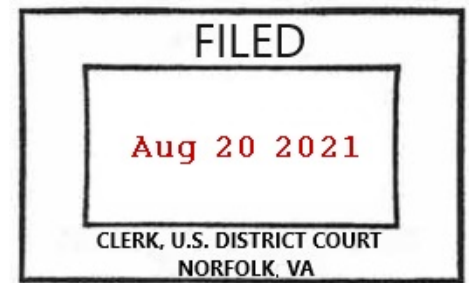


UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA



In re:
COURT OPERATIONS UNDER THE EXIGENT
CIRCUMSTANCES CREATED BY THE OUTBREAK
OF CORONAVIRUS DISEASE 2019 (COVID-19):
VACCINATION & TESTING POLICY FOR ADMITTED
COUNSEL AND EMPLOYEES OF THEIR OFFICES

Case No. 2:20mc7

General Order No. 2021-13

The United States District Court for the Eastern District of Virginia has continued to closely monitor the outbreak of Coronavirus Disease 2019 (COVID-19), as well as the developing guidance from the Centers for Disease Control and Prevention (CDC) and state and local health authorities. Notwithstanding a well-established COVID-19 vaccination effort, many adult Americans eligible for vaccination remain unvaccinated, and the COVID-19 Delta variant has caused a dramatic spike in COVID-19 cases and hospitalizations across the United States, Virginia, and this District. The risk posed by the spread of the Delta variant recently prompted this Court to adopt a vaccination and testing policy applicable to employees and contractors of the U.S. District Court, including its Clerk's Office and Probation Office. See Gen. Order No. 2021-12 (Aug. 13, 2021). In the seven days since this Court issued its Order adopting such policy, COVID-19 hospitalizations in Virginia have increased by 25%. During this same time, the Court has also had employees, as well as a trial

participant, test positive for COVID-19. Accordingly, the Court finds that it is appropriate to extend the previously adopted COVID-19 vaccination and testing policy to counsel admitted to practice in this Court and employees of their offices who enter our Courthouses and Court facilities, with appropriate modifications as set forth herein.

The Court's decision to extend such policy incorporates by reference the discussion set forth in General Order 2021-12. The Court has also considered the fact that other federal courts have adopted policies requiring that attorneys appearing in person provide proof of vaccination or, alternatively, proof of a negative COVID-19 test taken within 72 hours of counsel's appearance. See, e.g., http://www.ca7.uscourts.gov/forms/Current_Covid-19_Courtroom_Procedures.pdf (last visited Aug. 20, 2021). Multiple federal circuit courts have similarly adopted vaccination policies applicable to all individuals (including counsel, their clients, and members of the public) that enter court facilities. See, e.g., https://www.ca11.uscourts.gov/sites/default/files/courtdocs/general/General_Order_No_51.pdf (last visited Aug. 20, 2021). This Court, at least at this time, limits the extension of its vaccination and testing policy to all members of the bar of this Court and employees of their offices entering our Court facilities, whether together or individually, which includes counsel appointed under the Criminal Justice Act, Assistant Federal Public

Defenders, privately retained criminal counsel, Assistant United States Attorneys, attorneys representing clients in civil matters or other non-criminal proceedings, and those appearing pro hac vice (hereinafter, "admitted counsel and employees of their offices"). The Court finds that the extension of its vaccination and testing policy to admitted counsel is appropriate because such individuals are "Officers of the Court," and in such role, they (and employees of their offices) interact with countless others while in our facilities, including their clients, opposing counsel, Clerk's Office employees, probation officers, court security officers, deputy U.S. marshals, judges, court reporters, courtroom deputies, chambers staff, family members of litigants, and other members of the public.

Admitted counsel and employees of their offices entering our Courthouses or Court facilities are therefore required to either be fully vaccinated against the COVID-19 virus and attest to their vaccination status,¹ or alternatively: (1) be tested for COVID-19 and provide proof of a negative COVID-19 test **taken no more than 72 hours** before entering our Courthouses or Court facilities (and at least once every seven calendar days thereafter if involved in

¹ Individuals with concerns about the safety of the available COVID-19 vaccines are encouraged to consult their doctor/medical provider to discuss the safety of the vaccines and the risks to themselves, their family members, and the public should they remain unvaccinated, particularly in the context of the Delta variant and potential future variants of concern.

a trial or proceeding spanning more than one week);² and (2) wear a mask while indoors in our Courthouses and Court facilities at all times, unless you are authorized to remove the mask by a presiding judge.³ Anyone with a positive COVID-19 test result will not be permitted to enter our Courthouses and Court facilities for fourteen (14) days after the test was administered, unless a shorter period is approved on a case-by-case basis by the Chief Judge or Senior Active Judge. Should the default quarantine period change by subsequent General Order, such change shall supersede the fourteen (14) day period set forth herein.

For admitted counsel and employees of their offices who are not fully vaccinated, presiding judges may, on a case-by-case basis, require test results from an additional COVID-19 test taken more than 72 hours before entering a Courthouse for a trial, any other lengthy proceeding, any proceeding where witnesses or participants have traveled great distances to appear, or any other proceeding where time is of the essence, in order to avoid a last

² "At-home" COVID-19 test results will not be accepted by the Court, though in light of masking requirements and the need to receive timely test results, "rapid-tests" obtained through a pharmacy, health department, doctor's office, or other healthcare provider will be accepted. PCR test results will likewise be accepted. While the cost of testing, if any, will be the responsibility of admitted counsel and employees of their offices, no-cost testing may be available through a local health department and/or through the partnership between the Virginia Department of Health and Walgreens pharmacy. See, e.g., <https://www.vdh.virginia.gov/coronavirus/covid-19-testing/walgreens-partnership/> (last visited Aug. 20, 2021).

³ The currently in-force mask policy for vaccinated individuals is set forth in General Order No. 2021-11.

minute continuance due to a positive test result. Admitted counsel and employees of their offices who are not fully vaccinated should ensure that they plan ahead to arrange for all required testing as last minute requests for continuances based on a failure to comply with the testing policy will likely be viewed with disfavor.

In order to implement the instant vaccination and testing policy, all admitted counsel and employees of their offices entering our Courthouses or Court facilities must submit a vaccination attestation form, a copy of which is attached to this Order. A fillable version of such form will also be made available on the Court's public-facing website, and such form should be emailed to: vaed_counsel_attestation@vaed.uscourts.gov.⁴ The same email address should be used to submit proof of negative test results.

Admitted counsel and employees of their offices planning to enter our Courthouses and Court facilities in the next several weeks are encouraged to submit their attestation forms by **Friday, August 27, 2021**, as the policy requiring proof of negative COVID-19 test results for individuals that are not fully vaccinated, or who decline to disclose their vaccination status, will be effective

⁴ Individuals indicating on the attestation form that they are in the vaccination process, but are not yet "fully vaccinated" (defined as two weeks after receiving the second dose of a two-dose vaccine (Pfizer or Moderna) or the single-dose vaccine (Johnson & Johnson)) will be required to follow the testing and masking safety protocols for unvaccinated individuals until they are fully vaccinated.

September 1, 2021. Admitted counsel without any active cases in this Court, as well as admitted counsel and employees of their offices who do not anticipate entering our facilities in the immediate future, may submit their forms at a later date, though a completed form must, of course, be submitted in advance of entering our Courthouse or Court facilities on or after **September 1, 2021.** The Court requests that, when possible, such forms be submitted at least two business days prior to entering our Courthouses and Court facilities.

Exemptions to the vaccination policy may be granted for individuals with medical conditions that prevent them from being vaccinated and for individuals with sincerely held religious beliefs that prohibit them from being vaccinated. To request an exemption, admitted counsel and employees of their offices should submit a letter providing sufficient details and/or supporting documents to permit full consideration of the request. Similar to the attestation form, individuals submitting an exemption request are required to provide accurate information and sign the request. The exemption request letter may be submitted by email to the address specified above with "Confidential" in the subject line, or alternatively, may be mailed in paper format to the Clerk of Court with "Confidential" designated on the envelope. Such requests will be considered by the Chief Judge, who will determine the appropriate accommodation for any individual granted an

exemption, though there will still be health and safety requirements in place if admitted counsel and employees of their offices ultimately enter our Courthouses or other facilities. These health and safety requirements will include COVID-19 testing and masking.⁵

Vaccine mandates, even broad statewide mandates applicable to all adults, have been long deemed constitutional by the United States Supreme Court, Jacobson v. Massachusetts, 197 U.S. 11 (1905),⁶ with the history of mandated inoculation dating back to the founding of our nation. This Court, however, is not mandating a vaccine for all adults, or even for all admitted counsel and employees of their offices entering our facilities, but is instead adopting a vaccination and testing policy that presents two alternatives (vaccination, or testing within 72 hours of entering our Courthouses or facilities coupled with universal masking) to

⁵ Unless modified by the Chief Judge through the exemption process, the default safety policy for admitted counsel and employees of their offices who receive an exemption will require proof of a negative COVID-19 test **taken no more than 72 hours** before entering our Courthouses or Court facilities (and follow-up testing at least once every seven calendar days thereafter if involved in a trial or proceeding spanning more than one week).

⁶ In Jacobson, the United States Supreme Court rejected the claim that "a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best," explaining that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint" and that there "are manifold restraints to which every person is necessarily subject for the common good." Jacobson, 197 U.S. at 26 (emphasis added).

promote the health and welfare of everyone who enters our Courthouses and Court facilities. Moreover, the Court will authorize "exceptions for persons who declare vaccination incompatible with their religious beliefs and persons for whom vaccination is medically contraindicated." Klaassen v. Trustees of Indiana Univ., No. 21-2326, -- F.4th --, 2021 WL 3281209, at *1 (7th Cir. Aug. 2, 2021). Such policy, consistent with the policies adopted by the President and the Governor of Virginia, as well as the policy adopted by this Court for its employees and contractors, is a reasonable and lawful response during a nationwide state of emergency and will promote safety in our District Court facilities during the resurgence of the deadly COVID-19 virus. Cf. <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last visited Aug. 20, 2021) (discussing the lawfulness of COVID-19 vaccination and testing requirements for individuals physically entering the workplace "because an individual with the virus will pose a direct threat to the health of others"). Such policy will also inform litigants, witnesses, jurors, and supervisees that are compelled to appear in our Courthouses and Court facilities that diligent efforts have been made to protect them from the spread of COVID-19.

As indicated above, the vaccination and testing policy for admitted counsel and employees of their offices will take effect

September 1, 2021, and will remain in place until further Order of the Court. The Clerk of Court is hereby ordered to designate a representative to collect and monitor the attestation forms and proof of COVID-19 test results submitted by admitted counsel and employees of their offices who are not fully vaccinated. Such submissions should generally be treated as confidential unless there is a sufficient health and safety reason justifying their disclosure.

It is so ORDERED.

/s/ 

Mark S. Davis

CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
August 20, 2021