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Sent by email to brandy.chinn@ofm.wa.gov

Ms. Brandy Chinn and OFM rulemaking staff,

We collectively write to oppose the proposed rules that Office of Financial Management ("OFM") intends to implement through WSR 22-14-104. Our organizations, Silent Majority Foundation (SMF), Pacific Justice Institute (PJI), and Informed Choice Washington (ICWA) represent the tens of thousands of Washingtonians who are members or supporters of our advocacy work. We are joined by employment attorney, Joy Lockerby of Lockerby Law, PLLC. Our collective opposition to WSR 22-14-104 is grounded in two fundamental areas:

1. It is improper for OFM to implement a COVID-19 vaccine requirement through the rulemaking process as the subject matter of the proposed rules must be enacted under statute through the legislature. OFM lacks legal authority to implement such a rule.
2. Mandating specific COVID-19 vaccines or any other medicine or medical treatment as a term and condition of employment not only violates individual religious and creed-based rights and infringes upon privacy rights and medical autonomy, but also harms and disenfranchises the citizenry of Washington as a whole. There are numerous privacy concerns for the data collection of such information, particularly when there is a potential for that information to be misused. There are also questions being raised regarding whether the COVID-19 vaccines are "safe and effective" for every individual.

For these main reasons, and as we elaborate below, the proposed regulations contained in WSR 22-14-104 should not be adopted by rule, and this rulemaking effort should cease. The proposed regulations at issue are: WAC 357-04-125[1], WAC 357-16-197[2], WAC 357-19-373[3], WAC 357-

[1] "Must an employee provide proof of being fully vaccinated with one of the authorized COVID-19 vaccines as a condition of employment?" (proposed WAC 357-04-125).
[2] "Must an eligible candidate provide proof of being up-to-date with one of the authorized COVID-19 vaccines?" (proposed WAC 357-16-197).
[3] "What notification must an employer give a nonpermanent appointee?" (proposed WAC 357-19-373).

19-413[4], WAC 357-46-165[5], WAC 357-46-195[6], WAC 357-58-190[7]. These proposed regulations flout existing anti-discrimination laws and will disparately impact members of protected classes and harm the civil rights of employees. *See* Washington Law Against Discrimination, Chapter 49.60 RCW and Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000(e), et seq. Rules of this magnitude and import on civil liberties should not be adopted through a rulemaking process by *any* administrative agency. Only our elected representatives have the power and legal authority to engage in lawmaking, and the proposed changes require a legislative enabling act following debate and decision on the House and Senate floors of our legislature.

I. Only the legislature can make law that requires vaccines as a condition of State employment. OFM lacks statutory authority to initiate this rulemaking.

The Washington constitution addresses employee health and safety in Article II, Section 35, and lays that authority squarely and exclusively with the legislature:

> "The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same."

While it is debatable whether SARS-CoV-2 purported to cause COVID-19 reaches the "dangerous to life or deleterious to health" level of concern, if it does, the authority to implement worker safety regulations remains with the legislature unless and until the legislature delegates that authority. WA Const. art. II, § 35. No legislative delegation to OFM to mandate the COVID-19 vaccine as a condition of employment with Washington State agencies has occurred. Thus, OFM can claim no authority to issue such a mandate, and such a claim is patently false.

Moreover, any claim that OFM derives such authority from Governor Jay Inslee is disingenuous because he lacks the authority to direct OFM to undertake such action. Insofar as OFM is seeking to implement *Directive of the Governor 22-13* through this rulemaking, such action is without merit, lacks authority, and is a clear violation of the separation of powers doctrine. The authority to make laws regarding employee health and safety resides exclusively with the legislature. Here, OFM is seeking to implement a gubernatorial directive without statutory authority in form and effect. This proposed rulemaking twice violates the separation of powers doctrine. Only the legislature—through Washington's elected representatives—have the power to enact such wide sweeping laws that will impact freedoms.[8]

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[4] "Must a nonpermanent employee comply with the COVID-19 vaccine requirements set forth in WAC 357-04-125?" (proposed WAC 357-19-413).
[5] "When may an employer separate an employee in accordance with WAC 357-46-160?" (proposed WAC 357-46-165).
[6] "Can an employer separate an employee for nondisciplinary reasons?" (proposed WAC 357-46-195).
[7] "What must be addressed in agency's WMS recruitment and selection policy and/or procedure?" (proposed WAC 357-58-190).
[8] While the Washington constitution does not contain a formal separation of powers clause, the doctrine is inherent in the constitution itself. *See* WA Const., art. II, § 1, art. III, § 2, and art. IV, § 1; *Carrick v. Locke*, 125 Wn.2d 129,

A. OFM's statutory authority applies in budgetary matters.

The Office of Financial Management (OFM) is tasked by the legislature with ensuring budgetary management. Such authority is vested in and through RCW 43.41 and 43.88. OFM purports that RCW 41.06 provides the authority to adopt these rules. However, RCW 41.06 neither gives OFM the authority to mandate a medical intervention on its workforce nor allows OFM to promulgate regulations affecting medical and employment decisions statewide. RCW 41.06.010 *Declaration of purpose,* specifically makes evident the limitations:

> The general purpose of this chapter is to establish for the state a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, recruitment, retention, classification and pay plan, removal, discipline, training and career development, and welfare of its civil employees, and other incidents of state employment. All appointments and promotions to positions, and retention therein, in the state service, shall be made on the basis of policies hereinafter specified.

The Administrative Procedure Act (APA), Chapter 34.05 RCW, requires a state agency attempting to promulgate a "significant legislative rule" as defined in RCW 34.05.328(5)(c)(iii) to undertake additional steps. Additionally, the APA requires a rule be related to content that is explicitly and specifically dictated by statute. No statute dictates what OFM proposes.

B. *OFM has not been delegated authority to decide or create new terms and conditions of employment for all state employees and job candidates.*

Absent from the declaration of purpose found in RCW 41.06.010 and the state civil service laws is any indication that OFM has been delegated authority to create or implement health policy or to create and require medical interventions or procedures as a condition of employment. In short, it is impermissible for OFM to craft new conditions of employment out of whole cloth. OFM lacks authority to monitor sensitive and private medical information about a person's vaccine status. Not only has OFM not been delegated authority to create or adopt the proposed rule, but it also lacks the authority to promulgate regulations that will force state workers and prospective employees to receive "one of the authorized COVID-19 vaccines as a condition of employment." (Proposed WAC 357-04-125 and WAC 357-16-197).

C. OFM has not substantially complied with the procedural prerequisites for this rulemaking.

Even if OFM has the authority to implement the proposed rules, it has not substantially complied with the procedural prerequisites required by the APA. The notice is devoid of adequate information to assure all interested parties that the APA's prerequisites were met. For example,

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134-35, 882 P.2d 173 (1994). The separation of powers doctrine "serves mainly to ensure that the fundamental functions of each branch remain inviolate," and the court's inquiry is served by determining "whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.'" *Id.* at 135.

the agency must consider alternative measures to determine whether there is a less burdensome alternative for those required to comply with the rules. However, OFM is presenting these rules as a take-it-or-leave-it proposition to the people of Washington: Either receive the COVID-19 injections into your body or don't work in civil service. That proposition is simply not reasonable as a permanent rule. Moreover, the proposed rules lack any merit system, scientific methodology, economic impact analysis, or other general welfare analysis that can be shown to directly benefit civil employees and prospective employees. The proposed regulations constitute an egregious overstep of power by an administrative agency.

D. OFM's proposed rules go against the public interest.

The proposed rules on their face serve to disparately impact the protected classes of the very individuals our anti-discrimination laws are designed to protect. With each booster shot (and presumably later testing requirements for any monitoring system or other restrictions), the rights of Washington workers will continue to be jeopardized or even harmed. Although many people were hospitalized or died of a viral infection from SARS-CoV-2, many people fully recovered with natural immunity, and many had success using alternative medicines and therapies to treat their infection. Viable alternatives and consideration of other reasonable options should be available to Washington workers to protect their individual rights. Thus, what is being proposed is not the right fix for the people of Washington.

II. Mandating specific vaccines or any other medicine or medical treatment as a term and condition of employment not only violates individual religious and creed-based rights and infringes upon privacy rights and medical autonomy, but it also harms and disenfranchises the citizenry of Washington as a whole.

a. These proposed rules on their face are unconstitutional and facially discriminatory.

b. The proposed rules create an atmosphere that will invite impermissible discrimination, retaliation, and wrongful termination to occur.

c. The proposed rules will negatively impact medical rights, disability rights, and civil rights of protected classes. For example:

   i. Requiring an "exemption" from the rule is not a reasonable requirement. It unfairly burdens those people who have medical conditions or disabilities, and disparately impact those classes of people, as well as the older population.

   ii. Medicine is not a one-size-fits-all solution. There needs to be an individualized assessment by a licensed and qualified professional to determine the safety and efficacy of a given medication or vaccine. Such assessment should account for a person's medical history and other factors.

iii. A vaccine mandate would disparately impact protected populations, including older workers—many of whom are considered "high risk" for infection of SARS-CoV-2 or who are more likely to have comorbidities. These individuals will be disenfranchised from seeking work or working in state government. The exclusion of protected classes of people from the state workforce is not acceptable.

d. The proposed rules infringe on a person's privacy and allow the government to amass HIPAA-protected medical information and private and personal information about a person's religious beliefs or faith.

i. Medical treatment, testing and diagnosis, and medical decisions should be individualized assessments between a patient and provider, with the ultimate decision residing with the individual.

ii. People have the right to change their mind about their religious views or their views about taking an injection or other medical treatment into their body. Laws change over time. Disabilities and progression of disease can change over time. People's faith and views about God can change over time as well. People have the right to make independent decisions apart from any mandate. These proposed rules do not leave any room for this.

iii. It is not the state's business to know the details of a person's religion or to figure out who is religious or not. The mandates essentially require invasion into each state worker's personal or sincerely held religious beliefs if they initiate an exemption request. To put it frankly, it is not the state's business to know whether a person believes in Jesus, YHWH, Allah, or other gods.

iv. There have been numerous data breaches of sensitive information in places of employment in Washington. It is neither prudent nor safe for Washington to create and maintain a repository of who is vaccinated or not. Such information could be hacked and misused. There are other potential economic impacts as well.

e. The proposed rules infringe upon a person's medical autonomy and remove informed consent from the equation.

f. The proposed rules unfairly impact the existing state workforce and future job candidates. Washington State government is the largest employer in our state. Those of us who object to any vaccine mandate seek to live in a state whereby our civil servants are representative of all the citizenry. No person should be banned from working in a state government or agency contingent upon receiving any medication or vaccine, or genetic test, or virus test.

g. OFM has not demonstrated that it has coordinated with administrative agencies or considered the ramifications to other administrative programs. This prerequisite is imperative to safeguard our state's economic security, family stability, and employee rights. For example, these rules will have dire consequences for the Unemployment Compensation and Paid Family and Medical Leave programs overseen by the Employment Security Department, as benefit claimants could be unduly denied benefits. That in turn could lead to greater economic instability and family instability which is inconsistent with the purpose of these programs.[9]

h. This rulemaking and the way these rules are fashioned by OFM is the epitome of a "slippery slope." These rules would erode the foundation upon which our state's workforce was built. Where does it end? It is feasible that these regulations could later be extended to state contractors and into the private sector.

i. For unionized workers, a new term and condition that affects employment is the subject of mandatory bargaining through the employee's respective union, not rulemaking through OFM.

j. Let's not forget the Nuremberg trials following the Holocaust.[10] People should have the right to object to the vaccines on principle. It is wrong for anyone to be forced to request an "exemption" from an unlawful mandate or rule. People should have the right to refuse a medical treatment in their body for any reason, not just medical or religious grounds.

III. The proposed regulations stem from a faulty and inaccurate premise: Namely, that the COVID-19 vaccines are "safe and effective."

The COVID-19 vaccines were rushed to market and rolled out hastily. On a regular basis now, new evidence is coming to light that indicates these shots are not as safe and effective as advertised, and questions about their efficacy have arisen. Here are a few examples of some of the problems:

- The COVID-19 vaccine approval process failed to consider the vaccines on an individualized basis. Medicine, including vaccines, is not a one-size-fits all. There should have been full disclosure of all ingredients so that the patient and/or the provider can do an individualized risk-benefit analysis given the individual's blood type, medical history,

[9] *See Preamble* to the Employment Security Act, RCW 50.01.010; and *Intent* of Family and Medical Leave, RCW 50A.05.005.
[10] *See e.g., Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*. Buffalo: William S. Hein, 1995. (JX 5437.3 .I58 1995); and United States Office of Chief of Counsel for the Prosecution of Axis Criminality. *Nazi Conspiracy and Aggression.* Buffalo, NY: William S. Hein, 1996. (Reference JX 5437.3 .U65 1996).

comorbidities, etc. and have informed consent. Any vaccine rollout should account for natural immunity, alternative treatments, and any other "least restrictive" solutions.

- Evidence suggests the novel mRNA technology in the vaccines alter the human genome. In addition, questions have been raised regarding whether the substance remains localized to the injection site or whether it may affect bodily organs. The Vaccine Adverse Event Reporting System (VAERS) indicates that there have been numerous deaths and injuries. The Center for Disease Control (CDC) changed the definition of what it meant to be "fully vaccinated." As a result, if a person dies having had only one vaccine, it is considered an unvaccinated COVID-19 death. Science is ever changing as we learn more. These issues should be carefully evaluated, studied, and resolved to alleviate concerns.
- The obvious profit motives and public-private partnerships between pharmaceutical companies and federal agencies have largely driven COVID-19 vaccine rollout effort. Independent investigations should examine the nature of these relationships.
- The COVID-19 vaccines were issued under Emergency Use Authorization (EUA). Liability waivers that extend now to the COVID-19 shots prevent injured parties from obtaining financial recovery from the manufacturer or administrator who are shielded from liability. Protections should be put in place or reforms made to better protect people harmed by these products.
- There has been ongoing and active suppression of information going against the narrative that the "COVID-19 vaccines are safe and effective." Science is never settled. In fact, according to the FDA, the vast majority of adverse reactions and unintended consequences of licensed products are discovered in post-marketing studies. The medical and regulatory communities must put politics aside and encourage ongoing dialogue and debate so that the public may be provided with the information they need to make informed medical decisions without coercion or undue influence.

It is imperative that the issues raised in this letter—issues which have the potential to impact thousands of workers and civil servants—be debated on the floors of our House and Senate and not pushed through an improper, unconstitutional rulemaking process. The proposed rulemaking implicates issues related to medical treatment and health, privacy, religious freedoms, and civil liberties. Obviously, given the huge ramifications for the people of Washington, regulations such as these can only be addressed properly, and legally, through the legislative process and not through rulemaking.

We appreciate your time and consideration.

Respectfully,

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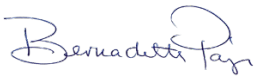

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