

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff,

v.

ALEX M. AZAR II, in his official capacity as
SECRETARY OF HEALTH AND HUMAN
SERVICES; and U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Defendants.

Civil Action No. 1:19-cv-01672-GLR

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO HOLD PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION IN ABEYANCE AND TO SET A
SUMMARY JUDGMENT BRIEFING SCHEDULE; OR, IN THE ALTERNATIVE, FOR
ENLARGEMENT OF TIME TO FILE THEIR OPPOSITION TO PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION**

Defendants' motion to hold Mayor and City of Council of Baltimore's (the City) Motion for a Preliminary Injunction in abeyance and set summary judgment briefing is untimely and provides no assurance that the City and its residents and insureds will not suffer immediate harm if the Court grants the motion and postpones preliminary injunction briefing until **after** the 84 Fed. Reg. 23,170 (May 21, 2018) (Rule) takes effect. The motion is not supported by any affidavit assuring the Court or the City that the proposed delay in enforcement of the Rule will even occur, much less that it will prevent immediate harm to the City and its residents and insureds when it takes effect on July 22, 2019. Accordingly, the Court should deny the motion and maintain the existing schedule or, in the alternative, on the basis of the argument and evidence presented in the City's as yet unopposed preliminary injunction motion, grant a Temporary Restraining Order to protect the *status quo* pending preliminary injunction hearing. Fed. Rule Civ. Proc. 65-(b). Otherwise, the City will face immediate harm when the Rule takes effect on July 22, 2019.

BACKGROUND

Defendants request that the Court order the City to forgo a preliminary injunction and litigate summary judgment on an abridged timeline that would give the City just two months to review the administrative record and oppose summary judgment or, alternatively, to postpone the preliminary injunction hearing until well after the Rule takes effect on July 22, 2019. Defendants sought the City's consent for this proposal on very different terms from those now presented to the Court. On June 21, 2019, Defendants justified this proposal to the City by representing that they would publish notice in the Federal Register delaying the **effective date** of the Rule from July 22, 2019 until November 22, 2019. The City responded on June 21, 2019 that it would be amenable to a reasonable postponement of preliminary injunction briefing **if** Defendants made the requisite showing that the delayed effective date would have the force of law and, thus, there would be no threat of immediate harm from the Rule taking effect. Defendants did not respond until 8:23 p.m. on June 25, 2019. The City received an email stating that Defendants "no longer intend to delay the **effective** date of the rule with a notice in the Federal Register" and instead would "delay any **enforcement** of the Rule until November 22, 2019." (emphasis added). In this 8:23 p.m. email, Defendants stated that they intended to file their motion around 10 p.m. Defendants filed their motion based on a bare assertion, with no affidavit in support, that counsel is "authorized to represent to this Court that HHS will delay enforcement of the [Rule]."

ARGUMENT

As an initial matter, Defendants motion violates Local Rule 105(9) requiring counsel to "attempt to obtain the consent of other counsel and shall **give notice of the motion to other counsel a reasonable time before presentation of the motion to the Court.**" (emphasis added). After representing to the City that Defendants would delay the effective date of the Rule until

November 22, just 1.5 hours before filing their motion—and after business hours—Defendants notified the City that they plan only to delay **enforcement**, and, on that basis, intended to ask the Court to abandon the preliminary injunction and adjudicate summary judgment on a severely-abridged timeline. The lack of notice prejudiced the City. The City had no time to seek clarification on Defendants’ vague assertion that they will delay **enforcement** of the Final Rule and to decide whether, and on what terms, to consent. As set forth below, this vague statement—which is not supported by an affidavit from Secretary Azar or anyone else—provides the City no assurance that its Department of Public Health, its residents, and its insureds across the nation will not suffer immediate harm.

Defendants’ watered-down proposal ensures that the City is **not** safe from immediate harm on July 22, 2019. In responding to the City’s more robust proposal for delaying the **effective date** of the Rule, the City made clear that it would need assurances that the delay in effective date would comply with the law and that the Rule would not, in fact, take effect on July 22, 2019. Rather than provide those assurances, Defendants, through their motion and notice provided 1.5 hours before filing, clarify that the Rule **will** take effect, but represent (without even a sworn affidavit from HHS) that HHS simply won’t **enforce** it until November 22, 2019. What does that mean? Will the administrative and substantive requirements (laid out in detail in the City’s Complaint (Dkt. No. 1) and Motion and Memorandum of Law in Support of Preliminary Injunction (Dkt. Nos. 14, 14-1)) take effect, and **violations** simply will not be enforced until November? How will entities that are subject to contractual or grant restrictions that require ongoing compliance with the law certify such compliance if the Rule has taken effect and they are not in compliance? And, even if Defendants do not intend to require covered entities to affirmatively **comply** prior November 22, 2019, how will entities that are not parties to this litigation know that? Accordingly, providers

across the country who serve the City's retirees and employees may begin implementing the Rule's requirements (administrative and substantive), not knowing that Defendants have represented in litigation that they will not enforce violations, and without any assurances that non-parties even have standing to enforce the vague promise that Defendants make in their motion. Because Defendants did not give notice of their changed plans until immediately before filing their motion, the City has not had time to seek clarification from Defendants on these questions, much less appropriate assurances that City will not suffer immediate harm on July 22, 2019. The only reasonable conclusion is that the City faces immediate harm as of July 22, 2019.

The City remains willing to work with Defendants to obtain the assurances that the City will not suffer immediate harm from the Rule prior to November 22, 2019 and, subject to those assurances, to discuss an alternative timeline. For example, the City might agree to delay the preliminary injunction and agree to a reasonable schedule for summary judgment based on a sworn affidavit and a stipulation entered by this Court that Defendants will: (1) delay implementation of the Rule's requirements until November 22, 2019—not just enforcement of violations; and (2) provide notice in the Federal Register or provide other effective notice to covered entities that are not party to litigation that they need not comply with the Rule prior to November 22, 2019. But Defendants' current proposal does not provide any such assurance that the City, its residents, and its insureds will not suffer harm when the Rule takes effect on July 22, 2019.

Accordingly, the City requests that the Court deny Defendants' motion, set a hearing date on the preliminary injunction motion for the week of July 14, and rule on the preliminary injunction motion prior to July 22, 2019. In the alternative, should this court grant HHS until July 31st to file their opposition, the City requests that the Court rely upon the facts and argument presented in the City's as yet unopposed preliminary injunction motion and supporting affidavits to enter a nation-

wide Temporary Restraining Order, effective July 22, 2019 at 12:01 a.m., not to exceed 28 days, to maintain the status quo pending resolution of the Motion for Preliminary Injunction. If the parties can reach a different scheduling agreement during the intervening time, the City will immediately notify the Court.

DATED: June 26, 2019

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2019 the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and all counsel of record will receive an electronic copy via the Court's CM/ECF system.

s/ Elisha B. Barron
Elisha B. Barron