of health.
- 3) Employers who are *not* restricted under §§ 36-114 and 36-184 can in fact adopt vaccine requirements for their employees, so long as they include legally required exemptions and accommodations for medical conditions and sincerely held religious beliefs, and so long as they are not themselves “engaged in an EUA activity.”⁵

The City of Tucson is not “engaged in an EUA activity,” and the Ordinance indisputably includes the medical exemptions and disability and religious accommodations described in the Opinion.

Legal Arguments and Conclusion

In light of the facts as stated above, I would appreciate the issuance of an Attorney General determination in response to the Complaint that states definitively and unambiguously that the Ordinance does **NOT** violate Arizona law. Indeed, given the Opinion just recently issued by Attorney General Brnovich, I do not believe that any other response is possible.

Attorney General Brnovich has already recognized that the newly enacted A.R.S. § 36-681 will not be effective until September 29, 2021 (if ever), notwithstanding the

³ Portions of the Opinion relate to matters that are completely outside the scope of the Complaint (e.g., authority of private businesses to require vaccines; rules for common carriers; etc.).

⁴ Again, please note that SB 1824 may *never* go into effect. The bill was enacted in violation of the Arizona Constitution and may be enjoined within the next 2 weeks, before it ever becomes effective.

⁵ This last restriction, relating to the employer being involved in an EUA activity (e.g., administering a vaccine that has only EUA status, rather than full FDA approval status) no longer applies in light of the FDA's full approval of the Pfizer vaccine. Full FDA approval of the other vaccines (Moderna and Johnson & Johnson) is expected to occur within weeks, if not sooner. In any event, the City of Tucson is not engaged in any EUA activity relating to any of the vaccines.

Governor's attempted invocation of that statute as a current limitation on the City's authority. Attorney General Brnovich has also already determined that the other statutes cited by the Governor in his EO 2021-18 apply only to a single state agency (AZ DHS, via § 36-114) and the various county health boards (via § 36-184), which necessarily means that they do not apply to any action taken by a municipal government employer, including but not limited to a charter city such as the City of Tucson.

In other words, the Governor's declaration in EO 2021-18 that a City's vaccine requirement for its own employees is a violation of the cited state laws is entirely void and meaningless.⁶ I would appreciate your confirmation of this determination, particularly in light of the Governor's suggestion that implementation of the City's Ordinance would expose City officials to criminal sanctions.

Additionally, I ask the Attorney General's Office to take note of its own prior opinion regarding the limited scope of the Governor's authority under his emergency powers. Governor Ducey cannot use his emergency powers to preempt local jurisdictions from enacting measures that are within the scope of their own separate legal authority.⁷ The action of the City of Tucson Mayor and Council in enacting the Ordinance was plainly and clearly within its separate legal authority under its own city charter, as specifically articulated in the Ordinance. That charter authority flows directly from the Arizona Constitution, Article 13, Section 2. We've fought that fight before – including recently over the subject of local elections – and there is no need for us to go down that path again. That fact is particularly true here, where the Governor's EO is meaningless on its face, at least insofar as the legislative actions of the City of Tucson's Mayor and Council are concerned, because the statutes that it cites have absolutely no application to the City.

A Final Note on SB 1824

I'm going to conclude this response with a final note on SB 1824, and specifically the portion of it that includes the enactment of the new A.R.S. § 36-681, which on its face prohibits (effective September 29th) a city from adopting any requirement relating to a "vaccine passport" or requiring any person to get vaccinated against COVID-19. I recognize that I am not an official who is authorized to request a formal Attorney General opinion. But I do think that it would be wholly appropriate for your office, in

⁶ EO 2021-18 is somewhat bizarre in that it does not include any executive orders arising out of the Governor's emergency powers, but instead seems to offer his "legal" interpretation of the application of existing Arizona laws, namely A.R.S. §§ 36-114 and 36-184, to the actions of the Tucson Mayor and Council. Of course, the Governor has none of the powers of the judicial branch relating to the interpretation of law; and he should leave the issuance of legal opinions to the Attorney General.

⁷ <https://www.azag.gov/opinions/i21-003-r21-004-r21-005>

Michael S. Catlett

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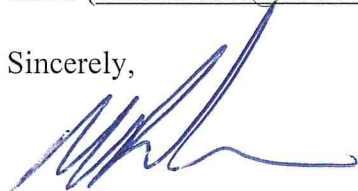
the course of responding to the Complaint, to recognize and determine that the Arizona Legislature and Governor Ducey violated Article IV, Part II, Section 13 (“**Section 13**”) and Article IV, Part II, Section 20 (“**Section 20**”) of the Arizona Constitution by adopting and executing SB 1824 because the question of that bill’s constitutionality is inextricably connected to the issues raised in the Complaint.

I urge you to consider the complaint filed by the plaintiffs in *Arizona School Boards Association, Inc., et al., v. State of Arizona*, Maricopa County Superior Court Case No. CV2021-012741. For related arguments, I urge you to consider the complaint filed by the City of Phoenix in *City of Phoenix v. State of Arizona and Mark Brnovich*, Maricopa County Superior Court Case No. CV2021-012955. I’m happy to send you these pleadings if you cannot find them in the dockets. Each of these actions lays out in compelling detail how a variety of budget reconciliation bills (BRBs), adopted by the Fifty-fifth Arizona Legislature, including but not limited to SB 1824, violated both the “single subject” and “title” requirements of Section 13 and the “single appropriations bill” requirement of Section 20.

I do not believe that there is any legitimate legal argument that SB 1824 is constitutionally sound. It is not, and I am confident that SB 1824, and its purported enactment of A.R.S. § 36-681, will be invalidated by the Arizona courts. I believe that, at a minimum, you should factor this into your consideration of the Complaint.

As always, with respect to SB 1487 complaints, I appreciate the opportunity to respond. I especially appreciate the professionalism of the Attorney General’s Office and its individual attorneys and support staff who engage with our city representatives in addressing these matters. 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 520.668.4888) or email (mike.rankin@tucsonaz.gov).

Sincerely,



Mike Rankin
City Attorney

MR/dg

Atts.: Exhibits A-C

EXHIBIT A

**Michael S. Catlett
Deputy Solicitor General
Letter dated August 18, 2021**



OFFICE OF THE ARIZONA ATTORNEY GENERAL
SOLICITOR GENERAL'S OFFICE

MARK BRNOVICH
ATTORNEY GENERAL

MICHAEL S. CATLETT
DEPUTY SOLICITOR GENERAL

August 18, 2021

By First-Class Mail and Email

Michael G. Rankin
Tucson City Attorney
City Hall
255 W. Alameda
Tucson, AZ 85701
Mike.Rankin@tucsonaz.gov

**Re: Notice of Submission of Legislator Request for Investigation Pursuant to
A.R.S. § 41-194.01; Request for Written Response**

Mr. Rankin:

Enclosed with this letter is a complete copy of a Legislator Request for Investigation under A.R.S. § 41-194.01 (the "Request") regarding the enactment of Ordinance 11869 ("Ordinance") by the City of Tucson (the "City") on August 13, 2021. More specifically, the Request asserts that Ordinance 11869 violates "Executive Order 2021-18, A.R.S. 36-787, A.R.S. 36-114, A.R.S. 36-681 and A.R.S. 36-184." Section 41-194.01 provides that "[a]t the request of one or more members of the legislature, the attorney general shall investigate any ordinance, regulation, order or other official action adopted or taken by the governing body of a county, city or town that the member alleges violates state law or the Constitution of Arizona." With the Request's filing, the Office will now conduct an investigation and prepare a report that, under the statute, must be completed within 30 days. A.R.S. § 41-194.01(A), (B).

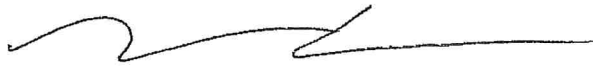
In the report, the Attorney General will reach one of three conclusions. *See id.*, § 41-194.01(B). If the City has not violated any provision of state law or the Arizona Constitution, the Office will take no further action. *Id.*, § 41-194.01(B)(3). If the City may have violated a provision of state law or the Arizona Constitution, the Attorney General will file an action in the Arizona Supreme Court. *See id.*, § 41-194.01(B)(2); *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588 (2017). If the City has violated a provision of state law or the Arizona Constitution, the Office will notify the City in writing and state that the City has 30 days to resolve the identified violation. A.R.S. § 41-194.01(B)(1). If the Attorney General determines that the City failed to resolve the violation within 30 days, the Attorney General will

Michael G. Rankin, Esq.
August 18, 2021
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notify the State Treasurer, who shall withhold and redistribute from the City state shared monies as provided by A.R.S. §§ 45-5029(L) and 43-206(F).

In light of the exigencies of the current circumstances, the Office hereby requests that the City voluntarily provide a written response to the Request by **5:00 p.m. on Wednesday, September 1, 2021.**

Please feel free to contact me if you have any questions.



Michael S. Catlett
Deputy Solicitor General
Government Accountability Unit



Office of Arizona Attorney General
Mark Brnovich

Legislator Request for Attorney General Investigation of
Alleged State-Law Violation by County, City, or Town



How to Submit a Request to Investigate

Under A.R.S. § 41-194.01, one or more members of the Legislature may ask the Attorney General to investigate whether an ordinance, regulation, order, or other official action adopted or taken by the governing body of a county, city, or town violates state law or the Arizona constitution. A request is made by submitting the form on pages 2-3 of this document to the Attorney General's Office (the "Office"). The physical address or email to submit the form is provided on the bottom of page 3.

Upon receiving a request, the Office will open an investigation. A request will not be deemed received, however, and therefore the 30-day investigation period will not start, until all required information is submitted. In addition, a separate request form must be submitted for each separate legal question. An attorney or staff member from the Office will reach out to the contact person identified in the request form to address any issues that prevent the Office from commencing an investigation.

How We Conduct Investigations

After a complete request is deemed received by the Office, the assigned attorney(s) and staff will conduct an investigation during a thirty-day period. The Office generally will contact the county, city, or town for a response to the allegations and any other relevant evidence. At the conclusion of this investigation period, the Attorney General will make a written report of findings and conclusions, including whether the complained-of action violates, may violate, or does not violate state law and the Arizona constitution. Copies of the report will be provided to the member(s) of the Legislature who made the request and other officials listed in A.R.S. § 41-194.01.

If the Attorney General determines the complained-of action violates state law, the Office will then provide notice to the county, city, or town that it has thirty days to resolve the violation. If the violation is not resolved within that timeframe, the Office will notify the Treasurer pursuant to A.R.S. § 41-194.01. If the Attorney General determines that the complained-of action may violate state law, the Office will take steps to obtain a judicial determination of the issue. If the Attorney General determines that the complained-of action does not violate state law, the Office will close the complaint file and take no further action.

How You Can Help Us

To expedite an investigation, please provide as much specific information as possible about the alleged violation, including the specific county, city, or town action that constitutes the violation; the specific state law or Arizona constitutional provision violated; the relevant facts, such as the dates of key events and names of persons with relevant knowledge; and all legal authority you are aware of regarding your allegations. Please also attach any documents or other evidence relevant to your allegations.

Rev. 8-2016



Office of Arizona Attorney General
Mark Brnovich



Legislator Request for Attorney General Investigation of
 Alleged State-Law Violation by County, City, or Town (Continued)

*Identify the member(s) of the Legislature submitting this request for investigation (attach additional sheet if necessary):

Senator Kelly Townsend

*Provide a contact person for communications from the Attorney General's Office regarding this request (may be a Legislator listed above or an employee of the Legislature).

*Name: Kelly Townsend

*Email address: ktownsend@azleg.gov

*Phone number: 602-926-4467

*Mailing address: 1700 W. Washington St.

Phoenix, AZ 85007

*The specific question for the Attorney General to investigate is:

Is the Mayor of Tucson, Regina Romero & the Tucson City Council

in violation of Executive Order 2021-18 by requiring employees to receive a COVID vaccination as a term of employment?

*The name of the county, city, or town that is the subject of this request:

Tucson

*The specific ordinance, regulation, order, or other official action adopted or taken by the governing body of the county, city, or town and the date thereof:

Ordinance No. 11869

August 13, 2021

*The specific Arizona statute(s) and/or constitutional provision(s) with which the action conflicts :

Executive Order 2021-18 , A.R.S. 36-787, A.R.S. 36-114, A.R.S. 36-681 and A.R.S. 36-184



Office of Arizona Attorney General
Mark Brnovich



Legislator Request for Attorney General Investigation of
Alleged State-Law Violation by County, City, or Town (Continued)

*All relevant facts of which you are aware (attach separate sheet if necessary):

see attached ordinance

*All relevant legal authority, including federal and state case law, of which you are aware (attach separate sheet if necessary):

n/a

* Any litigation involving this issue of which you are aware (include case name, number, and court where filed) :

n/a

Check this box if you are attaching supporting documentation.

NOTE: This form and other information submitted to the Attorney General's Office is subject to the public records law, A.R.S. § 39-121 et seq.

I, a current member of the Legislature, verify that I and the other Legislators listed on the previous page (if any) are submitting this request for investigation under A.R.S. § 41-194.01.

*First Name: Kelly *Last Name: Townsend

*Signature: [Signature] *Date: 8/17/2021

Please submit the completed form to:
Arizona Attorney General's Office
Attn: Appeals and Constitutional Litigation/A.R.S. 41-194.01
2005 North Central Avenue
Phoenix, AZ 85004
governmentaccountability@azagov

* required field
Rev. 8-2016

ADOPTED BY THE
MAYOR AND COUNCIL

August 13, 2021

ORDINANCE NO. 11869

RELATING TO PUBLIC HEALTH AND SAFETY AND THE PREVENTION OF 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 AS AN EMPLOYER; AUTHORIZING THE CITY MANAGER TO ESTABLISH HIGHER 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;

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 establish revised requirements relating to employee premiums under the City's health care coverage plan(s); under which employees who fail to demonstrate that they are fully vaccinated against the COVID-19 virus shall be responsible for higher premium payments than employees who choose to provide such proof. Any such 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:

REVIEWED BY:

CITY ATTORNEY

CITY MANAGER

MR/dg
8/12/21

EXHIBIT B

**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.

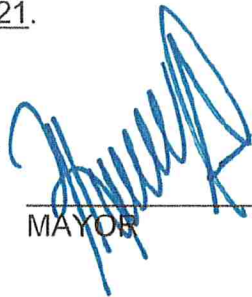
SECTION 4. The Mayor and Council find that the requirements of City employees as approved under this Ordinance and as established under the attached Exhibit A are lawfully imposed under the scope of "management rights" as that term is used in Chapter 14 of the Tucson Code and elsewhere, and hereby declare 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.

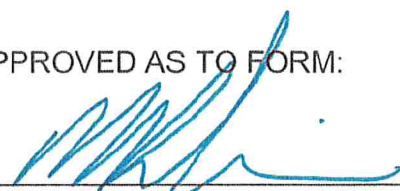


MAYOR


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
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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



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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.



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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



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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



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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.



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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 C

**Governor Doug Ducey
August 16, 2021
Executive Order 2021-18**

GOVERNOR DOUGLAS A. DUCEY

STATE OF ARIZONA

★

EXECUTIVE ORDER

Executive Order 2021-18

Returning to our Principles of Governance

WHEREAS, Article V, Section 4 of the Arizona Constitution, directs that the Governor shall transact all business of the executive branch and ensure that the laws of the state are faithfully executed; and

WHEREAS, Arizona Revised Statute (A.R.S.) § 36-787 gives primary jurisdiction to the state during a public health emergency; and

WHEREAS, A.R.S. § 36-787 provides specific guidelines on when vaccination mandates may be pursued during a public health emergency; and

WHEREAS, A.R.S. § 36-787 does not provide any authority to a city, town or county to implement vaccination mandates; and

WHEREAS, in addition to those laws applicable during a public health emergency, A.R.S. §§ 36-114 and 36-184 limit the imposition of a specific treatment by the government on a person and mandates that violation of such is a class 3 misdemeanor; and

WHEREAS, it is well established law in Arizona that cities, towns and counties have authority granted to them by the constitution and laws of the state, however such cannot be in conflict with state law; and

WHEREAS, unlike the state, cities, towns and counties do not have inherent police power to implement vaccine mandates; and

WHEREAS, even under declarations of emergency, cities, towns and counties have limited authority for the actions they can take; and

WHEREAS, consistent with state law, vaccination passports and mandates have previously been prohibited by executive order; and

WHEREAS, to further clarify the law on this matter, on June 23, 2021 the Arizona State Senate and on June 25, 2021, the Arizona House of Representatives passed Senate Bill 1824, titled: Health; Budget Reconciliation; 2021-2022; and

WHEREAS, Senate Bill 1824 was signed into law on June 30, 2021; and

WHEREAS, Senate Bill 1824 was filed by the Secretary of State under Chapter 409 of Laws, 2021; and

WHEREAS, Section 12 of the bill included an amendment to A.R.S. § 36-672 which unambiguously limits the government from requiring vaccinations for school attendance if the immunization only has an emergency use authorization and requires that any vaccinations required to attend school must be prescribed by the Arizona Department of Health Services through rule; and

WHEREAS, Section 13 of the bill also included a new statute A.R.S. § 36-681 which prohibits the state and any city, town or county from requiring a person to be vaccinated against COVID-19; and

WHEREAS, the Arizona State Legislature, who are duly elected by the people have spoken on this issue; and

WHEREAS, A.R.S. § 23-373, enacted under the Fair Wages and Healthy Families Act known as Proposition 206, provides that earned paid sick time shall be provided for employees when a public health official has determined that the person is a risk to the community's public health whether or not the person has a communicable disease; and

WHEREAS, some local jurisdictions seek to circumvent duly enacted laws in our state and implement their will on that of the people of our state; and

WHEREAS, Article II, Section 2, of the Arizona Constitution declares "governments derive[] their powers from the consent of the governed" and that governments "are established to protect and maintain individual rights."

NOW, THEREFORE, I, Douglas A. Ducey, Governor of the State of Arizona, by virtue of the authority vested in me by the Constitution and laws of the State, do hereby order as follows:

1. Any county, city, town or political subdivision official that implements a vaccine mandate contrary to the authorities outlined in this order, is in violation of A.R.S. §§ 36-114 and 36-184 and such actions are punishable by a class 3 misdemeanor and subject to legal action by individuals for violation of their rights under Arizona law.
2. Any county, city, town or political subdivision official that fails to provide earned paid sick time to an employee if it is recommended that the employee stay home due to exposure to COVID-19, is in violation of A.R.S. § 23-373 and action may be taken by individuals pursuant to A.R.S. § 23-374 in the courts or through the Industrial Commission of Arizona.
3. As this Executive Order is based on law that has been in effect prior to the enactment of Senate Bill 1824, the rights derived by law under these statutes apply to any action taken

by a county, city, town or political subdivision whether or not the action was taken prior to this Executive Order.

4. If any provision of this Executive Order or others associated with it and their application to any person or circumstance is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Executive Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Executive Order are declared to be severable.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona.



Douglas R. Ducey

GOVERNOR

DONE at the Capitol in Phoenix on this sixteenth day of August in the year Two Thousand and Twenty-one and of the Independence of the United States of America the Two Hundred and Forty-Sixth.

ATTEST:

[Signature]

Secretary of State