

# Chapter Leaders' Vaccine Mandate Discussion

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THURSDAY, DECEMBER 9, 2021



# Presentation Overview

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- Brief recap and latest vaccine mandate developments
- Discussion of grievances vs. EEO complaints for RA denials
- Checklist walkthrough, with examples
- Oral reply template walkthrough
- Q&A – please post Qs to chat and/or hold until end

# Recap and Latest Developments

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- November 22 deadline for full vaccination
- Counseling memos issued (automatically generated?)
- “Enforcement actions” beyond education and counselling suspended until after the holidays
- Timeline for processing of RA requests – varies by agency

# Vaccination Numbers/RA Requests

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Vary by agency

Gov't-wide:

- ❑ 92% at least partially vaccinated as of 11/22
- ❑ 4.5% have submitted RA requests
- ❑ 3.5% no RA/No Vaccine

# Contesting RA Denials/Forum Choice

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- **An employee may only choose one forum** (i.e., formal EEO complaint, grievance).
- Once choice made by filing grievance or formal complaint, can't be changed.
- Earlier grievance or EEO complaint challenging RA denial or counseling/reprimand may impact later suspension/removal.
- Advise employee to hold off on filing until suspension decision.
- Consult NFR as early as possible to discuss the best course for individual situations.

# Contesting RA Denials/Forum Choice (cont'd)

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- In oral/written reply, raise a discrimination claim as a defense to “Failure to Follow a Lawful Order” charge. (By improperly denying RA request, order is not lawful.)
- Cite discrimination defense in grievance/EEO complaint challenging suspension and appeal of removal (to arbitration by Field Office or MSPB).

Factor	Grievance	EEO Complaint
Time limits for filing	Check your contract's grievance article. Determine whether a grievance with a discrimination component is the same as any grievance or has its own separate time limit.	Must contact EEO counselor within 45 days of relevant discriminatory act (e.g., denial of reasonable accommodation request, suspension/removal for failure to be fully vaccinated following denial of reasonable accommodation request, etc.)
Other contract/legal violations	Can allege discrimination and other contractual violations	Can only allege discrimination violations
Employee Control	Union has choice whether to grieve and, eventually, whether to arbitrate on employee's behalf. Employee may grieve if Union doesn't, but employee cannot arbitrate case if Union declines.	Union has choice whether to represent employee. Employee may take case as far as employee wants without Union representation.
Duty of Fair Representation	Union has a DFR obligation	Union does not have DFR obligation
Processing time	Usually quicker, especially if grievance time limits adhered to	Potentially years if entire administrative process exhausted
Gathering documentation to support allegation	Union requests through 7114(b)(4) rights	Agency gathers and compiles Investigative Report. Additional discovery if hearing requested.
Procedures	Check contract grievance article	Refer to 29 C.F.R. Section 1614, found at <a href="http://www.eeoc.gov">www.eeoc.gov</a>
Damages	Arbitrators can award	EEOC/admin. judge can award

# Evaluating Medical RA Requests

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- Reminder: RA Requests can be submitted at any time, even after disciplinary process has commenced.
- Employee must provide documentation explaining medical circumstances and how they increase vaccine risks. Letter or RA form request best, but no specific form required.
- Employees MUST cooperate with interactive process and requests for further information. RA can be denied if Employee does not engage.
- If ANY vaccine is safe for the Employee, RA may be denied.
- Watch for cases where medical reason is not one of standard conditions (form info from CDC).



# Evaluating Religious RA Requests

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- Legal standards are less clear and more favorable to the agency generally.
- Is employee's reason for request religious in nature? Personal, political, ideological reasons are not considered religious.
- Can employee resubmit a clarified RA request if denied? (e.g., remove non-religious reasons, focus on religious aspects of belief)
- If denied, what reason did agency provide? Not a sincere belief? Undue burden to approve exception?

# Oral/Written Replies - ?'s to Keep in Mind

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- First question: whether to represent employees at replies
- Second question: whether to represent members only or all BUEs
- Third question: which template is in play (medical, religious, no RA request)
- Additional questions to ponder:
  - Has employee taken steps to come into compliance?
  - If medical → temporary delay or full exception
  - If religious → let employee describe nature of their religious objection?
  - Include discussion re: Douglas Factors?

# “Failure to Follow a Lawful Order”

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- Close variation: “Failure to Follow Direction or Instructions”
- In such cases, the agency bears the burden of proving:
  - The employee was given a specific directive or order by an agency authority, i.e., notice that the vaccination was required;
  - The order was lawful; and
  - The employee failed to comply
- Proof of intentional refusal is not required unless the charge is explicitly “Insubordination.”
- In most cases, simple failure to comply will constitute grounds for discipline.

# Representation at Replies

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- Therefore, the reply templates for employees denied their medical and religious exemption requests focus on arguing the wrongful denial of those requests which, in turn, would make the vaccine order unlawful because it must allow for exemptions on these bases.
- This could be cited in an appeal to a final decision imposing a suspension (through the grievance or EEO complaint process), or in an appeal to a final decision removing the employee (through the grievance/arbitration or MSPB “mixed case” appeal).

# Reply Template for Medical or Religious Exception Requests

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- If employee has taken steps since proposed disciplinary action to get vaccinated, provide evidence of that (e.g., date of shot, vaccine type, etc.)
- Legal theory: Agency cannot prove charge because:
  - EO 14043 requires vaccine mandate exception for medical condition/disability or religious objections
  - Employee requested an exception and provided necessary documentation
  - Agency improperly denied requested exception
- Douglas Factors?
  - In the alternative argument

# Reply Template Where No Exception Requested

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- Vaccination mandate of Executive Order 14043 constitutes a lawful order for federal employees
- Few, if any, defenses for employees who refused or failed to comply for personal, political, or other reasons (and who did not request an exception on religious or medical grounds)
- Although reply template which focuses on mitigating factors is also provided for those employees, a mitigation argument in these cases is unlikely to be successful
- See Mazares v. Dept. of the Navy, 302 F.3d 1382 (2002) (two employees fired, without progressive discipline, for failure to be vaccinated despite each having more than a decade of “honorable and dedicated” service and an excellent performance record)

# Questions?

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