



The Denver Police Protective Association



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September 29, 2021

VIA ELECTRONIC COMMUNICATION AND FIRST-CLASS MAIL

Chad Frasier, District Director
United States Department of Labor Wage and Hour Division
Denver Colorado District Office
72119th Street, Suite 114
Denver, CO 80202-5712

**RE: Denver Police Protective Association
Third-Party Wage & Hour Complaint/City and County of Denver**

Dear Mr. Frasier:

I am the President of the Denver Police Protective Association ("Association"), which represents more than 1,400 sworn Denver Police officers employed by the City and County of Denver ("Denver" or "City"). We are writing to submit a complaint on behalf of more than 150 Association members. Although the Association and the City are parties to a Collective Bargaining Agreement, this dispute arises under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq.*, and also implicates Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* On October 1, 2021, the City will begin systematically violating these members' wage and hour rights. As such, we respectfully request an immediate investigation.

On August 2, 2021, Denver Mayor Michael Hancock announced all Denver City employees would be required to be vaccinated against COVID-19 by September 30, 2021, excepting those who qualified for a religious or medical exemption. See *Mayor Hancock Announces COVID-19 Vaccine Requirement for Employees*, which can be found at: [Mayor Hancock Announces COVID-19 Vaccine Requirement for Employees - City and County of Denver \(denvergov.org\)](https://www.denvergov.org/news/2021/08/02/mayor-hancock-announces-covid-19-vaccine-requirement-for-employees). As of today's date, approximately 157 Denver Police officers have received either a medical or religious exemption from this mandate. We are attaching as **Exhibit A** the City's guidelines regarding such accommodations, which (in part) require exempt officers to receive a negative PCR test for COVID-19 every five days.

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Since the issuance of the Mayor's health Order, the Association has attempted to work with the City to coordinate implementation of these processes and requirements. However, the City has now made it clear police officers must be tested outside of normal working hours and they will not be compensated for the time they spend complying with the Mayor's mandate requirements. We have raised several alternatives, all of which have been rejected, or even refused to seriously be considered.

We believe the time spent getting tested is compensable and the City is preparing to violate (and perhaps, by the time you read this letter, is actively violating) the FLSA. The Department of Labor's own guidelines state:

For many employees, undergoing COVID-19 testing may be compensable because the testing is necessary for them to perform their jobs safely and effectively during the pandemic. For example, if a grocery store cashier who has significant interaction with the general public is required by her employer to undergo a COVID-19 test on her day off, such time is likely compensable because it is integral and indispensable to her work during the pandemic.

Department of Labor, *COVID-19 and the Fair Labor Standards Act Questions and Answers*, available at: <https://www.dol.gov/agencies/whd/flsa/pandemic>.

The same logic applies here: Denver is requiring its employees to be tested for COVID-19, and because those employees have "significant interaction with the general public," the time they spend getting tested "is integral and indispensable to [their] work." This approach benefits the City, which has both an obligation and a desire to limit the spread of the coronavirus among its employees and to the general public, and which has made the testing a requirement of these police officers' job. Federal courts have also held that time spent on mandatory medical testing and treatment is compensable. *E.g., Scott v. Raudin McCormick*, Case No. 08-4045, 2009 WL 3561301 (D. Kan. Oct. 30, 2009) (time spent outside of work on mandatory drug testing compensable); *Sehie v. City of Aurora*, 432 F.3d 749, 751-52 (7th Cir. 2005) (time spent in mandatory counseling sessions compensable).

In general, the time spent by an employee during a medical or physical examination which the employer orders the employee to undergo is counted as compensable time. *See Copeland v. ABB, Inc.*, 521 F.3d 1010 (8th Cir. 2008). Even if the examination occurs outside the employee's regular working hours, the time will be considered hours worked if the employer specifically requires the employee to undergo the examination as a condition of employment. *See Administrative Opinion*, August 2, 1989 (Wage and Hour Division, Department of Labor). The same rules apply to make the time spent during mandatory drug tests compensable under the FLSA.

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See Scott v. Raudin McCormick, Inc., supra; Twaddle v. RKE Trucking Co., 2006 WL 840388 (S.D. Ohio 2006). Further, in a series of letter opinions, the DOL has indicated that time spent in compulsory medical examinations outside of regular working hours is compensable. *See, e.g., Required Physical Examinations/Hours Worked, Op. of U.S. Dept. of Labor (Oct. 7, 1997); Police/Hours Worked, Op. of U.S. Dept. of Labor (Aug. 2, 1989); Hours Worked/ Medical Exams, Op. of U.S. Dept. of Labor (April 4, 1974).*

We have raised arguments with the City, to no avail. Denver insists it is not mandating testing, notwithstanding the fact that exempt police officers who do not get tested will be terminated.

Finally, the City has claimed it would be an undue hardship to compensate these police officers for their testing time, and it is, therefore, not required to do so. The Association does not believe it could ever be an undue hardship to comply with the basic dictates of the FLSA. The Association also believes because the City's proposed accommodation requires violations of this country's landmark wage and hour law, it is not a reasonable one.

There's no doubt Denver's compulsory, off-duty COVID testing, which is a condition of employment for those granted medical or religious exemptions/exceptions from COVID vaccination, is a compulsory medical examination that is compensable "hours worked" under the FLSA. Thank you for your attention to this matter. Please do not hesitate to reach out regarding this issue.

Respectfully submitted,

DENVER POLICE PROTECTIVE ASSOCIATION



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Enclosure

COVID-19 Mandated Vaccine Alternative/Accommodation

Because your exemption was approved, you will be expected to comply with the following accommodations starting **October 1, 2021**:

1. Wear a mask at all times during working hours except when eating or drinking.
2. Get a PCR COVID-19 test every five *calendar* days and upload the results into Workday weekly (see below). The test must be taken outside of your regular working hours and even while on accrued leave (PTO/vacation/sick). The test is free and can be taken at multiple sites in the metro and surrounding areas. Testing sites can be found at <https://covidcheckcolorado.org/find-our-sites-testing/> and <https://covid19.colorado.gov/testing>. They include participating Walgreens and Walmart pharmacies. Individual counties also post testing sites, e.g., <https://www.douglas.co.us/covid-19-testing-locations/>, <https://www.tchd.org/827/Free-Testing-Sites>. Rapid tests and at-home-tests will not be accepted.
3. Timely upload your PCR test results into Workday weekly. You will get a reminder task in Workday every five *calendar* days. You will need to open this task on a weekly basis and follow the instructions for uploading all your test results into Workday. This information will be maintained as confidential pursuant to Executive Order No. 143 and the city's Privacy/Data Protection Policy, It is not a violation of the Americans with Disabilities Act (ADA) or the Health Insurance Portability and Accountability Act (HIPAA) for the city to collect and maintain this information.

The failure to abide by these accommodations may result in discipline up to and including dismissal. The presumptive discipline for the first violation is a 10-day suspension. The presumptive discipline for the second violation is dismissal.

This is not a permanent accommodation. Your accommodation is subject to review at any time based on updated COVID-19 metrics, vaccine approvals by the Food and Drug Administration (FDA), new vaccines, new vaccine data, a change in medical conditions, or department/agency business reasons, including if the accommodation causes the department/agency an undue hardship.

As with any other employee, if you test positive for COVID-19, you must quarantine for 10 days after the testing date or until you are fever-free for 24 hours without the use of medications and other symptoms are improving. If you do not have symptoms and are able to work, you should contact your supervisor to determine if there is remote work available for you. If you have symptoms or are not able to work remotely, please review the Colorado Public Health Emergency (CPHE) Sick Leave, FMLA and CHFVA information on [DenverHub](#) for possible employee leave options. Employees who are unable to work remotely or unable to work because of symptoms and are not eligible for CPHE, will have to use their own sick leave, PTO, vacation and/or comp time. If you are ill for four or more days and/or hospitalized due to severe symptoms, please contact your respective FMLA Coordinator.