

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ISRAEL RYDIE, and

*

*

ELIZABETH FLEMING

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Plaintiffs,

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No. 21-2359

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v.

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*

JOSEPH R. BIDEN, in his official
capacity as President of the United States;

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PLAINTIFF-APPELLANTS’
MOTION FOR EXPEDITED
BRIEFING SCHEDULE

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XAVIER BECERRA, in his official
capacity as Sec’y of Health & Human Svcs;

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LLOYD J. AUSTIN III, in his official
capacity as Sec’y of Defense,

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Defendants.

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Pursuant to Fourth Circuit Rule 12 (c) and 28 U.S.C. §1657, Plaintiff-Appellants hereby move for an expedited briefing schedule and argument at the earliest possible date following completion of briefing. Government-Appellees are aware of the intended filing and is expected to reply.

MEMORANDUM

This interlocutory appeal from a preliminary injunction denial involves an issue of profound significance to tens of thousands of federal civil service employees. On September 9th President Biden issued an executive order requiring

COVID-19 vaccines for employees of all departments and agencies without making an alternative available, such as periodic testing that the States are doing. Only medically qualified or religious exemptions will be opted out. There are approximately 2 million federal employees, and the last reported figures show an approximate 3.5% noncompliance rate (as defined as not having submitted proof of vaccination or an exemption request).¹ This comes to approximately 70,000 employees including Appellants who stand to lose their jobs through a fast-track dismissal process that includes a 5-day counseling session followed by a two-week suspension, followed by a notice of proposed removal. The White House has widely publicized its delayed enforcement between the first step (5-day counseling session) and the second step (two-week suspension period) until after the holidays. Both appellants Israel Rydie and Elizabeth Fleming have been provided their letters of counseling, signifying that the enforcement has begun. *See* Exhibits B and C. This is consistent with earlier information made available to the Parties and the District Court, as indicated in page 3 of the memorandum opinion, “counsel for Defendants indicated that DISA and FDA would not finalize any proposed termination before January 2022.” ECF No. 26.

¹ “Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees,” available at <https://www.whitehouse.gov/omb/briefing-room/2021/11/24/update-on-implementation-of-covid-19-vaccination-requirement-for-federal-employees/> (last visited December 13, 2021).

The Safer Federal Workforce Task Force (“SFWTF”), which was directed to set up the deadlines pursuant to the executive order, had November 22nd as the hard deadline for compliance. This has not changed. A recent check on the SFWTF enforcement page has kept this date intact and made only minor adjustments to the timeframe for the initial 5-day counseling period, which accounts for the delay over the holidays. It also allows for a second period of suspension following the first, but this is an exception to the rule that there is to be “consistency across Government in the enforcement of this Government-wide vaccine policy.”² See updated enforcement section, which this Court may take judicial notice of, attached hereto as Ex. A. This means that January 2022 suspensions will likely take effect for Appellants and the vast majority of these employees.

A constitutional right to the privacy of one’s bodily integrity and right to refuse medical treatment is at stake, on an order with dubious foundational authority. The lower court clearly failed to recognize this as a fundamental right, and to condition employment based on it when there are alternatives available and have been shown to work in the States, constitutes exactly the kind of constitutional dilemma that warrants a preliminary injunction.

² OPM. Safer Federal Workforce Task Force, “Enforcement of Vaccination Requirement for Employees (Updated),” ¶¶2-3, available at <https://www.saferfederalworkforce.gov/faq/vaccinations/> (last accessed on December 13, 2021).

The Appendix has been completed by both sides, and the Appellant's opening brief can be submitted by Wednesday, December 22nd. The Notice of Appeal was filed December 6th. Due to the exigency, Appellants are asking for a briefing schedule for December and January that enables this Court to hear oral argument by its last sitting in January. The Government has indicated in discussions that it would prefer to have oral argument in March, which under normal circumstances would not pose a problem, but by that time the damage we are seeking to prevent by preliminary injunction will likely be done. Oral argument will aid this Court in examining counsel on their positions in light of the up-to-date nationwide rulings on the constitutionality of this and other vaccine mandates.

We ask this Court give serious consideration to the magnitude of the sheer number of our good public servants (and their families) that will certainly be impacted by an order likely to be shown to have no legal authority. And we further ask this Court to apply this case under 28 U.S.C. §1657 in which "the court shall expedite any action for temporary or preliminary injunctive relief" with good cause shown. According to §1657, "'good cause' is shown if a right under the Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates a request for expedited consideration has merit." That standard is well met in this case.

For the foregoing reasons, the motion to expedite should be granted.

Dated: December 20, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 20th day of December 2021, a copy of the foregoing MOTION FOR EXPEDITED BRIEFING SCHEDULE was filed electronically. Notice of this filing will be sent to the following counsel and all parties for whom counsel has entered an appearance by email and by operation of the Court's electronic filing system:

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/s/ Jonathan Bolls
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Exhibit A

Vaccinations

Vaccination Requirement for Federal Employees

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Vaccination Documentation and Information

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Limited Exceptions to Vaccination Requirement

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Enforcement of Vaccination Requirement for Employees **UPDATED**

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UPDATED Q: What steps may an agency take if a Federal employee refuses to be vaccinated or provide proof of vaccination?

A: Employees covered by Executive Order 14043 who fail to comply with a requirement to be fully vaccinated or provide proof of vaccination and have neither received an exception or extension nor have an exception or extension request under consideration, are in violation of a lawful order. Employees who violate lawful orders are subject to discipline, up to and including termination or removal.

Consistent with the Administration’s policy, agencies should initiate an enforcement process to work with employees to achieve their compliance. Accordingly, agencies should initiate the enforcement process with an appropriate period of education and counseling, including providing employees with information regarding [the benefits of vaccination](#) and [ways to obtain the vaccine](#). If the employee does not demonstrate progress toward becoming fully vaccinated through completion of a required vaccination dose or provision of required documentation by the end of the counseling and education period, agencies may issue a letter of reprimand, followed by a short suspension (generally, 14 days or less). Continued noncompliance during the suspension can be followed by proposing removal.

Operational needs of agencies and the circumstances affecting a particular employee may warrant departure from these guidelines if necessary, including whether to expedite or extend the enforcement process. For example, agencies may consider the length of the education and counseling period or following an initial brief suspension (14 days or less) with a longer second suspension (15 days or more), rather than moving from a first suspension to proposal of removal. That said, consistency across Government in enforcement of this Government-wide vaccine policy is desired, and the Executive Order does not permit exceptions from the vaccination requirement except as required by law.

Agencies may initiate the enforcement process for employees who fail to submit documentation to show

that they have completed receiving required vaccination dose(s), as long as those employees have not received an exception or extension, or the agency is not considering an exception or extension request from the employee.

If an employee responds at any phase of the enforcement process by submitting proof of progress toward full vaccination (i.e., completion of a required vaccination dose), the agency should hold the discipline in abeyance to afford the employee a reasonable period of time to become fully vaccinated.

In pursuing any adverse action, the agency must provide the required procedural rights to an employee and follow normal processes, including any agency policies or collective bargaining agreement requirements concerning disciplinary matters. Employees should not be placed on administrative leave while agencies are pursuing an adverse action for refusal to be vaccinated, but those employees will be required to follow safety protocols for employees who are not fully vaccinated when reporting to agency worksites.

If the employee claims a legally required exception, or a medical circumstance that necessitates delay of vaccination, as the reason for not being vaccinated, an agency should follow its ordinary process to review and consider what, if any, accommodation it must offer. All agency personnel designated to receive and review requests for accommodations should know how to handle requests consistent with applicable Federal law. If the employee's request for an exception or extension is denied, and the employee does not comply with the vaccination requirement in a timely manner, the agency may pursue disciplinary action, up to and including removal from Federal service.

OPM has issued [additional guidance](#) to further assist agencies with enforcing the vaccination requirement for Federal employees.

Visitors and Onsite Federal Contractors

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Labor Relations Related to Vaccination

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Safety Protocols Related to Vaccination

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Find COVID-19 Vaccines Near You

Visit [Vaccines.gov](https://www.vaccines.gov)

Or Call [1-800-232-0233](tel:1-800-232-0233)



For questions or comments, email the Safer Federal Workforce Task Force at SaferFederalWorkforce@gsa.gov



Exhibit B



DEFENSE INFORMATION SYSTEMS AGENCY

P. O. BOX 549
FORT MEADE, MARYLAND 20755-0549

12 November 2021

MEMORANDUM FOR RYDIE, ISRAEL D (JSSC/JCM2)

SUBJECT: COMPLIANCE WITH THE COVID 19 VACCINATION MANDATE

1. To implement and ensure compliance with EO 14043, you must either be fully vaccinated (as defined herein), against COVID 19 no later than 22 November 2021, or have a pending or approved request for an exemption as required by law. You are receiving this letter because your profile in CMIS is incomplete on this matter. Your CMIS profile either does not include acceptable proof of vaccination or does not reflect you submitted a request for medical or religious exemption. **You are instructed to complete your CMIS profile by 16 November 2021.** If you believe you have already uploaded sufficient proof or that CMIS reflects you have submitted a request for exemption that is not appearing in the system, please contact your supervisor and disa.meade.oc.mbx.covid-19-personnel-response-team@mail.mil.

2. The remaining information in this document is provided as a reminder of mandates and required actions. On 9 September 2021, the President of the United States issued Executive Order (EO) 14043 directing mandatory COVID-19 vaccinations for all federal employees in order to ensure the health and safety of the federal workforce and members of the public with whom they interact, subject to exceptions as required by law. On 1 October 2021, the Deputy Secretary of Defense issued a memorandum with the subject "Mandatory Coronavirus Disease 2019 Vaccination of DoD Civilian Employees," directing that all Department of Defense (DoD) civilian employees must be fully vaccinated by 22 November 2021, subject to exemptions as required by law. Further, on 29 October 2021, the Under Secretary of Defense (Personnel and Readiness) issued a memorandum with the subject "Force Health Protection Guidance (Supplement 23) Revision 2 – Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation, Screening Testing, and Vaccination Verification," providing further direction and guidance applicable to DoD civilian employees.

Employees are considered fully vaccinated against COVID-19 two weeks after completing the second dose of a two-dose COVID-19 vaccine (e.g., Moderna or Pfizer-BioNTech/Comirnaty vaccine), or two weeks after receiving a single dose of a one-dose COVID-19 vaccine (e.g., Johnson & Johnson/Janssen vaccine).

If you are already fully vaccinated or have received either a single dose of the one-dose COVID-19 vaccine or one or both doses of a two-dose COVID-19 vaccine by 22 November 2021, you are directed to report your single, first or second dose (as applicable) by logging into CMIS at <https://cmis.disa.mil/index.cfm>, going under "My Profile," and "File Management" and uploading administratively acceptable documented proof of vaccination as soon as practicable, but **no later than 22 November 2021**.

Types of administratively acceptable documentation to prove vaccination status may include:

- Copy of record of immunization from a health care provider or pharmacy;
- Copy of COVID-19 Vaccination Record Card (CDC Form MLS-319813_r, published on 3 September 2020);
- Copy of medical records documenting the vaccination;
- Copy of immunization records from a public health or state immunization information system; OR
- Copy of any other administratively acceptable official documentation containing the required data identified below.

SUBJECT: COVID-19 Vaccination Mandate

Administratively acceptable documentation must be from an official vaccination data source and contain the following required data:

- Type of vaccine administered;
- Number of doses received;
- Date(s) of administration; AND
- Name of health care professional(s) or clinic site(s) administering the vaccine(s).

In addition to providing proof of vaccination in CMIS, you are also hereby directed to complete Section A of DD Form 3175 via milConnect at [REDACTED] as soon as practicable, but no later than 22 November 2021.

If you have not yet begun the COVID-19 vaccination process and are not requesting an exemption as outlined in part 2 below, you are directed to begin the vaccination process and report your single or first dose (as applicable) by logging into CMIS at <https://cmis.disa.mil/index.cfm>, going under “My Profile,” and “File Management” and uploading administratively acceptable documented proof of vaccination as soon as practicable, but **no later than 22 November 2021**. Failure to comply with this instruction may result in administrative discipline, up to and including removal.

3. DoD civilian employees may request an exemption on the bases of a medical condition or circumstance or a sincerely held religious belief, practice or observance.

a. If you have a medical condition that contraindicates COVID-19 vaccination, you may seek a medical exemption to the vaccination requirement through CMIS at the following link: <https://cmis.disa.mil/index.cfm>, by going under “My Profile,” and “File Management” then clicking on “Click Here to Submit Proof of Vaccination,” “Enter COVID Vaccination Information” and “Request Vaccine Exemption Accommodation” and following the directions to make a request. This includes requests for temporary accommodation to delay complying with the vaccination requirement based on certain medical considerations that may not justify an exemption under the Rehabilitation Act. To support your request, you will need to submit the DISA Request for Medical Accommodation to COVID-19 Vaccination Requirement form (available at [REDACTED], under “DISA Alerts” for 14 October 2021) and/or administratively acceptable medical documentation from your medical provider detailing the reason(s) you cannot be safely vaccinated and/or the date upon which you will be able to be safely vaccinated. For the COVID-19 vaccination requirement, such request should be submitted as soon as the need for exemption or delay is known but must be submitted no later than 22 November 2021 in order to be compliant with this instruction. If you have previously submitted a request for accommodation under a medical exemption to the vaccination requirement through the DISA Disability Services Program Office (DSPO)/Reasonable Accommodation (RA) Office, you should not resubmit your request; however, you should verify that your request is captured in CMIS by going under “My Profile,” “File Management” and “COVID Proof of Vaccination.” If you are unable to locate your accommodation request, you must notify the DSPO/RA Office at [REDACTED].

b. If you have a sincerely held religious belief that requires an exemption to this vaccination, you may seek a religious exemption to the vaccination requirement through the same CMIS link provided in paragraph 2a above. Requests should be submitted as soon as the need for exemption is known, but must be submitted no later than 22 November 2021 in order to be compliant with this instruction. If you have previously submitted a request for accommodation under a religious exemption to the vaccination requirement through the DSPO/RA Office, you should not resubmit your request; however, you should verify that your request is captured in CMIS by going under “My Profile,” “File Management” and “COVID

SUBJECT: COVID-19 Vaccination Mandate

Proof of Vaccination.” If you are unable to locate your accommodation request, you must contact the DSPO/RA Office at [REDACTED].

c. For more information on the limited exceptions to the COVID-19 vaccination requirement and guidance about the medical considerations that may warrant a medical exemption or delay please go to: <https://www.saferfederalworkforce.gov/faq/vaccinations/>.

d. Employees are not considered fully vaccinated or exempt from the vaccination requirement based on a previous COVID-19 infection or positive serology.

4. DoD civilian employees are eligible to receive the COVID-19 vaccine at any DoD vaccination site, including military medical treatment facilities. Alternatively, you may opt to receive the COVID-19 vaccine at locations other than DoD vaccination sites, such as retail stores, private medical practices, and/or Federal, State and local government organizations, or private health care organizations and pharmacies.

a. If vaccination is not available to you through a DoD source, you may be reimbursed for the cost of getting vaccinated, if the cost is not covered by health insurance. However, if vaccination is available to you through a DoD source, and you opt to get vaccinated through a private provider, then you will not be eligible for reimbursement.

b. Only COVID-19 vaccines that receive full licensure from the Food and Drug Administration (FDA) will be utilized by DoD for mandatory vaccinations, unless you voluntarily receive a vaccine that has obtained FDA Emergency Use Authorization, is included in the World Health Organization’s Emergency Use Listing, or is approved for use in a clinical trial for which vaccine efficacy has been independently confirmed (e.g. Novavax).

c. You will be granted duty time (including time spent traveling to/from the vaccination location and any waiting time) for the purpose of receiving any authorized COVID-19 vaccination from DoD vaccination sites, retail stores, private medical practices, and/or Federal, State and local government organizations, or private health care organizations and pharmacies. You will receive the duty time necessary to obtain the vaccination, generally up to 4 hours per vaccination event. Additionally, you will be granted up to 2 workdays of administrative leave (for each dose) if you have a reaction to a COVID-19 vaccination dose that prevents you from working.

5. The written instructions provided specifically to you in this memorandum are serious and require your immediate attention and compliance. You are cautioned that your failure to follow these instructions, refusal to be vaccinated, or failure to provide proof of vaccination, may subject you to disciplinary measures, up to and including removal from Federal service, unless you have received an exemption or submitted a timely request for an exemption that is pending a decision.

6. Employees who are not fully vaccinated must comply with all requirements for individuals who are not fully vaccinated, including those related to masking, physical distancing, travel, and screening testing requirements. If you have questions related to the COVID-19 vaccination requirement, please see the Frequently Asked Questions page on Dateline DISA at [REDACTED].

[REDACTED]. Should you have questions or concerns regarding getting vaccinated against COVID-19, I encourage you to consult with your personal medical provider and visit the CDC website at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/index.html> for more information. Additionally, the DoD Employee Assistance Program (EAP) is available to you. You may contact the EAP provider at (866) 580-9046 or online at www.magellanascend.com to arrange a confidential appointment with a counselor.

SUBJECT: COVID-19 Vaccination Mandate

7. You are requested to acknowledge receipt of this document by signing and dating below and returning it to your supervisor. Your signature does not indicate your agreement or disagreement with its content, nor will it serve to waive any rights mentioned herein. Failure to sign will not void the content of this notice.



LORI L. RAMIREZ

Workforce Services and Development Director

Cc: WSD-HRFA

Acknowledgement of Receipt:

Signature of Employee

Date of Receipt

Exhibit C

Letter of Counseling related to Compliance with COVID-19 Vaccination Requirement

From: A Message from the Office of Human Capital Management
<AMessagefromtheOfficeofHumanCapitalManagement@fda.hhs.gov>
Sent: Wednesday, November 17, 2021 4:24 PM
To: Fleming, Elizabeth [REDACTED] >
Subject: Letter of Counseling related to Compliance with COVID-19 Vaccination Requirement



Method of Delivery: email

MEMORANDUM

Date: November 17, 2021

From: Tania L. Tse, Director
Office of Human Capital Management

To: Elizabeth Fleming
Information Technology Spec, GS-2210-13
OC

Subject: Letter of Counseling related to Compliance with COVID-19 Vaccination Requirement

This **Letter of Counseling** is issued in accordance with Safer Federal Workforce Task Force guidance. The Safer Federal Workforce Task Force guidance requires all employees, with limited exceptions only as required by law, to be fully vaccinated for COVID-19 by November 22, 2021. This means employees must have completed the required vaccination dose(s) by November 8,

2021, as they will not be considered “fully vaccinated” until 2 weeks after their final dose (e.g., the second of 2 doses for Pfizer BioNTech and Moderna, or a single dose of Johnson and Johnson/Janssen). FDA employees were also required to provide acceptable documentation of their COVID-19 vaccination status by November 9, 2021.

Since the issuance of President Biden’s Executive Order on September 9, 2021, the Department of Health and Human Services (HHS) has repeatedly announced this requirement and provided information to assist you in complying with the requirement to be fully vaccinated for COVID-19 by November 22, 2021. For example, this information included links to the Centers for Disease Control and Prevention website ([Your COVID-19 Vaccination | CDC](#)) to provide you with the tools to learn about the vaccines and their benefits, as well as links to <https://www.vaccines.gov> to find a vaccination site near you. Agency records as of Tuesday, November 16, 2021, show that you have not been vaccinated or have not provided acceptable documentation of your vaccination status. In addition, you do not have a pending request for a legally required exception or medical extension.

Therefore, you are hereby counseled based on your failure to comply with the requirement to be fully vaccinated for COVID-19. Continued failure to comply with this requirement may result in disciplinary action, up to and including removal from federal service. To prevent disciplinary action from being initiated for your failure to comply with the vaccination requirement, within five (5) business days, you must:

1. Provide information, including acceptable documentation, in FDA’s [VVT-VAM](#) ([REDACTED]) to show you are fully vaccinated for COVID-19; or
2. Provide information, including acceptable supporting documentation, in the [VVT-VAM](#) ([REDACTED]) to show you have begun the process to be fully vaccinated by obtaining either the first dose in a 2-dose COVID-19 vaccine series or a single dose in a 1-dose COVID-19 vaccine series; NOTE: You must complete the vaccination series to become fully vaccinated within six (6) weeks after your first dose and provide information, including acceptable supporting documentation, in the [VVT-VAM](#) ([REDACTED]), within three (3) business days of obtaining your final dose in the vaccination series; or
3. If applicable, initiate a request for a legally required exception or medical extension by emailing ReasonableAccommodation@fda.hhs.gov or ReligiousAccommodations@fda.hhs.gov or by contacting your supervisor, if you believe you are legally entitled to an exception based on a medical condition or sincerely held religious belief, practice, or observance or if you require an extension of the deadline due to documented medical necessity.

To assist those of you who have not begun the COVID-19 vaccination process you may visit

<https://www.vaccines.gov> to find a COVID-19 vaccine location nearby.

For additional questions or concerns related to this letter of counseling, please communicate directly with your supervisor.