



March 30, 2021

The Hon. Henry McMaster
Office of the Governor
1100 Gervais Street
Columbia, South Carolina 29201

By US Mail and by email to: governormcmaster@governor.sc.gov

Re: Executive Order 2021-12's Mandate that Non-Essential State Employees Return to In-Person Work

Dear Governor McMaster:

The American Civil Liberties Union of South Carolina and the American Civil Liberties Union Women's Rights Project write to express our grave concerns regarding the mandate in Executive Order 2021-12 that all non-essential state workers return to in-person work. This requirement, which ignores the continuing serious health risk posed by the COVID-19 pandemic, violates Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the South Carolina Human Affairs Law. It discriminates against women, who disproportionately bear caregiving responsibilities and will be forced to find alternative caregiving arrangements, and/or may be pregnant or nursing and unable to get vaccinated; and people with disabilities, many of whom are at an elevated risk for serious consequences from COVID-19. The Governor's authority, even in the context of a public health crisis, does not override federal or state anti-discrimination law nor does it give him the power to require non-essential state workers to put themselves and their families at an unnecessary health risk. In light of these serious issues, we demand that the Governor rescind the return-to-in-person-work requirement in EO 2021-12, or, at minimum, delay the return date until the end of the school year, when it will be easier to find alternative childcare arrangements, and modify the order to remove restrictions on the ability of agencies to provide individualized reasonable accommodations for employees.

The COVID-19 pandemic continues to present a serious threat to health and safety in South Carolina. The Centers for Disease Control and Prevention ("CDC") reports that there have been

nearly 4,700 new reported cases in South Carolina just over the last 7 days.¹ Only 30% of South Carolina residents have received even one dose of the vaccine, and just 16% are fully vaccinated.² Until very recently, the state had no way of vaccinating elderly people confined to their homes, who are among those at the highest risk for serious consequences from COVID-19.³ There is no statewide mask requirement, and EO 2021-12 rescinds the mask requirement in: (i) state government buildings, which will directly impact state employees required to return to in-person work,⁴ and (ii) restaurants, which will very likely contribute to increased rates of infection in the state overall.⁵ In this context, requiring state employees to return to in-person work exposes all workers and their families to a serious and unnecessary health risk and disproportionately affects specific protected classes of people.

Disparate Impact on Women. Title VII of the Civil Rights Act of 1964, which bars employment discrimination on the basis of sex, not only prohibits facially discriminatory policies, but also facially neutral policies that create a disparate impact on a protected class.⁶ EO 2021-12 has a disparate impact on women in several ways:

The mandate that all state employees return to work requires caregivers, who are disproportionately women,⁷ to scramble to make alternative arrangements for childcare, in-home schooling, and other caregiving responsibilities.⁸ University of South Carolina employees, for

¹ *United States COVID-19 Cases and Deaths by State*, CDC, https://covid.cdc.gov/covid-data-tracker/#cases_totalcases (accessed Mar. 30, 2021).

² *COVID-19 Vaccination Dashboard*, S.C. Dep’t of Health and Env’t Control, <https://scdhec.gov/covid19/covid-19-vaccination-dashboard> (accessed Mar. 29, 2021).

³ Sam Ogozalek, *Homebound seniors in Jasper, Hampton Co. can get COVID-19 vaccines via new SC program*, Island Packet (Feb. 26, 2021), <https://www.islandpacket.com/news/coronavirus/article249542023.html>.

⁴ The decision whether state employees must wear masks will be left to the discretion of each agency head. See S.C. Dep’t of Admin., *Memorandum re: State Government Staffing – Return to Normal Operations 2* (Mar. 5, 2021), <https://admin.sc.gov/sites/default/files/3-5-2021%20MA%20Memorandum%20-%20State%20Government%20Staffing%20-%20Executive%20Order%202021-12.pdf>.

⁵ Gery P. Guy Jr., et al., *Association of State-Issued Mask Mandates and Allowing On-Premises Restaurant Dining with County-Level COVID-19 Case and Death Growth Rates — United States, March 1–December 31, 2020*, MMWR 2021 (Mar. 12, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7010e3-H.pdf>.

⁶ 42 U.S.C. § 2000e-2(k); see, e.g., *Young v. United Parcel Serv., Inc.*, 135 S.Ct. 1338 (2015); *U.S. EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 655 (N.D. Ill. 1991) (holding policy of no paid sick leave for first year of employment disparately impacted women in violation of Title VII).

⁷ *Caregiver Statistics: Demographics*, Family Caregiver Alliance, <https://www.caregiver.org/resource/caregiver-statistics-demographics/> (accessed Mar. 27, 2021) (“Upwards of 75% of all caregivers are female, and may spend as much as 50% more time providing care than males.”).

⁸ *Memorandum re: State Government Staffing – Return to Normal Operations 3*.

example, only have until April 5, 2021, to make such arrangements before they are required to return to in-person work full-time.⁹ This requirement is all the more unreasonable given that about 20% of public schools are still on a “hybrid” schedule for all students, only open for in-person instruction 2 to 4 days a week.¹⁰ Schools that offer full-time, in-person instruction, like those in the Charleston County School District, also gave caregivers the option to school their children remotely.¹¹ Many caregivers already had to decide whether and how many days a week their children returned to in-person instruction. They cannot change those decisions just because the Governor is now requiring them to return to in-person work. And the pandemic has also negatively impacted the availability of safe, reliable afterschool activities and childcare—critical resources for many families. Yet the Governor’s mandate provides no support for state employees with caregiving responsibilities to help them identify or pay for supervision for schooling on “remote” days, afterschool childcare, or childcare for younger children. Rather, individual employees—again, disproportionately women—will be forced to shoulder that formidable pragmatic and financial burden largely on their own—a burden that will place children at risk of suffering further educational deficits, or worse, harm.

For individuals with conditions the CDC identifies as creating a higher risk for severe illness resulting from COVID-19, which includes pregnancy,¹² state agencies may provide a *temporary* reasonable accommodation to allow these individuals to continue to work remotely, but only until they have an opportunity to be vaccinated.¹³ Yet the CDC has made clear that the decision whether to receive vaccination is a personal choice for those who are pregnant, particularly in light of the “limited data on the safety of COVID-19 vaccines in pregnant people.”¹⁴ The same may be true for those who are breastfeeding: “Because the vaccines have not been studied on lactating people, there are no data available on: [t]he safety of COVID-19 vaccines in lactating people[, the] effects of vaccination on the breastfed infant[, or the] effects on milk production or

⁹ University of South Carolina, *Return to the Workplace Plan: March 10, 2021*, https://sc.edu/about/offices_and_divisions/human_resources/docs/rtw_plan.pdf.

¹⁰ *Current Operational Status*, S.C. Dep’t of Ed., <https://ed.sc.gov/districts-schools/schools/district-and-school-closures/operational-status/> (accessed Mar. 30, 2021).

¹¹ See, e.g., *About CCSD Central Virtual Academy*, CCSD Central Virtual Academy, <https://sites.google.com/charleston.k12.sc.us/centralvirtualacademy/home> (accessed Mar. 30, 2021) (“Charleston County School District (CCSD) will offer a centralized Full-Time Virtual Academy during the 2020-2021 school year. . . . Elementary students are required to commit for a quarter and middle school students are required to commit for a semester.”).

¹² *People with Certain Medical Conditions*, CDC (updated Mar. 29, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

¹³ *Memorandum re: State Government Staffing – Return to Normal Operations 2*.

¹⁴ *Information about COVID-19 Vaccines for People who Are Pregnant or Breastfeeding*, CDC (updated Mar. 18, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/pregnancy.html>.

excretion.”¹⁵ By not allowing those who are pregnant or breastfeeding to continue to work remotely based on evidence (such as a letter from a doctor) that they have been advised or have chosen not to get the vaccine, EO 2021-12 fails to address the uncertainty in this area of research, forcing those who are pregnant or breastfeeding to get vaccinated or risk losing their jobs or their income.

Policies that disproportionately affect women and those who are pregnant or breastfeeding, like EO 2021-12, violate Title VII unless an employer can demonstrate they are justified by business necessity.¹⁶ The Governor obviously cannot make this showing: he cannot claim that the jobs held by individuals affected by this order require physical presence given the continued operation of state government during the past year of the COVID-19 pandemic while these individuals have performed their job duties remotely.

Discrimination Against People with Disabilities. The Americans with Disabilities Act (“ADA”) and the South Carolina Human Affairs Law prohibit employment discrimination against people with disabilities by state agencies.¹⁷ Most, if not all, agencies also receive Federal financial assistance and are thus subject to the parallel requirements of section 504 of the Rehabilitation Act of 1973.¹⁸ The ADA prohibits using criteria or methods of administration that have on the effect of discriminating against people with disabilities.¹⁹ EO 2021-12 discriminates against people with disabilities in several ways:

As discussed above, for individuals with conditions the CDC deems high-risk, state agencies may, pursuant to EO 2021-12, grant these individuals a temporary accommodation to continue to work remotely, but only until they are vaccinated.²⁰ However, there are some individuals with these conditions for whom the vaccine may be contraindicated for medical reasons.²¹ These employees, who will continue to face elevated risk from COVID-19, will not be protected by the limited accommodation authorized by EO 2021-12. For example, the University of South Carolina’s plan to return employees to in-person work pursuant to EO 2021-12, which has been approved by the state, requires that high-risk employees get vaccinated and return to in-person

¹⁵ *Id.*

¹⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

¹⁷ 42 U.S.C. § 12111; S.C. Code Ann. §§ 1-13-30, 1-13-80.

¹⁸ 29 U.S.C. § 794(a).

¹⁹ *See* 42 U.S.C. § 12112(b)(3)(A); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 372 (2001).

²⁰ *Memorandum re: State Government Staffing – Return to Normal Operations 2.*

²¹ *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Authorized in the United States: Contraindications and precautions*, CDC, <https://www.cdc.gov/vaccines/covid-19/info-by-product/clinical-considerations.html#Contraindications> (accessed Mar. 30, 2021).

work by April 17, 2021. If employees are not able to meet this deadline, they may request an extension, but they must still demonstrate they are partially vaccinated by April 17, 2021.²²

Individuals who do not have medical conditions that meet the CDC's specific criteria may still be at elevated risk of serious consequences from COVID-19 because they have multiple medical conditions that combine to increase their risk, or because their specific conditions and circumstances place them in this higher risk category. EO 2021-12 does not allow for agencies to provide the reasonable accommodation of allowing these individuals to continue to work remotely, even temporarily, and even if these individuals can present evidence (such as a letter from a doctor) of their elevated risk.

Caretakers of people with an elevated risk of serious consequences from COVID-19 are also not exempt from the return to work order. The statement in South Carolina Department of Administration's memorandum to all state agencies on implementing EO 2021-12 that the "Americans with Disabilities Act does not apply when the individual with a disability is a family member or household resident of the employee" is flatly untrue.²³ The ADA forbids denying equal job benefits to an individual because of the known disability of an individual with whom they have a relationship or association.²⁴

EO 2021-12 also conflicts with the ADA when it directs agencies to make the determination that all jobs require being physically present at the workplace as an essential function, at least with respect to employees who do not have a condition that the CDC lists as putting them at high risk from COVID-19.²⁵ The determination of what job functions are essential is fact specific, depends on the characteristics of each job, and a number of different types of evidence may be relevant to the determination for each particular job.²⁶ There is no support in the law for issuing a blanket declaration that all jobs within the state government have any particular essential functions.

Crucially, the idea that all state jobs require employees to work in-person is factually absurd given the continued operation of state government over the last year.

Federal and state anti-discrimination laws protect South Carolinians, even during a public health crisis. The Governor's powers during such an emergency do not negate those laws, nor do they allow him to threaten the health of state employees and their families by forcing non-essential employees to return to in-person work. During a declared emergency, the Governor is

²² University of South Carolina, *Return to Normal Operations*, https://sc.edu/about/offices_and_divisions/human_resources/toolbox/return_to_workplace/return_to_normal_operations/index.php (accessed Mar. 30, 2021).

²³ *Memorandum re: State Government Staffing – Return to Normal Operations 3*.

²⁴ 42 U.S.C. § 12112(b)(4).

²⁵ *Memorandum re: State Government Staffing – Return to Normal Operations 2* ("Except for those employees working from home before the Covid-19 pandemic, it should be considered an essential job function for employees to be in the workplace.").

²⁶ 29 C.F.R. § 1630.2(n).

responsible for protecting “the safety, security, and welfare of the State.”²⁷ The Governor’s power to issue emergency orders derives from his responsibility to “cope with [the] threats and danger” created by that emergency, and to “prevent or minimize danger to life, limb or property.”²⁸ While the pandemic continues and many South Carolina residents remain unvaccinated, all South Carolina residents are safer if non-essential state employees continue to work remotely. EO 2021-12 does not just exceed the Governor’s authority in an emergency; it directly conflicts with his mandate to protect the state from the threats and dangers of this public health emergency.

In light of its discriminatory impact on women and people with disabilities and the health risk it creates for state employees and their families, we demand that the Governor rescind EO 2021-12’s requirement that non-essential state employees return to in-person work while the COVID-19 pandemic continues. Alternatively, this mandate must at least be delayed until June 15, and modified, to allow agencies to grant employees any and all individualized reasonable accommodations they need, so that they can continue to their jobs safely.

Please respond to this letter by 5 PM on **April 1, 2021** to let us know how the Governor intends to proceed. My email is sdunn@aclusc.org. My telephone is 843-830-1571.

Sincerely,

A handwritten signature in black ink, appearing to be 'Susan Dunn', with a long horizontal line extending to the right.

Susan Dunn
Legal Director

cc: Thomas A. Limehouse, Jr. (by email to tlimehouse@governor.sc.gov)

²⁷ S.C. Code Ann. § 25-1-440.

²⁸ S.C. Code Ann. § 1-3-430.