

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION**

The State of Georgia, et al.,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as
President of the United States, et al.,

Defendants.

Civil Action No. 1:21-cv-163-RSB-BKE

**PLAINTIFFS' OPPOSITION TO EMERGENCY MOTION TO CLARIFY
SCHEDULING ORDER**

In their “emergency” motion to clarify scheduling order, Defendants attempt to create a controversy for the sole purpose of delaying this matter. As discussed at the recent scheduling conference, however, delay would result in Plaintiffs being subjected to an unlawful and unconstitutional vaccine mandate. Under the current federal contractor vaccine mandate, December 7, 2021, is the last day a covered employee has to receive a first shot of the Moderna vaccine to be fully vaccinated (i.e., two weeks post-vaccine) by the current January 18, 2022 deadline. This deadline—created solely by Defendants—is the reason for the expedited schedule. If Defendants want a “time out” all they have to do is agree not to enforce the vaccine mandate until the Court has ruled on Plaintiffs’ motion for preliminary injunction. Of significance, the government agreed to pause enforcement of the OSHA vaccine mandate that is the subject of a stay issued by the Fifth Circuit

Court of Appeals. See <https://www.osha.gov/coronavirus/ets2> attached hereto as Ex. A (“While OSHA remains confident in its authority to protect workers in emergencies, *OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.*”) (emphasis added). There is no reason the government could not do the same here. But the government refuses.

Instead of agreeing to pause enforcement of the vaccine mandate, Defendants waited until after Plaintiffs filed their original complaint and motion for preliminary injunction to change the mandate through OMB action. The new OMB action is an unsuccessful attempt to backfill a number of the deficiencies in the original OMB action and will be addressed in Plaintiffs’ reply brief. Defendants fully expect to have to respond to the deficiencies raised in Plaintiffs’ reply as evidenced by Defendants’ preemptive request to file a surreply, to which Plaintiffs did not object and which the Court granted.

These issues are not unique to this case or new to the government. For example, the government agreed in a challenge to the federal contractor vaccine mandate in Florida to a preliminary injunction briefing schedule that contemplates Plaintiff amending its complaint and motion for preliminary injunction in response to the new OMB action. See *Florida v. Nelson*, No: 8:21-cv-2524, [Doc. 19] Joint Motion to Modify Briefing Schedule and for Florida to File an Amended Complaint, attached hereto as Ex. B.

The email Defendants attach to their emergency motion in this case was sent by Plaintiffs simply to inform Defendants that Plaintiffs intend to follow a similar plan contemplated in the Joint Motion in *Florida v. Nelson*. The email was sent as a courtesy and in the spirit of the Court's instruction for the parties to work together when possible. Contrary to Defendants argument, the email does not create any additional work for Defendants. Defendants know Plaintiffs are going to address the new OMB action in their reply brief, hence Defendants' request to file a surreply. Defendants also know that Fed.R.Civ.P. 15 controls a party's right to amend a complaint, that Plaintiffs are well within the period Plaintiffs may amend the complaint as a matter of course, that action taken by a defendant after the filing of an original complaint constitutes good cause to amend a complaint when leave of court is required, and that Plaintiffs never stated they would not amend the complaint in this case.

Defendants' argument that they are somehow being prejudiced is without merit. Defendants are in sole control of this schedule by virtue of refusing to delay enforcement of the vaccine mandate and by waiting until after Plaintiffs filed their original complaint and motion for preliminary injunction to issue the new OMB action. Nothing has changed since the Court issued its scheduling order in this case, and that order should not change now.

Respectfully submitted this 18th day of November, 2021.

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/s/ Drew F. Waldbeser

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2021, I caused to be electronically filed a true and correct copy of the foregoing with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to all counsel of record.

This 18th day of November, 2021.

/s/ Charles E. Peeler

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EXHIBIT A

Coronavirus Disease (COVID-19) / COVID-19 Vaccination and Testing ETS

EMERGENCY TEMPORARY STANDARD

COVID-19 Vaccination and Testing ETS



On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) ("ETS"). The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.

The ETS on Vaccination and Testing was officially filed in the Office of the Federal Register on November 4, 2021, and it became effective when it was published on November 5, 2021. Written comments on any aspect of the ETS must be submitted by December 6, 2021 in Docket number OSHA-2021-0007. Written comments on the information collection determination as described in V.K. of the ETS preamble [2021-23643] must be submitted by January 4, 2022 in Docket number OSHA-2021-0008.

Find information on the COVID-19 Healthcare ETS or on Coronavirus Disease (COVID-19).

About the Standard

ETS Regulatory Text (29 CFR 1910, Subpart U)

- 1910.501 - Vaccination, Testing, and Face Coverings
- 1910.504 - Mini Respiratory

Implementation

Policy Templates

- Mandatory Vaccination Sample
- Vaccination or Testing and Face Covering Sample

Fact Sheets

Additional Resources

Information on Vaccination

Finding a Vaccine

Testing

- Protection Program
 - 1910.505 - Severability
 - 1910.509 - Incorporation by Reference
 - Federal Register (PDF)
 - Ratification Document (PDF)
 - Materials Incorporated by Reference
 - News Release
 - Webinar
 - Fact Sheets
 - About the ETS
 - ETS Summary
 - How You Can Provide Comments (Spanish)
 - FAQs
 - Social Media
 - Toolkit (Spanish)
- Workers' Rights (Spanish)
 - Penalties for Knowingly Supplying False Information (Spanish)
 - Reporting COVID-19 Fatalities and In-Patient Hospitalizations

Reasonable
Accommodation

Labor Rights



Vaccines.gov



File an OSHA Complaint



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UNITED STATES DEPARTMENT OF LABOR

Occupational Safety & Health Administration
200 Constitution Ave NW
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TTY
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EXHIBIT B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STATE OF FLORIDA,

Plaintiff,

V.

No. 8:21-cv-2524-SDM-TGW

BILL NELSON, et al.,

Defendants.

**JOINT MOTION TO MODIFY BRIEFING SCHEDULE
AND FOR FLORIDA TO FILE AN AMENDED COMPLAINT**

On November 8, 2021, this Court entered a briefing schedule for Florida's motion for preliminary injunction, Doc. 10, and scheduled a hearing for December 7. *See* Doc. 17.

On November 10, Defendant OMB announced a new determination to be published in the Federal Register,¹ which, in the government's view, rescinds and replaces OMB's previous determination. It will be published in the Federal Register on November 16. Florida plans to challenge this new notice.

In light of this development, the parties have conferred and jointly request that the Court approve the following modifications to the Court's schedule:

¹ See <https://www.federalregister.gov/public-inspection/2021-24949/determination-regarding-the-revised-safer-federal-workforce-task-force-guidance-for-federal>.

- The government's response to Florida's motion for preliminary injunction, Doc. 10, will still be due on Wednesday, November 17.
- Florida's reply brief will still be due on Monday, November 29. But Florida will file an amended complaint no later than that date, and Florida's reply brief will also serve as an amendment to Florida's motion for preliminary injunction pursuant to Local Rule 6.02(d). Because Florida will brief additional issues raised by OMB's latest actions, Florida requests an enlargement of pages to 25 pages. The government consents.
- The government will file a surreply on Friday, December 3, limited to responding to issues that Florida raises with respect to OMB's latest actions. The government requests 15 pages. Florida consents.
- The hearing will be held on December 7 as planned.

Local Rule 3.01(g) Certification

The parties have conferred and all parties consent.

Respectfully submitted,

Ashley Moody
ATTORNEY GENERAL

/s/ James H. Percival
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Court's CM/ECF system, which provides notice to all parties, on this 14th day of November, 2021.

/s/ James H. Percival
James H. Percival