

**COVID-19 PANDEMIC VACCINATION REQUIREMENTS:
EXECUTIVE SUMMARY FOR CITY OF ASTORIA POLICYMAKERS**

**And Findings and the Amendment to the
TEMPORARY COVID-19 RESPONSE POLICY**

**Adopted Unanimously by the City Council
City of Astoria, Oregon
August 24, 2021**

The Situation and Law

1. The Governor’s Authority

The Oregon Constitution empowers the Governor to declare an emergency and issue executive orders which have force and effect of law. Such orders supersede inconsistent law for the duration of the emergency. ORS 401.192:

(1) All rules and orders issued under authority conferred by ORS 401.165 (Declaration of state of emergency) to 401.236 (Rules) shall have the full force and effect of law both during and after the declaration of a state of emergency. All existing laws, ordinances, rules and orders inconsistent with ORS 401.165 (Declaration of state of emergency) to 401.236 (Rules) shall be inoperative during the period of time and to the extent such inconsistencies exist.

(2) The authority exercised under ORS 401.165 (Declaration of state of emergency) to 401.236 (Rules) may be exercised with respect to the entire territory over which the Governor has jurisdiction, or to any specified part thereof.

(3) When real or personal property is taken under power granted by ORS 401.188 (Management of resources during emergency), the owner of the property shall be entitled to reasonable compensation from the state.

(4) The powers granted to the Governor by ORS 401.165 (Declaration of state of emergency) to 401.236 (Rules) shall continue until termination of the state of emergency. The powers granted to the Governor by ORS 401.185 (Providing temporary housing during emergency) may continue beyond the termination of the state of emergency and shall be terminated by proclamation of the Governor or by joint resolution of the Legislative Assembly.

2. Rules Related to Healthcare Workers

On August 5, 2021, the Oregon Health Authority adopted a Temporary Administrative Order (PH-34-2021, OAR 333-019-1010) which requires healthcare employees who work in healthcare settings to be vaccinated or tested at least weekly. This rule defines “healthcare personnel” broadly to include those who provide direct patient care and those with potential for direct or indirect exposure to patients or infectious materials and including those licensed by a health regulatory board (ORS 676.160) in a “healthcare setting.”

“Healthcare setting” is defined specifically to include ambulances and extends to fire service EMS responders.

On August 19, 2021, the Governor responded to the accelerating emergencies across Oregon. She announced that Oregon’s vaccination requirements for healthcare workers would no longer include a testing alternative. Vaccination will be required for all those subject to the rules. More specifically:

- The OAR pertaining to healthcare workers extends to EMTs, paramedics and those who work in an ambulance service and EMS medical response capacity – particularly those licensed as EMT/paramedic responders. The definitions extend the application of these requirements to firefighters.
- The OAR requires that the City must adopt a policy for requesting and obtaining from every healthcare provider (City firefighters and EMTs) proof of vaccination (and testing records until the test alternative is removed by amendment to this rule); and the City must maintain vaccination records in a confidential health record of employees subject to the OAR.
- The OAR mandates compliance with the rule not later than September 30, 2021.
- Healthcare providers, employers and responsible parties who violate the rule are subject to civil penalties of \$500 per day per violation.

3. Requirements for Teachers

On August 19, 2021, the Governor also announced that the OHA would issue a rule requiring all teachers, educators, support staff, and volunteers in K-12 schools to be fully vaccinated by October 18, or six weeks from FDA approval, whichever is later. It is reasonable to assume that OHA will supplement and amend the OARs the State has adopted, and that the Governor may issue additional executive orders which apply to the schools.

4. Rules Applicable to All State Employees

On August 13, 2021, the Governor issued Executive Order 21-29 which requires that all employees of the State of Oregon Executive Department, not excluded from requirements under the Order, must be vaccinated on or before October 18, 2021. The Order recognizes the possibility that some employees may be able to assert *bona fide* religious tenets protected by the First Amendment or medical conditions which might require accommodation, if possible.

Multnomah County Developments

Multnomah County Chair Kafoury announced on August 20, 2021, that the County would require that all County employees be vaccinated by the end of September 2021. The County policy mandate would conform to the Governor’s orders for healthcare worker vaccination.

The news release stated that any employee who failed to comply with the requirement would be “laid off.”

It is probable that the author of the press release used the “layoff” term ill-advisedly and inappropriately. Layoff customarily means a reduction in force (RIF) in classification for reasons of lack of funds, lack of work, inefficiency, or reorganization. Perhaps the County intends to characterize the situation as involving lack of work for those not fully vaccinated. We would not recommend that Astoria follow suit because this approach could prove problematic under the

City's current labor contracts. Alternatives of administrative separation and discipline are explained below regarding the City's response options discussed in relation to firefighters.

City Considerations

City policy developments adopted by the City Council should be based on Council legislative findings that to do is necessary to protect the public health within the City of Astoria and population served. Such findings may serve to invalidate challenges that employees or unions might advance. *See generally*, discussion of collective bargaining considerations below.

1. Vaccination Requirements and Policy Proposal for Council Consideration

The following addition to the City's **Updated Temporary COVID-19 Response Policy** is offered for your consideration. This proposed revision is tailored by staff and legal counsel narrowly to provide for the protection of children and to address the compelling community need to maintain Lil Sprouts services. This policy integrates the Governor's vaccination orders for healthcare workers including City fire department employees and volunteers as described below.

The City Council rejected restriction of the vaccination requirement to healthcare and childcare employees and adopted the policy vaccination requirement to all City employees not shielded by ORS 433.416. The Council discussion recognized explicitly that individual choice and beliefs are not protected when health and safety of others are at risk, and specifically described *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 US 872 (1990) and passages from Justice Scalia's opinion, which the Council deemed pertinent because public health and the welfare of others protected by vaccination requirements are paramount to personal and religious objection and may be required by governmental authority. Justice Scalia opined, in part:

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"-permitting him, by virtue of his beliefs, "to become a law unto himself," contradicts both constitutional tradition and common sense.

Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.

There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens. See, e.g., [*Sherbert*, 374 U.S., at 403, 83 S.Ct., at 1793-94](#) (religiously motivated conduct may be regulated where such conduct "pose[s] some substantial threat to public safety, peace or order"); [*Yoder*, 406 U.S., at 220, 92 S.Ct., at 1535](#) ("[A]ctivities of individuals, even when religiously based, are often subject to

regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare”).

2. Specific Findings Adopted by the City Council

The City Council made the following findings concerning revision and additions to the **UPDATED TEMPORARY COVID-19 RESPONSE POLICY**:

1. Exigent circumstances dictate immediate decision making and action to update the City’s **Temporary COVID-19 Response Policy** due to the very serious nature of the COVID-19 pandemic and direct threats which the Governor has recognized by declaring a public health emergency.
2. These circumstances call for swift and deliberate action.
3. City policy is adopted to safeguard public health and the well-being of City employees and children enrolled in Lil Sprouts programs, to mitigate the spread of COVID-19, and to establish policy and procedure for City compliance with Oregon law, OHA Public Health Temporary Rules, and Executive Orders issued by the Governor. The Council finds that to do so is necessary based upon COVID-19 infection and death rates, economic lockdowns, and other adverse consequences required to combat the on-going public health crisis and permit sustained Lil Sprouts programs and childcare services deemed essential to parents who must work to sustain families and community services they perform.
4. Delay negotiating about impacts of the Policy revision with an interested union will jeopardize public health or impede compliance with law, and time to do so does not exist. The Council does not intend that this should excuse bargaining obligations if an interested employee union representative seeks to bargain concerning impacts of changes if bargaining is required. Such negotiations can occur on an expedited basis within the time allowed by the Governor to achieve full compliance with COVID-19 related Executive Orders and OHA COVID-19 public health related rules.
5. An emergency is declared to exist. The revision to the City’s **Temporary COVID-19 Response Policy** which the Council adopts this 24th day of August 2021 is effective immediately upon adoption by the City Council.

3. Revision to be incorporated in the UPDATED TEMPORARY COVID-19 RESPONSE POLICY effective August 24, 2021

VACCINATION REQUIREMENTS

The City Council and City Manager will continue to monitor public health and COVID-19 vaccination related practices and mandates adopted in response to pandemic developments and evaluate propriety and necessity of mandating vaccination as condition of employment for groups and classes of City employees, case by case. The City actions to require vaccination is based on Council findings that to do so is necessary to protect health and required when balancing employee and the public interests. City vaccination requirements adopted for all City employees will be mandatory unless a reasonable accommodation is approved, unless the employee is shielded from application of vaccination requirements by ORS 433.416.

Lil Sprouts Academy. The City Council finds that sustained program operations is an essential City service critical to the constituents it serves. These services are important to families and area employers, and significant to the welfare and stability of children. Protection of youth and children are paramount considerations which the City prioritizes. The Governor has determined that

masks and vaccination of those to whom FDA approval now has extended are necessary in schools to protect children under 12, for whom vaccine has not yet been approved.

Consistent with the Governor's order that all K-12 educators, school staff and volunteers be vaccinated and in furtherance of City responsibility and its inherent and reserved management rights, the City will require that all City employees and volunteers who have contact with children through Lil Sprouts Academy program and facilities be fully vaccinated by October 18, 2021.

For the duration of the public health emergency declared by the Governor, City employees and volunteers who have direct or indirect contact with children through Lil Sprouts Academy programs and facilities must be fully vaccinated by October 18, 2021 and must submit proof of vaccination to the Human Resources Manager. Failure to do so will be deemed to constitute disobedience of the requirements of the City policy and work requirements hereby adopted by the City Council.

Firefighters and Healthcare Workers. The City Council finds that:

1. Oregon law established by lawful authority of the Governor and in effect throughout the duration of the COVID-19 public health emergency requires that all "healthcare providers and healthcare staff" of the Fire Department must be fully vaccinated and submit proof of COVID vaccination to the Human Resources Manager no later than September 30, 2021.
2. City employees classified as "healthcare providers and healthcare staff" as defined by the OHA Temporary Order PH-34-2021 must be vaccinated no later than September 30, 2021. (*See*, Section 5 of this Temporary Rule.)
3. The City must and the Human Resources Manager shall adopt administrative vaccination and record-keeping requirements and procedures which comply with requirements including maintaining records of proof of vaccination and proof of City and employee compliance with the Temporary Order and Governor's Executive Order. All employees shall cooperate fully to achieve full compliance efficiently.
4. Testing alternatives to vaccination previously established by Executive Order and OHA rules have been abolished by order of the Governor will not be offered by the City unless the Human Resources Manager determines that to do is a required accommodation in a particular instance.
5. *See generally for more specific guidance*, Sections 3, 4, 5 and 6 of the OHA Temporary Public Health Order which impose and define requirements on Fire Department employees.
6. *Refer also to* definitions stated in Section 2(d) and (e) of the OHA Temporary Order which impose mandates on City paid and volunteer firefighters and residential interns as follows:

"Healthcare providers and healthcare staff" is defined explicitly by the Rule to include "individuals, paid and unpaid working, learning, studying, assisting, observing or volunteering in a healthcare setting providing direct patient care ... or who have the potential for direct or indirect exposure to patients ... or infectious materials, and includes but is not limited to any individual licensed by a health regulatory board as that is defined in ORS 676.160, unlicensed caregivers, ... student and volunteer personnel."

“**Healthcare setting**” is defined to mean “any place where health care ... is delivered and includes but is not limited to any health care facility or agency licensed under ORS chapter 441 or 443, such as ambulances ...” The scope of this broad definition extends to the fire, EMS and rescue service as a whole.

7. The requirements set forth in the OHA Temporary Order and the Governor’s Executive Orders were adopted to respond to the COVID public health emergency. The Governor’s declaration and Executive Orders, and OHA orders and temporary rules have the full force and effect of Oregon law. For the duration of the public health emergency declared by the Governor, the City and all City employees subject to State requirements and policies which the City may adopt periodically, consistent with City Council findings of necessity to protect the public health, must comply with lawful requirements. The City Council finds that failure to do so will constitute a knowing and willful violation of law, disobedience of the Governor’s and OHA’s mandates which have force and effect of law, and disobedience of the requirements of this City policy adopted by the City Council.

All Other City Employees Not Shielded by ORS 433.416. The City Council finds the City and its employees’ obligations extend to acting responsibly and being vaccinated in order to stop the spread, save lives, mitigate the stress on the healthcare system and on healthcare workers, and care for the health and safety of others in necessary human interactions.

The City Council delegates to the Human Resources Manager full authority to further define and develop City policy and procedure as the Human Resources Manager finds appropriate to execute City Council policy hereby adopted, and to ensure that the City and City employees remain compliant with Oregon law now in effect and as it may be revised and updated periodically as circumstances, science and the informed findings of the Governor and OHA evolve. The Human Resources Manager shall do so with the advice of the City Manager and shall inform the Mayor and City Councilors of developments.

Employees required to be vaccinated will be notified by Human Resources Manager. The City will provide either onsite vaccination or a list of other locations where employees may receive the vaccine.

COVID-19 vaccinations are provided without cost. Employees will be paid for time taken to receive vaccinations if it is necessary to do so outside of their scheduled workday. For offsite vaccinations, employees shall work with their supervisors and managers to schedule an appropriate time which does not interfere with City operational requirements and staffing needs.

Employees must provide either proof of vaccination or obtain approval for exemption and accommodation from the Human Resources Manager based on proof of entitlement for an approved exemption based on reasonable accommodation before the stated deadline.

Employees in need of an exemption from policy requirements or mandates imposed on them by State law, due to a medical reason or because of a sincerely held religious belief, must submit a Request for Accommodation with appropriate documentation to the Human Resources Manager. This will initiate an interactive accommodation process. To demonstrate a medical condition that precludes receiving the COVID vaccine, an employee must provide documentation from their established healthcare provider regarding the nature of any impairment(s), the duration of the need for accommodation and the extent to which the impairment(s) conflict with the vaccination requirement. For religious accommodations, the employee must provide an explanation and

documentation of their sincerely held religious beliefs including but not limited to supporting evidence from the religious leader(s) regarding the religious belief that conflicts with participation in medical vaccination.

Requests must be submitted as soon as possible after vaccination deadlines are announced by adoption of City policy and/or by communication from the Human Resources Manager. Employees who seek exemption or accommodation of a disability or *bona fide* religious belief bear the burden of clear proof and persuasion to demonstrate entitlement to the accommodation requested. Accommodations which would result in undue hardship on the City or poses a direct threat to the health and safety of others will not be granted.

To demonstrate that religious accommodation is appropriate if possible, without undue hardship or posing a direct threat to the health and safety of others, an employee must provide sufficient evidence that the employee has a firm, fixed and sincere objection to participating in and receiving vaccination in any form by reason of religious training and belief. This exemption will be narrowly construed in a manner consistent with *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 US 872 (1990), and applicable law.

- “Religious” includes moral and ethical beliefs that have the same force in a person’s life as traditional religious beliefs.
- “Religious” does not include essentially political, sociological, or philosophical views.
- “Training or belief” refers to a source of conviction (experiences and values) that do not allow the employee to accept or submit to vaccination specifically, and equivalent medical treatments. “training and belief” may come from a lifetime of involvement in an organized religion or other comparable life experiences.
- “Participation” in relation to vaccination indicates that the religious objection is based on personal values, not mere objection in opposition to what is regarded as illogical or bad public policy, unlawful or inappropriate exercise of governmental authority.
- “In any form” means that the employee must be opposed to receiving or participating in all vaccinations, not just the COVID-19 vaccination required by the Governor’s Executive Order and OHA administrative rules.

Employees required to be vaccinated by law or by this policy who refuse to do so, or who do not comply with a City request for proof of vaccination will be subject to consequences deemed appropriate in the City’s discretion.

The consequences which the City may impose include but are not necessarily limited to the following:

1. Those who are unvaccinated in violation of the Governor’s Order or OHA rules, will not be qualified for continued employment because they will not possess the essential qualifications to work. Such employees will be subject to termination of employment administratively or by discipline, or both as separate and independent bases for adverse employment action.
2. Such unvaccinated employees may be dismissed administratively and not as discipline from employment for loss of qualification. The City may clarify when this action is taken that such employees will be entitled to reinstatement without back pay when qualification is regained (because the public health emergency no longer exists or when the employee is vaccinated), provided that at that time there is an available and suitable position for the employee to fill. Reinstatement rights do not include displacement of staff hired, transferred, or promoted to maintain operational requirements due to an individual’s administrative termination. (NOTE: *Refer to labor law considerations below.*)

3. Unvaccinated employees may be discharged for misconduct based on noncompliance with law, City policy, and/or job requirements in contradiction of essential job functions and related requirements, which are a serious matter the City legitimately may regard as just cause for discipline.
4. Reinstatement in every situation which stems from an employee's refusal of vaccination shall be without back pay unless the City determines that extenuating and mitigating circumstances justify leniency or special accommodation case-by-case and on a non-precedent setting basis.

4. City Employees Not Defined As Healthcare Workers

The City may establish vaccination requirements for executive, supervisory, union represented and non-represented employees as the City Council or Governor may require. Attached are general descriptions of law and policy considerations in the form of responses to Frequently Asked Questions.

Police support personnel, including 9-1-1 dispatchers, office staff (including records specialist, records & evidence specialist, administrative services manager) and community services officers are not shielded by ORS 433.416. These Police Department employees will not be treated as "police officers." They will be treated in the same manner as other City employees described in the preceding paragraph.

City employees regardless of position and job classification are strongly encouraged to be vaccinated consistent with the overwhelming medical evidence, FDA approval of Pfizer vaccine, the leadership of the President, Governor, OHA, and the overwhelming body of science. If the Governor extends the application of the Executive Order to mandate all public employee or certain City employee vaccination, the requirements of this Policy applicable fire department personnel will by operation of such extension apply with equal force to such City employees.

5. Police Officers

Unless the Governor extends the scope of the emergency Executive Orders to police officers, vaccination mandates the City might adopt will not apply to them because they will remain shielded from any vaccination mandate.

ORS 433.416 continues to apply to police officers. This law states, "**A worker shall not be required as a condition of work to be immunized under this section, unless such immunization is otherwise required by federal or state law, rule or regulation.**"

"Worker" as used in ORS 433.407 to 433.423 includes a law enforcement officer, a corrections officer or a parole and probation officer." ORS 433.407(3).

Included below is data related to police officers and line-of-duty COVID exposures and deaths:

- 65% of police officer line of duty deaths nationwide in 2020 were caused by COVID
- 50.4% of police officer line of duty deaths nationwide in 2021 to date were caused by COVID

The Officer Down Memorial compiles this data. *See*, <http://www.odmp.org/search/year?year=2020>) which includes the following:

Total Line of Duty Deaths:

	212 in 2021	370 in 2020
9/11 related illness	1	14
Aircraft Accident	1	0
Assault	4	1
Automobile crash	14	19
COVID-19	107	241
Drowned	2	4
Duty related illness	3	5
Gunfire	39	45
Gunfire (Inadvertent)	0	5
Heart attack	10	7
Heat Stroke	0	1
Motorcycle crash	3	4
Stabbed	3	0
Struck by vehicle	10	8
Training accident	1	0
Vehicular assault	15	13
Vehicular pursuit	0	2

Greater general information is available through the *Police Executive Research Forum*, which offers resources for law enforcement concerning agency responses to COVID-19 threats, and general guidance. See, <https://www.policeforum.org/covid-19-response#agency>

City police officers are strongly encouraged to be vaccinated consistent with the overwhelming medical evidence, including FDA approval of the Pfizer vaccine. If the Governor extends the application of the Executive Order to mandate police officer vaccination, the requirements of this Policy applicable to fire department personnel will apply with equal force to police officers.

6. Firefighter Paramedics and EMTs, and Firefighter Line Personnel

EMTs and paramedics are licensed through the OHA. Firefighters are within the OAR definition of healthcare personnel. These City employees and the City must comply with the OAR or face the civil fine penalties Oregon as adopted, as well as administrative separation and discipline for reasons described in this Policy. Noncompliance also may constitute separate OrOSHA rule violations.

The City must comply and require Fire Department personnel to comply with Oregon law, including OHA administrative rules and Executive Orders of the Governor.

Other Considerations

We recognize that developments are rapidly evolving. The FDA approved the Pfizer vaccine effective August 23, 2021. This triggers certainty in the Governor's deadline for vaccinations described above.

FDA approval and other circumstances, including initiatives elsewhere across the country and future successes of such measures may lead to reevaluation of Oregon's requirements, including recognition by the Governor that much broader mandates for vaccination, masks and other measures will better protect public health and essential municipal and State services. The City policy as drafted above is intended to preserve it's the City's ability to respond swiftly to developments as they occur.

This Executive Summary relied in part on the Oregon State Fire Marshal advice to Oregon's Fire Chiefs concerning the interpretation, force and effects of current law, as of August 23, 2021. The below quoted Fire Marshal advisory is based upon the Governor's executive orders and OHA administrative rules and does not represent independent State policy or rule.

In a recent email, I shared on behalf of the Oregon Fire Service Coronavirus Response Team (OFCA, OFMA, SDAO, OSFCC, OSFM, general fire service) updates with you on how the new indoor masking and vaccine requirements could apply to the fire service. We want to share a development in requirements for those who qualify as 'health care workers.' Oregon Health Authority (OHA) qualifies a health care worker as anyone who has the potential for direct or indirect exposure to patients or infectious materials. The OHA specifically includes licensed and unlicensed caregivers in their rule language, so most personnel involved as EMS providers may be governed by this rule. Health care workers will be required to be fully vaccinated by October 18th or six weeks after full FDA approval, whichever is later, and will no longer have a weekly testing alternative to vaccinations. Given that the FDA recently approved the Pfizer vaccine this begins the clock for this requirement.

Many of you have voiced concerns over the impact of this requirement to our overall capacity. We are tracking this concern and understand the impacts of this requirement to the fire service. We have voiced this concern and potential impacts with the governor's office multiple times. Given her recent application of this requirement to other sectors, I know that this concern transcends just fire, but we continue to inform and advocate for the fire service at that level.

*The Oregon Fire Service Coronavirus Response Taskforce continues to meet regularly to address these dynamic changes in recommendations and requirements from OHA and OSHA. We appreciate the responses we received thus far and is good grounding as we continue to monitor the situation and may request impacts in the future, **however at this time we are not requesting any further communication or information** however always appreciate any questions you have. The committee meets tomorrow and will be discussing the following:*

- *Timeline for vaccination*
- *Stated exemptions (medical & religious)*

- *FDA approval*
- *Impact to fire service*
- *Impact to Conflagrations and EMAC*

We will work to keep you informed as much as possible.

Collective Bargaining Considerations

The City's obligation to bargain over changes in policy related to the Governor's Executive Orders and OHA rules is limited to bargaining the impacts of those changes. There is no requirement to bargain the City's decision to comply with those orders and change policy because the changes are imposed by the force of law. Rather, the City's obligation is limited to bargaining over the changes in working conditions and issues related to implementation of the policy changes.

When interpreting the scope of the bargaining obligation under Oregon law, the Employment Relations Board (ERB) has adopted the private sector framework for assessing the parties' obligation with mandatory, permissive, and prohibited subjects of bargaining as defined in the Public Employee Collective Bargaining Act (PECBA). Mandatory subjects are those subjects which the parties are obligated to bargain. Permissive subjects are those subjects which the parties may choose but are not obligated to bargain. The parties have no obligation to bargain over a subject which is prohibited.

Prohibited subjects of bargaining are those which require a party to do an illegal act, conflict with statute, or violate the law. *Greater Sweet Home Area Education Ass'n v. Sweet Home School Dist.*, 6 PECBR 4832 (1981); *Petition for Declaratory Ruling Filed Jointly by Corvallis School Dist. 509J and Mid-Valley Bargaining Council*, 13 PECBR 598 (1992). The City and its unions may not bargain to alter the requirements of law, including the Governor's Executive Orders and OHA rules. Any proposal that would conflict with these will be deemed prohibited. Accordingly, the City will not be required to bargain over the decision to change City policy or practices to comply with the Governor's Executive Orders and OHA rules.

The City's obligation to comply with OHA rules and the Governor's Executive Orders does not, however, necessarily relieve the City of its duty to bargain under the PECBA over changes in working conditions designed by the City to satisfy City obligations during the public health emergency. The essence of a *mandatory subject of bargaining* is that it concerns direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment. The duty to bargain extends to mandatory impacts of decisions the City may make when adopting changes in the *status quo*.

In each instance, ERB will analyze the question presented and determine whether the subject of bargaining at issue is among those enumerated in the PECBA. If not, which is the more likely scenario in this instance, then ERB will determine whether the subject has a greater effect on the City's prerogatives than on "wages, hours and other terms and conditions of employment." (This is referred to by ERB as the balancing test to be applied in this situation.)

In this context, it may be that changes and impacts relate to minimum qualifications necessary for employment, which is a permissive subject of bargaining. Even so, ERB might find the impacts of the change (impacts of imposing the vaccination requirement) in this permissive subject to be mandatory and thus subject to a duty to bargain (even though we do not agree that

this view would be correct). The mandatory impacts could include loss of income and employment by administrative termination, discussed above. An employee's eligibility and the process for possible reinstatement, including the role of seniority in that process, could also potentially rise to the level of a mandatory impact triggering an obligation to bargain.

We believe that the contrary argument should be persuasive – that is, that the subject change has a greater effect on City prerogatives and ERB should not regard the subject as mandatory because the employee chose to refuse vaccination and thereby forced the City to choose between complying with State requirements and protecting public health, or otherwise accommodating the employee's desires in ways not required by the ADAAA, Title VII or the First Amendment protections of religion. These decisions will depend greatly upon the way ERB applies the balancing test, the persuasiveness of the City's case, the underlying basis for its policy changes, and the weight and deference ERB gives for the findings and Executive Orders of the Governor.

The City Council's legislative findings could also effectively bolster the arguments and balancing in support of changes in policy by detailing the scope and impact of the public health crisis. Such findings would ideally include reference to the regional statistics on COVID-19 infection and death rates, the impact of the economic lockdown on the City, the effect on City residents of isolation from friends and family, social distancing requirements, face covering mandates, and the many other adverse consequences arising from the need to combat the ongoing public health crisis. The City Council could also specify that it has determined, in the exercise of its managerial and public policy prerogative, that the changes in policy are necessary to meet its responsibility to mitigate the spread of COVID-19 and protect the public, in furtherance of the City's articulated public policy objectives. The City should also consider making specific note of the severity and duration of this global emergency and the impact on the City and its residents. Again, these detailed legislative findings could serve well in addressing any questions that arise regarding the City's balancing of its efforts to combat a public health crisis and any issues raised by individual employees and the unions.

Discipline is a mandatory subject of bargaining. However, this issue has been bargained fully in the articles of each of the City's labor contracts. The City has no obligation to bargain a matter that has already been fully bargained to completion. *OSEA v. Dep't of Human Resources*, 6 PECBR 4658, 4666–4667 (1981). The situations described above should not trigger a valid demand to bargain based on a possible or actual discipline decision or the impacts. Any difference will be resolved through the contractual grievance and arbitration process, which was fully bargained to completion in the City's current labor contracts.

The application of the collective bargaining principles to the firefighters and other employees who are healthcare workers under the Governor's Executive Orders and OHA rules, is relatively straightforward because the vaccination requirement and policy changes are mandated by law. The above referenced ERB authority therefore applies and the decision to implement policy changes to comply with the changes in law does not trigger a duty to bargain over the decision to do so. Instead, there is only an obligation to bargain over the impacts upon mandatory subjects.

Labor bargaining requirements and demands are unlikely to arise in the Parks Department because vaccination compliance has been achieved voluntarily by those concerned.

FAQs -- COVID-19 VACCINATION

1. Can an employer mandate vaccination as a condition of continued employment? Yes, subject to exemptions/exceptions noted below.

a. What are the exceptions? (e.g., health, religious, others?) There are three main categories of exemption: (1) Requirements of labor law under the PECBA and conflicting contracts, if any; (2) health care workers and police officers; and (3) employees/applicants with disabilities or sincerely held religious beliefs. Employees/applicants with disabilities or those with sincerely held religious beliefs may be entitled to reasonable accommodation under the ADAAA and Title VII.

b. How far can an employer inquire into the substance of the claim/proof of exceptions?

Disability. As is true in any request for accommodation under either the ADAAA or Title VII, an employer has the right to evaluate the substance and need for accommodation through an interactive process with the employee conducted in accordance with law and City policy, if any. This may include obtaining medical information from the employee and/or an established healthcare provider to confirm the existence, nature and extent of a disability, and the specific limitations impacting the employee's ability to be vaccinated for COVID-19, and what effective, reasonable accommodations may exist to overcoming such limitations/barriers, absent undue hardship. The result of that process would form the basis for proof of its existence and need.

Religious Belief. In the case of a request for accommodation based upon sincerely held religious belief, practice or observance, the ability to challenge the claim and/or proof of such belief is very limited. There may be those instances where the employer has some clear, objective basis to question the employee belief, in which case best practices (and the employer's policy) dictate proceeding carefully to question the subject employee and request documentation, witness statements, and other supporting information before deciding. Extensive law was developed concerning military waivers for conscientious objectors should be deemed instructive.

2. If an Employer does not require current employees to be vaccinated, can it require vaccinations of new hires as a condition of employment? The City should not adopt a vaccination policy that differentiates among employee groups, positions and classifications unless any such differences are based on rational bases, justifications, and differentiations and are not arbitrary. The City should avoid any distinction that could be deemed arbitrary, such as an offer of employment conditioned on proof of vaccination when the workforce is not subject to a vaccination requirement.

3. For unvaccinated employees, can the employer require the employee to submit to periodic testing such as swabs, temperature, or other tests? Yes, with some limitations. Based on the EEOC's most recent guidance, asking specific, relevant questions and/or taking body temperature of returning employees is permissible. An employer may also administer a COVID-19 test in accordance with the current CDC recommendations; however, according to the EEOC, an employer may not utilize antibody testing for such purpose.

a. Can the Employer require the employee to make separate arrangements for testing on personal, non-work/unpaid time or must it be paid time? Employers can require the employee make separate arrangements for testing on personal, non-work time, but state/federal disability law and best practices instruct that the employer should pay for such testing and the time required.

- b. If the employer requires testing, must the cost of the test be employer paid? Yes, to the extent there is any cost or unreimbursed co-pay.
 - c. Are there any circumstances where the employee could be compelled to pay for testing? We are not aware of such circumstance, unless the employee has intentionally interfered with or sabotaged, or refused to participate as directed in scheduled testing arranged by the employer. The better course is not to dock pay and discipline appropriately for the disobedience and other misconduct.
 - d. Are there limitations on the frequency of testing if it is employee paid or employer paid? Regardless of who pays, the CDC guidelines should be followed, and the testing must be “job-related” and “consistent with business necessity” as the ADAAA requires. Because testing issues and requirements seem to change frequently, we advise continued checking with the [CDC Overview of Testing for SARS-CoV-2 \(COVID-19\)](#). See, Most recent update August 1, 2021 (Revision). The Overview includes relevant guidance concerning “*Considerations for Testing in Different Scenarios – Diagnostic Testing; Screening Testing.*” We are unaware of limitations on an employer’s ability to determine frequency of testing which the employer may elect to require.
 - e. Can the employer require testing of those employees exempt from vaccinations because of health or religious exceptions? Yes, as well as implementing other potential accommodations, including use of face masks, social distancing and/or remote working. In certain work environments, assigning the employee to an isolated work area or modification of the employee’s work schedule to reduce interaction with other employees or customers may be effective and reasonable. As in any workplace decision based on a protected class status, it is important to make sure the decision is non-discriminatory and non-retaliatory.
4. Can the employer restrict out of town travel for seminars, conferences, etc. to those employees who are vaccinated? The assumption would be that such employee could be exposed to, and thereafter infect co-workers upon return to the workplace, and could become infected as an “occupational illness” contracted at work. At the present time, neither the EEOC nor CDC has opined on this question. An employer has the right to change or modify terms and conditions of employment in a non-union environment. Care should be taken to institute such a change in a fashion based on legitimate, non-discriminatory and non-retaliatory considerations and reasonable business justifications not inconsistent with existing employer policies and practices.
5. Can an employer restrict out of town travel for vaccinated employees who wish to attend seminars, conferences, etc., if they are travelling to place where the infection rate exceeds a certain threshold such as number of reported cases, hospitalizations, or other benchmarks? See response to #4. Basing such a restriction on objective criteria such as those mentioned seems unquestionably reasonable.