

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

| | | |
|---|---|-------------------------------------|
| FAITH N. CROCKER, <i>et al.</i>, |) | CIVIL ACTION NO. 22-cv-00757 |
| |) | |
| VERSUS |) | JUDGE HICKS |
| |) | |
| LLOYD J. AUSTIN, III, in his official |) | MAGISTRATE JUDGE HORNSBY |
| Capacity as United States Secretary of |) | |
| <u>Defense, <i>et al.</i></u> |) | |

DEFENDANTS' MOTION TO DISMISS

NOW INTO COURT, through undersigned counsel, come Defendants, who respectfully move this Court to dismiss Plaintiffs' First Amended Complaint (Doc. 12) as to all Plaintiffs, except for Plaintiff Byron Starks whose claims remain subject to a pending Motion to Dismiss previously filed herein. (Doc. 20).

As more particularly set forth in the accompanying Memorandum of Law filed simultaneously herewith, Plaintiffs' claims are moot and must therefore be dismissed.

Respectfully submitted,

BRANDON B. BROWN
United States Attorney

BY: *s/ Jennifer B. Frederick*
JENNIFER B. FREDERICK (#23633)
Assistant United States Attorney
800 Lafayette Street, Suite 2200
Lafayette, LA 70501
Telephone: (337) 262-6618
Facsimile: (337) 262-6693
Email: jennifer.frederick@usdoj.gov

Attorney for Defendants

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

| | | |
|---|---|-------------------------------------|
| FAITH N. CROCKER, <i>et al.</i>, |) | CIVIL ACTION NO. 22-cv-00757 |
| |) | |
| VERSUS |) | JUDGE HICKS |
| |) | |
| LLOYD J. AUSTIN, III, in his official |) | MAGISTRATE JUDGE HORNSBY |
| Capacity as United States Secretary of |) | |
| <u>Defense, <i>et al.</i></u> |) | |

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS**

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF AUTHORITIES | ii |
| BACKGROUND | 2 |
| I. Plaintiffs and Their Requested Relief..... | 2 |
| II. Rescission of the Department of Defense (DOD) and Department of the Air Force (DAF) COVID-19 Vaccination Mandates | 3 |
| ARGUMENT | 6 |
| I. Plaintiffs’ Claims Are Moot..... | 7 |
| II. Plaintiffs’ Claims Are Not Capable of Repetition Yet Evading Review, Do Not Survive Mootness Due to Voluntary Cessation, and Are Not Reasonably Expected To Recur | 9 |
| CONCLUSION..... | 12 |

TABLE OF AUTHORITIES

Federal Cases

| | Page(s) |
|---|---------|
| <i>Alabama ex rel. v. Baxley v. Woody</i> , 473 F.2d 10 (5th Cir. 1973) | 11 |
| <i>Allied Home Mortg. Corp. v. United States HUD</i> , 618 Fed. Appx. 781 (5th Cir. 2015) | 11 |
| <i>Already, LLC v. Nike, Inc.</i> , 568 U.S. 85 (2013) | 10 |
| <i>Amawi v. Paxton</i> , 956 F.3d 816 (5th Cir. 2020) | 6 |
| <i>Boudreaux v. La. State Bar Ass’n</i> , 2022 WL 3154190 (E.D. La. Aug. 8, 2022) | 12 |
| <i>Brach v. Newsom</i> , 38 F.4th 6 (9th Cir. 2022) | 11 |
| <i>Cain v. City of New Orleans</i> , 281 F.Supp.3d 624, 2017 WL 6372836 (E.D. La. Dec. 13, 2017) | 12 |
| <i>Chancey v. Biden</i> , No. 1:220-cv-00110-MW-ZCB (N.D. Fla. Feb. 14, 2023) | 6-7 |
| <i>Clapper v. Amnesty Int’l USA</i> , 568 U.S. 398 (2013) | 12 |
| <i>Creaghan v. Austin</i> , No. 22-0981 (D.D.C. Mar. 10, 2023) | 7 |
| <i>Creaghan v. Austin</i> , No. 22-5135 (D.C. Cir. Mar. 10, 2023) | 1, 6 |
| <i>Dunn v. Austin</i> , No. 22-15286, 2023 WL 2319316 (9th Cir. Feb. 27, 2023) | 1, 6 |
| <i>Fantasy Ranch Inc. v. City of Arlington</i> , 459 F.3d 546 (5th Cir. 2006) | 7, 11 |
| <i>Franciscan All., Inc. v. Becerra</i> , 47 F.4th 368 (5th Cir. 2022) | 11 |

TABLE OF AUTHORITIES

Federal Cases (continued)

| | Page(s) |
|---|----------|
| <i>Genesis Healthcare Corp. v. Symczyk</i> , 569 U.S. 66 (2013) | 6 |
| <i>ITT Rayonier, Inc. v. United States</i> , 651 F.2d 343 (5th Cir. 1981) | 9 |
| <i>Libertarian Party v. Dardenne</i> , 595 F.3d 215 (5th Cir. 2010) | 9, 10 |
| <i>Log Cabin Republicans v. United States</i> , 658 F.3d 1162 (9th Cir. 2011) | 8 |
| <i>Lopez v. City of Houston</i> , 617 F.3d 336 (5th Cir. 2010) | 9, 10 |
| <i>Moore v. Hosemann</i> , 591 F.3d 741 (5th Cir. 2009) | 9 |
| <i>N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York</i> 140 S. Ct. 1525 (2020)..... | 6, 8 |
| <i>Navy SEAL 4 v. Austin</i> , No. 22-5114 (D.C. Cir. Mar. 10, 2023) | 1, 6 |
| <i>Roth v. Austin</i> , No. 22-2058 (8th Cir. Mar. 16, 2023) | 1, 6 |
| <i>Short v. Berger</i> , Nos. 22-15755, 22-16607, 2023 WL 2258384 (9th Cir. Feb. 24, 2023) | 1, 6 |
| <i>Sierra Club v. Lynn</i> , 502 F.2d 43 (5th Cir. 1974) | 11 |
| <i>Sossamon v. Lone Star State of Tex.</i> , 560 F.3d 316 (5th Cir. 2009) | 10 |
| <i>Spell v. Edwards</i> , 962 F.3d 175 (5th Cir. 2020) | 6, 7, 10 |
| <i>Thomas v. Bryant</i> , 938 F.3d 134 (5th Cir. 2019) | 7, 11 |

TABLE OF AUTHORITIES

Federal Cases (continued)

| | Page(s) |
|---|----------------|
| <i>Veasey v. Abbott</i> , 888 F.3d 792 (5th Cir. 2018) | 6 |
| <i>Weinstein v. Bradford</i> , 423 U.S. 147 (1975) | 9 |

Federal Statutes

| | |
|--|---|
| 42 U.S.C. § 2000bb, <i>et seq.</i> | 2 |
|--|---|

Other

| | |
|---|---|
| James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA), Pub. L. No. 117-263, 136 Stat. 2395 (2022) | 3 |
|---|---|

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

| | | |
|--|---|-------------------------------------|
| FAITH N. CROCKER, <i>et al.</i>, |) | CIVIL ACTION NO. 22-cv-00757 |
| |) | |
| VERSUS |) | JUDGE HICKS |
| |) | |
| LLOYD J. AUSTIN, III, in his official Capacity as United States Secretary of Defense, <i>et al.</i> |) | MAGISTRATE JUDGE HORNSBY |
| |) | |

**MEMORANDUM IN SUPPORT OF
DEFENDANTS’ MOTION TO DISMISS**

Defendants move to dismiss the claims brought by Plaintiffs, except Plaintiff Byron Starks whose claims remain subject to a motion to dismiss previously filed separately. Plaintiffs sought to enjoin enforcement of the Air Force’s COVID-19 vaccination requirement. But consistent with a directive from Congress, the Secretary of Defense (SECDEF) has now rescinded that requirement. Implementing guidance precludes disciplining service members who requested exemptions and confirms that unvaccinated service members can actively participate in military missions.

Those developments moot this case: Plaintiffs face no threat of discharge or other adverse consequences for their noncompliance with the now-rescinded vaccination requirement. The Court should therefore dismiss Plaintiffs’ case, as other courts have recently done in materially similar circumstances. *See* Order, *Roth v. Austin*, No. 22-2058 (8th Cir. Mar. 16, 2023); *Navy SEAL 4 v. Austin*, No. 22-5114 (D.C. Cir. March 10, 2023); *Creaghan v. Austin*, No. 22-5135 (D.C. Cir. Mar. 10, 2023); *Dunn v. Austin*, No. 22-15286, 2023 WL 2319316 (9th Cir. Feb. 27, 2023); *Short v. Berger*, Nos. 22-15755, 22-16607, 2023 WL 2258384 (9th Cir. Feb. 24, 2023).

BACKGROUND

I. Plaintiffs and Their Requested Relief

Plaintiffs are six members of the United States Air Force and Air Force Reserve who sought religious exemptions from the Air Force’s COVID-19 vaccination requirement. Plaintiffs filed suit, claiming that the requirement violated the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, the Free Exercise Clause of the First Amendment, and the Administrative Procedures Act. First Amended Complaint (FAC), Doc. 12. They moved for a preliminary injunction barring the Air Force “from applying their facially discriminatory policies against Plaintiffs”; “from applying their practice of . . . systematic denial of religious accommodation requests for COVID-19 vaccination[,] . . . differential treatment of accommodation requests for the COVID-19 vaccination for secular reasons and accommodation requests for religious reasons[,] . . . and retributive or negative action against servicemembers who make or have made religious accommodation requests”; and “from making Plaintiffs’ non-receipt of COVID-19 vaccination or Plaintiffs’ submission of a request for a religious accommodation from COVID-19 vaccination a basis for adverse actions against Plaintiffs, including, but not limited to: separation from service, recoupment of education or training expenses; loss or delay of promotion, training opportunities, or retirement; and loss of bonuses, pay, or benefits.” Motion for Preliminary Injunction (“PI Motion”), Doc. 13, ¶¶ 1-3.

Subsequently, the United States District Court for the Southern District of Ohio issued a preliminary injunction prohibiting the enforcement of the COVID-19 vaccination mandate against members of its certified class; Plaintiffs were treated as members of that class. This Court then denied Plaintiffs’ PI Motion as moot, staying the case for all Plaintiffs, except for Plaintiff Byron O. Starks whose claims are subject to a motion to dismiss previously filed in this Court and pending

review. Order, Doc. 17; *see* Motion to Dismiss, Doc. 20. On March 6, 2023, this Court also denied Plaintiff Crocker’s original motion for preliminary injunction filed on March 28, 2022, requesting similar relief. Order, Doc. 33.

II. Rescission of the Department of Defense (DOD) and Department of the Air Force (DAF) COVID-19 Vaccination Mandates

On December 23, 2022, the President signed the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA), Pub. L. No. 117-263, 136 Stat. 2395 (2022). Section 525 of the NDAA, enacted over the objection of the DoD, and directed SECDEF to rescind the requirement “that members of the Armed Forces be vaccinated against COVID-19 pursuant to the memorandum dated August 24, 2021, regarding ‘Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members.’” 136 Stat. at 2571-72; *see also*, U.S. Dep’t of Def., Transcript: Sabrina Singh, Deputy Pentagon Press Secretary, Holds a Press Briefing (Dec. 7, 2022), <https://perma.cc/EXQ2-FNBN> (stating that SECDEF “support[ed] continuing the vaccine mandate in the NDAA”).

On January 10, 2023, SECDEF issued a memorandum carrying out Section 525 and rescinding the COVID-19 vaccination requirement for military service members. *See* Sec’y of Def. Mem. (Jan. 10, 2023), (Gvmt Ex. 1, Rescission Memorandum). The Rescission Memorandum provides that “[n]o individuals currently serving in the Armed Forces shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds”; that “[t]he Military Departments will update the records of such individuals to remove any adverse actions solely associated with denials of such requests, including letters of reprimand”; and that “[t]he Secretaries of the Military Departments will . . . cease any ongoing reviews of current Service member religious, administrative, or medical accommodation requests solely for exemption from the COVID-19 vaccine or appeals of denials

of such requests.” *Id.* The Rescission Memorandum further states that “[o]ther standing Departmental policies, procedures, and processes regarding immunizations remain in effect,” including “the ability of commanders to consider, as appropriate the individual immunization status of personnel in making deployment, assignment, and other operational decisions, including when vaccination is required for travel to, or entry into, a foreign nation.” *Id.*

On January 23, 2023, the Secretary of the Air Force issued a memorandum that rescinded prior guidance implementing the COVID-19 vaccination requirement specific to the Air Force. Gvmt Ex. 2, Sec’y of Air Force Mem. (Jan 23, 2023). The memorandum states that “[n]o individuals currently serving in the DAF shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious” or other grounds and that “[t]he DAF will update the records of such individuals to remove any adverse actions solely associated with denials of such requests, including letters of reprimand.” *Id.*

The DoD issued updated Force Health Protection Guidance on January 30, 2023, which eliminates vaccination-based travel restrictions, including restrictions on non-mission-critical travel for unvaccinated service members. Gvmt Ex. 3, Under Sec’y of Def. Mem. (Jan. 30, 2023). The guidance also eliminates vaccination-based distinction with respect to other force health protection measures, such as masking, quarantining, and testing. *See id.*

On February 10, 2023, the Chief of the Air Force Reserve issued a memorandum rescinding a prior policy that had limited unvaccinated service members’ participation in the Reserve. Gvmt Ex. 4, Chief of Air Force Reserve Mem. (Feb. 10, 2023). The memorandum states that unvaccinated service members may “participate in accordance with applicable DAF Instructions, policies, and Force Health Protection Guidance” and that COVID-19 vaccination status is no longer a barrier to service in the [Air Force Reserve].” *Id.*

On February 24, 2023, the Deputy SECDEF issued further guidance implementing the rescission of the vaccination requirement. The guidance explains that the SECDEF's Rescission Memorandum "rendered all DoD component policies, directives, and guidance implementing" the vaccination requirement "no longer in effect as of January 10, 2023." Gvmt Ex. 5, Feb. 24, 2023, Deputy SECDEF Memo ("Deputy SECDEF Memo"). "These include, but are not limited to, any COVID-19 vaccination requirements or related theater entry requirements and any limitations on deployability of Service members who are not vaccinated against COVID-19." *Id.* The guidance makes clear that DoD Component "policies, directives, and guidance have not been operative since the January 10, 2023, memorandum was issued" and directs the heads of military components, including the Air Force, to certify in writing that those policies have been formally rescinded "no later than March 17, 2023." *Id.* It further states that the DoD will "continue to respect any applicable foreign nation vaccination entry requirements" but that commanders "will not" otherwise "require a Service member or group of Service members to be vaccinated against COVID-19, nor consider a Service member's COVID-19 immunization status in making deployment, assignment, and other operational decisions, absent establishment of a new immunization requirement" in accordance with a process described in the guidance. *Id.* The guidance states that any new immunization requirement would require high-level review and approval and must be "justified by compelling operational needs" and be "as narrowly tailored as possible." *Id.*

Also on February 24, 2023, the Secretary of the Air Force issued guidance establishing procedures for the removal of adverse actions from the records of service members who failed to comply with the now-rescinded vaccination requirement. Gvmt Ex. 6, Sec'y of Air Force Mem. (Feb. 24, 2023) (detailing procedures for removal of letters of admonishment, counseling, or

reprimand; nonjudicial punishments; referral performance reports; promotion records; and involuntary discharge proceedings).

ARGUMENT

The rescission of the COVID-19 vaccination requirement mooted this case; accordingly, the case should be dismissed. “If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during the litigation, the action can no longer proceed and must be dismissed as moot.” *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (quotations omitted). The Supreme Court has recognized that claims for injunctive relief become moot when what is challenged is amended to give “the precise relief that [the plaintiffs] requested.” *N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020). The Fifth Circuit has made clear that “a case challenging a statute, executive order, or local ordinance usually becomes moot if the challenged law has expired or been repealed. . . . Once the law is off the books, there is nothing injuring the plaintiff and, consequently, nothing for the court to do.” *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020); *see also Veasey v. Abbott*, 888 F.3d 792, 799 (5th Cir. 2018); *Amawi v. Paxton*, 956 F.3d 816, 819, 821 (5th Cir. 2020). Federal appellate courts have recently dismissed appeals from the denial of preliminary relief in cases challenging the military’s now-rescinded COVID-19 vaccination requirement. *See Order, Roth v. Austin*, No. 22-2058 (8th Cir. Mar. 16, 2023); *Navy SEAL 4 v. Austin*, No. 22-5114 (D.C. Cir. March 10, 2023); *Creaghan v. Austin*, No. 22-5135 (D.C. Cir. Mar. 10, 2023); *Dunn v. Austin*, No. 22-15286, 2023 WL 2319316 (9th Cir. Feb. 27, 2023); *Short v. Berger*, Nos. 22-15755, 22-16607, 2023 WL 2258384 (9th Cir. Feb. 24, 2023). Likewise, federal district courts have dismissed as moot related cases since the rescission of the COVID-19 vaccine mandate. *See Chancey v. Biden*,

No. 1:220-cv-00110-MW-ZCB (N.D. Fla. Feb. 14, 2023); *Creaghan v. Austin*, No. 22-0981 (D.D.C. Mar. 10, 2023). This Court should do the same.

I. Plaintiffs' Claims Are Moot.

There is “nothing for [this] court to do.” *Spell*, 962 F.3d at 179. Plaintiffs’ claims are directed at a nullified and rescinded vaccination requirement. Gvmt Ex. 1, Gvmt Ex. 2. “[S]tatutory changes that discontinue a challenged practice are ‘usually enough to render a case moot, even if the [governing body] possesses the power to reenact the statute [or policy] after the lawsuit is dismissed.’” *Thomas v. Bryant*, 938 F.3d 134, 144 n.21 (5th Cir. 2019) (quoting *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 564 (5th Cir. 2006)).

The particular forms of relief requested in plaintiffs’ complaint make clear that this appeal is moot. For example, plaintiffs requested a preliminary and permanent injunction against the mandate and its associated policies as well as an order declaring them unlawful and setting them aside. *See* First Amended Complaint (“FAC”), Prayer for Relief, Doc. No. 12. SECDEF’s Rescission Memorandum not only terminates the vaccination mandate but also makes clear that “[n]o individuals currently serving in the Armed Forces shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious” or other grounds. Gvmt Ex. 1. The Secretary of the Air Force’s January 23 memorandum also terminates the DAF’s correlative vaccine mandate and reiterates the same point, stating that “No individuals currently serving in the DAF shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious” or other grounds.” Gvmt Ex. 2. The Chief of the Air Force Reserve’s February 10 memorandum further makes clear that unvaccinated service members can actively participate in the Air Force Reserve and will not be transferred to the Individual Ready Reserve or placed on no points/no pay status.

Gvmt Ex. 3. Plaintiffs therefore face no concrete prospect of ongoing injury because of their unvaccinated status.

Plaintiffs also request declaratory judgments that the COVID-19 vaccination mandate violates their rights under the First Amendment to the United States Constitution and the Administrative Procedure Act (APA). *Id.* Under the SECDEF Rescission Memorandum and the memoranda from the Secretary of the Air Force and the Chief of the Air Force Reserve, none of the Plaintiffs are subject to the August 2021 vaccine mandate, and none will have a record of discipline or adverse action based on their failure to be vaccinated. Of the six plaintiffs, four—Wayne, Schadwinkel, Potier, and McHaley—had no pending or past adverse action based on the vaccine requirement. Plaintiff Duff received a Letter of Counseling based solely on failure to be vaccinated; however, that has been rescinded and removed from his personnel records. Gvmt Ex. 7, Chaponis Decl. ¶ 3. Plaintiff Crocker received a Letter of Reprimand based solely on her failure to be vaccinated, but that has been rescinded and removed from her personnel records. Vaccination status no longer has any bearing on each plaintiff’s “duties as well as assignment, training, and deployment eligibility.” *Id.* ¶ 4. A judicial ruling as to whether plaintiffs are exempt from a now defunct policy on First Amendment or APA grounds would be an impermissible advisory opinion. *Cf. Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166-68 (9th Cir. 2011) (finding moot a challenge to the military’s Don’t-Ask-Don’t-Tell policy when the policy was repealed by statute after judgment). Because the “precise relief requested in the prayer for relief in their complaint” is not available, plaintiffs’ “claim[s] for declaratory and injunctive relief” are “therefore moot.” *N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020). Accordingly, this case is moot.

II. Plaintiffs’ Claims Are Not Capable of Repetition Yet Evading Review, Do Not Survive Mootness Due to Voluntary Cessation, and Are Not Reasonably Expected To Recur.

No mootness exception applies here. First, plaintiff’s case does not fall within the narrow exception for injuries that are capable of repetition but evading review. That exception applies only if “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.” *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010) (quoting *Weinstein v. Bradford*, 423 U.S. 147 (1975)). Neither requirement is satisfied here. As shown by the long-standing military vaccination requirements that have been in place for decades, a vaccination requirement is, by its nature, not short in duration. *Cf. Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009) (“Election controversies are paradigmatic examples of cases that cannot be fully litigated before the particular controversy expires.”).

First, a military vaccination requirement does not “inevitably expire[]” and thus constrain judicial review. *ITT Rayonier, Inc. v. United States*, 651 F.2d 343, 346 (5th Cir. 1981); *see also Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009) (stating that the exception would apply to cases such as election controversies, which “cannot be fully litigated before the particular controversy expires”). Second, Plaintiffs cannot “show a ‘demonstrated probability,’ not just a ‘theoretical possibility,’ that [they] will be subject to the same government action.” *Lopez*, 617 F.3d at 340 (quoting *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010)). DoD and the DAF have issued numerous policies implementing the rescission of the August 2021 vaccination requirement, and there is no reason to think they will reenact the rescinded requirement. Even if DoD were to issue some new vaccination requirement pursuant to the February 24 memorandum, Gvmt Ex. 5, “merely showing that the government will ‘have an

opportunity to act in the same allegedly unlawful manner in the future’ is not enough to satisfy the second prong of the exception without a reasonable expectation that the government *will* act in that manner.” *Lopez*, 617 F.3d at 341 (quoting *Libertarian Party*, 595 F.3d at 217) (emphasis in original). If the military or the Air Force imposed a new vaccination requirement—for example, a requirement limited to service members deployed to a particular location or “narrowly tailored” to some other “compelling operational need[],” Gvmt Ex. 5, then any challenge to discipline for noncompliance with such a requirement would raise different issues than this case does, requiring a different and individualized analysis for any requests for exemptions. There is no reason to think DoD or the DAF will issue another vaccination requirement that raises the same issues presented here, and the capable-of-repetition exception therefore does not apply. *Cf. Spell v. Edwards*, 962 F.3d 175, 180 (5th Cir. 2020) (finding that it was “speculative[] at best” when the Louisiana Governor “might reimpose” certain COVID-19 stay-at-home orders and thus the capable of repetition yet evading review exception did not apply).

The voluntary cessation exception is likewise inapplicable. The voluntary cessation exception to mootness does not apply. Here, the challenged policy was unambiguously terminated at the direction of Congress (over the objection of DoD), so Defendants did not voluntarily cease, and the exception does not apply. Even if rescinding the mandate at the direction of Congress was “voluntary cessation,” that would still not be sufficient to overcome mootness.

As an initial matter, although “a defendant cannot automatically moot a case simply by ending its [allegedly] unlawful conduct once sued,” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013), government defendants are afforded a lighter burden in that “formally announced changes to official governmental policy are not mere litigation posturing,” *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009), and that “a case can become moot if . . . [a] regulation

expires or is repealed.” *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 376 (5th Cir. 2022). This is because “the government, unlike private litigants, is presumed to act in good faith,” *Allied Home Mortg. Corp. v. United States HUD*, 618 Fed. Appx. 781, 786 (5th Cir. 2015); accord *Brach v. Newsom*, 38 F.4th 6, 12 (9th Cir. 2022) (en banc) (voluntary-cessation exception inapplicable where state “did not rescind its [policy] in response to th[is] litigation”). And this remains true even if the government “possesses the power to reenact” the offending policy “after the lawsuit is dismissed.” *Thomas v. Bryant*, 938 F.3d 134, 144 n.21 (5th Cir. 2019) (quoting *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 564 (5th Cir. 2006)). SECDEF rescinded the August 2021 vaccination requirement because Congress specifically directed him to do so, over the military’s objection. *See supra* pp. 3-6. There is no basis to conclude that the military sought to manipulate the course of this litigation.

Neither are plaintiffs’ alleged injuries “reasonably . . . expected to recur.” *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 376 (5th Cir. 2022). “A hypothetical threat, based on speculative facts, is not enough to support the jurisdiction of a Federal Court.” *Alabama ex rel. v. Baxley v. Woody*, 473 F.2d 10, 14 (5th Cir. 1973). Plaintiffs must show more than “the most speculative of possibilities that [they] will find it necessary in the future to invoke judicial guidance of [an agency’s] activities.” *Sierra Club v. Lynn*, 502 F.2d 43, 67 (5th Cir. 1974). As noted, there is no basis to think that DoD or the Air Force will reimpose the universal vaccination requirement that plaintiffs sought to enjoin. To the extent that the military *might* in the future impose a different or more limited COVID-19 vaccination requirement—itsself a “speculative” contingency that “demonstrate[s] no legal injury sufficient to present an actual case or controversy, *id.*—there is no basis to presume that plaintiffs would be subject to that hypothetical requirement or that their requests for a religious exemption from it would be denied. In fact, courts within the Fifth Circuit

have found that even for government policy changes that may, at first glance, appear to be in response to ongoing litigation, harm “could not reasonably be expected to recur” when the policy is formally revoked with “sincerity . . . reflected in defendants’ decision to rescind” actions taken under the defunct policy. *Cain v. City of New Orleans*, 281 F.Supp.3d 624, 639, 2017 WL 6372836 (E.D. La. Dec. 13, 2017) (finding a New Orleans change in policy sincere when the city revoked the Collections Department’s authority to issue warrants and rescinded all warrants issued for failure to pay fines and fees). Here, the DoD and DAF, taking “swift and thorough corrective action” at Congress’s direction has not only rescinded its vaccination policy but also directed the rescission of all adverse actions issued to individuals based solely on their refusal to be vaccinated. *Boudreaux v. La. State Bar Ass’n*, 2022 WL 3154190 (E.D. La. Aug. 8, 2022); Gvmt Ex 1; Gvmt Ex. 2. At minimum, any challenge to a future vaccination mandate would raise different questions than the now-moot dispute presented here. Attempting to adjudicate its validity now is “too speculative and remote to support standing.” *Boudreaux*, 2022 WL 3154190 (citing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013)).

CONCLUSION

For the foregoing reasons, the Court should dismiss all of Plaintiffs’ claims, except the claim of Byron O. Starks whose claim is the subject of a separate motion to dismiss and terminate this case.

Respectfully submitted,

BRANDON B. BROWN

United States Attorney

BY: s/ Jennifer B. Frederick

JENNIFER B. FREDERICK (#23633)

Assistant United States Attorney

800 Lafayette Street, Suite 2200

Lafayette, LA 70501

Telephone: (337) 262-6618

Facsimile: (337) 262-6693

Email: jennifer.frederick@usdoj.gov

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

| | | |
|---|---|-------------------------------------|
| FAITH N. CROCKER, <i>et al.</i>, |) | CIVIL ACTION NO. 22-cv-00757 |
| |) | |
| VERSUS |) | JUDGE HICKS |
| |) | |
| LLOYD J. AUSTIN, III, in his official |) | MAGISTRATE JUDGE HORNSBY |
| Capacity as United States Secretary of |) | |
| <u>Defense, <i>et al.</i></u> |) | |

ORDER

Considering the Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. 12) as to all Plaintiffs, except for Plaintiff Byron Starks, as moot and the law and evidence being in favor thereof,

IT IS ORDERED that the Motion to Dismiss filed by Defendants is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' claims, **except for the claim of Plaintiff Byron Starks**, are moot and are dismissed, in their entirety, with prejudice.

THUS DONE AND SIGNED this _____ day of _____, 2023 at
Shreveport, Louisiana.

HONORABLE S. MAURICE HICKS, JR.
CHIEF UNITED STATES DISTRICT JUDGE



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JAN 10 2023

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
COMMANDERS OF THE COMBATANT COMMANDS
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019
Vaccination Requirements for Members of the Armed Forces

I am deeply proud of the Department's work to combat the coronavirus disease 2019 (COVID-19). Through your leadership, we have improved the health of our Service members and the readiness of the Force, and we have provided life-saving assistance to the American people and surged support to local health care systems and agencies at all levels of government. The Department has helped ensure the vaccination of many Americans, while simultaneously providing critical and timely acquisition support for life-saving therapeutics, tests, and treatments for COVID-19. We have demonstrated the ability to support and defend the Nation under the most trying of circumstances.

The Department will continue to promote and encourage COVID-19 vaccination for all Service members. The Department has made COVID-19 vaccination as easy and convenient as possible, resulting in vaccines administered to over two million Service members and 96 percent of the Force — Active and Reserve — being fully vaccinated. Vaccination enhances operational readiness and protects the Force. All commanders have the responsibility and authority to preserve the Department's compelling interests in mission accomplishment. This responsibility and authority includes the ability to maintain military readiness, unit cohesion, good order and discipline, and the health and safety of a resilient Joint Force.

On December 23, 2022 the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 was enacted. Section 525 of the NDAA for FY 2023 requires me to rescind the mandate that members of the Armed Forces be vaccinated against COVID-19, issued in my August 24, 2021 memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members." I hereby rescind that memorandum. I also hereby rescind my November 30, 2021 memorandum, "Coronavirus Disease 2019 Vaccination for Members of the National Guard and the Ready Reserve."

No individuals currently serving in the Armed Forces shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds. The Military Departments will update the records of such individuals to remove any adverse actions solely associated with denials of such requests, including letters of reprimand. The Secretaries of the Military Departments will further cease any ongoing reviews of current Service member religious, administrative, or medical accommodation requests solely for exemption from the COVID-19 vaccine or appeals of denials of such requests.



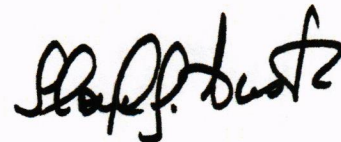
Religious liberty is a foundational principle of enduring importance in America, enshrined in our Constitution and other sources of Federal law. Service members have the right to observe the tenets of their religion or to observe no religion at all, as provided in applicable Federal law and Departmental policy. Components shall continue to apply the uniform standards set forth in DoD Instruction 1300.17, "Religious Liberty in the Military Services."

Other standing Departmental policies, procedures, and processes regarding immunizations remain in effect. These include the ability of commanders to consider, as appropriate, the individual immunization status of personnel in making deployment, assignment, and other operational decisions, including when vaccination is required for travel to, or entry into, a foreign nation.

For Service members administratively discharged on the sole basis that the Service member failed to obey a lawful order to receive a vaccine for COVID-19, the Department is precluded by law from awarding any characterization less than a general (under honorable conditions) discharge. Former Service members may petition their Military Department's Discharge Review Boards and Boards for Correction of Military or Naval Records to individually request a correction to their personnel records, including records regarding the characterization of their discharge.

The Under Secretary of Defense for Personnel and Readiness shall issue additional guidance to ensure uniform implementation of this memorandum, as appropriate.

The Department's COVID-19 vaccination efforts will leave a lasting legacy in the many lives we saved, the world-class Force we have been able to field, and the high level of readiness we have maintained, amidst difficult public health conditions. Our efforts were possible due, first and foremost, to the strength and dedication of our people. I remain profoundly grateful to the men and women of the Department of Defense for their efforts to protect our Force, the Department of Defense community, and to aid the American people.

A handwritten signature in black ink, appearing to read "Mark P. Dunne". The signature is written in a cursive, stylized font.



SECRETARY OF THE AIR FORCE
WASHINGTON

JAN 23 2023

MEMORANDUM FOR DEPARTMENT OF THE AIR FORCE COMMANDERS

SUBJECT: Rescission of 3 September 2021 Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members and 7 December 2021 Supplemental Coronavirus Disease 2019 Vaccination Policy Memoranda

In accordance with the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 Sec. 525 and the Secretary of Defense's 10 January 2023 memorandum, "Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces," I hereby rescind my 3 September 2021 memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members." The "Supplemental Coronavirus Disease 2019 Vaccination Policy" I issued on 7 December 2021 expired, by its own terms on 7 December 2022.

No individuals currently serving in the Department of the Air Force shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds. The Department of the Air Force will update the records of such individuals to remove any adverse actions solely associated with denials of such requests, including letters of reprimand. The Department of the Air Force will cease any ongoing reviews of current Service member religious, administrative or medical accommodation requests solely for exemption from the COVID-19 vaccine or appeals of denials of such requests. Former Department of the Air Force Service members may petition the Air Force Discharge Review Board and Board for Correction of Military Records to individually request a correction to their personnel records, including records regarding the characterization of their discharge. Additional guidance on implementation of the memorandum will be forthcoming, as needed.

I am immensely proud of the work the Department of the Air Force has done to combat COVID-19. The Regular Air Force and Space Force are 99% vaccinated, the Air National Guard and Air Force Reserve are vaccinated at 94.3% and 95.9%, respectively. As a result of this outstanding response by our members, including incredible work by our healthcare professionals, we maintained our worldwide commitments and provided effective support to the nation. A heartfelt thank you to all Airmen and Guardians for your sustained effort—it made a difference.

One Team, One Fight.

A handwritten signature in black ink, appearing to read "Frank Kendall", is positioned above the name.

Frank Kendall

cc:
SAF/DS





PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

JAN 30 2023

**MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
COMMANDERS OF THE COMBATANT COMMANDS
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS**

**SUBJECT: Consolidated Department of Defense Coronavirus Disease 2019 Force Health
Protection Guidance – Revision 4**

Effective immediately, the preamble, executive summary, and sections 1.3, 1.4, 2.1, 3.3, 4.1-4.4, 5.1-5.5, 5.9-5.10, 5.12, 6, 7.1-7.7, and 9 of the "Consolidated Department of Defense – Coronavirus Disease 2019 Force Health Protection Guidance," (August 29, 2022 version) are amended as attached. The complete document with amendments is also available at <https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/Latest-DOD-Guidance/>.

Where applicable, these changes end coronavirus disease 2019 (COVID-19) screening testing based on vaccination status; end the requirement to ask about COVID-19 vaccination status; update protocols for individuals exposed to someone with COVID-19; no longer require workplace occupancy limits for each Health Protection Condition levels; and modify travel guidance.

Components should engage with unions to ensure any bargaining obligations pursuant to chapter 71 of title 5, U.S. Code, are satisfied. Additionally, DoD Components should review in-place agreements and are encouraged to bring any conflicting provisions into compliance at the earliest possible opportunity.

Please direct any questions or comments to the following email address:
dha.ncr.ha-support.list.policy-hrpo-kmc-owners@health.mil.

A handwritten signature in black ink, appearing to read "Gilbert R. Cisneros, Jr.", is located below the email address.

Gilbert R. Cisneros, Jr.

Attachment:
As stated



Attachment

1. The preamble is amended as follows:

This guidance issued by the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) presents a uniform and consolidated DoD policy for the Department's response to the coronavirus disease 2019 (COVID-19) pandemic and serves as the DoD COVID-19 Workplace Safety Plan.¹ Implementation of this guidance will comply with: ~~1) applicable court orders, Presidential directives, and Office of Management and Budget (OMB) and Safer Federal Workforce Task Force guidance; and 2)~~ applicable labor obligations to the extent such obligations do not hinder the DoD Components' ability to carry out their missions during this public health emergency. Prior delegations and exceptions made pursuant to the rescinded references remain valid unless rescinded by the authorizing official. Individual sections of this guidance will be updated as necessary by the USD(P&R). **Commanders and supervisors may implement additional, more stringent requirements with respect to masking and physical distancing, as appropriate, to mitigate risk.**

* * *

Furthermore, this guidance consolidates, incorporates, and rescinds the following policy and guidance:

* * *

- **Assistant Secretary of Defense for Readiness Memorandum, "Continued Implementation of the Occupational Safety and Health Administration Emergency Temporary Standard for Healthcare during the Coronavirus Disease 2019 Pandemic," August 19, 2022.**

2. The Executive Summary is amended as follows:

The DoD is committed to providing safe working environments across the entire DoD enterprise, which consists of an approximately 2.9 million-person global workforce deployed or stationed in nearly 150 countries, including military Service members and their families, and DoD civilian and contractor personnel that work in a highly complex and large number of diverse and unique environments. This force health protection (FHP) Guidance ("Guidance") was developed to protect the DoD workforce, **which consists of Service members, DoD civilian employees,** contractor personnel, other occupants, and visitors (collectively referred to as "personnel") before, during, and after our orderly and final return to the physical workplace ("final reentry"). The Guidance is intended to meet the direction of the President's EOs² and guidance from the Safer Federal Workforce Task Force ("Task Force") and ~~OMB~~**the Office of Management and Budget**,^{3,4} and articulate steps the DoD has been and will be taking to halt the spread of COVID-19. **To ensure consistent application throughout DoD, if the Eos and guidance change, DoD Components will wait for DoD to update this consolidated guidance before implementing any changes.**

* * *

DoD has long recognized the threat posed by pandemics and disease outbreaks and has previously issued guidance, planning, and policy documents to prepare for and respond to such threats. The DoD also recognizes that successfully managing the COVID-19 pandemic requires the flexibility to adapt to changing conditions (e.g., variants, and disease prevalence or virulence) and new information (e.g., evolving best health and safety practices). **DoD continues to promote the importance of taking vaccines and boosters to protect our people against the adverse impacts of COVID-19. The Department also recognizes that wearing high-quality masks, testing, and improved ventilation are other factors to reduce COVID-19 exposure risks.**

3. Section 1.3 is amended as follows:

HPCON level determinations for COVID-19 are based on the CDC COVID-19 Community Levels reported by the CDC,⁸ which include screening levels that make use of new case-rates and health and health care systems-related information. HPCON Levels A, B, and C correspond directly to CDC COVID-19 Community Levels of low, medium, and high **community transmission**, respectively.^{9, 10}

* * *

Footnotes:

⁸ An overview of the CDC COVID-19 Community Levels is available at: <https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html>.

⁹ County Community Levels are available for U.S. States and territories is available at: <https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html>. Find community levels by “State or Territory” and then by “County or Metro Area.” Jurisdictions which are not counties, such as the District of Columbia, also are listed under “County or Metro Area.” The Pentagon is in Arlington County, Virginia.

¹⁰ **The CDC COVID-19 Community Levels do not apply in healthcare settings, such as hospitals and retirement homes. Instead, healthcare settings should continue to use community transmission rates and continue to follow CDC’s infection prevention and control recommendations for healthcare settings, as long as they are more restrictive than FHP guidance.**

Table 1 of section 1.3 is amended as follows:

- a. In the second column under HPCON D, the fifth paragraph is amended as follows:

“Military Health System (MHS) health care capability and utilization (percent and trend): Degradation of MHS capabilities requiring Crisis Status operations; and >95 percent staffed bed occupancy; or >50 percent military medical treatment facility (MTF) staff in isolation or quarantine ~~or unvaccinated~~; or >60 percent staff absent who provide urgent or emergent care; and Local emergency departments on divert or inability of civilian health care to absorb excess MHS patients; or Clinical or appointment capability reduced >60 percent in key departments.”

- b. In the third column under HPCON D:

Item “a” is deleted and the remaining items re-lettered.

~~a. Less than 25 percent of normal occupancy in the workplace, or the minimum required on-site for essential operations that must be conducted in person.~~

A new “f” is added and the remaining items are re-lettered: “f. Schools operated by Department of Defense Education Activity (DoDEA) will operate remotely.”

Footnote 12, associated with item h, is amended as follows: “¹²For information about masking ~~and screening testing~~ at the various HPCON levels, refer to sections 2.1 and 5.3.”

c. In the third column under HPCON C, “a,” “b,” and “c” are deleted and the remaining items re-lettered:

~~a. Less than 50 percent of normal occupancy in the workplace.~~
~~b. Consider limiting visitor access to the installation for non-essential mission-related/operational activities.~~
~~c. Limit social gatherings to less than 50 percent facility/room occupancy.~~

d. In the third column under HPCON B:

Item “a” is deleted and the remaining items re-lettered:

~~a. Less than 80 percent of normal occupancy in the workplace.~~

Item “b” is amended as follows:

a. Reduce potential workplace SARS-CoV-2 exposures through telework, remote work, flexible scheduling, and other methods, as appropriate. Permit liberal telework where possible, especially for individuals who self-identify as immunocompromised or being at high risk for severe disease.

A new “c” is added and the remaining item re-lettered:

c. Each installation and DoD facility will post signage at building entrances and in common areas of DoD owned and controlled facilities and post information on websites as appropriate encouraging individuals, regardless of vaccination status, to consider avoiding crowding, and physically distancing themselves from others in indoor common, areas, meeting rooms, and high-risk settings.

f. In the third column under HPCON A:

Item “a” is deleted and the remaining items re-lettered.

~~a. Less than 100 percent of normal occupancy in the workplace, with telework as appropriate.~~

Item “d” is amended as follows:

“c. DoDEA schools will operate following CDC recommendations and guidelines specific to schools as implemented in operational procedures and guidance from the Director, DoDEA.¹³ ~~Children are not required to mask.~~ Any DoD guidance that is more stringent than CDC guidance must be followed.”

Footnote added to “d”:¹³ <https://www.dodea.edu/covid-operations.cfm>.

4. Section 1.4 is amended as follows:

1.4. ~~TELEWORK~~ ~~WORKPLACE OCCUPANCY LEVELS WITHIN THE HPCON FRAMEWORK.~~

~~Workplace occupancy limits for each HPCON level are included as measures in Table 1. The workplace occupancy levels in Table 1 are ceilings, not goals. Reduced workplace occupancy may be achieved through telework, remote work, flexible scheduling, and other methods, as appropriate.~~

At HPCON A or higher, or when a DoD civilian employee is required to remain out of the workplace under section 5.5, DoD Components are granted an exception to policy from Enclosure 3, Paragraph 3.j.(2) of Department of Defense Instruction 1035.01, “Telework Policy,” and may allow DoD civilian employees to telework with a child or other person requiring care or supervision present at home. DoD civilian employees must still account for work and non-work hours during their tour of duty and take appropriate leave (paid or unpaid) to account for time spent away from normal work-related duties to care for a child or other person requiring care or supervision.

DoD Component heads have the authority to grant exemptions for workplace occupancy limits that are required for national security and the success of critical missions. DoD Component heads, other than the Secretaries of the MILDEPs, may delegate this workplace occupancy limit authority in writing to a level no lower than a general/flag officer or Senior Executive Service (SES) member (or equivalent). Secretaries of the MILDEPs may delegate workplace occupancy limit exemption authority in writing to a level no lower than an O-6 installation commander. The DA&M has workplace occupancy limit exemption authority for all DoD Components located on the Pentagon Reservation and other facilities within the National Capital Region managed by Washington Headquarters Services. This authority may be delegated at the discretion of the DA&M. DLA has workplace occupancy limit exemption authority for four locations.¹⁴ When considering a workplace occupancy limit exemption, those with exemption authority must take into account the ability to maintain distance between personnel and other public health and workplace safety measures contained in this Guidance.

A record of all workplace occupancy limit exemptions will be retained by the exemption authority for the duration of the pandemic and until returning to HPCON 0 and provided for awareness to the public health office concerned and to the installation commander, if different from the exemption authority. FHP measures and other

~~appropriate mitigation measures shall be used rigorously in all areas and especially in areas for which an occupancy exemption has been grant.~~

¹⁴~~DLA Land & Maritime (Columbus, OH), DLA Distribution HQ (New Cumberland, PA), DLA Aviation (Richmond, VA), and DLA Distribution (San Joaquin, CA).~~

5. *Title of section 2 and section 2.1 are amended as follows:*

SECTION 2: ~~VACCINATION VERIFICATION AND MEASURES BASED ON~~ ~~VACCINATION STATUS~~

2.1. ~~VACCINATION – GENERAL AND TESTING REQUIREMENTS.~~

Leaders at all levels should encourage Service members, DoD civilian employees, DoD contractor personnel, and others affiliated with DoD to be up to date on their COVID-19 vaccinations.

1. Service members:

Service members (members of the Armed Forces under DoD authority on active duty or in the Selected Reserve, including members of the National Guard) are strongly encouraged required to be fully vaccinated against up to date with COVID-19 vaccination, including booster doses ~~subject to any identified contraindications, any administrative or other exemptions established in DoD policy, and any applicable court orders.~~

To ensure an accurate medical record, Service members' vaccination status will be validated-maintained utilizing their Military Service-specific Individual Medical Readiness (IMR) system. If a Service member has been vaccinated against COVID-19 outside the military health system, that Service member must ~~show official proof~~ provide documentation of his or her COVID-19 vaccination ~~status~~ to update the IMR system.

~~Once the applicable mandatory vaccination date has passed, COVID-19 screening testing is required at least weekly for Service members who are not fully vaccinated, including those who have an exemption request under review or who are exempted from COVID-19 vaccination and are entering a DoD facility located in a county or equivalent jurisdiction where the CDC COVID-19 Community Level is high or medium. Service members who are not on active duty and who also are DoD civilian employees or DoD contractor personnel must follow the applicable requirements in section 2.3 for DoD civilian employees or in section 2.4 for DoD contractor personnel.~~

2. DoD civilian employees:

* * *

~~At least weekly COVID-19 testing is required for those DoD civilian employees who are not fully vaccinated when the CDC COVID-19 Community Level is high or medium in the county or equivalent jurisdiction where the DoD facility is located. DoD civilian employees who are not fully vaccinated and who telework or work remotely on a full-time basis are not subject to weekly testing, but must provide a negative result (from a test performed within the prior 72 hours) for entry into a DoD facility located in the county where the COVID-19 Community Level is high or medium.~~

~~* * *~~

~~If they have not already done so, supervisors of DoD civilian employees must ask DoD civilian employees whether they are fully vaccinated. Employees who indicate they are fully vaccinated must provide proof of that vaccination status to their supervisors. Acceptable proof includes:~~

- ~~a. A copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813_r, published on September 3, 2020);~~
- ~~b. A copy of medical records documenting the vaccination;~~
- ~~c. A copy of immunization records from a public health or State immunization information system; or~~
- ~~d. A copy of any other official documentation containing the data points required to be verified by the supervisor.~~

~~When necessary for implementing FHP measures related to workplace access in section 5.5, supervisors of DoD civilian employees may ask DoD civilian employees whether they are up to date with COVID-19 vaccinations. If there is a supervisory concern about the accuracy of the DoD civilian employee's response, DoD civilian employees are required to provide proof of up-to-date vaccination status. Supervisors must not inquire about disabilities when asking DoD civilian employees about up-to-date vaccination status.~~

~~* * *~~

3. DoD contractor personnel:

~~Vaccination requirements for DoD contractor personnel are outlined in several references.¹⁶ In implementing EO 14042, the DoD will comply with all relevant court orders.~~

~~Onsite DoD contractor personnel will complete the DD Form 3150, "Contractor Personnel and Visitor Certification of Vaccination";¹⁷ maintain a current completed copy; and show it to authorized DoD personnel upon request when they work at a DoD facility where the CDC COVID-19 Community Level is high or medium. Failure to complete the DD Form 3150 may result in denying DoD contractor personnel access to the DoD facility to which access is sought. Onsite DoD contractor personnel who are not fully vaccinated against COVID-19, because they are not performing under a covered contract that requires COVID-19 vaccination, due to a legally required accommodation, or who decline~~

~~to provide information about their COVID-19 vaccination status, will be subject to COVID-19 screening testing at least weekly when the CDC COVID-19 Community Level for the facility in which they work is high or medium. DoD contractor personnel who refuse required COVID-19 screening testing will be denied access to DoD facilities.~~

~~For purposes of the requirements regarding providing information about vaccination status and screening testing, “contractor personnel” are those individuals issued a credential by DoD that affords the individual recurring access to DoD facilities, classified herein as “credentialed recurring access” (CRA) (e.g., Common Access Cardholders) who are performing under a contractor or subcontract between their employer and the DoD. “Contractor personnel” do not include employees of DoD contractors or subcontractors receiving ad hoc access to DoD facilities (e.g., delivery personnel, taxi services) or employees of DoD contractors or subcontractors who have access to the grounds of, but not the buildings on, DoD installations (e.g., contract groundskeepers, fuel delivery personnel, household goods transportation personnel).~~

DoD Components should not take any steps to require contractors and subcontractors to implement the vaccination requirement for contractor personnel in Executive Order 14042, nor should they include in new solicitations or enforce in existing contracts (or task orders or delivery orders) any clauses implementing EO 14042.

¹⁶ Safer Federal Workforce Task Force, “COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors,” September 24, 2021; Principal Director for Defense Pricing and Contracting Memorandum, “Class Deviation 2021-00009 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors,” October 1, 2021; EO 14042, “Ensuring Adequate COVID Safety Protocols for Federal Contractors,” September 9, 2021.

¹⁷ <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd3150.pdf>.

4. Official visitors:

“Official visitors” are non-DoD individuals seeking access, one time or recurring, in association with the performance of official DoD business (such as to attend a meeting), but who do not have “credentialed recurring access” (CRA) (e.g., Common Access Cardholders). “Official visitors” do not include personnel receiving ad hoc access to DoD facilities (e.g., delivery personnel, taxi services); individuals who have access to the grounds of, but not the buildings on, DoD installations (e.g., contract groundskeepers, fuel delivery personnel, household goods transportation personnel); personnel accessing DoD buildings unrelated to the performance of DoD business (e.g., residential housing); or personnel accessing DoD facilities to receive a public benefit (e.g., commissary; exchange; public museum; air show; military medical treatment facility; Morale, Welfare, and Recreation resources).

~~Official visitors will complete DD Form 3150; maintain a current completed DD Form 3150; and show it to authorized DoD personnel, upon request when they are visiting a DoD facility where the CDC COVID-19 Community Level is high or medium. Failure to complete the DD Form 3150 may result in denial of an official visitor’s access to the DoD facility to which access is sought. Service members not on active duty or active duty for training are also subject to the requirements in this paragraph.~~

~~When visiting a DoD facility where the CDC COVID-19 Community Level is high or medium, official visitors who are not fully vaccinated against COVID-19, or who decline to provide information about their vaccination status, must show an electronic or paper copy of negative results from an FDA-authorized or approved COVID-19 test administered no earlier than 72 hours prior to their visit. If unable to show a negative COVID-19 test result, the official visitor may be provided onsite self-testing, if available, or will be denied access to the DoD facility (or facilities) to which access is sought. Service members who are not on active duty or on active duty for training at the time of their official visit are subject to the requirements in this paragraph.~~

6. *Section 3.3 is amended as follows:*

* * *

DoD contractor personnel suspected of having contracted COVID-19, or for whom testing is required for workplace surveillance or official travel, may be offered screening testing, subject to available funding, if such testing is necessary to support mission requirements and is consistent with applicable contracts. ~~For example, if testing is explicitly called for under the contract; or if testing is required to access a DoD facility and the contractor personnel must access the DoD facility to perform under the contract. DoD contracting officers may also modify existing contracts to require contractors to test their personnel, or to permit DoD to test their personnel, as necessary to support mission requirements and subject to available funding.~~

7. *Section 4.1 is rescinded.*

8. *Section 4.2 is amended as follows:*

* * *

- Contact tracing of confirmed COVID-19 positive cases to infected persons, as described in section 4.4 in accordance with all applicable Federal, State, local, and DoD requirements.

9. *Section 4.3 is amended as follows:*

* * *

- DoD Components may, in consultation with public health advisors, conduct surveillance and screening testing of Service members to reduce risk in select high-risk congregate settings, on ships, at training sites, during events, or in remote locations where early identification, isolation, and quarantine are important.

Screening testing protocols may involve testing of all Service members prior to participation in an event (such as an exercise or training evolution) with or without testing during the event. Finally, screening testing may be performed using a surveillance protocol in which a specified percentage of randomly selected Service members are tested during regular intervals over a period of heightened vulnerability such as when case rates are very high or medical resources are in high demand.

1. **Execute the screening testing requirement with FDA approved or authorized COVID-19 self-collection kits or self-tests. Testing should be performed primarily onsite at the installation or facility with proper supervision and documentation of testing results. If onsite COVID-19 screening testing is not feasible, as an alternative self-testing may be performed at home or in other locations. (Note: these COVID-19 self-tests do not require a health care provider's clinical care order and are, therefore, considered an over-the-counter test and do not require medical support to complete).**
 2. **Establish guidance for where and how these tests will be distributed and conducted, and how results are to be reported.**
 3. **After COVID-19 screening testing procedures are established, Service members subject to screening testing are required to have a negative COVID-19 screening test result for entry into a DoD facility. If the COVID-19 screening test is administered onsite, the test will be administered before Service members go to their work areas. Service members who have tested positive and do not have symptoms are exempted from regular screening testing for 30 days following the documented date of their initial positive test of COVID-19. Documented proof of this positive test date shall be provided upon request.**
- Voluntary testing of eligible family members, DoD civilian employees, and DoD contractor personnel (if appropriate and permitted in accordance with applicable contracts) who, if infected with COVID-19, could impact the DoD workforce and missions, may be conducted in support of the DoD's effort to interrupt transmission of the virus among our populations. Testing will be conducted based on availability and managed at the DoD Component level. **DoD civilian employees and DoD contractor personnel with CRA with positive COVID-19 screening tests will be offered, but not required to take, FDA approved or authorized confirmatory laboratory-based molecular (i.e., polymerase chain reaction) testing paid for by the relevant DoD Component. Contact tracing and mitigation measures will be conducted in accordance with sections 4.4 and 5.5.**

10. Section 4.4 is amended as follows:

4.4. COVID-19 CONTACT TRACING AND TESTING.

~~DoD Components will conduct contact tracing on all COVID-19 cases identified through testing activities and prioritize investigation of COVID-19 cases, clusters, and outbreaks involving high-risk congregate settings, unusual clusters of cases, and considered for novel or emerging variants that pose a significant risk for severe disease, hospitalization, or death. Follow-on quarantine or isolation measures and testing will be implemented as indicated.~~
DoD Components will conduct contact tracing on all COVID-19 cases identified in health care settings and certain high-risk congregate settings, unusual clusters of cases, and cases involving novel or emerging variants that pose a significant risk for severe disease, hospitalization, or death. In identifying certain settings in which to conduct contact tracing, DoD Component public health emergency officers should consider data reported to local and State public health entities and surveillance programs administered by the DoD and other Federal agencies.

11. Section 5.1 is amended as follows:

* * *

- ~~Avoid close contact (within 6 feet of any individual for a total of 15 minutes or more over a 24-hour period) with people.~~
- Consider exposure risks.

* * *

- ~~Launder or replace masks regularly.~~ Use dry, clean masks to promote good hygiene.

* * *

~~b. Installations will post signage about specific measures applicable to the installation, such as mask wearing and physical distancing requirements, and on installation websites, as appropriate.~~

12. Section 5.2 is rescinded.

13. Section 5.3. is amended as follows:

* * *

- When the CDC COVID-19 Community Level¹ is high in the county or equivalent jurisdiction where a DoD installation or facility is located, indoor mask-wearing is required for all individuals, including Service members, DoD civilian employees, onsite DoD contractor personnel (collectively, “DoD personnel”), and visitors, regardless of vaccination status. **Each installation and DoD facility will post signage at building entrances and in common areas of DoD owned and controlled facilities when the CDC COVID-19 Community Level is high indicating that masks are required.**

* * *

- Individuals may choose to wear a mask regardless of the **CDC** COVID-19 Community Level.

* * *

11. When individuals are enrolled in a respiratory protection program and are wearing a respirator during the performance of duties requiring respiratory protection. **Components that want to distribute N95 respirators to personnel must follow an OSHA respiratory protection program.**

* * *

d. Transportation: ~~All individuals must wear a mask on DoD aircraft, boats and other maritime conveyances, and buses traveling into, within, or out of the United States, and indoor DoD transportation hubs, regardless of vaccination status and the CDC COVID-19 Community Levels. Masks are optional in outdoor areas of these conveyances (if such outdoor areas exist on the conveyance) or while outdoors at transportation hubs, if these areas are uncrowded. Masking requirements apply whether the DoD aircraft, boats and other maritime conveyances, and buses are located inside or outside the United States, but exclude these conveyances and other tactical vehicles and craft in their operational environment. It is recommended that individuals wear a mask in Government cars, vans, or other low occupancy transportation assets, regardless of the CDC COVID-19 Community Level.~~ **It is recommended that all individuals wear masks on DoD conveyances (e.g., aircraft, maritime vessels, and buses) and in Government cars, vans, or other low occupancy transportation assets when more than one person is present.**

e. Notwithstanding the above, ~~and regardless of the CDC Community Level, masks must be worn by~~ **masking of patients, visitors, and** personnel working in DoD health care facilities (including military medical, dental, and veterinary treatment facilities) **will occur** in

¹ See section 1.3 for information about CDC COVID-19 Community Levels.

accordance with ~~requirements specified in 29 CFR § 1910.502 and in accordance with OSHA and CDC guidelines.~~²² ~~Masks will be worn by visitors and patients to DoD military medical and dental treatment facilities except while undergoing medical examinations or procedures that interfere with those activities.~~

Footnote added: ²² “Interim Infection Prevention and Control Recommendations for Healthcare Personnel During the Coronavirus Disease 2019 (COVID-19) Pandemic,” September 23, 2022. Available at: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html>.

14. Section 5.4 is amended as follows:

* * *

Management of Close Contacts of a Case ~~(as determined by contact tracing)~~:²³

- ~~Quarantine is not required for Service members who are close contacts and who are up-to-date with an FDA licensed or authorized COVID-19 vaccine, or a World Health Organization Emergency Use Listing COVID-19 vaccine. Regardless of vaccination status,~~ Close contacts identified through contact tracing or through exposure must wear a mask around others indoors for 10 days, even if mask wearing is not otherwise required by DoD guidance, ~~and if practical,~~ Service members in the workplace must test on day at least once after 5 full days following exposure. If symptoms develop, then the individual must get tested and isolate until test results are complete.
- ~~Close contact Service members who are not up-to-date with the COVID-19 vaccine must quarantine for 5 days. The Service member should wear a mask at all times when around other individuals, regardless of those individuals' vaccination status, and even if mask wearing is not otherwise required by DoD guidance. Testing should occur on day 5 after exposure. If no symptoms develop, quarantine may end after 5 days, but the Service member must continue to wear a mask around others for an additional 5 days (i.e., masks must be worn for a total of 10 days after exposure, including the time in quarantine). If any symptoms develop at any time, the individual should be tested for COVID-19 and advised to isolate.~~
- ~~Exceptions to the above protocols for asymptomatic Service members with potential exposure based on close contact who are not fully vaccinated, and whose presence is required in the workplace, may be considered in cases of mission-essential activities that must be conducted on site. This exception may be granted in writing by the first general/flag officer, SES member, or equivalent, in the chain of command/chain of supervision or, for those locations that do not have general/flag officers or SES leaders, by O-6 installation commanders. Vaccination status of the Service member should be considered in granting an exception, as more risk will be assumed in granting an exception for a Service member who is not fully vaccinated. Service members who develop signs or symptoms consistent with COVID-19 during the duty period, he/she will be ordered to return to quarters and provided instructions for compliance with this guidance. Service members granted an exception must comply with the following practices for 5 days after the last exposure:~~

- ~~○ Obtain a COVID-19 test on calendar day 5;~~
- ~~○ Conduct daily COVID-19 symptom screening with temperature checks;~~
- ~~○ Wear a mask in the workplace for 10 calendar days after exposure, even if mask wearing is not otherwise required by DoD guidance;~~
- ~~○ Practice hand and cough hygiene;~~
- ~~○ Refrain from sharing headsets or other objects used near the face;~~
- ~~○ Continue to physically distance as much as possible; and~~
- ~~○ Clean and disinfect their workspace daily~~
- In all situations, for a full 10 days after ~~last contact with a confirmed case~~ exposure, Service members must continue to self-monitor, and practice strict adherence to all non-pharmaceutical intervention mitigation strategies, and, ~~if not fully vaccinated~~, wear masks, avoid crowds and practice physical distancing, hand and cough hygiene, maintain adequate indoor ventilation, and perform environmental cleaning and disinfection. In addition, Service members located outside the United States identified as close contacts must follow host-nation policies, as applicable.

~~Testing Quarantined Individuals Who Develop Symptoms:~~

~~Test eligible Service members in quarantine who develop symptoms commonly associated with COVID-19.~~

- ~~• If laboratory positive: The Service member becomes a case and must be isolated (see above).~~
- ~~• If laboratory negative: The Service member must continue to follow procedures for quarantine as outlined above.~~

* * *

- If Service members become symptomatic during this time frame (~~whether or not they are a close contact of a case~~) they must self-isolate immediately and ~~be evaluated by a health care provider~~ retest to determine if they ~~may~~ have been re-infected with SARS-CoV-2 or if symptoms are caused by another etiology. Isolation ~~may be warranted during this time is required~~, particularly if symptoms developed within 10 days after ~~close contact exposure~~ with to an individual who has contracted COVID-19.

* * *

~~Contacts of Contacts: There is no indication to quarantine asymptomatic Service members who are contacts of contacts; they should continue to self-monitor for symptoms.~~

15. Section 5.5 is amended as follows:

* * *

b. ~~Regardless of COVID-19 vaccination status, p~~Personnel who test positive for COVID-19 will remain out of the workplace for 5 days ~~(day 0 is the day symptoms started or date of specimen collection if asymptomatic). To calculate the recommended time frames, day 0 is the day tested if no symptoms, or the date symptoms started. Personnel who test positive for COVID-19 Individuals~~ may return to the DoD workplace ~~after 5 days~~, if either: (1) they have no symptoms; or (2) if they are ~~afebrile fever-free~~ for more than 24 hours ~~(without the use of fever-reducing medication)~~ and any remaining symptoms are resolving. Mask wearing must continue in the workplace for an additional 5 days (for a total of 10 days post-positive result), even if mask wearing otherwise is not required by DoD guidance.

c. Personnel ~~with potential exposure exposed~~ to COVID-19 ~~based on close contact with a person who has a laboratory confirmed, clinically diagnosed, or presumptive case of COVID-19~~ will notify their supervisor.

1. ~~Asymptomatic personnel with potential exposure to COVID-19 based on close contact who are: (1) not fully vaccinated; or (2) are not up-to-date with the COVID-19 vaccine will remain out of the workplace for 5 days. Regardless of vaccination status,~~ ~~a~~Asymptomatic personnel ~~with potential exposure exposed~~ to COVID-19 ~~close contact~~ must wear a mask in the workplace for 10 days, even if mask wearing otherwise is not required by DoD guidance.

2. ~~In cases of mission-essential activities that must be conducted on site, asymptomatic personnel with potential exposure to COVID-19 based on close contact, who otherwise would need to remain out of the workplace, may be granted an exception to continue to work on site provided they remain asymptomatic, do not have a positive test for COVID-19, and comply with the following key practices for 5 days after the last exposure:~~

- ~~Obtain a COVID-19 test on day 5;~~
- ~~Conduct daily pre-screening with temperature checks;~~
- ~~Wear a mask in the workplace for 10 days after exposure, even if mask wearing is not otherwise required by DoD guidance;~~
- ~~Practice hand and cough hygiene;~~
- ~~Refrain from sharing headsets or other objects used near the face;~~
- ~~Continue to physically distance as much as possible; and~~
- ~~Clean and disinfect their workspaces daily.~~

~~This exception may be granted by the first general/flag officer or member of the SES, or equivalent, in the chain of command/chain of supervision or, for those locations that do not have general/flag officers or SES leaders, by O-6 installation commanders. If the individual develops signs or symptoms consistent with COVID-19 during the duty period, he/she will be sent home immediately.~~

* * *

d. DoD civilian employees who are remaining out of the workplace because of COVID-19 symptoms and who are waiting for a test result may telework if able to do so. If they are unable to or do not feel well enough to telework, they may request sick leave, use accrued annual leave or other forms of earned paid time off (e.g., compensatory time off or credit hours), or use unpaid leave, as appropriate. Weather and safety leave is unavailable in this situation, but to mitigate exposure risks in the workplace, and on a limited basis, up to 1 day of administrative leave may be offered to DoD civilian employees who have COVID-19 symptoms and are remaining out of the workplace while actively seeking to be tested.

e. DoD civilian employees who test positive for COVID-19 may telework during the 5 days they are required to remain out of the workplace if able to do so. If they are unable to or do not feel well enough to telework, they may request sick leave, use accrued annual leave or other forms of paid time off (e.g., compensatory time off or credit hours), or use unpaid leave in this situation, as appropriate. Weather and safety leave is not available in this situation.

16. Section 5.9 is amended as follows:

The SARS-CoV-2 virus is transmitted mainly by large respiratory droplets, but infected individuals generate aerosols and droplets across a large range of sizes and concentrations. There is no need to shut down air HVAC, air handling systems, or air vents to prevent the spread of COVID-19 within a building. Increasing indoor air movement and ventilation is a cornerstone of COVID-19 transmission mitigation strategy. Ensure existing HVAC systems in buildings are functioning properly, ensure the amount of outside air supplied to the HVAC system is maximized to the extent appropriate and compatible with the HVAC systems' capabilities, and ensure the use of air filters that have a Minimum Efficiency Reporting Value-13 or higher filter where the system can accommodate this type of filtration efficiency. In addition to the requirements for existing HVAC systems, building managers should consider other measures to improve ventilation ~~in accordance with as set forth in~~ CDC guidance ~~(e.g., opening windows and doors to let in outside air) at: (https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html)~~ **and guidance from American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE; https://www.ashrae.org/file%20library/technical%20resources/ashrae%20journal/2020journaldocuments/72-74_ieq_schoen.pdf).**

17. Section 5.10 is amended as follows:

- a. General workplace:** COVID-19 is a recordable occupational illness if a worker contracts the virus as a result of performing his or her occupational duties and if all of the following conditions are met: (1) COVID-19 illness is a confirmed case; (2) contraction of COVID-19 is work-related as described in 29 CFR § 1904.5 (this condition will

require a determination by the commander or supervisor who may require input from the worker's health care provider); (3) the case of illness satisfies the requirement as a recordable illness as set forth in 29 CFR § 1904.7 (e.g., medical treatment beyond first aid is required, the number of calendar days away from work meets the stated threshold).²

b. Health care providers: Adhere to COVID-19 illness recordkeeping and reporting procedures contained in 29 CFR §§ 1910.502(q)(2)(ii), 1910.502 (q)(3), and 1910.502(r).

18. Section 5.12 is amended as follows:

If workers are planning to conduct maintenance in a residence where a person who is known or suspected to have contracted COVID-19 resides and the maintenance is necessary and cannot be delayed, the resident should be asked to remove all items that would impede the work of the maintenance personnel. The resident should clean the area of any dirt, debris, dust, etc. that would impact the effectiveness of surface disinfectant used by maintenance personnel. Workers should maintain a the maximum possible distance ~~of at least 6 feet~~ from the resident who is known to have or suspected of having contracted COVID-19, and ask that the resident remain in a separate room while maintenance is conducted. If a separate room for the resident is unavailable and the worker is unable to ~~remain 6 feet in physically~~ distance from the resident during the work, appropriate protective equipment for ~~close contact exposure risks~~ must be worn by the worker. If necessary, clean and disinfect the work area following the procedures for personnel protection described in section 5.8.

19. Section 6 is amended as follows:

~~For any planned in-person meetings, events, and conferences (referred collectively herein as "meetings") sponsored by DoD with more than 50 participants in a county or equivalent jurisdiction where the CDC COVID-19 Community Level is high, the meeting organizer will obtain advance written approval from the DoD or Office of the Secretary of Defense (OSD) Component head concerned to hold the meeting. The DoD or OSD Component head concerned may delegate this authority in writing to their Principal Deputy (or equivalent) but no lower. For the Pentagon Reservation, the approval authority is the DA&M and this authority may not be further delegated.~~

~~For any in-person meetings in a county or equivalent jurisdiction where the CDC COVID-19 Community Level is high or medium, the meeting organizer will require all attendees, including Service members and DoD civilian employees, to show a completed DD Form 3150, "Contractor Personnel and Visitor Certification of Vaccination" and will follow the applicable requirements in section 5.2 for physical distancing. For any in-person meetings in a county or equivalent jurisdiction where the CDC COVID-19 Community~~

² The reporting requirements are described in more detail in DoDI 6055.07, "Mishap Notification, Investigation, Reporting, and Record Keeping," and at: <https://www.osha.gov/recordkeeping>.

level is low, the meeting organizers will follow the applicable requirements in section 5.2 for physical distancing.

~~In-person attendees who are not fully vaccinated, or who decline to provide information about their vaccination status, may not attend the meeting if they do not show the meeting organizer proof of a negative FDA approved or authorized COVID-19 test completed no earlier than 72 hours prior to the meeting, and at least weekly if the meeting is greater than one week in duration. Meetings do not include military training and exercise events conducted by MILDEPs.~~

For any planned in-person meetings, events, and conferences (referred collectively herein as “meetings”) sponsored by DoD in a county or equivalent jurisdiction where the CDC COVID-19 Community Level is high or medium, the meeting organizer will require all attendees, including Service members and DoD civilian employees, to physically distance and will limit attendance as necessary to maintain physical distance. Where the CDC COVID-19 Community Level is high, meeting organizers will require all attendees to wear high-quality masks. Meetings do not include military training and exercise events conducted by MILDEPs.

20. *Section 7.1 is amended as follows:*

In all cases, no personnel may engage in official travel if they have tested positive for COVID-19 and have not yet met the criteria for discontinuing isolation, they are symptomatic, or they are pending COVID-19 test results. After discontinuing isolation, personnel should avoid official travel until 10 calendar days after their symptoms started or the date of their positive test. If these personnel must travel on days 6 through 10, they must properly wear a well-fitting mask when they are around others for the entire duration of travel, even if mask wearing is not otherwise required by DoD guidance. Official travel should also be delayed if, in the past 10 days, an individual has been exposed to someone who has tested positive for, and/or been symptomatic of, COVID-19. Prior to travel, all official travelers should be educated on how to self-monitor and what actions to take if one develops signs or symptoms consistent with COVID-19 or contracts COVID-19.

~~Fully vaccinated individuals are not restricted from official travel, both domestic and international. Individuals who are not fully vaccinated, or who decline to provide information about their vaccination status, are limited to mission-critical official travel, both domestic and international. “Mission-critical” will be determined by the traveler’s DoD or OSD Component head, who may delegate this authority in writing to the Component’s Principal Deputy (or equivalent) but no lower. For the purpose of this FHP guidance, travel associated with permanent changes of station, travel in connection with Authorized or Ordered Departures issued by the Department of State, or travel in evacuations ordered by the appropriate DoD official is deemed to be “mission-critical.”~~

During all official travel, travelers will follow all applicable Federal, State, local, and commercial air carrier requirements, and applicable HN requirements as a means to respect HN law. ~~In addition to completion of required or recommended ROM, a~~Additional requirements

may be necessary when traveling to, or from, locations outside, and within, the United States. Travelers will follow any requirements in the Electronic Foreign Clearance Guide pertaining to entry, movement, or operations into a HN. Travelers will also refer and adhere to local updates in HN for travel and movement within the HN.

~~For travel via military airlift (contracted or organic), Aerial Point of Embarkation (APOE) health screening is mandatory. Travelers who have a medical issue identified during screening or who refuse to be screened at the APOE may be denied travel.~~

~~The waiver authority available to the Secretaries of the MILDEPs, heads of OSD Components, Chief of the National Guard Bureau, and Commanders of the GCCs for official travel is specified in section 7.4.~~ Travel that is limited to transit between, and through, foreign countries contained wholly within a single GCC area of responsibility, and between GCC areas of responsibility, is not subject to this memorandum and will be managed by each relevant GCC or GCCs as appropriate.

21. *Section 7.2 is rescinded.*

22. *Section 7.3 is rescinded and replaced with the following:*

7.2. ROM REQUIREMENTS

ROM after arrival at the travel destination may or may not be required by the HN. Travelers should consult the Electronic Foreign Clearance Guide (<https://www.fcg.pentagon.mil/fcg.cfm>) and check with the MILDEPs and GCCs for current information.

23. *Section 7.4 is rescinded.*

24. *Section 7.5 is rescinded and replaced with the following:*

7.3. OFFICIAL TRAVEL FROM THE UNITED STATES TO A FOREIGN COUNTRY.

1. Service Members and DoD civilian employees:

Service members and DoD civilian employees must follow all requirements imposed by the GCC with responsibility over the destination geographic area, including all applicable HN procedures as a means to respect HN law, and all requirements of the Electronic Foreign Clearance Guide.

2. DoD family members:

Service members must attest that, to the best of their knowledge, their family members have followed the same requirements as those set forth for Service members in this guidance. Failure to do so may result in delay or cancellation of previously authorized travel. This attestation requirement will be incorporated into travel orders issued to Service members.

3. DoD contractor personnel

DoD contracting officers will ensure that all contracts that include performance outside the United States require DoD contractor personnel to comply with the country entry requirements of the respective GCC.

25. *Section 7.6 is re-numbered as section 7.4.*

26. *Section 7.7 is rescinded.*

27. *Section 9 is amended as follows:*

~~Close contact. Close contact is defined as someone who was within 6 feet of a person who has contracted COVID-19 for a cumulative total of 15 minutes or more over a 24-hour period starting from 2 days before illness onset (or, for asymptomatic patients, 2 days prior to test specimen collection) until the time the patient is isolated and irrespective of whether the person with COVID-19 or the contact of such a person was wearing a face covering or mask or respiratory personal protective equipment.~~

Exposed. Persons are considered to be exposed to COVID-19 if they were less than 6 feet away from an infected person (laboratory-confirmed or a clinical diagnosis) for a total of 15 minutes or more over a 24-hour period, unless both parties were wearing masks or respirators. Individuals and supervisors may also assign the “exposed” classification below the thresholds above based on the following additional criteria:

- Cough or heavy breathing: Was the infected person coughing, singing, shouting, or breathing heavily? Activities like coughing, singing, shouting and breathing heavily due to exertion increase the risk of transmission.
- Symptoms: Did the infected person have symptoms at the time? Being around people who are symptomatic increases the risk of transmission.
- Ventilation and filtration: How well-ventilated was the space? Risk of transmission is increased in poorly ventilated vehicles or rooms.
- Physical Distance: Crowded settings can raise the likelihood of being close to someone with COVID-19. Keep in mind that while maintaining a distance beyond 6 feet of an infected person will limit exposures from larger droplets, exposures can occur beyond 50 feet based on ventilation, masking, and other factors.

* * *

Fully vaccinated.

An individual is considered “fully vaccinated” when at least 2 weeks have elapsed after a second dose of a two-dose COVID-19 vaccine series (e.g., PfizerBioNTech/Comirnaty, ~~or~~ Moderna/Spikevax, or Novavax vaccines), or 2 weeks after receiving a single dose of a one-dose COVID-19 vaccine (e.g., Johnson & Johnson’s Janssen vaccine) that are: (1) fully licensed (approved) or authorized ~~or approved~~ by the FDA; or (2) listed for emergency use on the World Health Organization Emergency Use Listing (e.g., AstraZeneca/Oxford); ~~or (3) approved for use in a clinical vaccine trial for which vaccine efficacy has been independently confirmed (e.g., Novavax).~~

An individual is “not fully vaccinated” if the individual either has not completed the ~~full~~ COVID-19 vaccination primary dose series; or declines to provide his or her COVID-19 vaccination status and declines to provide any requested proof of that status.

* * *

Mask. Acceptable masks high-quality are non-medical disposable masks; masks made with layered breathable fabric (such as cotton); masks made with tightly woven fabric that does not let light pass through when held up to a light source; masks with two or three layers; masks with inner filter pockets, or, on a voluntary basis in non-medical settings, an N95-type filtering face piece. A good practice is to wear a disposable mask underneath a cloth mask for added protection as long as this does not interfere with breathing. Novelty or non-protective masks, masks with ventilation valves, bandanas, and face shields are not authorized as a substitute for masks. ~~Masks must fit snugly around the nose and chin with no large gaps around the sides of the face.~~ Masks must be well fitting and worn correctly and consistently (around the nose and chin).

Physically distance. Maintain separation between individuals and prevent crowding in areas.

* * *

Up-to-Date. A person has received all recommended COVID-19 vaccines, including any booster dose(s) recommended when eligible. Booster doses are recommended, but are not required.



**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, DC**

FEB 10 2023

MEMORANDUM FOR AFR COMMANDERS AND DIRECTORS

FROM: HQ USAF/RE
1150 Air Force Pentagon
Washington DC 20330-1150

SUBJECT: Air Force Reserve (AFR) Guidance for COVID-19

References: (a) Secretary of the Air Force memo, *Rescission of 3 September 2021 Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members and 7 December 2021 Supplemental Coronavirus Disease 2019 Vaccination Policy memoranda*, January 23, 2023
(b) Chief of Air Force Reserve memo, *AFR COVID-19 Participation and TDY Guidance for Unvaccinated Members*, June 21, 2022 (Rescinded)

1. In accordance with reference (a), I hereby rescind reference (b). COVID-19 unvaccinated military members may:

- a. participate in accordance with applicable Department of the Air Force Instructions, policies, and Force Health Protection Guidance.
- b. request retirement (if eligible), resignation, or voluntary reassignment to the Individual Ready Reserve. Requests will be processed in accordance with applicable Department of the Air Force Instructions.

2. All military members will continue to follow applicable Force Health Protection guidance.

3. The AFR is fully engaged with SAF/MR, AF/A1, and the Air Force Personnel Center to develop Total Force processes, procedures, and instructions for removing qualifying adverse actions consistent with reference (a). We are working diligently to ensure these actions are addressed quickly and properly. Additional guidance is forthcoming.

4. Consistent with reference (a), COVID-19 vaccination status is no longer a barrier to service in the AFR. Individuals desiring to join the AFR should contact a recruiter to determine eligibility in accordance with standard accession processes and policies.

5. My POC for these issues is Colonel James A. Rigsbee. He may be reached via DSN 497-1215, Comm (478) 327-1215, or email at james.rigsbee.1@us.af.mil.

A handwritten signature in black ink, appearing to read "JOHN P. HEALY", is written over a horizontal line.

JOHN P. HEALY
Lieutenant General, USAF
Chief of Air Force Reserve





DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

FEB 24 2023

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
COMMANDERS OF THE COMBATANT COMMANDS
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Guidance for Implementing Rescission of August 24, 2021 and November 30, 2021
Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed
Forces

In today's rapidly changing global security environment, vaccines continue to play a critical role in assuring a ready and capable force that is able to rapidly deploy anywhere in the world on short notice. Department leadership is committed to ensuring the safety of our Service members and will continue to promote and encourage vaccinations for all Service members along with continued use of other effective mitigation measures. This includes monitoring changing public health conditions, relevant data, and geographic risks; and updating policies and processes as required to maintain the strategic readiness of our forces and our ability to defend national security interests around the globe.

This memorandum provides additional guidance to ensure uniform implementation of Secretary of Defense Memorandum, "Rescission of the August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces," January 10, 2023 (January 10, 2023 memorandum).

As required by section 525 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, the January 10, 2023 memorandum rescinded the August 24, 2021 and November 30, 2021 Secretary of Defense mandates that members of the Armed Forces be vaccinated against the coronavirus disease 2019 (COVID-19) and thereby also rendered all DoD Component policies, directives, and guidance implementing those vaccination mandates as no longer in effect as of January 10, 2023. These include, but are not limited to, any COVID-19 vaccination requirements or related theater entry requirements and any limitations on deployability of Service members who are not vaccinated against COVID-19.

DoD Component policies, directives, and guidance have not been operative since the January 10, 2023 memorandum was issued, regardless of the status of the DoD Component conforming guidance. DoD Component heads shall formally rescind any such policies, directives, and guidance as soon as possible, if they have not done so already. DoD Component heads shall certify to the Under Secretary of Defense for Personnel and Readiness in writing that these actions have been completed no later than March 17, 2023.

The January 10, 2023 memorandum recognizes that other standing Departmental policies, procedures, and processes regarding immunizations remain in effect, including the ability of commanders to consider, as appropriate, the individual immunization status of personnel in making deployment, assignment, and other operational decisions, such as when vaccination is



OSD001649-23/CMD002077-23

required for travel to, or entry into, a foreign nation. This continues to be the case, in accordance with the guidance below.

The Department's Foreign Clearance Guide will be updated to reflect that DoD personnel must continue to respect any applicable foreign nation vaccination entry requirements, including those for COVID-19. Other than to comply with DoD Foreign Clearance Guidance, DoD Component heads and commanders will not require a Service member or group of Service members to be vaccinated against COVID-19, nor consider a Service member's COVID-19 immunization status in making deployment, assignment, and other operational decisions, absent establishment of a new immunization requirement in accordance with the process described below. It is my expectation that any requests to the Assistant Secretary of Defense for Health Affairs (ASD(HA)) for approval to initiate mandatory immunizations of personnel against COVID-19 will be made judiciously and only when justified by compelling operational needs and will be as narrowly tailored as possible.

Department of Defense Instruction (DoDI) 6205.02, "DoD Immunization Program," July 23, 2019, will be updated as follows to establish a process requiring the Secretary of a Military Department, the Director of a Defense Agency or DoD Field Activity that operates medical clinics, or the Commandant of the Coast Guard, to submit a request for approval to initiate, modify, or terminate mandatory immunizations of personnel. Effective immediately, I direct the following action:

Paragraph 2.11. of DoDI 6205.02 is revised by adding a new subsection g., which will read:

"Submit requests to the ASD(HA) for approval to initiate, modify, or terminate mandatory immunizations of personnel and voluntary immunizations of other eligible beneficiaries determined to be at risk from the effects of deliberately released biological agents or naturally occurring infectious diseases of military or national importance."

The Commander of a Combatant Command must submit a request for approval to initiate, modify, or terminate mandatory immunizations of personnel through the Joint Staff, consistent with existing processes specified in DoDI 6205.02.

The Director of Administration and Management will make the revision directed above as a conforming change to the version of DoDI 6205.02 published on the DoD Issuances website.

A handwritten signature in dark ink, appearing to read "Kathleen H. H.", is centered below the text. The signature is fluid and cursive, with a large initial 'K' and a stylized 'H'.



SECRETARY OF THE AIR FORCE
WASHINGTON

February 24, 2023

MEMORANDUM FOR ALMAJCOM-FOA-DRU/CC
DISTRIBUTION C

SUBJECT: Department of the Air Force (DAF) Guidance on Removal of Adverse Actions and Handling of Religious Accommodation Requests

In accordance with my 23 January 2023 memorandum "Rescission of 3 September 2021 Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members and 7 December 2021 Supplemental Coronavirus Disease 2019 Vaccination Policy Memoranda," I want to reinforce that all policies within the Department of the Air Force associated with the implementation of the Coronavirus Disease 2019 (COVID-19) vaccination mandate for Service members were also rescinded. Commanders at all levels must ensure that associated guidance derived from the mandate is rescinded. Refer to USD(P&R) Re: Consolidated Department of Defense Coronavirus Disease 2019 Force Health Protection Guidance - Revision 4, 30 January 2023 for current force health protection guidance.

I am issuing the following additional guidance with respect to the removal of adverse actions, and the handling of religious accommodation requests for those Service members who refused vaccination. At the time the actions were taken, they were appropriate, equitable and in accordance with valid lawful policy in effect at the time; however, removal of those actions is now appropriate in some circumstances.

a. Removal of Adverse Information: Currently serving Regular Air Force (RegAF), Space Force, Air National Guard, and Air Force Reserve members [including those involuntarily reassigned to the Inactive Ready Reserve] who sought an exemption on religious, administrative, or medical grounds, and who received adverse actions solely due to their refusal to receive a Coronavirus Disease 2019 (COVID-19) vaccine shall have these items removed as detailed below. The Service member must have formally sought an accommodation on religious, administrative, or medical grounds prior to or concurrent with the official initiation of the adverse action in order to receive relief under this memorandum. Commanders will ensure the removal of such adverse actions from currently serving Service members' records in accordance with the below guidance. Members will be notified by their command or record holder (e.g. Air Force Personnel Center, Air Reserve Personnel Center) when the adverse actions have been removed from their records. This policy does not apply to members who refused the COVID-19 vaccination and did not request an exemption. Members who did not seek an exemption may petition their chain of command under existing DAF policy or the Air Force Board for Correction of Military Records (AFBCMR) for removal of adverse information if they believe an injustice or error has occurred. The process to petition the AFBCMR may be found at: <https://Afrba-portal.cce.af.mil>.



1) Letters of Admonishment, Counseling, or Reprimand, and Records of Individual Counseling issued solely for vaccine refusal after requesting an exemption as described above will be rescinded. Removal of actions for enlisted members will follow the procedures in DAFI 36-2907. Removal of officer adverse actions will follow DAFI 36-2907, except that the removal of Letters of Counseling related to a substantiated finding from an officially documented investigation, Letters of Admonishment and Letters of Reprimand from a Personnel Information File (PIF) or Unfavorable Information File (UIF) is delegated to commanders in the member's current chain of command who are equal or senior in grade to the initial imposing authority. Where the administrative action addresses additional misconduct, the administrative action will be redacted to remove all language associated with the member's refusal to receive the COVID-19 vaccine. Commanders will make new determinations as to whether to uphold, downgrade, or withdraw the administrative action and entry into a PIF or UIF without consideration of the refusal to receive the COVID-19 vaccine. Any requirement for AFBCMR direction for removal of actions from Military Human Resource Records or other files will be accomplished by AFPC/ARPC as appropriate if removal is required under this memorandum. The member's command will inform AFPC/ARPC which adverse actions will be removed, redacted, or replaced.

2) Nonjudicial punishments issued solely for vaccine refusal after requesting an exemption as described above will be set aside in their entirety. Nonjudicial punishments issued partially for such vaccine refusal will have the vaccine refusal portion set aside and the remainder of the nonjudicial punishment reassessed for appropriateness. When the set aside is more than four months after the execution of the punishment, commanders should reference the SecDef Memo dated 10 January 2023 on an attachment to the AF Form 3212.

3) Referral Performance Reports issued solely for vaccine refusal after requesting an exemption as described above will have the referral report removed from the member's personnel record and replaced with a statement of non-rated time. Where the referral report addresses additional misconduct, the report will be redacted to remove all language associated with the member's refusal to receive the COVID-19 vaccine and the rater and/or additional rater will reassess if the remaining report should remain a referral.

4) Promotion Records will be corrected by the record holder (e.g., AFPC, ARPC, SAF/IG) to remove or redact, as appropriate, all adverse actions related to the member's refusal to receive the COVID-19 vaccine.

5) Promotion Propriety Actions will continue processing in accordance with DAFIs 36-2501 and 36-2504 and may only be closed by Secretarial action.

6) Current involuntary discharge proceedings will be terminated IAW the procedures in DAFI 36-3211 if the basis was solely for refusal to receive the COVID-19 vaccine. If there are additional circumstances supporting discharge, commanders should make a determination as to whether to continue discharge proceedings, including re-notification of discharge.

7) Adverse actions removed under the provisions of this guidance memorandum contained in Inspector General files pursuant to AFI 90-301 will be removed from those files.

b. Processing of religious accommodation requests (RARs) requesting an exemption to the COVID-19 vaccination requirement.

1) Due to the rescission of the COVID-19 vaccine mandate, all outstanding RARs for COVID-19 vaccination have been cancelled and will be returned without action.

2) Individuals, whose COVID-19 RAR also requested accommodation for other mandated vaccinations, may resubmit their RAR to their unit commander for non-COVID-19 vaccinations in accordance with DAFI 52-201. Previous requests should be updated to provide any additional information the member deems relevant to the specific vaccine(s) the member is requesting an accommodation for. In order to expedite processing, members who desire to submit a new accommodation are requested to do so within 30 days.

3) Commanders will expeditiously review and adjudicate RARs in accordance with DAFI 52-201 with the following exceptions. Upon resubmission by the member, unit commanders will review the revised package and provide a command recommendation. Following unit commander recommendation on the resubmitted package, if the RAR was previously reviewed by a Religious Resolution Team (RRT), it will be forwarded to the initial decision authority. Resubmitted RARs that were not previously reviewed by an RRT will be processed expeditiously through the DAFI 52-201 RRT process. Resubmitted RARs that were at the appellate authority will be forwarded by the unit commander to the initial decision authority. If the initial decision authority disapproves the requested accommodation, it will be forwarded directly to the appellate authority. Personnel at all levels will consider additional information provided by the applicant and the commander's recommendation.

Let me close by expressing my admiration to the men and women of this Department for the tremendous effort and accomplishments in response to the COVID-19 pandemic while also ensuring the readiness of the force and defense of the Nation. We will continue to encourage COVID-19 vaccination for all personnel to ensure readiness, facilitate mission accomplishment, and protect our people.

A handwritten signature in black ink, appearing to read "Frank Kendall", with a stylized flourish at the end.

Frank Kendall
Secretary of the Air Force

cc:
AF/CC
SF/CSO

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

| | | |
|--|---|-------------------------------------|
| FAITH N. CROCKER, <i>ET AL.</i>, |) | CIVIL ACTION NO: 22-cv-00757 |
| |) | |
| VERSUS |) | JUDGE HICKS |
| |) | |
| LLOYD J. AUSTIN, III, in his official Capacity as United States Secretary of Defense, <i>et al.</i> |) | MAGISTRATE JUDGE HORNSBY |
| |) | |

DECLARATION OF STAFF SERGEANT ASHLEY CHAPONIS

I, Ashley Chaponis, United States Air Force, declare and state as follows:

1. I am an active-duty Air Force Staff Sergeant (SSgt) and currently perform duties as a paralegal for the Military Personnel Litigation Branch of the Personnel and Information Law Division, Civil Law Directorate, Department of the Air Force Judge Advocate General's Corps. I have been employed by the Department of the Air Force since October 19, 2010, and have served in various other roles in the Air Force Judge Advocate General's Corps.
2. I am familiar with the allegations made in the above-captioned case. As part of this case, my office coordinated with the commands for the 6 named plaintiffs concerning any potential adverse actions. I have reviewed the information provided by the respective commands concerning the plaintiffs. I have also reviewed the Secretary of the Air Force's Memorandum, dated February 24, 2023, "Department of the Air Force (DAF) Guidance on Removal of Adverse Actions and Handling of Religious Accommodation Requests."
3. Based on the information provided to me by their respective commands, I can confirm that the 6 named plaintiffs, besides Byron O. Starks, have no adverse actions (in accordance with the memorandum stated above) in their personnel records for refusal to follow the order to



receive the COVID-19 vaccine. Four of the plaintiffs—Lieutenant Colonel (Lt Col) Wayne E. Johnson, Major David Schadwinkel, Master Sergeant Ian McHaley, and Staff Sergeant Mendell Potier—received no adverse action for such refusals.

4. One plaintiff, Lt Col Christopher F. Duff, received a Letter of Counseling for failing to comply with the order to vaccinate, which was rescinded on March 3, 2023; he acknowledged its rescission on March 20, 2023. Senior Airman (SrA) Faith N. Crocker received a Letter of Reprimand for refusal to follow the order to receive the COVID-19 vaccine; her Letter of Reprimand was rescinded on March 24, 2023, along with an unfinalized Unfavorable Information File, and she acknowledged its rescission that day.

4. Neither Lt Col Duff nor SrA Crocker received any other adverse action. No other plaintiff has any adverse action in their personnel records for refusal to follow the order to receive the COVID-19 vaccine.

5. Revised Department of Defense policy directs all services not to “consider a Service member’s COVID-19 immunization status in making deployment, assignment, and other operational decisions.” *See* Deputy Sec’y of Def. Mem. (Feb. 24, 2023), “Guidance for Implementing Rescission of the August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces.”

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 28, 2023.

CHAPONIS.ASHLEY.LYNETTE.139515811
Digitally signed by
CHAPONIS.ASHLEY.LYNETTE
.1399515811
Date: 2023.03.28 15:16:57
-04'00'
ASHLEY CHAPONIS, SSgt, USAF
Paralegal, Military Personnel Litigation Branch
Personnel and Information Law Division
Air Force Judge Advocate General’s Corps