



Agenda Report

2725 Judge Fran Jamieson
Way
Viera, FL 32940

New Business - Miscellaneous

J.5.

2/23/2021

Subject:

Board Consideration of Policy Requiring Certain First Responders to Be Vaccinated Against COVID-19

Fiscal Impact:

Indeterminate: Preventing the spread of COVID-19 in the community may have substantial positive fiscal impacts

Dept/Office:

Dist. 3

Requested Action:

Board Discussion, consideration, and adoption of the attached policy

Summary Explanation and Background:

The Board has gone to extraordinary lengths to ensure the protection of Brevard County residents, as well as its own employees, from COVID-19. In particular, it has appropriated millions of dollars to ensure that any vaccine that the County receives is distributed quickly and efficiently. Furthermore, it has offered certain first responder employees an incentive to receive the vaccine. However, it appears that there are some first responders that are insisting on risking the lives of the very Brevard County citizens is their duty to protect. These employees are refusing the COVID-19 vaccine, even when it is available to them and they are getting paid to receive it.

According to the Director of the Brevard County Health Department, Maria Stahl, "EMTs not being vaccinated could definitely result in transmission of the virus which could result in death of a resident." Allowing Brevard County citizens to die from the preventable transmission of the virus by a County employee is absolutely unacceptable.

The County Attorney's Office, in researching whether it would be legally viable to require vaccination as a condition of employment, found that "given the severity of the ongoing pandemic and the risk of serious illness and death from the COVID-19 virus as well as the exposure they have to the public to perform the essential duties of their job, first responders would likely fit the "direct threat" definition." This definition includes "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

This is particularly applicable to most first responders, as they are often called upon to assist the most at-risk population during times of medical crisis, including in long-term care facilities. Indeed, Ms. Stahl, the most senior State official in charge of managing the pandemic in the County, stated that "in Brevard 88% of deaths are to those over the age of 65 and 57% are those from long term care facilities. Brevard EMS responds very

frequently to that age group and to facilities.”

Under these circumstances, it is essentially a statistical certainty that, should these employees not be vaccinated, a Brevard County resident will needlessly die. To say that such a decision poses a “direct threat” to the public is an understatement; in any case, it is absolutely unacceptable for the Board to allow this to occur when it is within their authority to prevent it.

Clerk to the Board Instructions:

N/A



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Kimberly.Powell@brevardclerk.us

February 24, 2021

M E M O R A N D U M

TO: Commissioner John Tobia, District 3

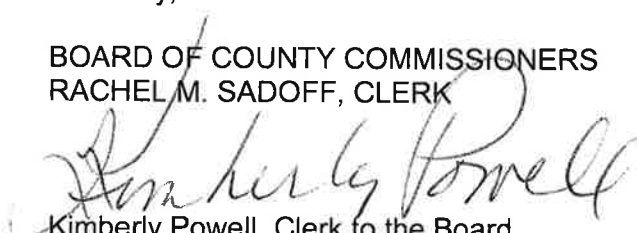
RE: Item J.5., Board Consideration of Policy Requiring Certain First Responders to be Vaccinated Against COVID-19

The Board of County Commissioners, in regular session on February 23, 2021, considered a Policy requiring certain first responders to be vaccinated against COVID-19, but took no action.

Your continued cooperation is always appreciated.

Sincerely,

BOARD OF COUNTY COMMISSIONERS
RACHEL M. SADOFF, CLERK


Kimberly Powell, Clerk to the Board

/sm



BOARD OF COUNTY COMMISSIONERS

POLICY

Number: BCC-100

Cancels:

Approved:

Originator: Comm. Tobia, DIST 3

Review:

TITLE: Vaccination and General Immunization Necessity Act

I. Objective

To mitigate the direct threat to the health of Brevard County residents, visitors and employees posed by transmission of COVID-19 and emerging variants of COVID-19 as a result of close contact between the public and certain Brevard County employees. Specifically, those first responders whose job duties include regular close contact with citizens who are at high risk of severe complications, or death, from transmission of COVID-19, are highly likely to pose an imminent, severe, and direct threat to themselves and to the very people who these employees are responsible for safeguarding, shall be vaccinated from the virus when such vaccination is available.

II. Definitions and References

- A. COVID-19 Vaccination: A vaccine approved for use by the U.S. Food and Drug Administration as effective against COVID-19. This includes vaccination approved through Emergency Use Authorization
- B. First Responder: Firefighters, Paramedics, and EMTs employed by Brevard County Board of County Commissioners.
- C. Direct Threat: A significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

III. Directives

In order to ensure the safety of the public, the County Manager, or his/her designee/s, is directed to establish a Procedure which shall implement the following measures to mitigate the severe and ongoing threat of COVID-19:

- A. Identify First Responder Positions That Meet the Definition Of A Direct Threat To Public Health

Evaluate each First Responder Firefighter, Paramedic, and EMT position to determine whether a direct threat is posed due to transmission of COVID-19, and whether such threat would be mitigated upon vaccination. Such evaluation shall be based on a reasonable medical judgment in reliance on the current medical knowledge and/or the best available objective evidence.

Factors to be considered shall include:

1. The duration of the risk
2. The nature and severity of the potential harm
3. The likelihood that the potential harm will occur; and
4. The imminence of the potential harm

B. Administer Vaccine

For those employees identified in section A, create a system in which vaccinations are administered, as a condition of employment, at no cost to the employee

C. Allow for Reasonable Accommodation

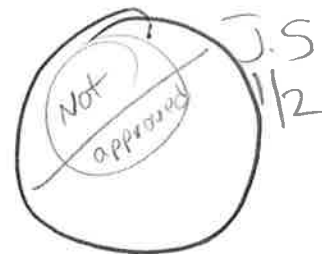
The County Manager shall ensure that a process exists for any employee identified in Section A to request a reasonable accommodation as required by State and Federal law

D. Discipline

Any employee identified in section A, and who is not granted an accommodation under section C, and who refuses a vaccination offered by the County, shall be subject to discipline in accordance with the Merit System Policies and Procedures as well as the applicable IAFF Collective Bargaining Agreement.

In making such a determination, the County Manager shall consider, but not be limited to, the following factors

1. The proportion of the vulnerable population in Brevard County that has been vaccinated or otherwise are protected from the virus. Such population shall include, but not be limited to, elderly residents in long-term care facilities
2. The positivity rate of those being tested for COVID-19 within the County
3. The number of deaths in Brevard County attributed to COVID-19
4. The expected transmission rate among First Responders



5. Available beds at Brevard County hospitals and the surrounding areas

IV. Reservation of Authority

The authority to issue and/or revise this policy is reserved to the Board of County Commissioners.

Rachel M. Sadoff, Clerk

Rita Pritchett, Chair
Board of County Commissioners
As approved by the Board on 02/23/2021



INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS®

HAROLD A. SCHAITBERGER
General President

EDWARD A. KELLY
General Secretary-Treasurer

November 19, 2020

National Governors Association
444 North Capitol Street, NW, Suite 267
Washington, DC 20001

Dear Governors:

On behalf of the nation's 322,000 professional fire fighters and emergency medical personnel, I respectfully request that you include fire fighters and emergency medical responders on the highest priority tier in your state's COVID-19 vaccine distribution plan.

As you are aware, the National Academies of Sciences, Engineering and Medicine have recommended that first responders, including fire fighters and emergency medical services personnel, be included in the initial vaccine distribution phase – phase 1(a). As stated by the Academies, reasons for protecting first responders include "the social value of maintaining emergency services, reciprocity for the assumption of additional risk by these groups, and... higher risk of acquiring infection and, potentially, transmitting the virus."

The level of risk to responders has never been greater than it is today. More than 30,000 professional fire fighters have had known exposures to COVID-19 in the course of duty, necessitating over 17,000 such personnel to quarantine or isolate. Nearly 150 professional fire fighters have been hospitalized upon contracting the virus, and at least 19 have died. All this, despite PPE use and rigorous decontamination procedures, makes vaccinating fire fighters and emergency medical personnel all the more urgent. The virus not only places the lives and health of responders at risk, it also poses a risk to the larger community as well as to fire fighters responding to emergencies in homes, businesses and elsewhere before they may be aware of an infection.

Adequately vaccinating fire fighters and emergency medical responders will also allow such personnel to continue serving their communities during this medical crisis. Absent adequate vaccination, responders will continue to be subject to lengthy quarantines when they are exposed to COVID-19 positive individuals, imposing significant costs on local governments as they backfill positions or operate understaffed, increasing response times and negatively impacting public safety.

Again, we request you prioritize fire fighters and emergency medical responders in the distribution of a COVID-19 vaccine and ensure such personnel are included in the highest priority tier in your state's distribution plan.

We appreciate your assistance in this important matter.

Sincerely,

Harold A. Schaitberger
General President



County Attorney's Office
2725 Judge Fran Jamieson Way
Building C, Room 308
Viera, Florida 32940

BOARD OF COUNTY COMMISSIONERS

TO: Brevard County Board of County Commissioners
Frank Abbate, County Manager
Jerry Visco, Director of Human Resources

THRU: *EB* Eden Bentley, County Attorney

FROM: Melissa H. Powers, Assistant County Attorney *MLP*

SUBJECT: Options Regarding Mandatory COVID Vaccines for First Responders

DATE: February 3, 2021

Question: What options can the County Commission consider regarding mandating the COVID-19 vaccine for Brevard County first responders?

Short Answer: Mandatory COVID-19 vaccines are allowable when employees pose a "direct threat" to themselves or others by their physical presence in the workplace without being immunized. However, if the vaccine is mandated, the County would have to ensure that the plan would be implemented in a manner that does not violate Federal or State law. In addition, provisions in the current collective bargaining agreement must also be considered.

Discussion: Pursuant to guidance from the U.S. Equal Employment Opportunity Commission (EEOC), an employer is allowed to mandate COVID-19 vaccinations when employees pose a "direct threat" to themselves or others by their physical presence in the workplace without being immunized.¹ In other words, it is permitted if workers would pose a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. "Direct threat" is fully defined as follows:

a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

¹ See FAQ K.5, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#)

In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

See 29 C.F.R. §1630.2(r).

If the County implemented a policy requiring first responders to get the COVID-19 vaccine, either as a condition of employment for new employees or as a mandate for existing employees, the County must do so in a manner that does not violate any Federal or State law. For example, an employer must consider reasonable accommodations for employees with disabilities and those with sincerely held religious objections. To illustrate this point, an employee may have a medical reason for not getting vaccinated. In those circumstances, the employer cannot automatically exclude them from the workplace nor take any negative action against them. The employer must have in place a systematic and interactive process of evaluating requests for reasonable accommodations. Brevard County currently has an existing system in place for considering requests for reasonable accommodations (AO-02) which can be utilized for this purpose.

Other considerations must be carefully contemplated in developing a policy for mandating a vaccine including the following:

Generally, it is unlawful to disclose that an employee is receiving a reasonable accommodation, therefore an employer should not reveal which employees have or have not been vaccinated.

Employers can request a simple proof of receiving the vaccine but cannot ask specific questions that may elicit more specific information about a disability. For example, asking why someone did not receive a vaccine is potentially problematic. One way to potentially avoid this problem is to advise employees that they should not provide any medical information as part of the proof of vaccination.

The fact that the COVID-19 vaccine is being issued under an "Emergency Use Authorization" has been raised in considering mandatory vaccinations. The option not to accept the vaccine is clearly stated in the fact sheets disseminated for people who have the option to receive the vaccine. This language is predicated on Federal law. However, in Florida, an at-will employment state, this likely would not prevent an employer from making a vaccine a condition of employment (the employer would still be subject to applicable federal and state discrimination laws as discussed above). Therefore, while an individual has the option to refuse the vaccine, the County can still require it as a condition of employment so long as the policy is implemented consistently and not done in a manner that violates federal or state discrimination law.

Specific to first responders, the County must consider any applicable contractual obligations in the current collective bargaining agreements with the IAFF union. There is no article in the current agreement that either specifically allows or prevents the County from mandating a vaccine.² However, there are some specific articles in the agreement that should be noted and are discussed below.

Article 3 sets forth Management Rights. These are areas in which it is understood and agreed that Management has the exclusive right to control its operations. Article 3.02(C) states that Management has the exclusive right to "take whatever action may be necessary to carry out the mission and responsibility of the County in unusual and/or emergency situations".

Article 53 establishes an Occupational and Safety Committee to help "maintain high standards of safety and health in firefighting, prevention, training, emergency medical services and other related areas; to eliminate, in so far as reasonably possible, accidents, deaths, injuries, health hazards and occupational illness." Both the Department and Union appoint members to the Committee which typically meets quarterly. The Committee may "research and prepare recommendations on any matter pertaining to the health and safety of bargaining unit members at the request of the Fire Chief."

Unilaterally implementing a policy to mandate the COVID-19 vaccine for first responders could potentially be a basis of an unfair labor practice claim under section 447.501, Florida Statutes. For example, the Union could argue that such unilateral action constitutes a failure to bargain collectively in good faith on an item that is a term or condition of employment. Generally, terms and conditions of employment are considered mandatory subjects of collective bargaining. However, when an action arguably falls under both a management prerogative and is a term and condition of employment, Florida courts have stated that "a balancing test should apply to determine which characteristic predominates." *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So.2d 31,34 (Fla. S.Ct. 1992)

In the *FOP, Miami Lodge 20 v. City of Miami* case, the issue was mandatory drug testing, not vaccines, however, the analysis would likely be similar. The fundamental issue contemplates the nexus of mandatory areas of bargaining (such as conditions of employment) and management rights. The Florida Supreme Court has held that under some circumstances, unilateral action by management taken in order to ensure public safety was not considered a mandatory subject of collective bargaining.

The concept of an employer unilaterally imposing mandatory policy changes that affected union employees to address an "overriding need" to protect the public was also addressed in the case of *Laborers' International Union of North America v. Greater Orlando Aviation Authority*, 869 So.2d 608 (Fla. 5th DCA, 2004). Instead of mandatory drug testing, the policy change involved criminal offense reporting requirements established after the 9/11 terrorist attack. The 5th DCA

² Employers in some health care industries (nursing homes and hospitals) and the military have required flu vaccines in the past. Currently, neither Florida law nor the collective bargaining agreement mandate any vaccine to work as a firefighter, paramedic or EMT. Article 53.07 of the current collective bargaining agreement states that the County agrees to vaccinate bargaining unit members against Hepatitis B at the employee's discretion and at no cost to the member.

held that, as in the *FOP, Miami Lodge 20 v. City of Miami* case, the need to protect the public justified the unilateral action to change a policy.

While the above cited cases provide some guidance on situations where unilateral action to change a policy that affects terms and conditions of union employees and sets forth a balancing test to be applied, it would not prevent a legal challenge from being asserted by the union.

Options:

Based on the foregoing, the Board of County Commissioners can consider the following options:

- 1) Do not implement a Board Policy mandating first responders (firefighters, paramedics and EMTs) receive a COVID-19 vaccine as a condition of employment;
- 2) Implement a Board Policy, subject to federal and state law, mandating COVID-19 vaccines for new-hires in those first responder positions;
- 3) Implement a Board Policy, subject to federal and state law, mandating COVID-19 vaccines for all first responders, including both existing employees and new-hires;
- 4) Direct the County negotiating team to invite the Union to impact bargain on a new vaccine policy;
- 5) Direct the Fire Chief to request the Occupational Health and Safety Committee established under Article 53 of the collective bargaining unit to research and prepare recommendations regarding a vaccine policy;
- 6) Take Board action to encourage COVID-19 vaccination of the County's first responders, but not mandate it.

Conclusion: EEOC guidance is clear that an employer can mandate the COVID-19 vaccine for employees that fit the definition of "direct threat." Given the severity of the ongoing pandemic and the risk of serious illness and death from the COVID-19 virus as well as the exposure they have to the public to perform the essential duties of their job, first responders would likely fit the "direct threat" definition. Therefore, the Board of County Commissioners could consider implementing a policy so long as it did not violate federal and state discrimination laws by allowing for appropriate reasonable accommodations. Taking this action without inviting the Union to impact bargain on a new vaccine policy could also trigger litigation based upon allegations of an unfair labor practice pursuant to Florida law. Alternatively, the Board could take no action or take some other Board action (in addition to the current incentive program), such as a resolution to encourage its first responders to get the COVID-19 vaccine to protect themselves, their co-workers and the public or direct the Fire Chief to research and prepare recommendations on a vaccine policy for first responders.

SA

From: Maria A. Lopez [mailto:maria@revard.gov]
Sent: 12/23/2020 10:48 AM
To: Nick, you

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EXTERNAL EMAIL: DO NOT CLICK links or attachments unless you recognize the sender and know the contents is safe.

Commissioner Nick,
I am curious that 3M's not being recommended could reflect the issue in transmission of the virus which could result in death of a resident. In Broward 88% of deaths are in those over the age of 65 and 57% are those with long term care facilities. Broward DHEC happens very frequently to that age group and in facilities.



Marla Maki, DMSc, RN
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From: Maria A. Lopez [mailto:maria@revard.gov]
Sent: Monday, December 28, 2020 12:21 AM
To: Nick, Maria A. Lopez [mailto:maria@revard.gov]
Subject: RE: 3M's Vaccinations

Nick, Nick,

Thank you for your timely response. It is great to know we are getting some feedback from the frontline (SNF) as to the vaccine. Broward is \$120 vaccine at \$10 per dose.

Model's work is a complex in your expert opinion based on your knowledge and experience, that allowing this particular group to get the vaccine being administered, which is a very effective and is highly accurate, would likely lead to the prevention death of at least one Broward County resident?

Thank you,



John Tapp
County Commissioner, District V



OFFICE OF COMMUNITY ENGAGEMENT