

**THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

Case No: 5:23-cv-00489-D-BM

CHRISTOPHER CAUDILL;)
RACHEL NIKETOPOULOS; and)
DAVID FRIEDLANDER, A/K/A)
DOVID FRIEDLANDER)

Plaintiff(s)

v.

THE NORTH CAROLINA)
SYMPHONY SOCIETY, INC.;)
THE NORTH CAROLINA)
DEPARTMENT OF NATURAL)
AND CULTURAL)
RESOURCES; and SANDI)
MACDONALD)

Defendant(s)

**NORTH CAROLINA DEPARTMENT
OF NATURAL AND CULTURAL
RESOURCES MEMORANDUM IN
SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFFS' COMPLAINT**

[Fed. R. Civ. P. 12(b)(1), (2) and (6)]

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**NORTH CAROLINA DEPARTMENT
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[Fed. R. Civ. P. 12(b)(1), (2) and (6)]

Now comes the North Carolina Department of Natural and Cultural Resources (“NCDNCR”) and pursuant to Local Rule 7.2 respectfully submits this memorandum in support of NCDNCR’s motion to dismiss Plaintiffs’ Complaint (“Complaint”).

NATURE OF THE CASE

Plaintiffs Chris Caudill, Rachel Niketopoulos and Dovid Friedlander (collectively, “Plaintiffs”), musicians formerly employed with the North

Carolina Symphony Society, Inc., filed a Complaint on August 31, 2023, (DE 1) against the North Carolina Symphony Society, Inc. (the “N.C. Symphony, Inc.” or “Symphony Orchestra”), Sandi Macdonald, the N. C. Symphony Inc.’s President and Chief Executive Officer and the North Carolina Department of Natural and Cultural Resources (“NCDNCR”), alleging violations of their rights through a mandated COVID-19 vaccine policy and subsequent denial of a religious accommodation under Title VII of the Civil Rights Act of 1964 and violation of the Free Exercise Clause pursuant to 42 U.S.C. § 1983. Plaintiffs’ Complaint asserts two causes of action:

1. Violation of Title VII of the Civil Rights Act of 1964 against the N.C. Symphony, Inc. and NCDNCR (Count I);
2. Violation of 42 U.S.C. § 1983 (Free Exercise Clause) against the N.C. Symphony, Inc. and Ms. Macdonald (Count II).

STATEMENT OF FACTS¹

In June of 2003, Plaintiff Chris Caudill (“Caudill”), who plays the French horn, joined the Symphony Orchestra in the horn section. (DE 1, ¶31). Plaintiff Rachel Niketopoulos (“Niketopoulos”), also a French horn player, joined the Symphony Orchestra in 2005. (CP 32) Caudill and Niketopoulos are married.

¹ While Plaintiffs’ allegations are presumed to be true for the purposes of this motion, Defendant reserves the right to contest them at the appropriate time if this case proceeds.

(DE 1, ¶33). Plaintiff Dovid Friedlander (“Friedlander”), who plays the violin, joined the Symphony Orchestra more than fifteen years ago. (DE 1, ¶34).

The N.C. Symphony, Inc. is a non-profit corporation which was incorporated in 1933, and is organized as a non-profit under Chapter 55A of the North Carolina General Statutes. Sandi Macdonald is the President and Chief Executive Officer of the N.C. Symphony, Inc. (DE 1, ¶¶ 9-10). The N.C. Symphony, Inc.’s restated Articles of Incorporation state that the purpose of the non-profit corporation is to promote and foster musical culture within and without the State, including organizing the North Carolina Symphony Orchestra and supervising the musicians². It is governed by a Board of Directors and, upon information and belief, Defendant Macdonald reports to that Board. N.C.G.S. § 143B-94 (2023).

The NCDNCR is a cabinet-level department within the North Carolina government whose duties include, *inter alia*, assisting local organizations and

² This Court may take judicial notice of matters of public record which cannot be reasonably disputed and can readily be determined from accurate sources. *See* Fed. R. Evid. 201; *Sec’y of State for Defense v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir 2007)(“In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record”.); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (noting that a court may take judicial notice of public information when reviewing a motion to dismiss); *Johnson v. North Carolina*, No. 4:14-cv-50, 2015 U.S. Dist. LEXIS 11487, at *6 n.3 (E.D.N.C. Jan. 30, 2015)(“On a motion to dismiss, courts may properly take judicial notice of matters of public record.”)

the community with needs, resources and opportunities related to the arts. (DE 1, ¶ 10); N.C.G.S. § 143-406 (2023). In support of the N.C. Symphony, Inc., NCDNCR assigns several NCDNCR (State) employees to assist in some administrative functions of the N.C. Symphony, Inc. (DE 1, ¶ 10). N.C.G.S. § 126-5(c11)(2).

In August 2021, in response to the Covid-19 pandemic, the North Carolina Symphony Player's Association (though not clear from Plaintiffs' complaint, this is believed to be the labor union for orchestra musicians in North Carolina) and the N.C. Symphony, Inc., issued a COVID-19 Vaccination Policy for the 2021-2022 season. (DE 1, ¶ 42). According to Plaintiffs, the vaccination policy provided that, to be part of the orchestra, musicians must receive COVID-19 vaccinations or have a medical or religious exemption. *Id.* Additionally, the union's Orchestra Committee ("OC") informed its members that "Management" (again, it is unclear from the complaint whether this is the management of the union or management of the N.C. Symphony Society, Inc.) would provide musicians with a "Religious Accommodation Request Form." According to Plaintiffs, if the religious accommodation was approved, the policy included, "twice weekly testing during all weeks of the season." (DE 1, ¶ 43). Additionally the OC informed its members that approved unvaccinated players would be socially distanced. (DE 1, ¶ 44).

In early September 2021, Plaintiffs sought religious accommodations from the vaccination requirement. (DE 1, ¶ 46). Plaintiffs allege that, on September 14, 2021, Sandi Macdonald, President and CEO of the N.C. Symphony, Inc., denied the Plaintiffs religious accommodation request. (DE 1, ¶ 49). Plaintiffs were placed on unpaid leave with health benefits through the 2021-2022 season, approximately September through early June. (DE 1, ¶¶ 42 fn.18, 51). Plaintiffs further allege Ms. Macdonald agreed to meet with them by April 1, 2022 to discuss whether the N.C. Symphony, Inc., could accommodate them after that time. Despite having been placed on unpaid leave for an entire symphony season, Plaintiffs allege that they elected not to file charges at the EEOC. (DE 1, ¶ 51). Plaintiffs further allege that Ms. MacDonald's true basis for denying Plaintiffs religious accommodation request was not an inability to provide a reasonable accommodation but rather Ms. Macdonald wanted to promote a "culture" of vaccination at the N.C. Symphony, Inc. (DE 1, ¶ 59). Ms. Macdonald never scheduled the April 1st meeting with Plaintiffs and on May 17, 2022, sent letters to the Plaintiffs that they are terminated, effective June 30, 2022, for failing to comply with the Covid-19 Vaccination Policy. Macdonald informed Plaintiffs that it was an undue hardship for the N.C. Symphony, Inc., to allow Plaintiffs to perform with

mitigation measures and it had become an undue hardship to continue to provide Plaintiffs with unpaid leave with health benefits. (DE 1, ¶ 60).

Niketopoulos filed her Charge of Discrimination with the EEOC on August 19, 2022, Caudill on September 19, 2022 and Friedlander on October 22, 2022 (Friedlander, without explanation, asserts he did not receive his May 17th letter until July 28, 2022). (DE 1, ¶¶ 60 fn. 31, 61). On June 4, 2023, the EEOC issued Right to Sue letters to Plaintiffs³. (DE 1, ¶ 62).

QUESTIONS PRESENTED

- I. WHETHER PLAINTIFFS' TITLE VII CLAIM AGAINST NCDNCR SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

- II. WHETHER PLAINTIFFS' TITLE VII CLAIM AGAINST NCDNCR SHOULD BE DISMISSED FOR FAILURE TO**

³ Plaintiffs' EEOC Charges of Discrimination and Right to Sue letters are attached to Defendant's Motion to Dismiss as: Exhibit 1-Caudill's September 19, 2022 EEOC Charge of Discrimination; Exhibit 2-Friedlander's October 22, 2022 EEOC Charge of Discrimination; Exhibit 3- Niketopoulos' August 19, 2022 EEOC Charge of Discrimination; Exhibit 4-Caudill's June 4, 2023 EEOC Notice or Right to Sue; Exhibit 5-Friedlander's June 4, 2023 EEOC Notice or Right to Sue; and Exhibit 6-Niketopoulos' June 4, 2023 EEOC Notice or right to Sue and are incorporated herein. A document referenced in and integral to the complaint may be considered in a motion to dismiss even of outside the pleadings. *See Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995); *Plummer v. Veolia Trans. Servs.*, No. 5:09-CV-557, 2010 U.S. Dis. Lexis 64419, at *1 n. 1 (E.D.N.C. June 29, 2010)(considering EEOC Charge and other documents attached to defendant's motion to dismiss because they were integral to and relied upon by the complaint).

EXHAUST ADMINISTRATIVE REMEDIES AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

DISMISSAL STANDARDS

1. Rule 12(b)(6) Standard.

A motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989). The “court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint,” but does not consider “legal conclusions, elements of a cause of action, . . . bare assertions devoid of factual enhancement[,] . . . unwarranted inferences, unreasonable conclusions, or arguments.” *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citations omitted). The 12(b)(6) standard for dismissal requires the articulation of facts that, if true, demonstrate a claim that the plaintiff may plausibly be entitled to relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (citations omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged” --- a standard that requires

more than facts “that are ‘merely consistent with’ a defendant’s liability.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) Although the Court accepts factual allegations as true, it is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) Therefore, to survive a motion to dismiss, a complaint must provide more than “‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

2. Rule 12(b)(1) Standard.

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the burden of proving subject matter jurisdiction on a motion to dismiss is on the party who asserts the existence of subject-matter jurisdiction, the plaintiff. *See Mims v. Kemp*, 516 F.2d 21 (4th Cir. 1975). “Unlike the procedure in a 12(b)(6) motion where there is a presumption reserving the truth finding role to the ultimate factfinder, the court in a 12(b)(1) hearing weighs the evidence to determine its jurisdiction.” *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. Va. 1982). “When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” *Evans v. B. F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (citations omitted)

3. Rule 12(b)(2) Standard.

A motion filed under Rule 12(b)(2) of the Federal Rules of Civil Procedure tests a court's jurisdiction over an individual. Again, the burden is on the plaintiff to demonstrate that jurisdiction is proper, *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1272 (6th Cir. 1998), and the plaintiff must set forth specific facts showing that the court has jurisdiction. *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 930 (6th Cir. 1974). Although a plaintiff who opposes a 12(b)(2) motion is entitled to have all reasonable inferences drawn in his favor, the court is not required to look solely to plaintiff's proof. *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, *rev'd on other grounds*, 7 F.3d 1130 (4th Cir 1993).

ARGUMENT

I. PLAINTIFFS' TITLE VII CLAIMS AGAINST NCDNCR SHOULD BE DISMISSED BECAUSE THE PLAINTIFFS WERE NOT EMPLOYEES OF NCDNCR OR THE STATE OF NORTH CAROLINA AND PLAINTIFFS HAVE OTHERWISE FAILED TO STATE A CLAIM AGAINST NCDNCR.

All of Plaintiffs' claims against NCDNCR should be dismissed because Plaintiffs' employer—and Defendant Macdonald's employer—was the North Carolina Symphony Society, Inc., and not NCDNCR or the State of North Carolina.

Title VII provides that it shall be an “unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). “Title VII on which plaintiff relies require[s] that a claimant be an employee or applicant for employment, 42 U.S.C. §§ 2000e-2(a) . . . [.] and thus employee status is an element of a substantive Title VII claim.” *Curl v. Reavis*, 740 F.2d 1323, 1327 n. 2 (4th Cir. 1984).

Under Title VII, “[t]he term ‘employee’ means an individual employed by an employer . . .” 42 U.S.C. § 2000e-(f). “[A] plaintiff’s status as an employee under Title VII is a question of federal, rather than of state, law; it is to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand.” *Curl*, 740 f.2d at 1327. (quoting *Calderon v. Martin County*, 639 F.2d 271, 272-73 (5th Cir. 1981)). State law is relevant insofar as it describes the plaintiff’s position, including his duties and the way he is hired, supervised and fired. *Id.* (quotations and citations omitted). As such, the court must “focus principally on the responsibilities and powers inherent in the position, rather than on the actions of specific individuals, including plaintiffs,

who hold or have held the position.” *Kelley v. City of Albuquerque*, 542 F.3d 802, 810 (10th Cir. 2008).

In adopting this definition, Congress essentially left the term “employee” undefined. *See Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256, 259 (4th Cir. 1997). The Fourth Circuit has found that when Congress uses the term “employee” in a statute without defining it, the courts will presume that Congress intended to describe the “conventional master-servant relationship as understood by common-law agency doctrine.” *Id.* (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992)).

In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989), the Supreme Court identified a non-exhaustive list of factors relevant to determining whether an individual is an employee under the common law of agency. *See Mangram v. Gen. Motors Corp.*, 108 F.3d 61, 62-63 (4th Cir. 1997). These factors include: 1) control of hours worked by the individual and administrative details incident to work; 2) source of instrumentalities of individual’s work; 3) duration of the relationship between the parties; 4) whether the hiring party has right to assign additional work or to preclude the individual from working at other facilities; 5) method of payment; 6) the individual’s role in hiring and paying assistants; 7) whether

work is part of the regular business of the hiring party and how it is customarily discharged; 8) provision of employee benefits; 9) tax treatment of income; and 10) the parties' belief as to type of relationship. *See Cilecek*, 115 F.3d at 259 (citing *Reid*, 490 U.S. at 751-52)

Based on the factual allegations raised in the Plaintiffs' complaint and the attached Charges of Discrimination, in applying the foregoing factors, Plaintiffs have not shown that they were ever NCDNCR's employees.

Here, Plaintiffs have not alleged or averred that they were hired by NCDNCR (or, the State), that NCDNCR controls their hours of work, has the right to assign work, or preclude them from working at different facilities, or controls where or when they will perform as part of the Symphony Orchestra. Rather, Plaintiffs admit they were hired by N.C. Symphony, Inc., and each musician in the orchestra signs a contract every January that is negotiated between an elected Orchestra Committee, the local musicians union, and the N.C. Symphony, Inc. (DE 1, ¶¶ 42-48) (**Exs. 1 and 2**). Accord, N.C.G.S. § 95-98 (2023) (Contracts between the State and any labor union, trade union or labor organization bargaining for any public employee are against public policy of the State and are unlawful and void.). Plaintiffs do not contend that NCDNCR has any control over the instrumentalities of their work. Plaintiffs have each worked for the N.C. Symphony Orchestra for over fifteen years (DE

1, ¶¶ 31, 32 and 34) and have presumably signed an employment contract with the N.C Symphony, Inc. each of those years. There is no allegation or facts in the Complaint that NCDNCR is involved in the hiring or firing of Symphony Orchestra musicians, or that NCDNCR directed, or had the authority to direct, someone in the hiring, firing, or disciplining of the same. All the allegations related to the adverse employment action are aimed at Ms. Macdonald in her position as President and CEO of the N.C. Symphony, Inc. (DE 1, ¶¶ 11, 49, 51, 60, 65, 66 and 67). Plaintiffs have not alleged or averred that they were paid by NCDNCR (or the State), that they received health or other benefits from the State, or that they pay into the State's retirement system. *See* N.C.G.S. § 135-1 (2023) ("employee" shall mean, *inter alia*, full-time employees, agents or officers of the State of North Carolina or and any of its departments, bureaus or institutions.) Plaintiffs have not alleged or averred they received any guidance, performance evaluation (DE 1, ¶ 71) or support from the human resources division at NCDNCR or the North Carolina Office of State Human Resources, which makes policies and rules governing State employees. N.C.G.S. § 126-1 (2023)

Utilizing the *Reid* test, Plaintiffs do not meet the definition of a NCDNCR employee for the purposes of Title VII. Instead, Plaintiffs make the blanket legal assertion that "[u]nder State law, employees of the Symphony

are considered State employees. N.C. Gen. Stat. § 126-(c11)(2).” (DE 1, ¶ 23)⁴. Plaintiffs convolute and misapply the law. The intent and purpose of Chapter 126, the North Carolina Human Resources Act, is to establish for the State a system of personnel administration. N.C.G.S. § 126-1. All State employees not exempted from Chapter 126 are subject to the provisions and protections of the chapter. Under N.C.G.S. § 126-5(c11)(2), “*employees* of the Department of Natural and Cultural Resources” whose positions are assigned to assist the “North Carolina Symphony” are exempted from certain classifications, compensation, holidays, promotion and transfer requirements. However, they are not wholly exempted from Chapter 126 and are State employees (emphasis added). Chapter 126 applies to employees that may be assigned to the N. C. Symphony Society, Inc., but it does not create State employees from whole cloth. *See* N.C.G.S. § 143B-53.2(c) (2023) (“The exemptions to Chapter 126 of the General Statutes authorized by G.S. § 126-5(c11)(2) for the *employees* of the Department of Natural and Cultural Resources listed in that subsection shall be used to develop organizational classification and compensation innovations that will result in the enhanced efficiency of operations.”)

⁴ Plaintiffs are members of the State Employees Credit Union (SECU). (DE 1, ¶ 23). The SECU is formed under N.C.G.S. § 54-109.1 as a cooperative, non-profit association with their own qualifications for membership. Membership or qualification for membership does not make you a State employee.

(emphasis added). Plaintiffs and the other twenty-six N.C. Symphony, Inc., employees and the approximate sixty-six orchestra musicians⁵ are not transformed into NCDNCR (or, State) employees under N.C.G.S. § 126-5(c11)(2). Rather, the six employees listed on NCDNCR's website as employees of NCDNCR (DE 1, ¶ 20) and assigned to administratively assist the Symphony Orchestra and are full time State employees, subject to the rights and privileges of Chapter 126 with a few limited exemptions⁶. Plaintiffs are not. Importantly, Plaintiffs have not alleged or averred that the six NCDNCR employees assisting the Symphony Orchestra had any input or participation in the creation or implementation of the Symphony Society's COVID-19 policy or decision to terminate their employment.

Plaintiffs further allege that the N.C. Symphony, Inc. receives funding from the State and therefore has an impact on the state treasury. (DE 1, ¶¶ 21-22). Presumably, Plaintiffs are asserting that State funding transforms the N.C. Symphony, Inc. into a state actor. It does not. The U.S. Supreme Court's opinions in *Blum v. Yaretsky*, 457 U.S. 991, 1010-11, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 830, 840, 102 S. Ct. 2764,

⁵ DE 1, ¶ 20, fn. 7, "Symphony Website, *Our People*."

⁶ Under N.C.G.S §126-5(c11)(2) these same exemptions apply to NCDNCR employees at the NC Museum of History, Tryon Palace, Transportation Museum, and others.

73 L. Ed. 2d 418 (1982), and the Fourth Circuit's opinion in *Mentavlos v. Anderson*, 249 F.3d 301, 319 (4th Cir. 2001), make clear that even when a private organization relies significantly on the State for funds, that dependence does not alone make the acts of the private organization acts of the State.

Plaintiffs also allege that the N.C. Symphony, Inc., is a “statewide-versus local-concern” and that it is “North Carolina’s state orchestra” embracing a legacy of “statewide service and music education.” (DE 1, ¶ 24). These allegations do not assert that a state law or regulation compels the Symphony Orchestra’s conduct or that the N.C. Symphony, Inc., is so pervasively intertwined with NCDNCR as to be considered state conduct. *See Peltier v. Charter Day School, Inc.*, 8 F.4th 251, 266-268 (4th Cir. 2021). The operation of an orchestra could hardly be considered a state function, and Plaintiffs have not alleged or averred any facts the NCDNCR has any approval or supervision of the Symphony Orchestra’s COVID-19 policies or hiring and firing policies.

a. N.C. Symphony, Inc. and NCDNCR are not a single or integrated employer.

Plaintiffs’ claims against NCDNCR should be dismissed because NCDNCR did not employ the Plaintiffs, and Plaintiffs have failed to allege or aver facts sufficient to support a claim that N.C. Symphony, Inc. and NCDNCR

are a single legal entity. Defendants must generally employ a plaintiff to be liable for employment discrimination; however, defendants who do not directly employ a plaintiff may still be considered the plaintiff's employer in civil rights lawsuits. *See, e.g., Dunlap v. TM Trucking of the Carolinas, LLC*, 288 F. Supp. 3d 654, 664 (D.S.C. 2017). Under the "integrated employer" or "single employer" doctrine, "a parent company and its subsidiary can be considered a single employer for purposes of Title VII liability," *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 409 n.3 (4th Cir. 2015) (internal quotations omitted), when they are so "interrelated that they constitute a single employer," *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 442 (4th Cir. 1999), *abrogated on other grounds, Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143 (4th Cir. 2012).

To determine whether to treat corporate entities as an "integrated employer," courts consider the following factors: "(1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control." *Hukill*, 192 F.3d at 442. Although "no single factor is conclusive," control of labor operations "is the most critical factor." *Id.* (citing *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 (5th Cir. 1997) (finding that control of labor relations has traditionally been the most important)).

Under the first and second considerations, the courts look to whether the separate corporations share a common manager who runs the day-to-day operations, can hire and fire employees and transfer employees between locations. *Gilbert v. Freshbikes, LLC*, 32 F. Supp. 3d 594, 603 (D. Md. 2014); *see also Hukill*, 192 F.3d at 443. Third, the courts look to whether a single party controls employment decisions across multiple corporations, including the power to hire, fire, supervise, and set employee schedules, and whether one individual owns and has financial control over the different enterprise. *Gilbert*, 32 F. Supp. 3d at 603; *see also Hukill*, 192 F.3d at 444 (finding no centralized control of labor operations when the company had “no power to hire, fire, or supervise employees” at the allegedly related companies).

Here, Plaintiffs have failed to allege or aver any facts that NCDNCR had the ability to hire, fire, or transfer any of the three Plaintiffs. Likewise, there are no facts alleged that NCDNCR has control over the Symphony Orchestra’s budget. The N.C. Symphony, Inc., has approximately 30 employees (not including musicians) who are tasked with the day-to-day operations of the Symphony Orchestra, including a Personnel Manager, Director of Orchestral Personnel, Senior Vice President of Finance and Administration & CFO, Vice President of Marketing, Vice President of Philanthropy, among others.

The N.C. Symphony, Inc., is a non-profit corporation established in 1933 (DE 1, ¶ 9). The corporation was organized to promote and foster musical culture and education within and without the State including “organizing the North Carolina Symphony orchestra” and “supervising and providing for the training of musicians.” (**Ex. 7, 2010 N.C. Symphony, Inc., Articles of Restatement**).

In 1943 the North Carolina General Assembly enacted Article 2 of Chapter 140 of the N.C. General Statutes addressing the North Carolina Symphony Society, Inc. The Act established, *inter alia*, a sixteen-member governing board of trustees (§ 140-6), allowed the adoption of by-laws by the board of trustees (§140-7), and provided that the Symphony Society “shall be under the patronage and control of the state” (§140-8). In 1983, the North Carolina General Assembly amended N.C.G.S. §140-8 and removed the language placing the Symphony Orchestra under the control of the State. 1983 N.C. Sess. Laws c. 913; N.C.G.S. §140-8 (2023).

In 1973, the General Assembly enacted the Executive Organization Act. 1973 N.C. Sess. c. 476. As part of the Act, the functions, powers and duties of the N.C. Symphony, Inc. were transferred and vested within NCDNCR, “except as otherwise provided by the Executive Organization Act of 1973.” N.C.G.S. §143B-51(b). The Executive Organization Act also repealed N.C.G.S. §140-6

(1973 N.C. Sess. c. 476, s.89) and replaced it with N.C.G.S. §143B-94. 1973 N.C. Sess. c. 476, s.88. N.C.G.S. § 143B-94 confirms that the N.C. Symphony, Inc., shall “continue to be under the patronage of the State” as provided in Article 2 of Chapter 140. Therefore, the N.C. Symphony, Inc., continued to be governed by its board of trustees, which had the authority to adopt by-laws for the Symphony Orchestra. *See* N.C.G.S. § 140-7. Additionally, all language that the N.C. Symphony, Inc., shall be under the “control” of NCDNCR has been removed from the statutes. While “patronage” accurately reflects the regular State appropriations made to the non-profit corporation, the North Carolina General Assembly made a conscientious decision to remove the word “control” from the statutory text. “When the wording of an amended statute differs in substance from the wording of the statute prior to amendment, we can only conclude that [the General Assembly] intended the statute to have a different meaning.” *Nalley v. Nalley*, 53 F.3d 649, 652 (4th Cir. 1995).

b. N.C. Symphony, Inc. is not agency or subdivision of NCDNCR.

In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 384, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995) the National Railroad Passenger Corporation (“Amtrak”) was deemed part of the federal government for First Amendment purposes. *Lebron*, 513 U.S. at 400. (“We hold that where, as here,

the Government [1] creates a corporation by special law, [2] for the furtherance of governmental objectives, and [3] retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.”).

Here, it is plain enough that the N.C. Symphony, Inc., was not created by special statute. Rather, it was created in 1933 under the general non-profit incorporation statutes of North Carolina. (DE 1, ¶ 10). Article 2 of Chapter 140 of the North Carolina General Statutes was enacted in 1943 to “support” the Symphony Orchestra. (DE 1, ¶ 15). Additionally, the N.C. Symphony, Inc.’s governing body continues to be a board of trustees now consisting of not less than 16 members. The Governor and the Superintendent of Public Instruction serve as ex officio members. Four members are named by the Governor. The remaining ten trustees are chosen by members of the N.C. Symphony, Inc. N.C.G.S. §143B-94. NCDNCR (or, the State) therefore, does not retain permanent authority to appoint a majority of the trustees for the N.C. Symphony, Inc. The *Lebron* test is not met and the N.C. Symphony, Inc. is not an agency or subdivision of NCDNCR.

c. COVID-19 Vaccination Policy.

In August 2021, the N.C. Symphony, Inc., and the North Carolina Symphony Player’s Association announced a COVID-19 Vaccination Policy

that required all orchestra musicians to receive a COVID-19 vaccination or have a medical or religious exemption from the requirement. (DE 1, ¶ 42). Plaintiffs further allege that on September 14, 2021, their religious accommodation requests were denied by the N.C. Symphony, Inc. (DE 1, ¶ 49), and they were ultimately terminated effective June 30, 2022 for failing to comply with the COVID-19 Vaccination Policy. (DE 1, ¶ 6). At the same time Plaintiffs allege they were required to receive a COVID-19 vaccination, the State and NCDNCR were implementing its COVID-19 policy, which did not require State employees to be vaccinated.

On July 29, 2021, Governor Roy Cooper issued Executive Order No. 224 directing the Office of State Human Resources (“OSHR”) to issue a COVID-19 policy that State employees must either: 1) provide proof that they are fully vaccinated or, 2) be tested at least once a week for COVID-19. The Order applied to all cabinet level agencies. (**Ex. 8, Executive Order 224**). NCDNCR is a cabinet level agency. (DE 1, ¶ 10). In response, OSHR issued the State policy titled, “Requirement for COVID-19 Testing and Face Coverings as an Alternative to Proof of Full Vaccination,” effective September 1, 2021. (**Ex. 9, State policy titled, “Requirement for COVID-19 Testing and Face Coverings as an Alternative to Proof of Full Vaccination”**). NCDNCR followed the State policy for employees to: 1) provide proof of full vaccination

or, alternatively, 2) wear a face mask while indoors at work and provide results of COVID-19 testing each week. The policy also provided for accommodation requests. This policy was effective until May 9, 2022, when the State no longer required weekly testing for employees who were not fully vaccinated. **(Ex. 10, State policy titled, “Policy on Face Coverings and on Vaccination or Testing.”)**.

Plaintiffs allege they were NCDNCR employees during the pertinent time alleged in their complaint. (DE 1, ¶ 23). However, they also agree that they were subject to the Symphony Orchestra’s August 2021 mandatory vaccination COVID-19 policy announced by their labor union and the N.C. Symphony, Inc. (DE 1, ¶ 42). This incongruity is emblematic of the ambiguities and uncertainties of Plaintiffs’ Complaint. They attempt to paint themselves as NCDNCR employees all the while alleging they were under the supervision and control of the N.C. Symphony, Inc. Had they been NCDNCR employees, they would have had the option to test weekly in lieu of becoming vaccinated. In sum, Plaintiffs allege that they were terminated pursuant to the Symphony’s COVID-19 Vaccination Policy, rather than on the basis of any policy enacted and enforced by the State or NCDNCR. That concession bolsters the argument that Plaintiffs lack a cause of action against NCDNCR.

II. PLAINTIFFS FAILED TO EXHAUST THEIR EEOC

ADMINISTRATIVE REMEDIES.

Before filing a discrimination claim under Title VII, Plaintiffs must timely file an administrative charge with the EEOC and exhaust the administrative procedural requirements. 42 U.S.C. § 2000e-5(b). “Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent title VII lawsuit.” *Evans v. Techs. Applications & Serv. Co.*, 80 f.3d 954, 963 (4th Cir. 1996). The Supreme Court held that Title VII’s charge-filing requirement is not jurisdictional, but rather a claims-processing rule. *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1850-51, 204 L. Ed. 2d 116 (2019). *See Oswaldo Argueta v. Fred Smith Co.*, No. 5:19-cv-84-FL, 2019 U.S. Dist. LEXIS 204733, 2019 WL 6337426, at *3 (E.D.N.C. Nov. 26, 2019) (finding that *Davis* requires that the charge-filing requirement be analyzed under Rule 12(b)(6)). Therefore, failure to exhaust EEOC administrative remedies claims will be analyzed under Rule 12(b)(6).

- A. Plaintiffs’ Title VII claims against NCDNCR must be dismissed because Plaintiffs did not file an EEOC charge naming NCDNCR as a respondent.**

Proper EEOC charges must meet several requirements. The charge must be in writing and verified under oath or affirmation under penalty of perjury. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 112, 122 S. Ct. 1145, 152 L. Ed. 2d 188 (2002). A charge is sufficient “only if it is ‘sufficiently precise to identify the parties, and to describe generally the action or practices complained of.’” *Chacko v. Patuxent Inst.*, 429 F.3d 505, 508 (4th Cir. 2005) (quoting 29 C.F.R. § 1601.12(b) (2004)). The scope of the plaintiffs’ right to file a federal lawsuit is determined by the charge’s contents. *See Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 (4th Cir. 2002). Likewise, individual defendants who were not named as respondents in EEOC charges generally cannot be held liable in federal court. Specifically, “[u]nder Title VII, a civil action may be brought after administrative proceedings have ended or conciliation attempts have failed only ‘against the respondent named in the [administrative] charge.’” *Alvarado v. Bd. of Trustees of Montgomery Cmty. Coll.*, 848 F.2d 457, 458 (4th Cir. 1988); *see also, EEOC v. 1618 Concepts, Inc.*, 432 F. Supp. 3d 595, 603 (M.D.N.C. 2020) (“The failure to name a party in an EEOC charge may constitute a failure to exhaust administrative remedies . . .”).

An EEOC charge serves two important purposes: (1) “it notifies the charged party of the asserted violation” and (2) “it brings the charged party

before the EEOC and permits effectuation of the [Civil Rights] Act's primary goal, the securing of voluntary compliance with the law." *Dickey v. Greene*, 710 F.2d 1003, 1005 (4th Cir. 1983), *rev'd on other grounds*, 729 F.2d 957 (4th Cir. 1984); *see Miles v. Dell, Inc.*, 429 F.3d 480, 491 (4th Cir. 2005) (noting that administrative exhaustion is to "ensure[] that the employer is put on notice of the alleged violations so that the matter can be resolved out of court if possible"). The exhaustion requirement, therefore, is not "simply a formality to be rushed through so that an individual can quickly file his subsequent lawsuit." *Chacko v. Patuxent Inst.*, 429 F.3d 505, 510 (4th Cir. 2005). It "serves a vital function in the process of remedying an unlawful employment practice." *Balas v. Huntington Ingalls Indus., Inc.*, 711 F.3d 401, 407 (4th Cir. 2013). "Clearly, an entity not named in the administrative charge, and not provided with notice of the charge or the proceedings, cannot participate in the administrative conciliation processes." *Marshall v. Anne Arundel Cty. Md.*, No. SAG-18-0074, 2020 U.S. Dist. LEXIS 71083, 2020 WL 1939712, at *5 (D. Md. Apr. 22, 2020).

In this matter it is undisputed that Plaintiffs did not name NCDNCR in their charges of discrimination with the EEOC. **(Exs. 1-3)** Likewise, Plaintiffs have failed to allege or aver that NCDNCR had any knowledge of the EEOC

charges of discrimination, or that NCDNCR participated in the administrative proceedings or conciliation.

It is anticipated Plaintiffs may attempt to cure their failure to name NCDNCR in their EEOC charges through an alternative “substantial identity” exception to the Title VII naming requirements. “Although the Fourth Circuit has not formally adopted the test, other Courts within the circuit have employed the substantial identity test to assess whether a civil action can fairly be brought against a defendant other than the one named in the EEOC charge.” *Marshall*, 2020 U.S. Dist. LEXIS 71083, 2020 WL 1939712, at *5; *see also Bing Yang v. Lai*, 2022 U.S. Dist. 117396 *12, 2022 WL 244834 (M.D.N.C. 2022) (“Some courts in the Fourth Circuit have recognized a ‘substantial identity’ exception to the general rule that a [discrimination] civil action may only be brought against a respondent listed on the EEOC charge.”); *1618 Concepts*, 432 F. Supp. 3d at 604, (“although the Fourth Circuit has only discussed the substantial identity exception in dicta . . . other courts in this district have applied the exception.”). Under the “substantial identity” test, “[i]f unnamed defendants are substantially or ‘functionally’ identical to named [respondents], then the plaintiff may sue all defendants in a district court action, despite failing to name some of them in the administrative action.” *Mayer v. Moore*, 419 F. Supp. 2d 775, 783 (M.D.N.C. 2006).

Under this exception, courts consider four factors:

- 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint;
- 2) whether, under the circumstances, the interests of a named [respondent] are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings;
- 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party;
- 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named [respondent].

Id. (quoting *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3d Cir. 1977)).

Even if this court undertakes an analysis under the “substantial identity” factors, the dual purposes of the naming requirement have not been satisfied. The facts alleged fail to support that NCDNCR had notice of the charges against it, and that its interests were fairly represented by the named party at the EEOC, the North Carolina Symphony Society, Inc.

First, the allegations in Plaintiffs’ Complaint support a reasonable inference that Plaintiffs could have ascertained the names of the unnamed entity, NCDNCR, through reasonable effort. Plaintiffs allege they are State employees. (DE 1, ¶¶ 23, 69, 70, 72, 74-76 and 80). They further allege that Ms. Macdonald, the CEO and President of the N.C. Symphony, Inc., is listed

on the NCDNCR website as “leadership” (DE 1, ¶¶ 11 and 20) and several other high level Symphony Orchestra employees are also listed on the NCDNCR webpage as employees of the NCDNCR. (DE 1, ¶ 20). Plaintiffs’ Complaint allegations themselves establish that the NCDNCR’s identity was or should have been known to them.

Under the second factor, Plaintiffs have failed to plausibly allege that the interests of the N.C. Symphony, Inc., the named respondent in the EEOC charge, are so similar to those of the NCDNCR that it would be unnecessary to include NCDNCR in the EEOC proceedings. In *Efird v. Riley*, the court refused to dismiss claims against a sheriff where only the sheriff’s department as a whole had been named as respondent in the EEOC charge. 342 F. Supp. 2d 413, 423 (M.D.N.C. 2004). The court reasoned that because, by statute, the sheriff had the exclusive right to hire, discharge, and supervise the employees in his office and was the official party that could be held liable for employment law violations committed by the sheriff’s department, the sheriff himself had reason to know his conduct was at issue and he could be held responsible in his official capacity. *Id.* at 420, 422. Moreover, the sheriff had participated in the EEOC proceeding. *Id.* at 423. Here, there is no allegation that NCDNCR had any authority to hire, discharge or supervise employees of the Symphony Orchestra, much less musicians in the orchestra who had contracts of

employment with the Symphony Orchestra that included labor union protections. **(Exs. 1-3)**. Further, there is no allegation that NCDNCR participated in the EEOC proceedings or that NCDNCR could be held responsible for employment law violations committed by the N.C. Symphony, Inc. Nor is there an allegation that the Symphony's Vaccination Policy and the State OSHR's or NCDNCR's Vaccination Policy was one and the same.

Contrast, *Davis v. BBR Management, LLC*, where the court dismissed the individual defendants not named in the EEOC charge. Civil Action No. DKC 10-0552, 2011 U.S. Dist. LEXIS 8716, 2011 WL 337342, at *5 (D. Md. Jan. 31, 2011). Plaintiff filed a charge at the EEOC naming "Babcock & Brown Residential-Holly Tree as the discriminating employer." 2011 U.S. Dist. LEXIS 8716, [WL] at *1. The Plaintiff then brought suit in federal court against that entity and two individual employees. *Id.* Plaintiff contended that the claims against the unnamed employees should not be dismissed because they were not named in the EEOC charge because their employer was named and the employees were described in the facts portion of the EEOC charge. 2011 U.S. Dist. LEXIS 8716, [WL] at *4. The court disagreed with the plaintiff, and found that "the individual defendants named in Plaintiff's complaint had no reason to know of the EEOC charge and were not in positions to make them substitutable for or essentially identical to the named respondent in the

charge.” 2011 U.S. Dist. LEXIS 8716, [WL] at *5. Moreover, court concluded that “[t]he fact that their names were mentioned in the particulars section of the charge is not adequate” and dismissed the claims against the unnamed individual defendants. *Id.*

Here, the relationship of unnamed NCDNCR to the named respondent, N.C. Symphony, Inc., “is not so similar that the interests of the [named party] would render the presence of [Defendants] unnecessary in the administrative process.” *Scurry v. Lutheran Homes of S.C., Inc.*, C/A No. 3:13-2808-JFA—PJG, 2014 U.S. Dist. LEXIS 123490, 2014 WL 4402797, at *4 (D.S.C. Sept. 3, 2014). There are no allegations that NCDNCR “had . . . reason to know of the EEOC charge,” or “were . . . in positions to make them substitutable for or essentially identical” to N.C. Symphony, Inc. *Davis*, 2011 U.S. Dist. LEXIS 8716, 2011 WL 337342, at *5. Plaintiffs’ EEOC Charges indicate that they were subject the Symphony Orchestra’s vaccine mandate, which required all musicians to be vaccinated or receive a religious exemption. The decision to implement the COVID-19 vaccine policy was reached by the musician’s labor union and the N.C. Symphony, Inc. The decision to deny the religious exemption was made by their employer, the N.C. Symphony, Inc. **(Exs. 1-3).**

Conversely, NCDNCR, in compliance with the State's COVID-19 policy, did not mandate that NCDNCR employees must be vaccinated. Therefore, under the gravamen of the EEOC charge, NCDNCR could not be "essentially identical" to the N.C. Symphony, Inc. Because NCDNCR's interests are not so similar to the N.C. Symphony, Inc., it follows that under the fourth factor, the Symphony Orchestra did not represent NCDNCR's interests. *See Mayes v. Moore*, 419 F. Supp. 2d 775, 783 (M.D.N.C. 2006) (finding where second factor weighed in favor of the unnamed defendants, the fourth factor also weighed in those defendants' favor).

"The third factor considers actual prejudice to the unnamed party" stemming from its absence during the EEOC proceedings. *1618 Concepts*, 432 F. Supp. 3d at 605. Plaintiffs' Complaint does not provide any information about the inquiry conducted during those proceedings. The June 4, 2023, Notice of Right to Sue letters "granted [Plaintiffs'] request for a Notice of Right to Sue, and more than 180 days have passed since the filing of [the] charge" the "EEOC is terminating its processing of this charge." (**Exs. 4-6**). Therefore, the EEOC terminated its investigation without making any findings or conclusions that may or may not establish any employment discrimination. NCDNCR was unable to present to the EEOC any information concerning; 1) the employment status or history of Plaintiffs; 2) the conflicting COVID-19

policies between the N.C. Symphony, Inc. and the NCDNCR; 3) the fact that NCDNCR does not supervise, manage, hire, or fire orchestra musicians and, 4) NCDNCR has no ability to return Plaintiffs to their jobs as orchestra musicians if required by this Court. Additionally, it can be inferred that the N.C. Symphony, Inc., would have complied with the EEOC request for a Position Statement, including documentation, which would have addressed its COVID-19 policy and the reasoning behind its decision to deny the Plaintiffs' religious exemption. None of this would or could have addressed NCDNCR's concerns. NCDNCR was prejudiced by Plaintiffs' request to terminate the EEOC investigation and the inability, as a separately named respondent, to address any issues raised by the EEOC. Distinguish, *Bockman v. T&B Concepts of Carrboro, LLC*, 1:19CV622, 2020 U.S. Dist. LEXIS 179871, 2020 WL 5821169, at *9 (M.D.N.C. Sept. 30, 2020), where the court found that the named and unnamed Defendants were so similar that it was unnecessary to include the unnamed defendant in the EEOC charge. Therefore, when the EEOC was unable to conclude that the information obtained against the named defendant established a violation of the statute, there was no prejudice to the similar unnamed defendant. Other courts have held that when "the EEOC filings in the record do not indicate that any party represented the interest of the [unnamed defendants] during the administrative proceeding,"

this factor should weigh in favor of the unnamed defendants. *See Scurry*, 2014 U.S. Dist. LEXIS 123490, 2014 WL 4402797, at *4; *see also Mayes*, 419 F. Supp. at 783, (concluding that the named and unnamed parties were separate entities and the unnamed party was prejudiced because “no one represented [the unnamed parties] interests in the administrative process.”)

Finally, the fourth factor examines whether the unnamed party has represented to the complainant that its relationship with the complainant should be through the named party. Here, Plaintiffs alleged the N.C. Symphony, Inc. and NCDNCR are Plaintiffs’ employers. If that were the case, Plaintiffs should have named NCDNCR in the EEOC Charges.

Examining all the relevant factors, the dual purposes of the naming requirement have not been satisfied. *See 1618 Concepts*, 432 F. Supp. 3d at 603. Of the four factors, courts have found that “the second and third speak most directly to the dual purposes of the Title VII naming requirement,” *Id.* at 604, because “they are most reflective of the two-fold purpose of the naming requirement, that is, providing notice and an opportunity for voluntary conciliation.” *Keener v. Universal Cos.*, 128 F. Supp. 3d 902, 915-16 (M.D.N.C. 2015) (cleaned up and quotations omitted). Because the facts alleged fail to support a reasonable inference that NCDNCR had notice of the charges against them, and that NCDNCR’s interests were fairly represented by the

named party, this court should dismiss Plaintiffs' Title VII claims against NCDNCR for failure to exhaust the required administrative procedures

B. Plaintiffs Title VII claims against NCDNCR must be dismissed because Plaintiffs did not file an EEOC charge within the required time.

“Before a plaintiff may file suit under Title VII or the ADEA, he is required to file a charge of discrimination with the EEOC.” *Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009). The charge of discrimination must be filed with the EEOC within 180 days after the alleged unlawful employment practice occurred. *See* 42 U.S.C. § 2000e-5(e); *Jones*, 551 F.3d at 300 (charge must be filed within 180 days after the unlawful employment practice). “[T]he filing period runs from the time at which the employee is informed of the allegedly discriminatory employment decision, regardless of when the effects of that decision come to fruition.” *Price v. Litton Business Systems, Inc.*, 694 F.2d 963, 965 (4th Cir. 1982). A plaintiff may not recover for discriminatory acts that occurred outside the 180-day time period. *Belton v. City of Charlotte*, 175 Fed. Appx. 641, 652-53 (4th Cir. 2006) (per curiam).

In *Delaware State College v. Ricks*, 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980), the Supreme Court considered when such an act “occurs” in the context of a university professor's discriminatory discharge claim under Title VII of the Civil Rights Act of 1964. The Court held that the alleged discrimination had occurred when the university denied the professor tenure

and informed him of that act, a date over a year before his last day of work. The Court emphasized that “even though one of the *effects* of the denial of tenure -- the eventual loss of a teaching position--did not occur until later . . . ‘the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.” *Id.* at 258 (quotation omitted) (emphases and alteration in original). The date of that act marks the time from which the 180 days are counted. To the extent that notice enters the analysis, it is notice of the employer’s actions, *not* the notice of a discriminatory effect or motivation, which establishes the commencement of the pertinent filing period. The Fourth Circuit has faithfully followed that criterion in discriminatory employment cases, wherein the courts have counted the 180 days from either the time of discharge or from the moment the employee received advance notice of the pending discharge. *See, e.g., Hamilton v. 1st Source Bank*, 928 F. 2d 86 (4th Cir. 1990); *English v. Pabst Brewing Co.*, 828 F.2d 1047 (4th Cir. 1987).

A review of Plaintiffs’ Complaint demonstrates that the alleged discriminatory act, the denial of a religious exemption to the Symphony Orchestra’s labor union-mandated COVID-19 vaccination policy, occurred in early September 2021. (DE 1, ¶¶ 42 and 46). Specifically, in August 2021, the North Carolina Symphony Player’s Association, the Symphony Orchestra’s labor union, announced a mandatory COVID-19 vaccine policy for its union members, including the Plaintiffs. In fact, Plaintiffs Caudill and Niketopoulos

allege they were “part” of the Symphony Orchestra’s labor union. (DE 1, ¶¶ 42-43). In early September 2021, in accordance with the labor union’s vaccination policy, Plaintiffs sought religious accommodations from the vaccine requirement. (DE 1, ¶ 46). On September 14, 2021, Ms. Macdonald denied Plaintiffs’ religious accommodation request. (DE 1, ¶ 49). Plaintiffs were placed on unpaid leave for the 2021-22 symphony season. Plaintiffs were to meet with Ms. Macdonald by April 1, 2022, to discuss any accommodation. Plaintiffs hoped a resolution to their suspension could be reached before April 2022 and did not file a charge of discrimination with the EEOC at that time. (DE 1, ¶ 51). The April 2022 meeting never occurred and on May 17, 2022, Plaintiffs were sent correspondence indicating they were terminated as of June 30, 2022. (DE 1, ¶ 60). Plaintiffs filed their EEOC charges on August 19, 2022 (Niketopoulos), September 19, 2022 (Caudill) and October 22, 2022 (Friedlander). (DE 1, ¶ 61). Therefore, Plaintiffs were all aware of the alleged discriminatory conduct, failure to accept a religious accommodation to the labor union’s vaccine mandate, in September 2021 and adverse employment action was taken at that time, unpaid suspension.

CONCLUSION

For all the reasons detailed above, NCDNCR request that the Court dismiss all of Plaintiffs’ claims.

Respectfully submitted, this the 3rd day of November, 2023.

JOSHUA H. STEIN
Attorney General

/s/ Charles G. Whitehead
Charles G. Whitehead
Spec. Dep. Attorney General
N.C. Department of Justice
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Raleigh, North Carolina
27602
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CERTIFICATE OF WORD COUNT

The undersigned hereby certify that pursuant to LR 7.2(f)(3) of the Local Civil Rules, the foregoing Memorandum contains 8,380 words (including the body of the brief, headings, and footnotes, but excluding the caption, signature blocks, this certificate of compliance, and exhibits) as reported by the word-processing software.

This the 3rd day of November, 2023.

/s/ Charles G. Whitehead
Charles Whitehead
Special Deputy Attorney General

EXHIBIT 1

<p>CHARGE OF DISCRIMINATION</p> <p>This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.</p>	<p>Charge Presented To: EEOC</p> <p>Agency(ies) Charge No(s): 433-2022-01828</p>
<p>and EEOC</p>	
<p>_____</p> <p><i>State or local Agency, if any</i></p>	

<p>Name (indicate Mr., Ms., Mrs.)</p> <p>Mr. Christopher R. Caudill</p>	<p>Home Phone</p> <p>919-360-2191</p>	<p>Year of Birth</p>
--	--	----------------------

Street Address

908 W. South Street Raleigh, NC

RALEIGH, NC 27603

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

<p>Name</p> <p>North Carolina Symphony</p>	<p>No. Employees, Members</p> <p>15 - 100 Employees</p>	<p>Phone No.</p>
---	--	------------------

Street Address

3700 GLENWOOD AVE STE 130

RALEIGH, NC 27612

<p>Name</p>	<p>No. Employees, Members</p>	<p>Phone No.</p>
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Street Address

City, State and ZIP Code

<p>DISCRIMINATION BASED ON</p> <p>Religion</p>	<p>DATE(S) DISCRIMINATION TOOK PLACE</p> <table style="width:100%;"> <tr> <td style="width:50%;">Earliest</td> <td style="width:50%;">Latest</td> </tr> <tr> <td>06/30/2022</td> <td>06/30/2022</td> </tr> </table>	Earliest	Latest	06/30/2022	06/30/2022
Earliest	Latest				
06/30/2022	06/30/2022				

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

I.I was hired by the above-named- respondent in June 2003, and last held the position of Second French Horn. August of 2021 I was notified by my employer that it would be requiring all employees to be fully vaccinated. I sincerely hold a religious belief that conflicts with my employer's vaccination requirement. On September 9, 2021, I filled out the managements religious exemption paperwork. On September 14, 2021, I got a letter from CEO Sandy Mcdonald that said I did not submit enough information on my vaccine religious exemption paperwork and there are no reasonable accommodations available. On September 14, 2021, I was placed on unpaid leave.I amended my personal binder in December of 2021, which had been unilaterally altered by Management, to indicate that I wanted to keep my job, but that I was still requesting an exemption to the Symphony's Vaccine Mandate policy because of my sincere religious belief. I felt that I was being put in a trap, because not signing the binder could be used by Management to fire me; but signing it as written was an attempt to coerce me into complying with being vaccinated. The management never engaged in a dialogue about possible accomodations - they consistently asserted that there were none to discuss, and that my unvaccinated presence at work was itself an undue burden, even though I was willing to take tests and wear masks.In December 2021 I was shown my personal binder that has my individual contract that was changed, it now reads that I agree to comply with the vaccine mandate in the contract. I signed the contract with that

<p>I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.</p>	<p>NOTARY – When necessary for State and Local Agency Requirements</p>
<p>I declare under penalty of perjury that the above is true and correct.</p> <p>Digitally Signed By: Mr. Christopher R. Caudill</p> <p>09/19/2022</p> <p style="text-align: center;"><i>Charging Party Signature</i></p>	<p>I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.</p> <p>SIGNATURE OF COMPLAINANT</p> <p>SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)</p>

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and EEOC

State or local Agency, if any

clause in it. On May 17, 2022, I was told that there is no vaccine exemption and no accommodationsII.I was told that if I was not vaccinated by June 30, 2022, I am terminated.III. believe I have been discriminated against due to my religion (Buddhism) in violation of Title VII of the Civil Rights Act of 1964, as Amended.

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Please **notify** EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, Section 503(a) of the ADA and Section 207(f) of GINA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.

EXHIBIT 2

<p>CHARGE OF DISCRIMINATION</p> <p>This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.</p>	<p>Charge Presented To: Agency(ies) Charge No(s):</p> <p style="text-align: center;">EEOC 433-2022-02114</p>
<p>_____ and EEOC</p> <p style="text-align: center;">_____ State or local Agency, if any</p>	

Name (indicate Mr., Ms., Mrs.)	Home Phone	Year of Birth
Mr. David Friedlander	614-288-5693	

Street Address

709 Dorothea Drive RALEIGH, NC 27603

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name	No. Employees, Members	Phone No.
NORTH CAROLINA SYMPHONY SOCIETY	15 - 100 Employees	

Street Address

3700 GLENWOOD AVE STE 130 RALEIGH, NC 27612

Name	No. Employees, Members	Phone No.

Street Address City, State and ZIP Code

DISCRIMINATION BASED ON	DATE(S) DISCRIMINATION TOOK PLACE				
Religion	<table style="width:100%; border: none;"> <tr> <td style="width:50%; text-align: center;">Earliest</td> <td style="width:50%; text-align: center;">Latest</td> </tr> <tr> <td style="text-align: center;">09/01/2021</td> <td style="text-align: center;">06/01/2022</td> </tr> </table>	Earliest	Latest	09/01/2021	06/01/2022
	Earliest	Latest			
09/01/2021	06/01/2022				

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

I. I am an individual with sincerely held religious beliefs. I was the Associate Concertmaster with the North Carolina Symphony Orchestra (NCSO). II. Each musician in the orchestra signs a contract every January that is negotiated between an elected Orchestra Committee, the local musician's union and the management of the NCSO. The contract does allow for religious exemptions. In August 2021 NCSO instituted a COVID-19 vaccine requirement to allow the orchestra to return to work in September 2021. New provisions were added to the contract that had already been signed in January 2021. Employees were offered three options in regard to COVID vaccination: a) Receive the COVID vaccine b) Submit and be approved for either a religious or medical exemption. Once approved for exemption, masking, periodic testing, and social distancing would be required. c) If the medical or religious exemption was denied, the employee would be placed on a one-year unpaid leave. I completed the accommodation form for my religious exemption and included a letter that clearly discussed my religious objections to receiving the COVID vaccine. My exemption request was denied in September 2021, and I was forced to take unpaid leave for one year. The reason given for denial of my exemption was as follows: "In your request, you seek an accommodation based upon your religious beliefs. Without going into detail, we do not believe that you have submitted sufficient information to qualify for consideration for an accommodation based upon your identified beliefs. Even had you submitted sufficient information to

<p>I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.</p>	<p>NOTARY - When necessary for State and Local Agency Requirements</p>
<p>I declare under penalty of perjury that the above is true and correct.</p> <p>Digitally Signed By: Mr. David Friedlander 10/22/2022</p> <p style="text-align: center;"><i>Charging Party Signature</i></p>	<p>I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.</p> <p>SIGNATURE OF COMPLAINANT</p> <p>SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)</p>

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<p>_____ and EEOC</p> <p style="text-align: center;"><i>State or local Agency, if any</i></p>	

establish a basis for a valid religious reason that would support a request for an accommodation, your request cannot be granted." It appears that my request was never considered, and would have been denied, regardless of any documentation that I provided. Two other coworkers were denied religious exemptions and also were forced to take unpaid leave. It should be noted that I have never taken a vaccine and do not use any prescription or recreational drugs as these substances also conflict with my sincerely held religious convictions. I was required to sign a new contract in January 2022. In March 2022, I was advised that I might be terminated. None of the prior discussions or documentation advised me that termination was a consequence of not taking the COVID vaccine. Previously, I was told that a meeting to discuss my position would be held on April 1, 2022. The meeting was not held. The OC tried to put me on unpaid leave for another year, but I wanted to return to work. The year of leave had a devastating impact on me and my family. In June 2022, I was sent a letter to advise me that I was terminated. III. I believe I was discriminated against because of my religion in violation of the Civil Rights Act of 1964, as amended.

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EXHIBIT 3

CHARGE OF DISCRIMINATION	Charge Presented To:	Agency(ies) Charge No(s):
This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.	EEOC	433-2022-01926
		and EEOC
_____ <i>State or local Agency, if any</i>		

Name (indicate Mr., Ms., Mrs.) Ms. Rachel I. Niketopoulos	Home Phone 919-537-2384	Year of Birth
--	----------------------------	---------------

Street Address
908 W South St
RALEIGH, NC 27603

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name North Carolina Symphony Society	No. Employees, Members Unknown Number Of Employees	Phone No.
---	---	-----------

Street Address
3700 GLENWOOD AVE STE 130
RALEIGH, NC 27612

Name	No. Employees, Members	Phone No.

Street Address _____ City, State and ZIP Code _____

DISCRIMINATION BASED ON Religion	DATE(S) DISCRIMINATION TOOK PLACE Earliest 05/17/2022	Latest 05/17/2022
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THE PARTICULARS ARE (if additional paper is needed, attach extra sheet(s)):

<p>I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.</p> <p>I declare under penalty of perjury that the above is true and correct.</p> <p>Digitally Signed By: Ms. Rachel I. Niketopoulos</p> <p>08/19/2022</p> <p style="text-align: center;"><i>Charging Party Signature</i></p>	<p>NOTARY – When necessary for State and Local Agency Requirements</p>
	<p>I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.</p> <p>SIGNATURE OF COMPLAINANT</p> <p>SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)</p>

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<p>_____ and EEOC</p> <p style="text-align: center;"><i>State or local Agency, if any</i></p>	

I. I have been playing in the NC Symphony since 2003, and tenured since 2006. I was notified by my employer that it would be requiring all employees to be fully vaccinated. I sincerely hold a religious belief that conflicts with my employers vaccination requirement. During my employment, I notified my employer of my religious belief and my need for an accommodation from the vaccination requirement. I requested a religious exemption to Respondents Covid-19 vaccination mandate, which was denied. My religious exemption request was called frivolous and there was no interactive process at all. I reluctantly agreed to stay away from work and wait for Covid to subside. I am still a member of the orchestra, but I will be fired on June 30, 2022. I believe my employer failed to accommodate me and discriminated against me because of my religion, in violation of Title VII of the Civil Rights Act of 1964, as amended.

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Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

NOTICE OF NON-RETALIATION REQUIREMENTS

Please **notify** EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, Section 503(a) of the ADA and Section 207(f) of GINA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.

EXHIBIT 4



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Raleigh Area Office
434 Fayetteville Street, Suite 700
Raleigh, NC 27601
(984) 275-4800
Website: www.eeoc.gov

DISMISSAL AND NOTICE OF RIGHTS (This Notice replaces EEOC FORMS 161 & 161-A)

Issued On: June 4, 2023

To: Mr. Christopher R. Caudill
908 W. South Street Raleigh, NC
RALEIGH, NC 27603

Charge No: 433-2022-01828

EEOC Representative and email: REBEKAH LOPEZ
Investigator
rebekah.lopez@eeoc.gov

DISMISSAL OF CHARGE

The EEOC has granted your request for a Notice of Right to Sue, and more than 180 days have passed since the filing of this charge.

The EEOC is terminating its processing of this charge.

NOTICE OF YOUR RIGHT TO SUE

This is official notice from the EEOC of the dismissal of your charge and of your right to sue. If you choose to file a lawsuit against the respondent(s) on this charge under federal law in federal or state court, **your lawsuit must be filed WITHIN 90 DAYS of your receipt of this notice.** Receipt generally occurs on the date that you (or your representative) view this document. You should keep a record of the date you received this notice. Your right to sue based on this charge will be lost if you do not file a lawsuit in court within 90 days. (The time limit for filing a lawsuit based on a claim under state law may be different.)

If you file a lawsuit based on this charge, please sign-in to the EEOC Public Portal and upload the court complaint to charge 433-2022-01828.

On behalf of the Commission,

J. M. Barrett

Johnnie Barrett
Raleigh Area Office Director

Digitally signed by J. M.
Barrett

Date: 2023.06.04 12:40:56
-04'00'

Cc:

Rosemary G Kenyon
Smith Anderson Blount Dorsett Mitchell & Jernigan
PO BOX 2611 RKENYON@SMITHLAW COM
Raleigh, NC 27602

Sandi Macdonald
North Carolina Symphony Society, Inc.
3700 GLENWOOD AVE STE 130
Raleigh, NC 27612

Adam Draper
adraper@pji.org

Please retain this notice for your records.

**INFORMATION RELATED TO FILING SUIT
UNDER THE LAWS ENFORCED BY THE EEOC**

(This information relates to filing suit in Federal or State court under Federal law. If you also plan to sue claiming violations of State law, please be aware that time limits may be shorter and other provisions of State law may be different than those described below.)

IMPORTANT TIME LIMITS – 90 DAYS TO FILE A LAWSUIT

If you choose to file a lawsuit against the respondent(s) named in the charge of discrimination, you must file a complaint in court **within 90 days of the date you receive this Notice**. Receipt generally means the date when you (or your representative) opened this email or mail. You should **keep a record of the date you received this notice**. Once this 90-day period has passed, your right to sue based on the charge referred to in this Notice will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notice, and the record of your receiving it (email or envelope).

If your lawsuit includes a claim under the Equal Pay Act (EPA), you must file your complaint in court within 2 years (3 years for willful violations) of the date you did not receive equal pay. This time limit for filing an EPA lawsuit is separate from the 90-day filing period under Title VII, the ADA, GINA or the ADEA referred to above. Therefore, if you also plan to sue under Title VII, the ADA, GINA or the ADEA, in addition to suing on the EPA claim, your lawsuit must be filed within 90 days of this Notice **and** within the 2- or 3-year EPA period.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Filing this Notice is not enough. For more information about filing a lawsuit, go to <https://www.eeoc.gov/employees/lawsuit.cfm>.

ATTORNEY REPRESENTATION

For information about locating an attorney to represent you, go to:
<https://www.eeoc.gov/employees/lawsuit.cfm>.

In very limited circumstances, a U.S. District Court may appoint an attorney to represent individuals who demonstrate that they are financially unable to afford an attorney.

HOW TO REQUEST YOUR CHARGE FILE AND 90-DAY TIME LIMIT FOR REQUESTS

There are two ways to request a charge file: 1) a FOIA Request or 2) a Section 83 request. You may request your charge file under either or both procedures. EEOC can generally respond to Section 83 requests more promptly than FOIA requests.

Since a lawsuit must be filed within 90 days of this notice, please submit your request for the charge file promptly to allow sufficient time for EEOC to respond and for your review. Submit a signed written request stating it is a "FOIA Request" or a "Section 83 Request" for Charge Number 433-2022-01828 to the District Director at Elizabeth A. Rader, 129 West Trade Street Suite 400

Charlotte, NC 28202.

You can also make a FOIA request online at <https://eeoc.arkcase.com/foia/portal/login>.

You may request the charge file up to 90 days after receiving this Notice of Right to Sue. After the 90 days have passed, you may request the charge file only if you have filed a lawsuit in court and provide a copy of the court complaint to EEOC.

For more information on submitting FOIA Requests and Section 83 Requests, go to:
<https://www.eeoc.gov/eeoc/foia/index.cfm>.

EXHIBIT 5



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Raleigh Area Office
434 Fayetteville Street, Suite 700
Raleigh, NC 27601
(984) 275-4800
Website: www.eeoc.gov

DISMISSAL AND NOTICE OF RIGHTS

(This Notice replaces EEOC FORMS 161 & 161-A)

Issued On: **June 4, 2023**

To: Mr. David Friedlander
709 Dorothea Drive
RALEIGH, NC 27603

Charge No: 433-2022-02114

EEOC Representative and email: **REBEKAH LOPEZ**
Investigator
rebekah.lopez@eeoc.gov

DISMISSAL OF CHARGE

The EEOC has granted your request for a Notice of Right to Sue, and more than 180 days have passed since the filing of this charge.

The EEOC is terminating its processing of this charge.

NOTICE OF YOUR RIGHT TO SUE

This is official notice from the EEOC of the dismissal of your charge and of your right to sue. If you choose to file a lawsuit against the respondent(s) on this charge under federal law in federal or state court, **your lawsuit must be filed WITHIN 90 DAYS of your receipt of this notice.** Receipt generally occurs on the date that you (or your representative) view this document. You should keep a record of the date you received this notice. Your right to sue based on this charge will be lost if you do not file a lawsuit in court within 90 days. (The time limit for filing a lawsuit based on a claim under state law may be different.)

If you file a lawsuit based on this charge, please sign-in to the EEOC Public Portal and upload the court complaint to charge 433-2022-02114.

On behalf of the Commission,

J. M. Barrett

Johnnie Barrett
Raleigh Area Office Director

Digitally signed by J. M.
Barrett
Date: 2023.06.04 12:43:58

-04'00'

Cc:

Rosemary G Kenyon
Smith Anderson Law
PO Box 2611
Raleigh, NC 27602

Adam Draper
The Pacific Justice League
P.O Box 276600
SACRAMENTO, CA 95827

Please retain this notice for your records.

**INFORMATION RELATED TO FILING SUIT
UNDER THE LAWS ENFORCED BY THE EEOC**

(This information relates to filing suit in Federal or State court under Federal law. If you also plan to sue claiming violations of State law, please be aware that time limits may be shorter and other provisions of State law may be different than those described below.)

IMPORTANT TIME LIMITS – 90 DAYS TO FILE A LAWSUIT

If you choose to file a lawsuit against the respondent(s) named in the charge of discrimination, you must file a complaint in court **within 90 days of the date you receive this Notice**. Receipt generally means the date when you (or your representative) opened this email or mail. You should **keep a record of the date you received this notice**. Once this 90-day period has passed, your right to sue based on the charge referred to in this Notice will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notice, and the record of your receiving it (email or envelope).

If your lawsuit includes a claim under the Equal Pay Act (EPA), you must file your complaint in court within 2 years (3 years for willful violations) of the date you did not receive equal pay. This time limit for filing an EPA lawsuit is separate from the 90-day filing period under Title VII, the ADA, GINA or the ADEA referred to above. Therefore, if you also plan to sue under Title VII, the ADA, GINA or the ADEA, in addition to suing on the EPA claim, your lawsuit must be filed within 90 days of this Notice **and** within the 2- or 3-year EPA period.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Filing this Notice is not enough. For more information about filing a lawsuit, go to <https://www.eeoc.gov/employees/lawsuit.cfm>.

ATTORNEY REPRESENTATION

For information about locating an attorney to represent you, go to:
<https://www.eeoc.gov/employees/lawsuit.cfm>.

In very limited circumstances, a U.S. District Court may appoint an attorney to represent individuals who demonstrate that they are financially unable to afford an attorney.

HOW TO REQUEST YOUR CHARGE FILE AND 90-DAY TIME LIMIT FOR REQUESTS

There are two ways to request a charge file: 1) a FOIA Request or 2) a Section 83 request. You may request your charge file under either or both procedures. EEOC can generally respond to Section 83 requests more promptly than FOIA requests.

Since a lawsuit must be filed within 90 days of this notice, please submit your request for the charge file promptly to allow sufficient time for EEOC to respond and for your review. Submit a signed written request stating it is a "FOIA Request" or a "Section 83 Request" for Charge Number 433-2022-02114 to the District Director at Elizabeth A. Rader, 129 West Trade Street Suite 400

Charlotte, NC 28202.

You can also make a FOIA request online at <https://eeoc.arkcase.com/foia/portal/login>.

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For more information on submitting FOIA Requests and Section 83 Requests, go to:

<https://www.eeoc.gov/eeoc/foia/index.cfm>.

EXHIBIT 6



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Raleigh Area Office
434 Fayetteville Street, Suite 700
Raleigh, NC 27601
(984) 275-4800
Website: www.eeoc.gov

DISMISSAL AND NOTICE OF RIGHTS

(This Notice replaces EEOC FORMS 161 & 161-A)

Issued On: June 4, 2023

To: Ms. Rachel I. Niketopoulos
908 W South St
RALEIGH, NC 27603

Charge No: 433-2022-01926

EEOC Representative and email: REBEKAH LOPEZ
Investigator
rebekah.lopez@eeoc.gov

DISMISSAL OF CHARGE

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The EEOC is terminating its processing of this charge.

NOTICE OF YOUR RIGHT TO SUE

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If you file a lawsuit based on this charge, please sign-in to the EEOC Public Portal and upload the court complaint to charge 433-2022-01926.

On behalf of the Commission,

J. M. Barrett

Johnnie Barrett

Raleigh Area Office Director

Digitally signed by J. M.

Barrett

Date: 2023.06.04 12:31:17

-04'00'

Cc:

Jenny Bobbitt
Smith Anderson
PO BOX 2611
Raleigh, NC 27602

Rosemary G Gill Kenyon
Smith Anderson
PO BOX 2611 RKENYON@SMITHLAW COM
Raleigh, NC 27602

Adam C Draper
Pacific Justice Institute
PO Box 21521
WINSTON SALEM, NC 27120

Please retain this notice for your records.

**INFORMATION RELATED TO FILING SUIT
UNDER THE LAWS ENFORCED BY THE EEOC**

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Charlotte, NC 28202.

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For more information on submitting FOIA Requests and Section 83 Requests, go to:
<https://www.eeoc.gov/eeoc/foia/index.cfm>.

EXHIBIT 7

State of North Carolina
Department of the Secretary of State

ARTICLES OF RESTATEMENT
FOR NONPROFIT CORPORATION

Pursuant to §55A-10-06 of the North Carolina General Statutes, the undersigned does hereby submit the following for the purpose of restating its Articles of Incorporation.

1. The name of the corporation is: The North Carolina Symphony Society, Incorporated (the "Corporation").
2. The entire text of the Restated Articles of Incorporation is attached hereto.
3. The Restated Articles of Incorporation were adopted by the board of directors and contain amendments not requiring member approval. The Corporation has no members and therefore no member approval was required for the approval of the Restated Articles of Incorporation.
4. The Restated Articles of Incorporation were ratified, adopted and approved by the board of directors in the manner prescribed by Chapter 55A of the General Statutes of North Carolina.
5. These Articles of Restatement and the attached Restated Articles of Incorporation will be effective upon filing.

This the 28 day of September, 2010.

**The North Carolina Symphony Society,
Incorporated**

By: Don K Davis
Name: DON K DAVIS
Title: President and Chief Executive Officer

**RESTATED
ARTICLES OF INCORPORATION
OF
THE NORTH CAROLINA SYMPHONY SOCIETY, INCORPORATED
(A NON-STOCK NON-PROFIT CORPORATION)**

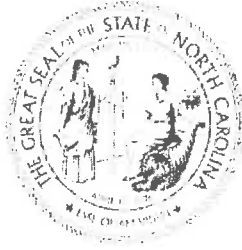
1. The name of the Corporation is The North Carolina Symphony Society, Incorporated.
2. The purposes for which the Corporation is organized are:
 - (a) to promote and foster musical culture and education at such places within and without the State as may be determined by the Board of Trustees, including organizing the North Carolina Symphony orchestra and other orchestras, supervising and providing for the training of musicians, arranging and conducting concerts and all forms of musical entertainment, and arranging and conducting conferences, lectures, and instruction on musical subjects; and
 - (b) to exercise any power which may be exercised and to carry out any lawful activity which may be carried on by a nonprofit corporation under Chapter 55A of the North Carolina General Statutes and by the Corporation under (i) Article 2 of Chapter 140 of the North Carolina General Statutes and (ii) Section 94 of Article 2 of Chapter 143B of the North Carolina General Statutes.
3. The street address and mailing address of the registered office of the Corporation is 3700 Glenwood Avenue, Suite 130, Raleigh, NC 27612. The county in which the registered office of the Corporation is located is Wake County, North Carolina. David Chambless Worters is the Corporation's registered agent at such address.
4. The street address and mailing address of the principal office of the Corporation is 3700 Glenwood Avenue, Suite 130, Raleigh, NC 27612. The county in which the principal office of the Corporation is located is Wake County, North Carolina.
5. The Corporation will not have members.
6. In addition to the general powers granted to nonprofit corporations under the laws of the State of North Carolina, the Corporation shall have full power and authority:
 - (a) To buy, sell, own, assign, mortgage, or lease any interest in real and personal property and to construct, maintain, and operate improvements on such real property necessary or incident to the accomplishment of the purposes set forth in these Restated Articles of Incorporation.
 - (b) To borrow money and issue evidence of indebtedness in furtherance of any or all of the objects of its business, and to secure the same by mortgage, pledge, or other lien on the Corporation's property.

- (c) To do and perform all acts reasonably necessary to accomplish the purposes of the Corporation.
 - (d) To receive gifts, devises and bequests or real, personal and mixed property.
 - (e) To draw, accept, endorse, discount, buy, sell, issue and deliver bills of exchange, promissory notes, bonds, coupons or other negotiable instruments and securities.
7. The activities of the Corporation shall be restricted as follows:
- (a) No part of the net earnings shall inure to the benefit of or be distributed to any officers or Trustees of the Corporation or other private person except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered, to make payments and distributions in furtherance of the Corporation's purposes and to reimburse reasonable expenses properly incurred on behalf of the Corporation.
 - (b) No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of, or in opposition to, any candidate for public office.
 - (c) Notwithstanding any other provision of these Restated Articles of Incorporation, the Corporation shall not carry on any other activities not permitted to be carried on by (i) a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code (the "Code") or the corresponding provision of any future United States Revenue Law, (ii) a corporation, contributions to which are deductible under Section 170(c)(2) of the Code or any other corresponding provision of any future United States Internal Revenue Law, or (iii) a "charitable or religious corporation" as that term is defined under the North Carolina Nonprofit Corporation Act.
8. Pursuant to the Corporation's authority under Section 55A-8-01(c) of the North Carolina General Statutes, the members of the Corporation's Board of Trustees shall be removable from office by a vote of at least two-thirds ($\frac{2}{3}$) of the members of the Executive Committee or Governance Committee. The removal procedures described in the previous sentence shall not apply to the two ex officio members and the four members named by the Governor as set forth in Section 94 of Article 2 of Chapter 143B of the North Carolina General Statutes.
9. Upon dissolution of the Corporation, the Board of Trustees shall, after paying or making provision for the payment of all liabilities and obligations of the Corporation, dispose of all of the assets of the Corporation in accordance with the provisions of the North Carolina Nonprofit Corporation Act, to such organization or organizations as shall, at the

time of dissolution, qualify as an organization or organizations exempt from tax under Sections 501(a) and 501(c)(3) of the Code.

10. The foregoing supersedes all prior Articles of Incorporation of the Corporation.

EXHIBIT 8



State of North Carolina

ROY COOPER
GOVERNOR

July 29, 2021

EXECUTIVE ORDER NO. 224

IMPLEMENTING MEASURES TO ADDRESS COVID-19 AND RELATED VARIANTS

WHEREAS, on March 10, 2020, the undersigned issued Executive Order No. 116, 34 N.C. Reg. 1744-1749 (April 1, 2020), which declared a State of Emergency to coordinate the state's response and protective actions to address the Coronavirus Disease 2019 ("COVID-19") public health emergency and provide for the health, safety, and welfare of residents and visitors located in North Carolina; and

WHEREAS, on March 11, 2020, the World Health Organization declared COVID-19 a global pandemic; and

WHEREAS, on March 13, 2020, the President of the United States issued an emergency declaration for all states, tribes, territories, and the District of Columbia, retroactive to March 1, 2020, and the President declared that the COVID-19 pandemic in the United States constitutes a national emergency; and

WHEREAS, on March 25, 2020, the President approved a Major Disaster Declaration, FEMA-4487-DR, for the State of North Carolina; and

WHEREAS, on February 24, 2021, the President issued notice that the national emergency relating to COVID-19 must remain in effect because the pandemic "continues to cause significant risk to the public health and safety of the Nation"; and

WHEREAS, in responding to the COVID-19 pandemic, and for the purpose of protecting the health, safety, and welfare of the people of North Carolina, the undersigned has issued Executive Order Nos. 116-122, 124-125, 129-131, 133-136, 138-144, 146-153, 155-157, 161-165, 169-173, 176-177, 180-181, 183-185, 188-193, 195, 197-198, 200, 204-207, 209-212, 215-217, and 219-221; and

WHEREAS, more than one million forty-four thousand (1,044,000) people in North Carolina have had COVID-19, and over thirteen thousand six hundred (13,600) people in North Carolina have died from the disease; and

WHEREAS, COVID-19 continues to infect thousands of North Carolinians every day, and a State of Emergency remains in place for the purpose of maintaining the state's ability to meet challenges presented by COVID-19; and

WHEREAS, the State of Emergency allows North Carolina to receive federal funding; to provide increased regulatory flexibility to the North Carolina Department of Health and Human Services ("NCDHHS") and health care facilities, which allows health care providers to expand their capacity to treat patients and assist with vaccination efforts; and to respond to any spikes in spread of the disease; and

WHEREAS, the undersigned has taken a science and data-driven approach to implementing public health measures to curb the spread of the virus and to advance the state's economy in a safe and effective way, which is in the best interests of all North Carolinians; and

Current Metrics

WHEREAS, as COVID-19 has continued to be spread from person to person across the United States and world, variants (genetically distinct strains) of COVID-19 have developed; and

WHEREAS, the Delta variant of COVID-19 is more transmissible than the original COVID-19 virus; and

WHEREAS, the spread of the Delta variant amongst the unvaccinated population in North Carolina has generated increased concern from medical professionals; and

WHEREAS, while North Carolina has continued to see improvement in vaccination numbers, the weekly number of doses of COVID-19 vaccinations administered has slowed in recent months, and there are still more than eighteen (18) counties in which under thirty-five (35%) of the population have been Fully Vaccinated; and

WHEREAS, because the Delta variant is more contagious than the original virus or other current COVID-19 variants, it quickly became the most common kind of COVID-19 in North Carolina during summer 2021, and now, the Delta variant makes up more than eighty percent (80%) of all new COVID-19 cases in North Carolina; and

WHEREAS, the Delta variant's growing dominance, coupled with its increased transmissibility, has led to a significant increase in the number of COVID-19 cases and hospitalizations; and

WHEREAS, on June 25, 2021, 388 new COVID-19 cases were reported, and 400 people were hospitalized with COVID-19, but one month later (on July 25, 2021), 1,910 new COVID-19 cases were reported, and 954 people were hospitalized with COVID-19; and

WHEREAS, over recent weeks, and despite the overall progress the state has made during the pandemic, North Carolina is experiencing a rapid increase in COVID-19 cases, almost entirely among those who are unvaccinated; and

WHEREAS, specifically, as of the date of this Executive Order, the state's key metrics for COVID-19 are worsening: the number of people hospitalized for COVID-19 has doubled over the past two weeks, the number of people going to emergency departments with COVID-like symptoms is rising, the number of COVID-19 daily diagnoses is rising, and the percent of total COVID-19 tests that are positive is rising and higher than five percent (5%); and

WHEREAS, although the Delta variant represents a severe threat to the unvaccinated, being vaccinated greatly reduces the chance of being infected by the Delta variant, and being vaccinated greatly reduces the risk that anyone who does contract the Delta variant becomes severely ill or requires hospitalization; and

WHEREAS, on July 27, 2021, the U.S. Centers for Disease Control and Prevention ("CDC") issued new guidance which: (i) suggests that Face Coverings should be worn by all people if they are indoors in a public place and are in areas of substantial or high transmission; (ii) identifies most of North Carolina as being areas of substantial or high transmission; and (iii) recommends all teachers, staff, students, and visitors to schools wear Face Coverings, regardless of vaccination status; and

Progress in COVID-19 Vaccination

WHEREAS, COVID-19 vaccines are now widely available at no cost to all eligible North Carolinians who wish to receive one, and all eligible North Carolinians are strongly encouraged to get vaccinated; and

WHEREAS, the state has mounted a robust vaccination effort to distribute the state's supply of COVID-19 vaccines authorized by the Food and Drug Administration ("FDA") to all eligible people living in or spending significant time in North Carolina; and

WHEREAS, as of the date of this Executive Order, eighty-four percent (84%) of the state's population age sixty-five (65) and older is Fully Vaccinated; and

WHEREAS, as of the date of this Executive Order, fifty-five percent (55%) of the state's population age twelve (12) and older is Fully Vaccinated, and forty-five percent (45%) is not fully vaccinated; and

WHEREAS, although forty-five percent (45%) of North Carolinians age twelve (12) and over are not fully vaccinated, more than ninety-four percent (94%) of recent North Carolina cases are in people who are not Fully Vaccinated; and

Measures to Protect Against COVID-19

WHEREAS, unvaccinated people pose a risk not only to themselves, but to people who are immunocompromised and to children who are too young to be vaccinated; and

WHEREAS, it remains critical that North Carolinians exercise personal responsibility to protect themselves and their friends and neighbors from the spread of COVID-19, including by obtaining the free and widely available COVID-19 vaccines; and

WHEREAS, the undersigned and the Secretary of the Department of Health and Human Services have taken measures to ensure that COVID-19 testing and vaccination administration are accessible to as many North Carolinians as possible, and the undersigned has determined that these measures should continue; and

WHEREAS, to protect State employees and the public, the undersigned has also determined that Cabinet agency workers should be required to show either that they are Fully Vaccinated or that they have been recently tested for COVID-19; and

WHEREAS, to protect State employees and the public, the undersigned has determined that Face Covering requirements for unvaccinated workers should be implemented at Cabinet agencies; and

WHEREAS, the undersigned encourages all state and local government agencies, school systems, and private businesses and organizations, at a minimum, to adopt the same protections for state employees and the public; and

WHEREAS, if the state's COVID-19 case rate continues to increase, if the state's vaccination rate does not improve, or if existing or new COVID-19 variants continue to pose increased dangers, it may be necessary to reevaluate whether additional restrictions are necessary to reduce the risk of death and serious illness from COVID-19; and

Statutory Authority and Determinations

WHEREAS, Executive Order No. 116 invoked the Emergency Management Act, and authorizes the undersigned to exercise the powers and duties set forth therein to direct and aid in the response to, recovery from, and mitigation against emergencies; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.10(b)(2), the undersigned may make, amend, or rescind necessary orders, rules, and regulations within the limits of the authority conferred upon the Governor in the Emergency Management Act; and

WHEREAS, N.C. Gen. Stat. § 166A-19.10(b)(3) authorizes and empowers the undersigned to delegate Governorially vested authority under the Emergency Management Act and to provide for the sub-delegation of that authority; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(a)(1), the undersigned may utilize all available state resources as reasonably necessary to cope with an emergency, including the transfer and direction of personnel or functions of state agencies or units thereof for the purpose of performing or facilitating emergency services; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(a)(2), the undersigned may take such action and give such directions to state and local law enforcement officers and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of the Emergency Management Act and with the orders, rules, and regulations made thereunder; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(c)(i), the undersigned has determined that local control of the emergency is insufficient to assure adequate protection for lives and property of North Carolinians because not all local authorities have enacted such appropriate ordinances or issued such appropriate declarations restricting the operation of businesses and limiting person-to-person contact, thus needed control cannot be imposed locally; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(c)(ii), the undersigned has determined that local control of the emergency is insufficient to assure adequate protection for lives and property of North Carolinians because some but not all local authorities have taken implementing steps under such ordinances or declarations, if enacted or declared, in order to effectuate control over the emergency that has arisen; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(c)(iii), the undersigned has determined that local control of the emergency is insufficient to assure adequate protection for lives and property of North Carolinians because the area in which the emergency exists spreads across local jurisdictional boundaries and the legal control measures of the jurisdictions are conflicting or uncoordinated to the extent that efforts to protect life and property are, or unquestionably will be, severely hampered; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(c)(iv), the undersigned has determined that local control of the emergency is insufficient to assure adequate protection of lives and property of North Carolinians because the scale of the emergency is so great that it exceeds the capability of local authorities to cope with it; and

WHEREAS, N.C. Gen. Stat. § 166A-19.30(c) in conjunction with N.C. Gen. Stat. § 166A-19.31(b)(1) authorizes the undersigned to prohibit and restrict the movement of people in public places; and

WHEREAS, N.C. Gen. Stat. § 166A-19.30(c) in conjunction with N.C. Gen. Stat. § 166A-19.31(b)(2) authorizes the undersigned to prohibit and restrict the operation of offices, business establishments, and other places to and from which people may travel or at which they may congregate; and

WHEREAS, N.C. Gen. Stat. § 166A-19.30(c) in conjunction with N.C. Gen. Stat. § 166A-19.31(b)(5) authorizes the undersigned to prohibit and restrict other activities or conditions, the control of which may be reasonably necessary to maintain order and protect lives or property during a state of emergency; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(c)(1), when the undersigned imposes the prohibitions and restrictions enumerated in N.C. Gen. Stat. § 166A-19.31(b), the undersigned may amend or rescind the prohibitions and restrictions imposed by local authorities; and

WHEREAS, pursuant to Article III of the Constitution of North Carolina and N.C. Gen. Stat. §§ 143A-4 and 143B-4, the Governor is the chief executive officer of the state and is responsible for formulating and administering the policies of the executive branch of state government; and

WHEREAS, pursuant to N.C. Gen. Stat. § 143B-10(j)(3), the head of each principal state department and the Director of the Office of State Human Resources may adopt policies, consistent

with law and with rules established by the Governor and with rules of the State Human Resources Commission, which reflect internal management procedures within each department, including policies governing the conduct of employees of the department; and

WHEREAS, pursuant to N.C. Gen. Stat. § 126-4, the State Human Resources Commission (“Commission”) shall establish state human resources policies and rules subject to approval of the Governor, and pursuant to this statute, the Commission has issued a Communicable Disease Emergency Policy and rules that require social distancing policies, including administrative and engineering controls, that shall be implemented immediately upon orders from the Governor.

NOW, THEREFORE, by the authority vested in me as Governor by the Constitution and the laws of the State of North Carolina, **IT IS ORDERED**:

Section 1. Introduction.

1.1. Structure of this Executive Order.

North Carolina has made great strides since the start of the pandemic to save lives. Nevertheless, the state is presently experiencing a surge in COVID-19 spread, principally among those who are unvaccinated. The state’s key COVID-19 metrics suggest some measures must remain active to address and mitigate the spread of COVID-19.

Section 2 of this Executive Order is intended to provide the State Health Director with flexibility to issue any statewide standing order needed for COVID-19 testing or for administering an authorized or approved COVID-19 vaccine. The standing order may be issued as necessary in her medical judgment to allow individuals who meet NCDHHS criteria for testing to access and undergo testing for COVID-19 or receive a COVID-19 vaccine. Section 2 of this Executive Order also promotes COVID-19 testing and vaccine administration by preempting local regulations that may prevent such activity.

NCDHHS has developed guidance listing effective measures for businesses and organizations to use in protecting their employees and customers against COVID-19, including the Delta variant. Section 3 of this Executive Order provides information about this guidance and recommends that all private organizations and schools follow NCDHHS recommendations.

The most effective protection against the Delta variant—or against any form of COVID-19—is getting vaccinated. Vaccinations also protect the people around us from sickness and death. The undersigned has also determined that workers at Cabinet agencies must either be vaccinated or be regularly tested to ensure that they are not spreading COVID-19 to their fellow employees and members of the public. Section 4 of this Executive Order requires the Office of State Human Resources and all Cabinet agencies to implement these measures. The undersigned also has determined that Face Coverings should be required for unvaccinated workers at Cabinet agencies in many situations. Non-Cabinet agencies, state universities, and state commissions, local governments and school systems, and private businesses and organizations are strongly encouraged, at a minimum, to enact the same measures.

1.2. Definitions.

- a. “**Face Covering**” means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears and fits snugly against the side of a person’s face. A Face Covering can be made of a variety of synthetic and natural fabrics, including cotton, silk, or linen. Face Coverings are most effective when they fit snugly against a person’s face and have two (2) or more layers. This can be achieved by wearing a cloth Face Covering with two or more layers or by wearing one disposable mask underneath a cloth mask. A cloth Face Covering may be factory-made, sewn by hand, or can be improvised from household items such as scarfs, bandanas, t-shirts, sweatshirts, or towels. These Face Coverings are not intended for use by healthcare providers in the care of patients.

Based on recommendations from the CDC, face shields do not meet the requirements for Face Coverings.

- b. "Face Covering Exception" means any of the exceptions from wearing Face Coverings listed in Section 2.3 of Executive Order No. 209 and any of the exceptions from wearing Face Coverings during exercise listed in the bullet points within Section 2.4 of Executive Order No. 209. Those portions of Executive Order No. 209 are incorporated into this Executive Order, but only for the purpose of serving as exceptions to Face Covering requirements and recommendations.
- c. "Fully Vaccinated" means that it has been two weeks after someone has received the second dose in a two-dose COVID-19 vaccine series (Pfizer or Moderna), or that it has been two weeks after someone has received a single-dose COVID-19 vaccine (Johnson & Johnson).
- d. "Guest" means any attendee, customer, guest, member, patron, spectator, or other person lawfully on the property of another that does not own the property or work at the property.
- e. "Surgical Mask" means American Society for Testing and Materials ("ASTM") Level 1, 2, or 3 approved procedural and surgical masks.

Section 2. COVID-19 Testing and Vaccine Administration.

For the reasons and pursuant to the authority set forth above, the undersigned orders as follows:

- 2.1. **Statewide Standing Order for COVID-19 Testing.** In order to further protect the public health by providing greater access to COVID-19 testing, the undersigned orders the State Health Director, in addition to and in accordance with her powers set out in N.C. Gen. Stat. Chapter 130A, to issue any statewide standing order needed in her medical judgment that would allow individuals who meet NCDHHS criteria for testing to access and undergo testing for COVID-19, subject to the terms of the standing order. This standing order may continue for the duration of the State of Emergency.
- 2.2. **Statewide Standing Order for COVID-19 Vaccination.** In order to further protect public health by providing greater access to COVID-19 vaccines, the undersigned orders the State Health Director, consistent with her powers set out in N.C. Gen. Stat. Chapter 130A, to issue such statewide standing orders as needed in her medical judgment that would allow individuals eligible for vaccinations to access and receive a COVID-19 vaccination, subject to the terms of the standing order. This standing order may continue for the duration of the State of Emergency.
- 2.3. **School and Health Officials to Continue Efforts.** NCDHHS, the North Carolina Department of Public Instruction, and the North Carolina State Board of Education are directed to continue to work together during this State of Emergency to maintain and implement measures to provide for the health, nutrition, safety, educational needs, and well-being of children enrolled in North Carolina schools as they transition back to in-person learning.
- 2.4. **Effect on Local Emergency Management Orders.**
 - a. **Most of the Restrictions in This Executive Order Are Minimum Requirements. And Local Governments Can Impose Greater Restrictions.** The undersigned recognizes that the impact of COVID-19 has been and will likely continue to be different in different parts of North Carolina. Over the course of the COVID-19 emergency in North Carolina, COVID-19 outbreaks have occurred, at different times, in urban and rural areas; in coastal areas, the piedmont, and the mountains; and in a variety of employment and living settings. As such, the undersigned acknowledges that counties and cities may deem it necessary to adopt ordinances and issue state of emergency declarations which impose restrictions or prohibitions to the extent authorized under North Carolina law, such as on the activity of people and businesses, to a greater degree than in this Executive Order. To that end, nothing herein, except where specifically stated below in this Subsection 2.4, is intended to limit or prohibit counties and cities in North Carolina from enacting ordinances and issuing state of emergency declarations which

impose greater restrictions or prohibitions to the extent authorized under North Carolina law.

- b. Local Restrictions Cannot Restrict State or Federal Government Operations. Notwithstanding Subsection 2.4(a) above, no county or city ordinance or declaration shall have the effect of restricting or prohibiting governmental operations of the state or the United States.
- c. Local Restrictions Cannot Prevent COVID-19 Testing. To ensure that COVID-19 testing is available to the maximum extent possible, and to create certainty and uniformity across the state for businesses and operations that are providing this valuable testing, the undersigned specifically prohibits all local prohibitions and restrictions that would prevent or restrict businesses or operations from providing COVID-19 testing or would prevent or restrict businesses or operations from advertising COVID-19 testing services that they are providing to the public. This preemption includes, but is not limited to, building permits, signage restrictions, and zoning requirements. However, the preemption provided by this Section is available only to COVID-19 testing sites that are operated in accordance with state and federal law and in cooperation with the NCDHHS or a local public health department.
- d. Local Restrictions Cannot Prevent COVID-19 Vaccine Administration. To ensure that COVID-19 vaccines are available to the maximum extent possible, and to create certainty and uniformity across the state for businesses and operations that are providing this valuable service, the undersigned specifically prohibits all local prohibitions and restrictions that would prevent or restrict businesses or operations from providing COVID-19 vaccines or would prevent or restrict businesses or operations from advertising COVID-19 vaccines that they are providing to the public. This preemption includes, but is not limited to, building permits, signage restrictions and zoning requirements. However, the preemption provided by this Section is available only to COVID-19 vaccination sites that are operated in accordance with state and federal law and in cooperation with the NCDHHS or a local public health department.

Section 3. Guidelines for Private Businesses, Organizations, and Schools.

Federal and state health officials have issued guidance on how individuals and businesses can reduce the risk of transmission of COVID-19, including the Delta variant. These recommendations are available at <https://covid19.ncdhhs.gov/guidance>. Private businesses and organizations are strongly encouraged, at a minimum, to follow the measures in the NCDHHS guidance. These measures include requiring workers to either verify that they are Fully Vaccinated or, if they are not Fully Vaccinated, to wear Face Coverings and be tested on a weekly basis. These measures also include recommending Face Coverings for Fully Vaccinated workers and Guests indoors when other people are present.

Nothing in this Executive Order is intended to prohibit or discourage private businesses and organizations from requiring Face Coverings for their workers or Guests, or to prevent such businesses and organizations from enforcing all existing rights under the law to prohibit Guests from entering without Face Coverings.

In accordance with CDC's recommendations, and as recommended in the StrongSchoolsNC Public Health Tool Kit, leaders at all public and non-public schools should require all students, school staff, and visitors, regardless of vaccination status, to wear Face Coverings at all K-12 schools (unless a Face Covering Exception applies or medical or developmental conditions prohibit use).

Section 4. Measures to Protect State Employees and Members of the Public Who Enter State Facilities.

For the reasons and pursuant to the authority set forth above, the undersigned orders as follows:

4.1. **Vaccination or Testing Required for Unvaccinated Workers at Cabinet Agencies.**

The undersigned directs the Office of State Human Resources (“OSHR”) to issue a policy that includes the following requirements in this Section. OSHR is delegated the authority to issue this policy. OSHR shall issue this policy no later than August 13, 2021. OSHR may amend that policy thereafter.

The OSHR policy shall be effective September 1, 2021, and the requirements in this Subsection 4.1 shall become effective on that date.

These requirements set out prohibitions and restrictions only upon operation of agencies that are part of the Governor’s Office or are headed by members of the Governor’s Cabinet. All other state and local government agencies are strongly encouraged to voluntarily adopt similar policies.

- a. All workers must either:
 1. Provide proof that they are Fully Vaccinated; or
 2. Be tested at least once a week for COVID-19.
- b. The OSHR policy shall identify how workers may show that they are Fully Vaccinated. This proof shall include, but not be limited to, providing a valid COVID-19 vaccination record card to a representative of the agency’s Human Resources staff.
- c. The OSHR policy shall identify how an employee may show that they have tested negative for COVID-19. This proof shall include, but not be limited to, providing test results to a representative of the agency’s Human Resources staff. The OSHR policy, which shall be drafted in consultation with NCDHHS, shall also identify the conditions under which a positive or pending test result requires exclusion from the workplace.
- d. The OSHR policy shall identify confidentiality requirements for the information provided by workers under this Subsection 4.1. These confidentiality provisions shall be consistent with guidance from the Equal Employment Opportunity Commission.
- e. State employees may be subject to disciplinary action for violations of this Subsection 4.1 or the OSHR policy, up to and including dismissal. Each agency may determine the appropriate level of discipline for violations by issuing guidelines or policy. This Subsection 4.1 shall be enforceable only through disciplinary action for workers, and not by law enforcement under N.C. Gen. Stat. § 166A-19.30(a)(2).
- f. Workers with disabilities that impair or prevent vaccination, workers who are not recommended by a physician to be vaccinated, and workers with a sincerely held religious belief, practice, or observance that is inconsistent with vaccination may request a reasonable accommodation from the proof of vaccination option in Section 4.1(a)(1). The testing option in Section 4.1(a)(2) may serve as a reasonable accommodation for workers seeking an accommodation from the proof of vaccination option. These workers may request an exception by contacting their agency’s Human Resources office.

4.2. **Face Covering Requirements at Cabinet Agencies.** Effective Monday, August 2, 2021:

- a. If they are not Fully Vaccinated, workers must wear Face Coverings in any indoor space, within a state government office, building, or facility, that is that is controlled by an agency that is either part of the Governor’s Office or is headed by a member of the Governor’s Cabinet.
- b. Workers are excepted from the Face Covering requirements in this Subsection 4.2 if they provide proof that they are Fully Vaccinated. OSHR shall issue no later than July 30, 2021, a policy detailing how workers may provide this proof. This policy shall be replaced, effective September 1, 2021, by the policy issued under Subsection 4.1 of this Executive Order. OSHR is delegated the authority to issue this policy.

- c. Each agency may set its own Face Covering policy for Guests and for Fully Vaccinated workers in its offices, buildings, and facilities. All workers and Guests are welcome to wear a Face Covering at any time. It is recommended that Fully Vaccinated workers and Guests wear a Face Covering.
- d. Face Coverings are not required when a person is alone in a room or when a Face Covering Exception applies.
- e. State employees may be subject to disciplinary action for violations of this Subsection 4.2 or the OSHR policy, up to and including dismissal. Each agency may determine the appropriate level of discipline for violations by issuing guidelines or policy. This Subsection 4.2 shall be enforceable only through disciplinary action for workers, and not by law enforcement under N.C. Gen. Stat. § 166A-19.30(a)(2).
- f. The requirements of this Subsection 4.2 set out prohibitions and restrictions only upon operation of agencies that are part of the Governor's Office or are headed by members of the Governor's Cabinet. All other state and local government agencies are strongly encouraged to adopt similar policies.

Section 5. No Private Right of Action.

This Executive Order is not intended to create, and does not create, any individual right, privilege, or benefit, whether substantive or procedural, enforceable at law or in equity by any party against the State of North Carolina, its agencies, departments, political subdivisions, or other entities, or any officers, employees, or agents thereof, or any emergency management worker (as defined in N.C. Gen. Stat. § 166A-19.60) or any other person.

Section 6. Savings Clause.

If any provision of this Executive Order or its application to any person or circumstances is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Executive Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Executive Order are declared to be severable.

Section 7. Distribution.

I hereby order that this Executive Order be: (1) distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (2) promptly filed with the Secretary of the North Carolina Department of Public Safety, the Secretary of State, and the superior court clerks in the counties to which it applies, unless the circumstances of the State of Emergency would prevent or impede such filing; and (3) distributed to others as necessary to ensure proper implementation of this Executive Order.

Section 8. Enforcement.

- 8.1. Except where otherwise specified herein and pursuant to N.C. Gen. Stat. § 166A-19.30(a)(2), the provisions of this Executive Order shall be enforced by state and local law enforcement officers.
- 8.2. A violation of this Executive Order may be subject to prosecution pursuant to N.C. Gen. Stat. § 166A-19.30(d) and is punishable as a Class 2 misdemeanor in accordance with N.C. Gen. Stat. § 14-288.20A. Local governments are specifically authorized and encouraged to adopt ordinances that provide law enforcement officials with flexibility to use civil, rather than criminal, penalties to enforce violations of this Executive Order.
- 8.3. Nothing in this Executive Order shall be construed to preempt or overrule a court order regarding an individual's conduct (e.g., a Domestic Violence Protection Order or similar orders limiting an individual's access to a particular place).

Section 9. Effective Date.

This Executive Order is effective July 29, 2021, at 5:00 pm. This Executive Order shall remain in effect through August 31, 2021, at 5:00 pm, unless repealed, replaced, or rescinded by another applicable Executive Order. An Executive Order rescinding the Declaration of the State of Emergency will automatically rescind this Executive Order.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 29th day of July in the year of our Lord two thousand and twenty-one.



Roy Cooper
Governor

ATTEST:



Elaine F. Marshall
Secretary of State



EXHIBIT 9

Requirements for COVID-19 Testing and Face Coverings as an Alternative to Proof of Full Vaccination

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Requirements for COVID-19 Testing and Face Coverings as an Alternative to Proof of Full Vaccination

§ 1. Introduction**The COVID-19 Pandemic**

The Coronavirus Disease 2019 (“COVID-19”) is an urgent and serious danger to the health of the people who work in state agencies, along with the members of the public who visit those agencies. As of August 26, 2021:

- COVID-19 has infected more than 1.1 million people in North Carolina, which is more than 10% of the State’s population.
- The disease has killed at least 14,272 people in North Carolina.
- More than 3,500 people are hospitalized with COVID-19, the highest number since January 2021.

As COVID-19 has continued to spread from person to person across the United States and world, variants (genetically distinct strains) of COVID-19 have developed. The Delta variant of COVID-19 is more transmissible than the original COVID-19 virus. The spread of the Delta variant among the unvaccinated population in North Carolina has generated increased concern from medical professionals. The Delta variant now makes up the vast majority of all new COVID-19 cases in North Carolina. The Delta variant’s growing dominance, coupled with its increased transmissibility, has led to a significant increase in North Carolina’s number of COVID-19 cases and hospitalizations.

Although the Delta variant represents a severe threat to the unvaccinated, people who are fully vaccinated have a greatly reduced chance of being infected by the Delta variant. Further, being fully vaccinated greatly reduces the risk that anyone who does contract the Delta variant becomes severely ill or requires hospitalization. The best way to prevent infection and severe illness from COVID-19 is being vaccinated.

The Centers for Disease Control and Prevention (“CDC”) and the North Carolina Department of Health and Human Services (“NCDHHS”) recommend that:

- Everyone 12 years and older should get a COVID-19 vaccination to help protect against COVID-19.

Requirements for COVID-19 Testing and Face Coverings as an Alternative to Proof of Full Vaccination

- All people wear Face Coverings¹ if they are indoors in a public place and are in areas of substantial or high transmission. (As of the date this Policy is released, all North Carolina counties are areas of substantial or high transmission.)

Staff in state government workplaces, if they are not Fully Vaccinated, pose a greater risk of spreading COVID-19 to their colleagues and members of the public. The same is true for staff who provide public service outside of their homes. Because workers who are not Fully Vaccinated create a higher risk to their colleagues and members of the public, the agencies who have joined in this Policy are taking measures to reduce that risk. This Policy mitigates that risk by (1) requiring Workers who are not Fully Vaccinated to be tested each week for COVID-19 and (2) requiring Workers who are not Fully Vaccinated to wear Face Coverings.

About This Policy

The purpose of the Policy is to assist in the protection of the health and safety of state employees and the general public. This Policy is adopted by the department head and the Director of the Office of State Human Resources under N.C.G.S. § 143B-10(j)(3) as a policy “which reflect[s] internal management procedures within the department” and as a policy “governing the conduct of employees of the department.” Sections 4.1 and 4.2 of Executive Order 224 called for Cabinet agencies to adopt such a policy. This Policy is also adopted as Provision 8.1 under the Communicable Disease Emergency Policy, stating public health emergency response measures that Participating Agencies may implement.

Consistent with Section 4.1 of Executive Order 224, this Policy may be amended, both before and after this Policy’s September 1, 2021 effective date. This Policy replaces the Interim Policy for Face Covering Requirements issued July 30, 2021.

¹ Capitalized terms in this introduction are defined below in § 2 of this Policy.

§ 2. Definitions

Designated Person — A person designated by Human Resources to collect documents under this Policy, treat them confidentially, provide them to Human Resources, and (if applicable) return them to the Worker.

Face Covering – A covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears and fits snugly against the side of a person's face. Based on recommendations from the CDC, face shields do not meet the requirements for Face Coverings.

Face Covering Exception means any of the following exceptions from a requirement to wear a Face Covering. Face Coverings do not need to be worn by a person who:

1. Should not wear a Face Covering due to any medical or behavioral condition or disability (including, but not limited to, any person who has trouble breathing, or is unconscious or incapacitated, or is otherwise unable to put on or remove the Face Covering without assistance);²
2. Is actively eating or drinking;³
3. Is seeking to communicate with someone who is hearing-impaired in a way that requires the mouth to be visible;
4. Is giving a speech for a broadcast or to an audience;
5. Is working at home or is in a personal vehicle;
6. Is temporarily removing his or her Face Covering to secure government or medical services or for identification purposes;
7. Would be at risk from wearing a Face Covering at work, as determined by local, state, or federal regulations or workplace safety guidelines; or
8. Has found that his or her Face Covering is impeding visibility to operate equipment or a vehicle.

² Using this first exception requires use of the accommodation process set out in § 13 of this Policy.

³ Agencies may restrict use of this exception to reasonable intervals during the workday if a Worker attempts to abuse this exception by constantly having food or drink in hand.

In addition, people need not wear a Face Covering while exercising if:

9. They have symptoms while strenuously exercising, such as trouble breathing, dizziness, or lightheadedness;
10. They are wearing equipment like a mouthguard or helmet and are having trouble breathing;
11. They are doing any activity in which the Face Covering could become entangled and a choking hazard or impair vision in high risk activities; or
12. They are doing activities that may cause the Face Covering to become wet, like swimming or other activities in a pool, lake, water attraction, or similar body of water.

To the extent that an agency may require Face Coverings for Guests and have children in the workplace, the following additional exceptions apply:

13. Children under five (5) years of age need not wear a Face Covering, and children under two (2) years of age should not wear a Face Covering.
14. Face Coverings need not be worn by a child whose parent, guardian, or responsible person has been unable to place the Face Covering safely on the child's face.

Fully Vaccinated means that it has been at least two weeks after someone has received the second dose in a two-dose COVID-19 vaccine series (Pfizer or Moderna), or that it has been two weeks after someone has received a single-dose COVID-19 vaccine (Johnson & Johnson). Participants in the Novavax trial who are two weeks after having received both doses in the series also count as "Fully Vaccinated" under this Policy. People who have received all recommended doses of a COVID-19 vaccine that is listed for emergency use by the World Health Organization also count as "Fully Vaccinated" under this Policy.⁴

Guest – Any attendee, customer, guest, member, patron, spectator, vendor, or other person lawfully on the property of the agency, other than a Worker.

⁴ Participants in other clinical trials should contact OSHR and DHHS so that guidance about those clinical trials can be added to this Policy. OSHR and DHHS will provide guidance in the future about how people who are authorized for additional vaccination doses (so-called booster shots) should be treated for purposes of counting as "Fully Vaccinated." For the initial version of the Policy effective September 1, 2021, people who are authorized for additional doses do not need to have taken those doses to count as "Fully Vaccinated" under this Policy.

Home – Place of residence.

Participating Agency – Agencies that adopt this Policy in whole or in part.

Worker – Any employee (full or part-time, permanent, temporary, probationary, or time-limited), intern, volunteer, or contractor.⁵

§ 3. Scope of This Policy

Agencies Covered by This Policy

This Policy, like Section 4 of Executive Order 224, applies to agencies that are either part of the Governor's Office or are headed by a member of the Governor's Cabinet. Other state and local government agencies are strongly encouraged by the Governor to voluntarily adopt this Policy in whole or with any modifications. Non-Cabinet agencies may adopt this Policy by sending a letter or email to the Office of State Human Resources' Chief Deputy Director.

When and Where This Policy Applies

This Policy applies at Participating Agencies to all Workers.

The Face Covering requirements of this Policy apply to:

- Any indoor public space, within a state government office, building, or facility, that is controlled by a Participating Agency; and
- Participating Agencies' Workers when they are indoors doing work for their job, even if they are not on the Participating Agency's premises.

⁵ See the discussion in Section 15 of this Policy for how it applies to contractors.

§ 4. Policy on Being Vaccinated or Tested

Requirement to Be Vaccinated or Be Tested for COVID-19

All Workers at Participating Agencies must either:

1. Provide proof that they are Fully Vaccinated; or
2. Be tested at least once a week for COVID-19, with the last test result negative for COVID-19 infection.

Proof of Vaccination

To provide proof of Full Vaccination, a Worker should follow the procedures in § 8 of this Policy.

Proof of Testing

If a Worker chooses to be tested rather than becoming Fully Vaccinated, a Worker meets the requirements of this Policy by providing the following to the Participating Agency's Human Resources office, to an Information Technology support system designated by the Human Resources office, or to a Designated Person.

- The Worker needs to provide a negative result from a COVID-19 test, and this COVID-19 test must have been taken in the last seven days (168 hours) before the beginning of the Worker's shift.

The procedures for Workers to provide test results are set out in § 9 of this Policy. Four days before the next test result would be due, Human Resources staff (or an IT system on behalf of HR) are encouraged to regularly prompt Workers to either become Fully Vaccinated or be tested again for COVID-19. However, a Worker's duties under this Policy apply whether or not HR staff provide this prompt to the Worker.

Waiting on Test Results

At the discretion of an agency, a Worker can come on-premises to the work site even if the Worker is still waiting on the test results for a test conducted in the last week, so long as the Worker is asymptomatic for COVID-19. In this situation, a Worker will need to provide proof

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of being tested, such as a receipt from the test provider.⁶ The agency, through HR staff, can evaluate the circumstances and instruct the Worker whether to come in.

Timing for Testing Requirement

Tests beginning on September 1, 2021 fulfill the requirements of this Policy. Beginning on September 8, 2021, workers must either prove that they are Fully Vaccinated or have a negative test result taken in the last week.

§ 5. Responding to Symptoms of COVID-19 or Positive Test Results

Stay Home If Sick

Workers who are symptomatic for COVID-19 must not come to work on-site, whether or not they are Fully Vaccinated, unless the symptoms are explained by another known cause (such as diagnosed seasonal allergies) or they receive a negative COVID-19 test. A Worker also must stay home if he or she is instructed by a treating health care provider or public health official to quarantine after having close contact with someone who has COVID-19.

When an Employee Tests Positive for COVID-19

If the Worker's last test result was positive for COVID-19, the Worker cannot come on-premises to the work site until the end of the number of days of isolation set out in current CDC and NCDHHS recommendations.

As of the date when this Policy was issued, the CDC and NCDHHS recommendation for non-health care workers was:

- For people who test positive and remain asymptomatic, to isolate until ten days have passed since the date of the first positive COVID-19 test; and
- For people who test positive and have symptoms:
 - To isolate for at least ten days after the worker first had symptoms, and

⁶ Under this Policy, an inconclusive test is the same as waiting on a test result.

- Not to return to work, even after ten days, until both (i) the Worker has had no fever (without using fever-reducing medicine) for at least one day and (ii) the Worker's other symptoms are removing.

(This matches the DHHS Symptom Screening Checklist for Non-Healthcare Workers, available at <https://covid19.ncdhhs.gov/symptom-screening-checklist-english-0/open> .) This isolation period will automatically update in this Policy as the CDC and DHHS recommendations change over time. Refer to the Communicable Disease Emergency Policy for any employee leave options that may be applicable.

If an agency experiences a worker shortage, the agency head may waive the provisions of this Policy and allow asymptomatic people who are in their isolation period to work on-site while wearing Face Coverings.

Once someone has contracted COVID-19, he or she may continue to test positive for many weeks afterwards. In addition, the likelihood of reinfection within 90 days of an initial infection is low. Therefore, once someone tests positive for COVID-19 and completes the isolation period, he or she does not need to be tested again under this Policy for 90 days after the first positive test.

§ 6. Details on Getting Tested

Where to Be Tested

Many Participating Agencies will provide testing on site at the workplace. Workers who have testing at the work site must use the tests available at the work site, except in extraordinary circumstances.⁷ For on-site testing, Workers must bring their insurance information. Agencies may establish a schedule for Workers to be tested each week to minimize disruption to business operations.

⁷ People who are not regularly working on-site can use tests near their home, instead of the tests available at the work site. For example, someone coming in for the first day of work at a new job could get tested in advance near his or her home.

If tests are not available at the work site, or if extraordinary circumstances prevent getting tested at the work site, Workers may go to a private testing provider (like a pharmacy, doctor's office, public health department, or urgent care site) to be tested.

How to Receive a No-Cost COVID-19 Test

The State Health Plan currently waives the cost of COVID-19 testing from in-network providers. See <https://www.shpnc.org/blog/2020-03-03/coronavirus-updates> for more details. If Workers use a testing provider other than a test at work, they should make sure the provider is in-network.

Additionally, everyone is eligible for no-cost COVID-19 testing that takes place at No-Cost Community Testing Events. At these events, there is no cost to the insurer or the person being tested. As of the date of this Policy, there are dozens of these events occurring every day, all across the state. See <https://www.hhs.gov/coronavirus/community-based-testing-sites/index.html> for more details.

Types of Tests That Meet the Requirements of This Policy

Accepted diagnostic testing includes an antigen or molecular test (nucleic acid amplification test [NAAT] or RT-PCR) authorized by the Food and Drug Administration. Results must come from a Clinical Laboratory Improvement Amendments (CLIA) certified setting appropriate for the test type (i.e., high, moderate, or waived laboratory), which means that at-home tests are not authorized. The test result should include name, date of birth, date of specimen collection, date of result, and diagnostic test result.

Time Entry for Being Tested

Employees subject to the Fair Labor Standards Act ("FLSA-subject" employees, commonly called hourly employees) can list as "Time Worked" any time getting tested for the weekly tests required under this Policy.⁸ This includes time spent waiting for testing at the test location and any time spent traveling to a third-party site. Employees should take reasonable measures to minimize the amount of time taken to complete weekly tests. This includes

⁸ Employees' time is not compensable for additional tests beyond the ones required under this Policy.

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employees using on-site, rather than off-site, testing, whenever available. In general, employees using off-site testing are expected to take no more than a maximum of two hours per week per test.

For all other Workers, including without limitation employees who are exempt from the Fair Labor Standards Act (commonly called salaried employees), time spent being tested is compensable only if they are being tested on-site at an agency-designated work site.

§ 7. Policy on Face Coverings

Face Covering Requirements for Workers of Participating Agencies

Participating Agencies have the flexibility to adopt either:

1. A policy requiring all Workers to wear Face Coverings indoors if they are not Fully Vaccinated; or
2. A policy requiring Face Coverings indoors for all Workers — vaccinated and unvaccinated.

How Agencies Can Elect One of These Face Covering Options

By sending an email to all employees, posting a notice in the workplace, or any other reasonably effective means, agencies may instruct whether they are adopting option 1 (under which Fully Vaccinated Workers are not required to wear Face Coverings) or option 2 (under which all Workers are required to wear Face Coverings).

Local Government Emergency Orders Requiring Face Coverings

This Policy does not serve as an exception from any Face Covering requirements issued by other governmental entities that apply to Fully Vaccinated people.

For example, if a county or city has issued an emergency order that requires Face Coverings indoors for everyone, then Participating Agency facilities in that county or city must have all Workers and Guests wear Face Coverings indoors. If a local emergency order contains exceptions for government operations, the Face Covering requirements of this Policy, rather than the local emergency order, will apply.

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Face Coverings for Guests

Each Participating Agency may set its own procedure about whether Face Coverings are required for Guests. This policy may be issued by posting a notice at entrances and exits, or by any other reasonably effective means.

Exceptions to Face Coverings

The Face Covering requirements in this Policy do not apply if the Worker is alone in a room, if the Worker only has household members in a room, if a Face Covering Exception applies, or if the Worker is in his or her home.

§ 8. How Workers Can Show They Are Fully Vaccinated

How to Provide Documents, and What to Do While Waiting for HR Review

A Worker shall follow their agency's process for submitting proof of vaccination. This process may be a manual or electronic process. The proof can be provided directly by the Worker to the agency's Human Resources office, to an Information Technology system designated by the agency's Human Resources office, or to a Designated Person.

After Workers have submitted proof of vaccination, they do not need to be tested weekly for COVID-19 while they are waiting on HR staff to review the documents. However, those Workers must wear Face Coverings indoors in the workplace while they are waiting for HR review, unless a Face Covering Exception applies.

What to Submit

A Worker can show that they are Fully Vaccinated by submitting any of the following:

1. An original or copy of a COVID-19 Vaccination Record Card issued on the form provided by the U.S. Centers for Disease Control and Prevention ("CDC").

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2. A note or receipt signed by a licensed nurse, physician pharmacist, physician's assistant, or other representative of the place where the vaccine was administered. This note or receipt must show at least:
 - a. The Worker's name
 - b. The name of the healthcare provider administering the vaccine
 - c. Date(s) of vaccination
 - d. Place of vaccination
 - e. Vaccine product name (i.e., Moderna, Pfizer, or Johnson & Johnson)
3. A printout made by the Worker of the Worker's record from North Carolina's COVID-19 Vaccine Management System ("CVMS"). (Note that some people may not have their information available in CVMS.) For information about accessing CVMS and to register, people may visit https://covid-vaccine-portal.ncdhhs.gov/s/?language=en_US.⁹

§ 9. How Workers Can Show They Have Been Tested and Provide Test Results

A Worker shall follow their agency's process for submitting test results. This process may be a manual or electronic process. The proof can be provided directly by the Worker to the agency's Human Resources office, to an Information Technology system designated by the agency's Human Resources office, or to a Designated Person. Where feasible, and where a Worker is notified and provides consent, agencies may also set up a process to receive test results directly from a laboratory.

The Worker should indicate to the best of his or her ability whether the lab's report said the results were positive, negative, or inconclusive.¹⁰

⁹ Other vaccine management systems (for example, the systems used in other states, or the systems used by pharmacies or other health care providers) may also contain vaccination information. This Policy may be updated in the future to identify additional systems that can have printouts used to show that an employee is Fully Vaccinated.

¹⁰ If the lab report is not easy to understand, a Worker cannot be disciplined for incorrectly indicating whether the test was positive, negative, or inconclusive.

§ 10. What Participating Agencies May Do with Vaccination or Testing Documentation

If staff at a Participating Agency receive any of the vaccination documentation or testing results listed above from a Worker, laboratory, or IT system as part of verification under this Policy, they must do the following.

Review of Information by HR

Authorized Human Resources staff must review the material in good faith to determine whether it appears to be valid.

- Under this Policy, no additional research is required by the Human Resources staff member to determine whether the information provided by the Worker is truthful and accurate.
- However, the Human Resources staff member is authorized to require additional verification if the staff member has a reasonable basis to suspect that the information provided is inauthentic or fraudulent.

Sampling

For proof of vaccination, Human Resources staff will review each document provided by the employee. For test results, HR staff may use sampling (for example, reviewing only one out of every four documents submitted), but HR staff must review any document where the Worker did not indicate whether the test result was positive, negative, or inconclusive.

Confidentiality

If any vaccination documentation or test results are stored:

- Each staff member who receives those records must store them only in an agency confidential health information file that is maintained in accordance with any applicable State Records Center retention schedule.
- This file (including any database containing this information) must be separate from any employees' general personnel files and must be available only to Human Resources staff within the Participating Agency.

- Workers should not be asked to transmit these records through a system (like email) unless that system is encrypted or otherwise secured with limited access.

The reason for any exemption from the requirements of this Policy must also be maintained consistent with these confidentiality requirements.

Managers and supervisors shall not have direct access to vaccination status, testing information, or the reason for any exemption from this Policy unless they are Designated Persons (as that term is defined in § 2 above).

Information That Can Be Provided to Managers and Supervisors

So that managers and supervisors may implement the Policy, Human Resources staff members shall communicate to managers and supervisors:

- Whether and when Workers are available to work on-site. (Workers may be unable to come to work if they have tested positive for COVID-19 or if they have not met the weekly COVID-19 testing requirements in this Policy.)
- Whether Workers are exempt from the weekly COVID-19 testing requirement. (Workers may be exempt from testing if they are Fully Vaccinated, are within a 90-day period after a diagnosed infection, or if they have received an exemption for some other reason.)
- Whether Workers are exempt from the Face Covering requirement. (Workers may be exempt from this requirement if they are Fully Vaccinated or if they have received an exemption for some other reason, such as an accommodation for medical reasons.)

If asked, managers and supervisors may tell other workers that a particular Worker is exempt from any part of this Policy. Managers and supervisors should not say what the reason is for the Worker being exempt.

§ 11. Duty to Provide Truthful Information

Workers violate this Policy if they knowingly provide a false or inauthentic document under this Policy. This includes any kind of document provided under this Policy, including but not limited to proof of vaccination, COVID-19 test results, or any information related to requests for exemption.

§ 12. Discipline for Violations of this Policy

Employees may be subject to disciplinary action for violations of this Policy, up to and including dismissal. Each Participating Agency may determine the appropriate level of discipline for violations. Different Participating Agencies need not adopt the same kind of discipline for violations of this Policy, but each Participating Agency should be consistent with respect to the kind of discipline issued by that particular Participating Agency.

If a Worker willfully refuses to comply with this Policy, he or she may be removed from the work site so that the Worker does not endanger other people on the site. The next day, if he or she again willfully refuses to comply, that is a new, additional violation of this Policy.

Willful violations of this Policy may be grounds for terminating a contractor's contract.

Pursuant to Subsections 4.1 and 4.2 of Executive Order 224, violations of this Policy shall be enforceable only through disciplinary action for workers, and not by law enforcement under N.C. Gen. Stat. § 166A-19.30(a)(2).

§ 13. Accommodation Requests and Other Exemptions or Exceptions to Policy

Workers may seek reasonable accommodations from relevant requirements of this Policy on the basis of disabilities, because they are not recommended by a physician licensed in North

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Carolina to be vaccinated or wear a Face Covering, because they have a sincerely held religious belief, practice, or observance, or for any other lawful reason.

The testing option may serve as a reasonable accommodation for workers seeking an accommodation from the proof of vaccination option.

Workers may request an exception by contacting their agency's Human Resources office. These requests shall be considered under the agency's standard reasonable accommodation process. Workers may be asked to submit documentation to substantiate their request for accommodation.

§ 14. How This Policy Applies to Remote Workers or Workers on Leave

Workers Who May Be On-Site

Workers are not exempt from this Policy if they are, or may be, required to come into a Participating Agency's office for meetings or any part of their duties.

Workers With Remote Duty Stations Who Interact with the Public

Workers are not exempt from this Policy, even if they never come into a Participating Agency's office, if they meet with the public as part of their job duties.

Fully Remote Workers

Field-based or home-based Workers are exempt from this Policy if their duty station is their home, the Worker stays home with no work-related in-person public interaction, and the Worker is never expected to come into the work site. In this scenario, the Worker shall not be asked for vaccination information or be required to get weekly tests for COVID-19.

No Change of Duties

Each state agency has important jobs to fulfill under state law, and those jobs often require employees to come on-site or interact with the public. Pursuant to the state Teleworking

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Program Policy, employees will not be asked, for reasons of convenience, to incur additional duties routinely performed by other employees specifically for the purpose of enabling them to telework to avoid requirements of this policy.

§ 15. How This Policy Applies to Contractors

Contractors must follow the requirements in this Policy to (1) be Fully Vaccinated or tested weekly and (2) wear Face Coverings indoors at Participating Agency facilities. Where possible, it satisfies this Policy for an agency to have a contractor's employer, rather than the agency, ensure that the requirements of this Policy are being met. If necessary, Participating Agencies may limit the measures in this Policy to not cover contractors that they do not logistically control (for example, HVAC or electric technicians), contractors for whom the contract cannot be changed, or contractors for whom the contract is in the process of being changed.

§ 16. Other Exceptions

Exception for Workers on Leave/Vacation

A Worker who has been on leave will not be in violation of this policy if, upon return to the work site, the Worker has a negative test result from a test taken within the previous seven days.

Exception for Adverse Weather or Other Events That Prevent Testing

If adverse weather, emergency closings, or other conditions make testing procedures not feasible, an agency head or the State Director of Human Resources may provide a temporary exception from the requirements of this Policy.

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Relationship to Other Policies

Nothing in this Policy prevents any agency, now or in the future, from requiring vaccination for certain groups of employees under other policies. This Policy sets minimum, not maximum, requirements.

§ 17. Effective Date and Duration

This Policy is effective September 1, 2021. It shall remain in effect until rescinded. It may be modified or rescinded by the Director of State Human Resources (for Cabinet agencies) or agency head (for non-Cabinet Participating Agencies) for any reason, including but not limited to COVID-19 developments, any additional Executive Orders, and any additional federal or NCDHHS guidance.

§ 18. Miscellaneous Terms**No Private Right of Action**

Except as stated below under the heading “Grievances,” this Policy is not intended to create, and does not create, any individual right, privilege, or benefit, whether substantive or procedural, enforceable at law or in equity by any party against the State of North Carolina, its agencies, departments, political subdivisions, or other entities, or any officers, employees, or agents thereof, or any emergency management worker (as defined in N.C. Gen. Stat. § 166A-19.60), or any other person.

Grievances

An employee may grieve any discipline imposed against him or her as a result of this Policy, subject to the provisions of the State of North Carolina’s Employee Grievance Policy, but an employee may not file a grievance based on an assertion that another person violated this Policy. Nothing in this Policy restricts an employee’s right to file a grievance for any of the issues stated in N.C.G.S. § 126-34.02, any other law, or any State Human Resources Commission policy.

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Savings Clause

If any provision of this Policy or its application to any person or circumstances is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Policy which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Policy are declared to be severable.

§ 19. Authorities

Source of Authority

This Policy is issued by direction of Section 4 of Executive Order 224 (July 29, 2021). Section 4 of the executive order takes the form of (1) prohibitions and restrictions issued under the Emergency Management Act, as well as (2) a direction to the Office of State Human Resources to issue a policy. Therefore, this Policy is issued under the Emergency Management Act (Chapter 166A of the North Carolina General Statutes), the statute empowering agency heads and the Director of the Office of State Human Resources to issue policies (N.C.G.S. § 143B-10(j)(3)), and the Communicable Disease Emergency Policy issued by the State Human Resources Commission pursuant to N.C.G.S. § 126-4.

§ 20. History of this Policy

Date	Version
August 13, 2021	First version
August 27, 2021 (Version 1.1)	<p>Several minor adjustments:</p> <ul style="list-style-type: none"> • In Section 6, added more information about No-Cost Community Testing Events, which are completely free to the person being tested. • In Section 6, text has been updated about compensating test-taking time for FLSA-subject employees. • In Section 7, clarified that if a local emergency order contains exceptions for governmental operations, then the Face Covering requirements of this Policy, rather than the local emergency order, will apply. • Section 8 has been updated to specify that Workers do not need to be tested, but must wear Face Coverings if the Workers have

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	<p>submitted proof of Full Vaccination, but are waiting on HR to review that proof.</p> <ul style="list-style-type: none">• Section 9 has been updated to reflect that laboratories may, with consent, provide test results directly to the state agency.• Section 9 has been updated to reflect that in the statewide vendor system, employees will be asked (to the best of their ability) to indicate whether a test result was positive, negative, or inconclusive, and HR staff may use sampling on test results.• Clarified text about how the Policy applies to contractors, and moved it from a footnote into Section 15 of the main text.
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EXHIBIT 10

Policy on Face Coverings and on Vaccination or Testing

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Policy on Face Coverings and on Vaccination or Testing

IMPORTANT NOTICE CONCERNING VERSION 3.0 OF THIS POLICY

Effective May 9, 2022 and until further notice, Participating Agencies are no longer required to implement the terms of this Policy that require weekly testing for Workers who are not Fully Vaccinated. However, agency heads may, in their discretion, continue to require testing for Workers who are not Fully Vaccinated consistent with this Policy in those settings that the agency head determines to be high-risk to employees, the public, or others. Such places may include, but are not limited to, long term care facilities, correctional facilities, homeless shelters, and health care facilities. Federal rule may also require testing, in certain settings, for Workers who are not Fully Vaccinated.

All of the following provisions of this policy addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing for some or all of the Participating Agency's Workers who are not Fully Vaccinated. The weekly testing provisions apply only to the unvaccinated Workers identified by the Participating Agency as needing to continue testing under this Policy.

Participating Agencies should notify Workers who will continue to be tested under the terms of this Policy by sending an email, posting a notice in the workplace, or any other reasonably effective means of notifying Workers of the continued requirement. Agency heads may discontinue testing at any time, in their discretion.

Workers may choose to continue providing documentation of their vaccination status, so that they are exempted if testing resumes in the future. For this reason, Participating Agencies that elect to discontinue the weekly testing component of this Policy should continue to accept vaccination documentation.

Participating Agency heads may reinstate the testing requirement of this Policy in their discretion, in coordination with the Governor's Office and OSHR, and with no less than one (1) week notice to impacted Workers.

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

§ 1. Introduction

The COVID-19 Pandemic

As of the date of Version 3.0 of this Policy, community burden of the Coronavirus Disease 2019 (“COVID-19”) is relatively low in almost all North Carolina counties. The number of North Carolinians testing positive for COVID-19 has generally decreased in the weeks preceding the effective date of this revised Policy; the same holds true for the number of positive cases detected amongst state employees who are not Fully Vaccinated.

Accordingly, this version of this Policy removes the requirement for unvaccinated Workers at Participating Agencies to test weekly for COVID-19, but allows agency heads to continue to require testing, in their discretion, for unvaccinated Workers who work in settings that they determine to be high-risk.

Despite the recent positive trends in the trajectory of the virus, COVID-19 remains a serious danger to the health of the people who work in state agencies, along with the members of the public who visit those agencies. As of April 30, 2022:

- There have been more than 2.6 million cases of COVID-19 in North Carolina.
- The disease has killed at least 24,577 people in North Carolina.

As COVID-19 has continued to spread from person to person across the United States and world, variants (genetically distinct strains) of COVID-19 have developed. The Delta variant of COVID-19 is more transmissible than the original COVID-19 virus, and the Omicron variant is more transmissible than the Delta variant. When each of these variants came to North Carolina, they produced significant increases in the number of COVID-19 cases and hospitalizations. As of February 25, 2022, the Omicron variants make up almost all new COVID-19 cases in North Carolina. New variants and new lineages of the existing variants may develop in the future, posing new risks.

Although COVID-19 represents a severe threat to the unvaccinated, people who are fully vaccinated have a reduced chance of being infected by COVID-19. Further, being fully vaccinated reduces the risk that anyone who does contract COVID-19 becomes severely ill

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

or requires hospitalization. This protection is strengthened further by taking recommended boosters to become up-to-date on vaccination.

Having previously recovered from a COVID-19 infection may, in certain cases, provide partial protection against the risks of future reinfection and severe disease; however, the data do not demonstrate that this protection is more effective than what would be produced in the same circumstances from vaccination.¹ Even those who have already contracted COVID-19 can benefit from strengthening their protection through vaccination.

The Centers for Disease Control and Prevention (“CDC”) and the North Carolina Department of Health and Human Services (“NCDHHS”) recommend that everyone 5 years and older should get a COVID-19 vaccination to help protect against COVID-19, and individuals should also receive a booster shot, if and when eligible. The best way to prevent infection and severe illness from COVID-19 is being vaccinated and staying up-to-date on COVID-19 vaccinations.

State government staff, if they are not Fully Vaccinated, pose a greater risk of spreading COVID-19 to their colleagues in the workplace and members of the public they may contact in-person as part of their jobs. Further, for people who are at the highest risk of severe illness and death – workers who are not yet Fully Vaccinated – periodic testing increases the chance of an early diagnosis, which permits more effective therapeutics or other treatments.

Wearing Face Coverings lowers the risk of transmission and infection from COVID-19. The CDC recommends that employers should implement Face Coverings as an enhanced COVID-19 prevention measure in high-risk congregate settings, such as correctional facilities and homeless shelters, and people should consider wearing Face Coverings if they have contact with people at high risk for severe COVID disease. Therefore, this Policy allows agency heads to require Face Coverings in higher-risk settings.

¹ This Policy takes previous infections into account by exempting covered Workers who are subject to the testing requirement for a period of 90 days following infection with COVID-19.

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

The agencies participating in this Policy take these measures, among other reasons: (1) to mitigate the risks of spreading COVID-19, (2) to protect the health of their employees by encouraging COVID-19 vaccination, and (3) to protect the health of their employees by early detection of COVID-19 cases among Workers who are unvaccinated, the people who have the highest risk of severe COVID-19 illness and death.

About This Policy

The purpose of the Policy is to assist in the protection of the health and safety of state employees and the general public. This Policy is adopted by the department head and the Director of the Office of State Human Resources under N.C.G.S. § 143B-10(j)(3) as a policy “which reflect[s] internal management procedures within the department” and as a policy “governing the conduct of employees of the department.” Sections 4.1 and 4.2 of Executive Order 224 called for Cabinet agencies to adopt this Policy; those directions have been continued in subsequent executive orders, including Executive Order 253 issued March 1, 2022. This Policy reflects the Governor’s directions in Executive Order 253. This Policy is also adopted as Provision 8.1 under the Communicable Disease Emergency Policy, stating public health emergency response measures that Participating Agencies may implement.

As authorized by the Governor’s executive orders, this Policy may be amended, both before and after this Policy’s September 1, 2021 effective date. This Policy replaces the Interim Policy for Face Covering Requirements issued July 30, 2021. This version of the Policy² (Version 3.0) replaces the previous version (Version 2.0) effective at the beginning of the day on March 9, 2022.

² A previous version of this Policy was named “Requirements for COVID-19 Testing and Face Coverings as an Alternative to Proof of Full Vaccination.” Agencies are encouraged to revise their documents about this Policy to list its revised name, but agency documents remain fully valid if they identify this Policy by its prior name, by the phrase “vaccination-or-testing policy,” or by any other reasonably clear name.

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

§ 2. Definitions

Designated Person — A person designated by Human Resources to collect documents under this Policy, treat them confidentially, provide them to Human Resources, and (if applicable) return them to the Worker.

Face Covering – A covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears and fits snugly against the side of a person's face. Based on recommendations from the CDC, face shields do not meet the requirements for Face Coverings.

Face Covering Exception means any of the following exceptions from a requirement to wear a Face Covering. Face Coverings do not need to be worn by a person who:

1. Should not wear a Face Covering due to any medical or behavioral condition or disability (including, but not limited to, any person who has trouble breathing, or is unconscious or incapacitated, or is otherwise unable to put on or remove the Face Covering without assistance);³
2. Is actively eating or drinking;⁴
3. Is seeking to communicate with someone who is hearing-impaired in a way that requires the mouth to be visible;
4. Is giving a speech for a broadcast or to an audience;
5. Is working at home or is in a personal vehicle;
6. Is temporarily removing his or her Face Covering to secure government or medical services or for identification purposes;
7. Would be at risk from wearing a Face Covering at work, as determined by local, state, or federal regulations or workplace safety guidelines; or

³ Using this first exception requires use of the accommodation process set out in § 13 of this Policy.

⁴ Agencies may restrict use of this exception to reasonable intervals during the workday if a Worker attempts to abuse this exception by constantly having food or drink in hand.

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

8. Has found that his or her Face Covering is impeding visibility to operate equipment or a vehicle.

In addition, people need not wear a Face Covering while exercising if:

9. They have symptoms while strenuously exercising, such as trouble breathing, dizziness, or lightheadedness;
10. They are wearing equipment like a mouthguard or helmet and are having trouble breathing;
11. They are doing any activity in which the Face Covering could become entangled and a choking hazard or impair vision in high-risk activities; or
12. They are doing activities that may cause the Face Covering to become wet, like swimming or other activities in a pool, lake, water attraction, or similar body of water.

To the extent that an agency may have children in the workplace, the following additional exceptions apply:

13. Children under five (5) years of age need not wear a Face Covering, and children under two (2) years of age should not wear a Face Covering.
14. Face Coverings need not be worn by a child whose parent, guardian, or responsible person has been unable to place the Face Covering safely on the child's face.

Fully Vaccinated means that it has been at least two weeks after someone has received the second dose in a two-dose COVID-19 vaccine series (Pfizer or Moderna), or that it has been two weeks after someone has received a single-dose COVID-19 vaccine (Johnson & Johnson).⁵

Home – Place of residence.

⁵ In addition, the following people who have taken other vaccines count as "Fully Vaccinated":

- Participants in the Novavax trial who are two weeks after having received both doses.
- For any other COVID-19 vaccine that is listed for emergency use by the World Health Organization, people who have received all recommended doses, after any waiting period recommended for the doses to take full effect.

For the current version of this Policy, people who are authorized for additional vaccination doses (so-called "booster shots") do not need to have taken those doses to count as "Fully Vaccinated" under this Policy.

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

Participating Agency – Agencies that adopt this Policy in whole or in part.

Worker – Any employee (full or part-time, permanent, temporary, probationary, or time-limited), intern, volunteer, or contractor.⁶

§ 3. Scope of This Policy

Agencies Covered by This Policy

This Policy applies to agencies that are either part of the Governor’s Office or are headed by a member of the Governor’s Cabinet. Other state and local government agencies are strongly encouraged by the Governor to voluntarily adopt this Policy in whole or with any modifications. Non-Cabinet agencies may adopt this Policy by sending a letter or email to the Office of State Human Resources’ Chief Deputy Director.

When and Where This Policy Applies

This Policy applies at Participating Agencies to all Workers on days that they either:

- (1) come to the Participating Agency’s facility for work or
- (2) interact with members of the public as part of their job duties.

See § 14 of this Policy for further details about how this Policy applies, or does not apply, to remote workers, field-based workers, and workers on leave.

§ 4. Policy on Being Vaccinated or Tested

Requirement to Be Vaccinated or Be Tested for COVID-19

Workers covered by this Policy at Participating Agencies must either:

1. Provide proof that they are Fully Vaccinated; or
2. Provide a timely test result for COVID-19.

⁶ See the discussion in Section 15 of this Policy for how it applies to contractors.

Policy on Face Coverings and on Vaccination or Testing

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

Proof of Vaccination

To provide proof of Full Vaccination, a Worker should follow the procedures in § 8 of this Policy.

Proof of Testing

If a Worker chooses to be tested rather than becoming Fully Vaccinated, a Worker meets the requirements of this Policy by providing the following to the Participating Agency's Human Resources office, to an Information Technology support system designated by the Human Resources office, or to a Designated Person.

- The Worker needs to provide a negative result from a COVID-19 test, and this COVID-19 test must have been taken in the last seven days (168 hours) before the beginning of the Worker's shift.

The procedures for Workers to provide test results are set out in § 9 of this Policy. Four days before the next test result would be due, Human Resources staff (or an IT system on behalf of HR) are encouraged to regularly prompt Workers to either become Fully Vaccinated or be tested again for COVID-19. However, a Worker's duties under this Policy apply whether or not HR staff provide this prompt to the Worker.

Waiting on Test Results

At the discretion of an agency, a Worker can come on-premises to the work site even if the Worker is still waiting on the test results for a test conducted in the last week, so long as the Worker is asymptomatic for COVID-19. In this situation, a Worker will need to provide proof of being tested, such as a receipt from the test provider.⁷ The agency, through HR staff, can evaluate the circumstances and instruct the Worker whether to come in.

Timing for Testing Requirement

Tests beginning on September 1, 2021 fulfill the requirements of this Policy.

⁷ Under this Policy, an inconclusive test is the same as waiting on a test result.

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

§ 5. What to Do After a Positive Test or Symptoms of COVID-19

Workers who test positive or who are symptomatic for COVID-19 must follow the isolation period established in current CDC and DHHS recommendations.⁸ A Worker also must stay home if he or she is instructed by a treating health care provider or public health official to quarantine after having close contact with someone who has COVID-19. If an agency experiences a worker shortage, the agency head may waive the provisions of this Policy and allow asymptomatic people who are in their isolation period to work on-site while wearing Face Coverings.

The state Communicable Disease Emergency Policy has provided a limited amount of paid “CDE-Administrative Leave” to employees who must isolate or quarantine. Refer to the provisions under the Communicable Disease Emergency Policy for conditions and details.

Once someone has contracted COVID-19, he or she may continue to test positive for many weeks afterwards. Therefore, once someone tests positive for COVID-19 and completes the isolation period, he or she does not need to be tested again under this Policy for 90 days after the first positive test. If someone receives an initial positive test that is later confirmed to be a false positive, this 90-day exemption from testing does not apply.

§ 6. Details on Getting Tested

At-Home Rapid Tests

Beginning on March 7, 2022, Workers may meet the testing requirements of this Policy by completing at-home rapid COVID-19 antigen tests.⁹

⁸ As of the date of this version of this Policy, these recommendations are found at <https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html>.

⁹ Agency heads may continue to require PCR tests, rather than at-home rapid tests, for Workers (a) where required by the federal government and (b) in settings that the agency head determines to be high-risk to employees, the public, or others.

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

On-Site Testing

Some Participating Agencies will provide testing on site at the workplace. For on-site testing, Workers must bring their insurance information. Agencies may establish a schedule for Workers to be tested each week to minimize disruption to business operations.

How to Receive a No-Cost COVID-19 Test

The State Health Plan currently

- (1) Covers 100% of the cost of at-home rapid COVID-19 tests, with a limit of 8 covered at-home rapid tests per 30 days; and
- (2) Waives the cost of traditional PCR COVID-19 testing from in-network providers.

See <https://www.shpnc.org/coronavirus-updates> for more details and important conditions. If Workers use a testing provider other than a test at work, they should make sure the provider is in-network.

Additionally, everyone is eligible for no-cost COVID-19 testing that takes place at No-Cost Community Testing Events. At these events, there is no cost to the insurer or the person being tested. As of the date of this Policy, there are dozens of these events occurring every day, all across the state. See <https://covid19.ncdhhs.gov/about-covid-19/testing/find-my-testing-place/no-cost-community-testing-events> for more details.

Types of Tests That Meet the Requirements of This Policy

Accepted diagnostic testing includes either:

- (1) An at-home rapid COVID-19 antigen self-test, or
- (2) A molecular COVID-19 test (nucleic acid amplification test [NAAT] or RT-PCR).

In either case, the test must be authorized by the Food and Drug Administration (including but not limited to authorizations for emergency use). Methods of taking these tests may include nasal swabs, saliva tests, or other methods authorized by the FDA.

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Time Entry for Being Tested

Because at-home rapid COVID-19 tests are allowed under this Policy, and because some agencies have on-site testing programs, it should rarely be the case that employees take substantial amounts of time to get tested under this Policy.

Employees subject to the Fair Labor Standards Act (“FLSA-subject” employees, commonly called hourly employees) can list as “Time Worked” the time getting tested for the weekly tests required under this Policy.¹⁰ Employees should take reasonable measures to minimize the amount of time taken to complete weekly tests. Reasonable measures to minimize this time include employees using (1) at-home rapid COVID-19 tests, if those are available in the area, and (2) using on-site, rather than off-site, testing when available.

For all other Workers, including without limitation employees who are exempt from the Fair Labor Standards Act (commonly called salaried employees), time spent being tested is compensable only if they are being tested on-site at an agency-designated work site.

§ 7. Policy on Face Coverings

General Policy

Face Coverings are generally optional in Participating Agency facilities. Agency heads, in their discretion, may require Face Coverings in settings that the agency head determines to be high-risk to employees, the public, or others. Such places may include, but are not limited to, long term care facilities, correctional facilities, homeless shelters, and health care facilities.

Identifying Areas Where Face Coverings Are Required

By sending an email to all employees, posting a notice in the workplace, or any other reasonably effective means, agencies may instruct whether Face Coverings are required in a facility.

¹⁰ Employees' time is not compensable for additional tests beyond the ones required under this Policy.

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

Employees Are Welcome to Wear Face Coverings

Employees continue to be welcome to wear Face Coverings, even where not required. Individuals are recommended to consult DHHS guidance to inform their decisions about wearing Face Coverings. Unvaccinated employees are strongly encouraged to wear Face Coverings, even in situations where Face Coverings are not required.

Local Government Orders or Federal Authority Requiring Face Coverings

This Policy does not serve as an exception from any Face Covering requirements issued by other governmental entities. For example, the federal government has several Face Covering requirements that apply in particular settings, such as health care. These federal Face Covering requirements override any contrary language in this Policy. Similarly, if a county or city has issued an emergency order that requires Face Coverings indoors for everyone, then Participating Agency facilities in that county or city must have everyone wear Face Coverings indoors. If a local emergency order contains exceptions for government operations, the Face Covering requirements of this Policy, rather than the local emergency order, will apply.

Exceptions to Face Coverings

The Face Covering requirements in this Policy do not apply if the Worker is alone in a room, if the Worker only has household members in a room, if a Face Covering Exception applies, or if the Worker is in his or her home.

Applying the Face Coverings Policy to Shared Facilities

If an agency requires Face Coverings in certain situations, those requirements apply to:

- Any indoor public space, within a state government office, building, or facility, that is controlled by that Participating Agency; and
- Participating Agencies' Workers when they are in that situation and indoors doing work for their job, even if they are not on the Participating Agency's premises.

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§ 8. How Workers Can Show They Are Fully Vaccinated

How to Provide Documents, and What to Do While Waiting for HR Review

A Worker shall follow their agency's process for submitting proof of vaccination. This process may be a manual or electronic process. The proof can be provided directly by the Worker to the agency's Human Resources office, to an Information Technology system designated by the agency's Human Resources office, or to a Designated Person.

After Workers have submitted proof of vaccination, they do not need to be tested weekly for COVID-19 while they are waiting on HR staff to review the documents. However, those Workers must wear Face Coverings indoors in the workplace while they are waiting for HR review, unless a Face Covering Exception applies.

What to Submit

A Worker can show that they are Fully Vaccinated by submitting any of the following:

1. An original or copy of a COVID-19 Vaccination Record Card issued on the form provided by the U.S. Centers for Disease Control and Prevention ("CDC").
2. A note or receipt signed by a licensed nurse, physician pharmacist, physician's assistant, or other representative of the place where the vaccine was administered. This note or receipt must show at least:
 - a. The Worker's name
 - b. The name of the healthcare provider administering the vaccine
 - c. Date(s) of vaccination
 - d. Place of vaccination
 - e. Vaccine product name (i.e., Moderna, Pfizer, or Johnson & Johnson)
3. A printout made by the Worker of the Worker's record from North Carolina's COVID-19 Vaccine Management System ("CVMS"). (Note that some people may not have their

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information available in CVMS.) For information about accessing CVMS and to register, people may visit https://covid-vaccine-portal.ncdhhs.gov/s/?language=en_US.¹¹

§ 9. How Workers Can Show They Have Been Tested and Provide Test Results

A Worker shall follow their agency's process for submitting test results. This process may be a manual or electronic process. The proof can be provided directly by the Worker to the agency's Human Resources office, to an Information Technology system designated by the agency's Human Resources office, or to a Designated Person. For tests that go to a laboratory, where feasible, and where a Worker is notified and provides consent, agencies may set up a process to receive test results directly from that laboratory.

The Worker should indicate to the best of his or her ability whether the lab's report said the results were positive, negative, or inconclusive.¹²

What to Provide for Rapid Tests

For rapid at-home COVID-19 tests, the Worker may submit a smartphone photo of the test result, or the Worker may provide some other reasonable proof of the test result suggested by the agency's Human Resources office.

¹¹ Other vaccine management systems (for example, the systems used in other states, or the systems used by pharmacies or other health care providers) may also contain vaccination information. This Policy may be updated in the future to identify additional systems that can have printouts used to show that an employee is Fully Vaccinated.

¹² If the lab report is not easy to understand, a Worker cannot be disciplined for incorrectly indicating whether the test was positive, negative, or inconclusive.

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§ 10. What Participating Agencies May Do with Vaccination or Testing Documentation

If staff at a Participating Agency receive any of the vaccination documentation or testing results listed above from a Worker, laboratory, or IT system as part of verification under this Policy, they must do the following.

Review of Information by HR

Authorized Human Resources staff may review the material in good faith to determine whether it appears to be valid.

- Under this Policy, no additional research is required by the Human Resources staff member to determine whether the information provided by the Worker is truthful and accurate.
- However, the Human Resources staff member is authorized to require additional verification if the staff member has a reasonable basis to suspect that the information provided is inauthentic or fraudulent.

Sampling

For proof of vaccination, Human Resources staff will review each document provided by the employee. For test results, HR staff may use sampling (for example, reviewing only one out of every four documents submitted), but HR staff must review any document where the Worker did not indicate whether the test result was positive, negative, or inconclusive.

Confidentiality

If any vaccination documentation or test results are stored:

- Each staff member who receives those records must store them only in an agency confidential health information file that is maintained in accordance with any applicable State Records Center retention schedule.
- This file (including any database containing this information) must be separate from any employees' general personnel files and must be available only to Human Resources staff within the Participating Agency.

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- Workers should not be asked to transmit these records through a system (like email) unless that system is encrypted or otherwise secured with limited access.

The reason for any exemption from the requirements of this Policy must also be maintained consistent with these confidentiality requirements.

Managers and supervisors shall not have direct access to vaccination status, testing information, or the reason for any exemption from this Policy unless they are Designated Persons (as that term is defined in § 2 above).

Information That Can Be Provided to Managers and Supervisors

So that managers and supervisors may implement the Policy, Human Resources staff members shall communicate to managers and supervisors:

- Whether and when Workers are available to work on-site. (Workers may be unable to come to work if they have tested positive for COVID-19 or if they have not met the weekly COVID-19 testing requirements in this Policy.)
- Whether Workers are exempt from the weekly COVID-19 testing requirement. (Workers may be exempt from testing if they are Fully Vaccinated, are within a 90-day period after a diagnosed infection, or if they have received an exemption for some other reason.)
- Whether Workers are exempt from any Face Covering requirement that might be in place.

If asked, managers and supervisors may tell other workers that a particular Worker is exempt from any part of this Policy. Managers and supervisors should not say what the reason is for the Worker being exempt.

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§ 11. Duty to Provide Truthful Information

Workers violate this Policy if they knowingly provide a false or inauthentic document under this Policy. This includes any kind of document provided under this Policy, including but not limited to proof of vaccination, COVID-19 test results, or any information related to requests for exemption.

§ 12. Discipline for Violations of this Policy

Employees may be subject to disciplinary action for violations of this Policy, up to and including dismissal. Each Participating Agency may determine the appropriate level of discipline for violations. Different Participating Agencies need not adopt the same kind of discipline for violations of this Policy, but each Participating Agency should be consistent with respect to the kind of discipline issued by that particular Participating Agency.

If a Worker willfully refuses to comply with this Policy, he or she may be removed from the work site so that the Worker does not endanger other people on the site. The next day, if he or she again willfully refuses to comply, that is a new, additional violation of this Policy.

Willful violations of this Policy may be grounds for terminating a contractor's contract.

Pursuant to applicable executive orders, violations of this Policy shall be enforceable only through disciplinary action for workers, and not by law enforcement under N.C. Gen. Stat. § 166A-19.30(a)(2).

§ 13. Accommodation Requests and Other Exemptions or Exceptions to Policy

Workers may seek reasonable accommodations from relevant requirements of this Policy on the basis of disabilities, because they are not recommended by a physician licensed in North

Policy on Face Coverings and on Vaccination or Testing

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

Carolina to be vaccinated or wear a Face Covering, because they have a sincerely held religious belief, practice, or observance, or for any other lawful reason.

The testing option may serve as a reasonable accommodation for workers seeking an accommodation from the proof of vaccination option.

Workers may request an exception by contacting their agency's Human Resources office. These requests shall be considered under the agency's standard reasonable accommodation process. Workers may be asked to submit documentation to substantiate their request for accommodation.

§ 14. How This Policy Applies to Remote Workers, Field-Based Workers, and Workers on Leave

Workers Who May Be On-Site

Workers must follow this Policy if they are, or may be, required to come into a Participating Agency's facility for meetings or any part of their duties.

Workers With Remote Duty Stations Who Interact with the Public

Workers must follow this Policy if they meet with the public as part of their job duties, even if they never come into a Participating Agency's office.

Fully Remote Workers

This Policy does not apply to a Worker on any day when he or she did not:

- (1) come to the Participating Agency's facility for work or
- (2) interact with members of the public as part of their job duties.

Therefore, Workers will never be covered by this Policy if their duty station is their home, the Worker stays home with no work-related in-person public interaction, and the Worker is never expected to come into the work site. In this scenario, the Worker shall not be asked for vaccination information or be required to get weekly tests for COVID-19.

Policy on Face Coverings and on Vaccination or Testing

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Workers on Leave, Vacation, or Days Off

A Worker who has been on leave, on vacation, or who has had days off will not be in violation of this Policy if, upon return to the work site, the Worker has a negative test result from a test taken within the previous seven days.

No Change of Duties

Each state agency has important jobs to fulfill under state law, and those jobs often require employees to come on-site or interact with the public. Pursuant to the state Teleworking Program Policy, employees will not be asked, for reasons of convenience, to incur additional duties routinely performed by other employees specifically for the purpose of enabling them to telework to avoid requirements of this Policy.

§ 15. How This Policy Applies to Contractors

Contractors must follow the requirements in this Policy to (1) be Fully Vaccinated or tested weekly and (2) wear Face Coverings indoors at Participating Agency facilities. Where possible, it satisfies this Policy for an agency to have a contractor's employer, rather than the agency, ensure that the requirements of this Policy are being met. If necessary, Participating Agencies may limit the measures in this Policy to not cover contractors that they do not logistically control (for example, HVAC or electric technicians), contractors for whom the contract cannot be changed, or contractors for whom the contract is in the process of being changed.

§ 16. Miscellaneous Exceptions

Policy on Face Coverings and on Vaccination or Testing

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

Exception for Adverse Weather or Other Events That Prevent Testing

If adverse weather, emergency closings, or other conditions make testing procedures not feasible, an agency head or the State Director of Human Resources may provide a temporary exception from the requirements of this Policy.

Relationship to Other Policies and Requirements

This Policy sets minimum, not maximum, requirements, and it does not override other governmental requirements. For example, the vaccination requirement issued by the Centers for Medicaid and Medicare Services (CMS) overrides any contrary language in this Policy.

§ 17. Effective Date and Duration

This Policy became effective September 1, 2021, and this version of the Policy is effective May 9, 2022. It shall remain in effect until rescinded. It may be modified or rescinded by the Director of State Human Resources (for Cabinet agencies) or agency head (for non-Cabinet Participating Agencies) for any reason, including but not limited to COVID-19 developments, any additional Executive Orders, and any additional federal or NCDHHS guidance.

§ 18. Miscellaneous Terms

No Private Right of Action

Except as stated below under the heading "Grievances," this Policy is not intended to create, and does not create, any individual right, privilege, or benefit, whether substantive or procedural, enforceable at law or in equity by any party against the State of North Carolina, its agencies, departments, political subdivisions, or other entities, or any officers, employees, or agents thereof, or any emergency management worker (as defined in N.C. Gen. Stat. § 166A-19.60), or any other person.

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

Grievances

An employee may grieve any discipline imposed against him or her as a result of this Policy, subject to the provisions of the State of North Carolina's Employee Grievance Policy, but an employee may not file a grievance based on an assertion that another person violated this Policy. Nothing in this Policy restricts an employee's right to file a grievance for any of the issues stated in N.C.G.S. § 126-34.02, any other law, or any State Human Resources Commission policy.

Savings Clause

If any provision of this Policy or its application to any person or circumstances is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Policy which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Policy are declared to be severable.

§ 19. Authorities

Source of Authority

This Policy is issued independently under each of the sources of authority below:

- a) The Emergency Management Act (Chapter 166A of the North Carolina General Statutes), at the direction of Executive Order 224 (July 29, 2021), the subsequent executive orders continuing that direction, and Executive Order 253 (March 1, 2022).
- b) The statute empowering agency heads and the Director of the Office of State Human Resources to issue policies (N.C.G.S. § 143B-10(j)(3)).
- c) The statute providing the Governor with the power and duty to supervise the official conduct of all executive and ministerial officers (N.C.G.S. § 147-12).
- d) The Communicable Disease Emergency Policy issued by the State Human Resources Commission pursuant to N.C.G.S. § 126-4.

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

§ 20. History of this Policy

Date	Version
Aug. 13, 2021	First version
Aug. 27, 2021 (Version 1.1)	<p>Several minor adjustments:</p> <ul style="list-style-type: none"> • In Section 6, added more information about No-Cost Community Testing Events, which are completely free to the person being tested. • In Section 6, text has been updated about compensating test-taking time for FLSA-subject employees. • In Section 7, clarified that if a local emergency order contains exceptions for governmental operations, then the Face Covering requirements of this Policy, rather than the local emergency order, will apply. • Section 8 has been updated to specify that Workers do not need to be tested, but must wear Face Coverings if the Workers have submitted proof of Full Vaccination, but are waiting on HR to review that proof. • Section 9 has been updated to reflect that laboratories may, with consent, provide test results directly to the state agency. • Section 9 has been updated to reflect that in the statewide vendor system, employees will be asked (to the best of their ability) to indicate whether a test result was positive, negative, or inconclusive, and HR staff may use sampling on test results. • Clarified text about how the Policy applies to contractors, and moved it from a footnote into Section 15 of the main text.
Mar. 1, 2022, effective Mar. 7, 2022 (Version 2.0)	<ul style="list-style-type: none"> • Updated Section 1, the discussion of the pandemic and public health guidance. • In Sections 3 and 14, clarified the Policy provisions concerning application of the Policy to people who are on days off or who are working from home. • In Section 5, updated materials on isolation and quarantine to point to most recent CDC and DHHS recommendations. • In Sections 6 and 9, authorized Workers to meet the testing requirements in this Policy by using at-home rapid tests. • In Section 7, modified policy on Face Coverings to provide that starting on March 7, 2022, Face Coverings are generally not required in Participating Agency facilities. However, Face Coverings may be required by the agency head in certain higher-risk situations.
May 6, 2022, effective May 9, 2022 (Version 3.0)	<ul style="list-style-type: none"> • Added a Section prior to the Introduction removing the required weekly testing component of the policy for Workers who have not submitted proof of Full Vaccination, effective May 9, 2022. Clarified that agency heads may, in their discretion, elect to continue weekly testing for some or all Workers at the

Policy on Face Coverings and on Vaccination or Testing

Note: Provisions addressing weekly testing apply only to those Participating Agencies that elect to continue weekly testing, and apply only to the Workers identified by those Participating Agencies as needing to test.

	<p>Participating Agency who work in settings that the agency head determines, in their discretion, to be high-risk. Clarified that the terms of the Policy addressing weekly testing apply only to those Participating Agencies and covered Workers at those agencies that elect to continue weekly testing or that reinstate weekly testing if discontinued at any point.</p> <ul style="list-style-type: none">• Updated Section 1, the discussion of the pandemic and testing trends among Workers who are not Fully Vaccinated.• Made other clarifying edits throughout to conform with the change in policy noted above.
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