

Legistar ID No.: 2021-0683

**AGENDA REQUEST FORM**

**FOR:** Council Meeting of September 7, 2021

**FROM:** Council Member Matthew Petty

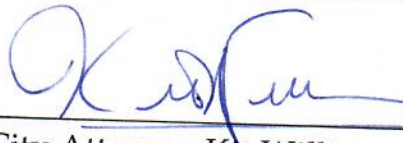
**ORDINANCE OR RESOLUTION TITLE AND SUBJECT:**

A RESOLUTION TO REQUEST THAT MAYOR JORDAN REQUIRE ALL CITY EMPLOYEES TO SUBMIT WEEKLY RAPID PCR OR ANTIGEN COVID-19 VIRUS TESTS TO HUMAN RESOURCES UNLESS THEY HAVE SUBMITTED PROOF OF COMPLETE VACCINATION

**APPROVED FOR AGENDA:**

Approved by email  
Council Member Matthew Petty

August 31, 2021  
Date

  
City Attorney Kit Williams  
Approved as to form

August 27, 2021  
Date

## Williams, Kit

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**From:** Petty, Matthew  
**Sent:** Friday, August 20, 2021 11:57 AM  
**To:** Sharkey, Marti  
**Cc:** Petty, Matthew; Williams, Kit; Hardin, Brad  
**Subject:** Re: Please draft legislation to require PCR testing of all employees

Kit, let's draft this as "PCR or antigen" on Dr. Sharkey's counsel.

On Aug 20, 2021 11:38 AM, "Sharkey, Marti" <msharkey@fayetteville-ar.gov> wrote:  
If you are wanting to screen for Covid, at this point in time it is better to use the antigen test for screening of asymptomatic individuals instead of PCR tests. PCR tests can take several days to get results, and if one has a positive result, then you have let that person continue to interact with others when they should have been in self-isolation. If someone is symptomatic, then a negative antigen test needs to be followed up by a PCR. In addition, the antigen tests are cheaper and easier to administer. Where were you considering sending the employees to be tested?

### Marti Sharkey, MD, FAAP

City Health Officer  
Fayetteville, Arkansas  
msharkey@fayetteville-ar.gov  
www.fayetteville-ar.gov

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**From:** Sharkey, Marti <msharkey@fayetteville-ar.gov>  
**Sent:** Friday, August 20, 2021 11:02 AM  
**To:** dr.martisharkey@gmail.com <dr.martisharkey@gmail.com>  
**Subject:** FW: Please draft legislation to require PCR testing of all employees

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**From:** Petty, Matthew <matthew.petty@fayetteville-ar.gov>  
**Sent:** Friday, August 20, 2021 11:02:12 AM (UTC-06:00) Central Time (US & Canada)  
**To:** Williams, Kit <kwilliams@fayetteville-ar.gov>  
**Cc:** Hardin, Brad <bhardin@fayetteville-ar.gov>; Sharkey, Marti <msharkey@fayetteville-ar.gov>  
**Subject:** Please draft legislation to require PCR testing of all employees

Kit, I've got another thing for the city to lead by example. Would you please draft legislation for the next regular agenda? The legislation is to:

- require all city employees to submit weekly PCR test results for COVID-19
- waive the testing requirement for any employee who submits proof of vaccination
- reaffirm the confidentiality of personnel records, including immunization records

Thank you,  
Matthew

**RESOLUTION NO. \_\_\_\_\_**

**A RESOLUTION TO REQUEST THAT MAYOR JORDAN REQUIRE ALL CITY EMPLOYEES TO SUBMIT WEEKLY RAPID PCR OR ANTIGEN COVID-19 VIRUS TESTS TO HUMAN RESOURCES UNLESS THEY HAVE SUBMITTED PROOF OF COMPLETE VACCINATION**

**WHEREAS**, the City Board of Health is very concerned about the highly contagious and rapidly spreading Delta Variant of Covid-19 virus within the unvaccinated population; and

**WHEREAS**, city staff should be protected as much as possible from being infected with this dangerous Delta Variant from any other city employee; and

**WHEREAS**, a weekly rapid PCR or Antigen Covid-19 virus test can be obtained free of charge for an insured city employee from Walgreens and other pharmacies and clinics and the employee can provide the results to Human Resources to help ensure an infected city employee properly quarantines rather than exposing other city employees and citizens to this deadly virus; and

**WHEREAS**, fully vaccinated city staff pose much less of a threat of becoming infected or infecting others with the Delta Variant of Covid-19 and so should be exempted from the weekly testing requirement unless they are experiencing Covid-19 symptoms.

**NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:**

Section 1: That the City Council of the City of Fayetteville, Arkansas hereby requests that, during this period of high transmission rates, hospitalizations and deaths, Mayor Jordan establish a City policy for all employees that would require submission of a weekly testing report of a rapid PCR or Antigen test for Covid-19 virus to the Human Resources Department for all employees who do not present their valid vaccination cards showing they are fully vaccinated (including any required booster vaccinations) to Human Resources.

**PASSED and APPROVED** this 7<sup>th</sup> day of September, 2021.

APPROVED:

ATTEST:

By: \_\_\_\_\_  
**LIONELD JORDAN**, Mayor

By: \_\_\_\_\_  
**KARA PAXTON**, City Clerk/Treasurer

## Williams, Kit

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**From:** Williams, Kit  
**Sent:** Tuesday, August 31, 2021 9:35 AM  
**To:** Petty, Matthew  
**Subject:** RE: weekly covid tests for employees

Matthew,

The Mayor is primarily responsible for the city employees. The City Council controls and uses its budgetary authority for all employee positions, necessary equipment and even benefits. However the employees' job performance, duties and requirements would be an administrative duty rather than a legislative duty. Our Mayors through the years have issued and revised many city policies affecting employee duties and responsibilities. This would be another of those city policies. The Mayor is responsible for the hiring and firing of all non-uniformed employees. Therefore, I believe it is more legally proper for the Council to recommend or request that the Mayor make such employee policy rather than trying to do so itself and encroaching inadvertently upon an administrative function.

Kit

**From:** Petty, Matthew  
**Sent:** Tuesday, August 31, 2021 9:17 AM  
**To:** Williams, Kit <kwilliams@fayetteville-ar.gov>  
**Cc:** Petty, Matthew <matthew.petty@fayetteville-ar.gov>  
**Subject:** Re: weekly covid tests for employees

I think this works.

Can I check out one thing? Why a request instead of a law? (Not that I doubt the Mayor.)

Otherwise, would you please consider this approved by me for the agenda?

On Aug 27, 2021 4:56 PM, "Williams, Kit" <kwilliams@fayetteville-ar.gov> wrote:

Matthew,

Please review the draft Resolution and let me know what changes need to be made.

Kit



## DEPARTMENTAL CORRESPONDENCE

OFFICE OF THE  
CITY ATTORNEY



Kit Williams  
City Attorney

Blake Pennington  
Assistant City Attorney

Jodi Batker  
Paralegal

TO: **Mayor Jordan**  
**City Council**

CC: **Susan Norton**, Chief of Staff  
**Paul Becker**, Finance Director  
**Missy Cole**, HR Director

FROM: **Kit Williams**, City Attorney

DATE: **August 31, 2021**

RE: **Council Member Petty's Resolution For Weekly Covid-19 Test**

I have been asked whether Council Member Matthew Petty's Resolution requesting a city requirement for employees to furnish the results of a weekly rapid PCR or antigen test for Covid-19 during this period of high transmission rates, hospitalization and deaths from the Delta variant violates Act 977 of 2021. I do not believe such a city policy would violate that Act.

The Resolution, if made into a City Policy by Mayor Jordan, is a weekly Covid-19 testing requirement. Act 977 is a "Prohibition on requirement for vaccine or immunization for coronavirus 2019 (Covid-19)." A city policy requiring weekly Covid-19 testing to protect city employees and citizens from exposure by an infected city employee is not a vaccine or immunization requirement.

Such a weekly testing requirement could cost the City substantial money (for the tests) and a reduction of public services for the staff time spent to get the tests. I believe the time needed to get such tests would have to be "on the clock" to avoid any issues with Fair Labor Standards or even Act 977 if vaccinated employees who voluntarily choose to show Human Resources proof of full vaccination are exempted.

Another legal concern is Act 1030 which enacts a new A.C.A. §20-7-142 **Prohibition on vaccine passports** into the *Arkansas Code*.

**"20-7-142. Prohibition on vaccine passports.**

- (a) As used in this section, "vaccine passport" means documentation that an individual has been vaccinated against coronavirus 2019 (COVID-19).

- (b) The state, a state agency or entity, a political subdivision of the state, or a state or **local official shall not require an individual to use a vaccine passport** in this state for any purpose.
- (c) The use of a vaccine passport shall not be a condition for entry, travel, education, or services." (emphasis added).

Our City Policy, if established by Mayor Jordan, should be absolutely clear that no employee is **required** to furnish their vaccination card or any evidence of vaccination to the City. However, an employee may **voluntarily** show such proof of vaccination if they wish to be exempted from the weekly Covid-19 test just as most employees did to receive their \$50.00 incentive payments. If an employee is fully vaccinated but does not wish to show proof of vaccination, that employee is not required to show proof of vaccination, but like every other employee would need to be tested weekly for Covid-19. Because showing a vaccination card must be a totally voluntary act, it is neither required nor "a condition for entry, travel, education, or services." (Act 1030) I believe that state law will also not be violated by a properly drafted City Policy for weekly Covid-19 tests.

It is within the City Council's policy powers to recommend such City Policy to the Mayor. The Mayor has the final discretion to determine whether or not he believes that it would be in the best interests of our employees and citizens to institute such weekly Covid-19 testing to better protect our employees and citizens. The likely costs in staff time lost to undergo a test, additional burdens on Human Resources, any costs to test asymptomatic employees, and any employee issues for required testing could be considered by the Mayor along with the potential safety benefits.

This may be a difficult policy decision for the City Council and possibly also for the Mayor. I am empowered only to examine the **legality** of such policy question. My opinion is that such a mandatory weekly test for Covid-19 can be legally required of all city employees including me, especially during this period of high transmission rates, hospitalizations and deaths from Covid-19 in Fayetteville and Washington County.

I do need to correct or clarify the third Whereas clause I wrote for Council Member Petty's Resolution. I am not sure that "a weekly rapid PCR or Antigen Covid-19 virus test can be obtained free of charge for an insured city employee..." I have had two free tests myself, but I had a sore throat or other possible symptom. It may be that the City will need to pay for such a test where the employee is symptom free and without known contact of an infected person. Similarly, an uninsured city employee (we have a few) would also need such test to be paid for by the City. We must ensure that no cost is imposed upon our employees to comply with any City required Covid-19 test.

Attached is a slightly amended Resolution for improved compliance with state law.

**RESOLUTION NO. \_\_\_\_\_**

**A RESOLUTION TO REQUEST THAT MAYOR JORDAN REQUIRE ALL CITY EMPLOYEES TO SUBMIT WEEKLY RAPID PCR OR ANTIGEN COVID-19 VIRUS TESTS TO HUMAN RESOURCES UNLESS THEY HAVE SUBMITTED PROOF OF COMPLETE VACCINATION**

**WHEREAS**, the City Board of Health is very concerned about the highly contagious and rapidly spreading Delta Variant of Covid-19 virus within the unvaccinated population; and

**WHEREAS**, city staff should be protected as much as possible from being infected with this dangerous Delta Variant from any other city employee; and

**WHEREAS**, a weekly rapid PCR or Antigen Covid-19 virus test can be supplied by the City free of charge for a city employee from pharmacies and clinics and the employee can provide the results to Human Resources to help ensure an infected city employee properly quarantines rather than exposing other city employees and citizens to this deadly virus; and

**WHEREAS**, fully vaccinated city staff pose less of a threat of becoming infected or infecting others with the Delta Variant of Covid-19 and so may be exempted from the weekly testing requirement unless they are experiencing Covid-19 symptoms by voluntarily providing proof of vaccination to Human Resources.

**NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:**

Section 1: That the City Council of the City of Fayetteville, Arkansas hereby requests that, during this period of high transmission rates, hospitalizations and deaths, Mayor Jordan establish a City policy for all employees that would require submission of a weekly testing report of a rapid PCR or Antigen test for Covid-19 virus to the Human Resources Department for all employees, but exempt employees who voluntarily present their valid vaccination cards showing they are fully vaccinated (including any required booster vaccinations) to Human Resources.

**PASSED and APPROVED** this 7<sup>th</sup> day of September, 2021.

APPROVED:

ATTEST:

By: \_\_\_\_\_  
**LIONELD JORDAN**, Mayor

By: \_\_\_\_\_  
**KARA PAXTON**, City Clerk/Treasurer