25-Jan-2022

MEMORANDUM FOR XXXXXXXX

SUBJECT: Clarification of My Position and Rights Under the Law – Rank First Last

1. I am being ordered to be tested for COVID-19 by _____ [Name and Rank of Person giving Order]. The assumption is that this is a lawful order, and I understand that _____ [XX name and rank of person giving order] believes his/her order to be lawful, but I respectfully disagree.

2. Since COVID-19 is relatively new, all vaccines, at least those available, as well as testing products and others are under Emergency Use Authorization (EUA) by the Food and Drug Administration (FDA). This is because there has not been enough time to ensure the safety and efficiency of these products, which usually takes many years. Therefore, by law since these products are EUA those providing or requiring their use **must** provide informed consent which allows service members the absolute right refuse them. (*See*, 10 USC §1107 and 1107a).

3. In an order issued Nov. 12 in Doe et al. v. Austin, U.S. Federal District Judge Allen Winsor stated that “the DOD cannot mandate vaccines that only have an EUA.” This logic and thus ruling would obviously apply to all EUA products.

4. Per the FDA:

a) FDA Fact Sheet: Under the EUA, it is your choice to receive or not receive the vaccine. Again, because the law pertaining to EUA products, since they are experimental, allows for a choice.

b) Informed Consent. Additionally, per the EUA law (§1107a), if there is an approved vaccine, experimental vaccines are unlawful to use. This would similarly apply to tests that are EUA products. Under the EUA, they must provide informed consent, which allows you to refuse the vaccine (*See*, 21 U.S. Code §360bbb–3(e)(1)(a)(ii)):

> (ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are informed—
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> (I) that the Secretary has authorized the emergency use of the product;
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> (II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and
>
> (III) of the option to accept or **refuse** administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

5. For any EUA product to be mandatory the President himself must sign an Executive Order (EO) authorizing it. Absent that EO, service members have the absolute right, by law, to refuse.

6. There may have been some interpretations of the FDA law that products such as tests, do not fall under Informed Consent and therefore can be mandated. Unfortunately, these interpretations are wishful at best and misinterpret the law. An EUA under Section 564 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) allows for the special use of drugs and **other medical products** during certain types of emergencies. An EUA permits the use of unapproved medical products (drugs, biologics [e.g., vaccines], and devices [e.g., diagnostics]) or the use of approved medical products in unapproved ways to diagnose, treat, or prevent serious diseases or conditions caused by chemical, biological, radiological, or nuclear (CBRN) agents if certain criteria contained in FD&C Act §564 are met.[1]

7. Therefore, any order to use an EUA product that does not provide the opportunity to reject its use, and which may be considered coercive or threatening, is an unlawful order. The following are articles of the UCMJ that may be applicable to an unlawful order include: “Cruelty and Maltreatment” (Art. 93), “False Official Statement” (Art. 107), “Communicating Threats” (Art. 115), “Extortion” (Art. 127), “Assault” (Art. 128), “Conduct Unbecoming” (Art. 133), the “General Article” (Art. 134), and other potential charges.

8. Per this notice, I will comply with COVID-19 testing if a “fully licensed” COVID-19 test available. If a fully licensed test is not available, then I respectfully refuse.

9. To clarify, (Sir/Ma’am), are you ordering me to be tested for COVID-19 utilizing a “fully licensed COVID-19 test”? Yes: _____ No: _____

10. If no, are you ordering me to be tested for COVID-19 utilizing a COVID-19 test that still under EUA status? Yes: _____ No: _____

Signature Block

[1] See, Federal Food, Drug, and Cosmetics Act, as amended. Codified at 21 U.S.C. 301 et seq.; U.S. Food and Drug Administration. “Emergency Use Authorizations Questions and Answers” webpage. Available at www.fda.gov/NewsEvents/PublicHealthFocus/ucm153297.htm. Accessed January 31, 2012; Project BioShield Act of 2004. Pub. L. No. 108-276.