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October 14, 2021

The Honorable Martin J. Walsh
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., NW
Washington, D.C. 20210

James S. Frederick
Principal Deputy Assistant Sec'y of Labor for OSHA
U.S. Department of Labor - OSHA
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Comments and Recommendations For OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard

Dear Secretary Walsh and Principal Deputy Assistant Secretary Frederick,

On behalf of the ***Employers COVID-19 Prevention Coalition*** (the Coalition), we submit the following comments and recommendations for your consideration as OSHA responds to President Biden's directive to OSHA to promulgate a COVID-19 emergency temporary standard (ETS) focused on vaccination and testing and generally addresses how best to protect workers from the spread of COVID-19 in the workplace. While we understand OSHA has not commenced a traditional rulemaking or opened a formal docket for this matter due to the urgency associated with the ongoing COVID-19 pandemic, we respectfully urge OSHA to consider this feedback from the regulated community about how to effectively drive employer-involvement in employee vaccinations and testing.[1]

Introduction

The Coalition is composed of a diverse group of national employers and trade associations representing many industries, including manufacturing, construction, petroleum refining and chemical manufacturing, airline operations, retail (from big box to grocers), aerospace defense, shipping/logistics, food manufacturing and distribution, agriculture, trucking, media and entertainment, healthcare and many more, with millions of employees across thousands of workplaces in every state in the nation. The common thread among our Coalition members is that they are responsible employers who care deeply about their employees' health and safety.

[1] Assuming there will be no pre-rule comment period, the Coalition urges OSHA to open a comment period *after the rule is issued* to provide stakeholders meaningful opportunity to comment on the ETS, and OSHA meaningful opportunity to consider amendments to the rule and/or helpful guidance based on public comment.

Our Coalition members implemented thoughtful and effective COVID-19 prevention plans even before the first state's COVID-19 emergency rule, and have achieved real success mitigating the spread of the coronavirus in their workplaces. Our Coalition members have been on the frontlines fighting this pandemic for the last year and a half, and since the rollout of safe and efficacious vaccines earlier this year, the members of our Coalition have been deeply involved in the campaign to achieve a vaccinated US workforce.

Many of our member organizations have already voluntarily implemented hard or soft vaccine-mandates and vaccine-incentives, implemented policies to make vaccination accessible, hosted vaccination events and testing programs, and conducted many thousands of COVID-19 tests. We have learned valuable lessons about the practices and policies that most effectively increase vaccination rates, as well as those that are less effective and/or that inadvertently stymie vaccination efforts. Based on this work, we also have an understanding of which efforts impose burdens that substantially outweigh any benefit and those that are unworkable or untenable at most workplaces.

The recommendations and concerns we share today, represent the collective wisdom of employers and the essential employees who have worked through this national health crisis. Our motivation here is to ensure that if OSHA does issue a COVID-19 ETS focused on vaccination and testing, that it is effective in its purpose – minimizing workplace transmission of COVID-19 and "moving the needle" on the number of US workers who are vaccinated – and reasonable in the burdens it places on employers.

Below are specific comments about twelve provisions likely being considered for the ETS, with recommendations for how most effectively to incorporate them into the ETS, including:

1. Phasing-in implementation dates for the various ETS requirements, with the paid time benefit for getting vaccinated becoming effective in relatively short order, but the "soft" vaccine-mandate elements of the standard (i.e., requiring vaccination or a recent negative test result to report to work) not becoming effective for at least seventy-five days after publication of the ETS in the Federal Register.

2. Clarifying that the ETS does not prohibit employers' from voluntarily implementing "hard" vaccine mandate policies.

3. Capping paid time off (PTO) required for employee-time getting vaccinated at four hours per dose (but eliminating PTO for employers who host an onsite vaccine event during work hours), and capping PTO for time recovering from any ill effects of the vaccines at four hours for the first dose and eight hours for a second.

4. Defining "fully vaccinated" by memorializing (as opposed to cross-referencing) the current CDC definition of that term, which excludes booster shots for any segment of the workforce and includes certain vaccines not yet approved by the US FDA.

5. Calculating the 100-employee threshold for ETS coverage based on the peak number of employees in CY 2020, including part-time, seasonal, remote, and supervised temporary workers, but not applying the "soft" vaccine-mandate aspects of the rule to employees working remotely.

6. ***NOT*** requiring employers to pay for employee-time associated with testing or the hard costs of testing for employees who are subject to a weekly testing requirement because of their own voluntary choice to forego vaccination.

7. Providing flexibility to employers in how they document employee vaccination-status and test results, and excluding those records from the preservation requirements of 29 C.F.R. Section 1910.1020 (or setting a brief alternative preservation requirement).

8. Addressing the virtually inevitable shortage of COVID-19 testing materials and unavoidable delays in obtaining test results that will occur upon implementation of the ETS by allowing unvaccinated employees who opt for testing to report to work during periods of demonstrable test shortages or delays, subject to enhanced safety protocols.

9. Memorializing in the ETS that adverse reactions to vaccination are exempt from OSHA injury and illness recordkeeping no matter the employers' vaccination policies, and that confirmed, work-related COVID-19 cases are only recordable if the case involves an unvaccinated worker.

10. Incorporating clear language expressing OSHA's intention that the ETS preempts any state laws that conflict with the ETS or that frustrate its purpose to increase rates of employee vaccinations.

11. Providing a narrow qualified carveout for truck drivers and other key jobs vital to maintaining the stability of the US food supply chain.

12. Limiting the scope of the ETS to focus only on vaccination and testing (and not delve into programmatic requirements like the earlier COVID-19 ETS for healthcare).

I. Phased Implementation of the Vaccine/Testing Mandate

While the Coalition recognizes that the ETS likely will become effective in short order after issuance, OSHA can, and often does, set staggered or delayed enforcement/compliance deadlines for various provisions within regulations, and in fact, did so for select requirements of the June COVID-19 ETS for healthcare. Our Coalition strongly urges OSHA to take that approach for this ETS. Specifically, we recommend that the ETS become effective soon after publication *only* with regard to the requirement for employers to provide PTO for employees to get vaccinated and recover from the ill effects of the vaccines. With respect to the vaccination–testing mandate elements of the rule, however, OSHA should build into the standard a period of time – at least seventy-five (75) days [2] – to allow unvaccinated employees a meaningful opportunity to get vaccinated before having to submit to weekly testing, and for employers to: (i) implement policies and programs to get employees vaccinated; (ii) develop systems for verifying vaccination-status; and (iii) establish a testing program and/or a process to verify test

[2] It is particularly important that these deadlines not kick-in prior to the winter holidays. Implementing these new systems, determining employees' vaccination status, grappling with a likely overwhelming demand for religious accommodations, acquiring acceptable test materials, and facing meaningful levels of employee resignations or termination in advance of the busy holiday season for retailers and distributors would be utterly unworkable and could cripple the US economy.

results for those employees who refuse to get vaccinated. This recommended timeline will create immediate incentives for unvaccinated employees to get vaccinated (i.e., the PTO incentive and a clear path to avoid having to submit to weekly testing), and will give employers an immediate incentive to help advance employee vaccinations (e.g., educating employees about the vaccines, and facilitating easy and convenient vaccination, such as hosting on-site vaccination events).

Anything other than a phased approach would be completely untenable for employers. Regardless of their commitment to the program and objective of the ETS, they could not reasonably be expected to immediately comply with the requirements of the standard without lead time to assess the status of their workforce and develop systems to verify and document vaccinations and/or testing. Specifically, they will need substantial time after seeing the regulatory text of the ETS to develop a compliant system to determine which of their employees have already been fully vaccinated and which will be required to either get vaccinated or be put into the pool of workers who will need to present evidence of weekly testing. For those employees who have gotten vaccinated, employers will need to establish systems for verifying vaccination status (and perhaps revisit previous verifications if OSHA sets a specific form of verification); recording and tracking the status; and maintaining this proof.

Beyond this is the need to develop an even more complicated system for employee testing for the pool of employees who refuse to get vaccinated. Many employers may opt to obtain and distribute home testing kits, or set up testing centers at their workplaces in order to facilitate testing and avoid the almost inevitable problem of employees claiming that they were unable to obtain a test or experienced delays getting test results. It will take several weeks to obtain sufficient test kits or identify and secure testing availability at the workplace or at remote sites, and similar time to develop testing protocols. And regardless of whether employee testing is done by distribution of home testing kits, testing vans in the company parking lot, arrangements for employees to get tested at a clinic or community testing center, or employees independently arranging for their own testing, employers will need time to establish a tracking system to check and record that those employees in the "testing pool" met the weekly testing requirement.

Employers certainly cannot be expected to magically have these vaccination and testing programs in place literally overnight upon promulgation of the ETS, especially since we do not know at this time what the rule will require, what types of tests will be acceptable, who is expected to pay for the testing, and many other unanswered questions that we attempt to address through these comments.

It is also important for OSHA to understand that thousands of employers around the country will be adjusting not only to OSHA's new ETS about vaccinations, but also simultaneously to President Biden's other, different vaccine-related requirements for federal contractors and certain healthcare services. To the extent the OSHA ETS goes into effect in advance of the December 8, 2021 deadline for the federal contractor and healthcare vaccine-mandates, employers potentially covered by both the ETS and one of the hard mandates will face an

impossible challenge managing implementation of both.[3] For example, if the ETS requires weekly testing for not-yet vaccinated workers before December 8th, large federal contractors and healthcare employers will have to build out a massive, complicated infrastructure to manage a testing program only to fall under a hard mandate a short time later.

Our Coalition members and other employers across the Nation are ready to do their part to "move the needle" on the vaccination rate in this country to get us all past the pandemic. But they cannot and should not be asked to do the impossible. A phased approach to implementation of the various components of the ETS is critical. Such an approach will in no way impede or delay the objective of the ETS.

II. The ETS Should Be Clear That It Does Not Prohibit Employers From Voluntarily Implementing "Hard" Vaccine-Mandate Policies

When the ETS is published for public consumption, the provision that require employers to ensure vaccination or a negative test may cause confusion among employees and others regarding whether an employer is permitted to continue or to implement in the future a "hard" vaccine-mandate (i.e., to not provide a testing-out option for unvaccinated employees, except where federally-recognized exemptions apply). Anti-vaccination campaigns may endeavor to mislead the public that any employer policy more rigorous than the ETS's soft mandate would violate federal law.

To avoid that confusion, or providing another tool for misinformation campaigns, OSHA should include in the regulatory text of the ETS and any related public communications (e.g., press releases, guidance documents, FAQs, etc.), a clear statement that the ETS sets a floor requiring at a minimum, a soft vaccine-mandate, but does not prohibit employers from retaining or adopting in the future a "hard" mandate that does not include a testing option.

III. Paid Time to Get Vaccinated and Recover from Ill Effects of the Vaccines

A. The ETS should set caps on the amount of paid time employers must provide for vaccination and recovery from vaccine side effects.

To the extent the ETS includes a provision requiring employers to provide PTO for employees to get vaccinated and/or to recover from any ill effects of immunization, the standard should set specific caps on that PTO. The Coalition agrees that employees should be provided a reasonable amount of PTO to get vaccinated, however, the ETS should set caps on this time. Based on anecdotal data regarding the total time associated with getting vaccinated, the Coalition recommends that PTO to get vaccinated should not exceed four hours for each dose of the vaccine. Where the vaccine type requires two doses, that would be a total of up to 8 hours of paid time in which to get vaccinated. To the extent the

[3] In general, the Coalition encourages OSHA to find opportunities to align the requirements of the federal contractor executive order and OSHA's ETS, because many employers will be required to comply with both, with some of their facilities covered by the federal contractor executive order and others by the ETS.

employees accomplish vaccination in less time than the maximum allotted, the PTO should cover only the actual time spent getting vaccinated.

There is precedent for PTO caps, and caps at this level, at the state and local level where paid leave for vaccination is already required. For example, in New York, which requires employers to provide their employees paid leave to get vaccinated, an employer must allow an employee sufficient paid time to get vaccinated, not to exceed four hours. The same standard applies in Chicago. It is important that the ETS reflect or expressly preempt existing state requirements, if possible, to avoid confusion and a greatly complicated patchwork of requirements for employers.

Even more important, the ETS should set caps on paid time associated with recovery from any ill effects from the vaccines, and these caps should be based on currently available data. Per data collected by the CDC, systemic reactions to each vaccine that would generally require leave from work to recover (i.e., fever, fatigue, headache, etc.) endure for a median of one to two days, most often at a moderate level, and most often only after the second dose of a two-dose vaccine. *See* the linked CDC information below.

Adverse Reactions to the Pfizer Vaccine	Adverse Reactions to the Moderna Vaccine	Adverse Reactions to the J&J Vaccine

Accordingly, the ETS should establish caps consistent with the data, with a higher cap for paid recovery time for the final dose in a vaccination series. Setting a higher cap for paid time for the second dose is not only consistent with the science, but it also provides an incentive for employees to get the second vaccine dose; i.e., to become fully vaccinated.

Appropriate caps for recovery leave:

1. First Dose: maximum of four hours of paid leave to recover from side effects
2. Second Dose: maximum of eight hours of paid time to recover from side effects

The PTO for recovery time should also be limited to a brief window of time shortly after employees receive the vaccine dose, during which time the ill effects typically materialize. According to the CDC, the median time for onset of ill effects across the three vaccines predominately available in the US (Pfizer, Moderna, and J&J) ranged from zero to two days after injection. Accordingly, employers should not be required to provide PTO for vaccine recovery time more than two days after an employee is vaccinated.

The ETS also should clarify that this paid time for getting vaccinated or for recovery time, although it would be *compensated time*, should not constitute *hours-worked*; i.e., the time should not count towards or as overtime pay.

Finally, employers should receive some level of tax credit for the costs they bear in providing employees with PTO for getting and recovering from vaccinations. President Biden has made clear that this ETS is necessary because he needs employers to do what the Administration, notwithstanding its best efforts, has been unable to do, which is to get sufficient numbers of citizens vaccinated to move us past the pandemic. Placing this burden on employers,

through the ETS, may be necessary; however, shifting the costs of this effort to employers is unfair and could at least be partially addressed by providing tax credits to those employers who bear significant costs under the ETS to meet PTO requirements.

B. The ETS should allow employers to require employees to first use existing and remaining PTO for getting vaccinated and recovering from vaccine ill effects.

Most employers, like employees, have been hit hard by the pandemic. Many have suffered significant financial setbacks. We believe it is therefore important to establish fair limits on the cost of ETS compliance by allowing employers to require existing PTO to be used for vaccination time and adverse reaction recovery before new PTO is required. There is precedent for permitting employers to require employees to first consume accrued PTO benefits in the context of other federally required leave laws. For example, under the Family and Medical Leave Act (FMLA), employers can require employees to use accrued paid leave for some or all of the unpaid FMLA leave period. In fact, precedent exists for this construct specifically in the context of COVID-19. A similar policy was included in the Emergency Family and Medical Leave Expansion Act (EFMLEA). After the first two weeks of paid sick leave (provided for quarantine or due to symptoms of COVID-19), employers could require employees to use any accrued paid leave benefits concurrently with the remaining leave under EFMLEA, so that the employer did not have to pay the employee ⅔ of their regular pay rate in addition to any PTO the employer already provided per its policies. Likewise, under Cal/OSHA's COVID-19 ETS, employers are permitted to require employees to use their existing PTO for time getting vaccinated, where vaccinations have not been specifically mandated by the employer. Allowing such a cap on PTO will limit any temptation to abuse the benefit and ensure employees will be paid for that time that actually rises to the level of requiring time off from work.

C. Employers should not be required to provide PTO for employees getting vaccinated if the employer provides on-site access to vaccines during working hours.

If an employer hosts an on-site vaccine clinic or otherwise provides access to vaccinations at work (e.g., a retail pharmacy employer that provides vaccination services) during employees' working hours, which provides sufficient opportunity for all interested employees to get vaccinated, the employer should not be required to provide separate PTO to employees who decline to get vaccinated through that on-site vaccine opportunity. Separate PTO would create an incentive for employees to decline vaccination made available and convenient by employers. Likewise, setting this limitation to PTO would incentivize employers to provide convenient access to vaccines on-site, which will no doubt increase vaccination rates among US workers.

IV. <u>Definition of "Fully Vaccinated"</u>

A. The ETS should not include booster shots in the definition of "Fully Vaccinated"

While our Coalition is not opposed to aligning the definition of "fully vaccinated" with revised definitions of that term developed by CDC (if that occurs), we urge OSHA to do so through

rulemaking, and not attempt to build in a "living" definition of the term, which would stand on questionable legal authority and could create a constantly moving target. Rather, OSHA should write into the ETS the CDC's current definition of "fully vaccinated" (including its footnote) as a fixed definition. That is, the ETS should not incorporate by reference a CDC definition of this term; instead, the ETS should explicitly state that employees are considered fully vaccinated two weeks after their second dose in a two-dose vaccine series, such as the Pfizer or Moderna vaccines; or two weeks after a single-dose vaccine, such as the J&J vaccine. *See* CDC, "When You've Been Fully Vaccinated" (updated Sept. 16, 2021).

Currently, COVID-19 vaccine booster shots are available for Pfizer-BioNTech vaccine recipients who completed their initial series at least six months ago, and who are: (1) 65 years and older; (2) age 18+ who live in long-term care settings; (3) age 18+ who have underlying medical conditions; (4) age 18+ who work in high-risk settings; and (5) age 18+ who live in high-risk settings. *See* CDC, "Who Is Eligible for a COVID-19 Vaccine Booster Shot?" (updated Oct. 7, 2021). While our Coalition members certainly encourage employees in these groups to seek booster shots, given the complexity, and potential privacy concerns associated with trying to separately track which employees meet these criteria, particularly around medical conditions that are protected from disclosure under the Americans with Disabilities Act (ADA), any requirements regarding booster shots are best left to individual employees, not their employers or OSHA, and should not be covered by any aspect of this ETS, including the PTO provisions.

Our Coalition also points out that adoption of CDC's current definition of "fully vaccinated" (including the exclusion of booster shots) aligns with the President's "Path Out of the Pandemic: President Biden's COVID-19 Action Plan" (Action Plan). Per the President's six-pronged Action Plan, OSHA was directed to issue the ETS under the *first prong* of the Action Plan – to "vaccinat[e] the ***unvaccinated***." *See* White House, "Path Out of the Pandemic: President Biden's COVID-19 Action Plan" (emphasis added). It can be inferred, therefore, that the ETS is meant to reach the approximately 75 million workers in private sector business who have yet to receive ***even a single shot***. Had the President intended to do more, OSHA would have been directed to issue the ETS under the second prong of the President's Action Plan – "***further protect***[] the [already] vaccinated." *See id.* (emphasis added). But that is not the element of the President's Plan from where this emergency rulemaking derives.

As booster shots become more widely available, and as the science continues to evolve (as it has for the past 19 months), CDC's definition of "fully vaccinated" may change, but a *living* definition of "fully vaccinated" would cause great uncertainty for the regulated community. For purposes of a *temporary* emergency standard, a simple, well-understood, fixed definition that excludes booster shots is the best approach.

B. Employees should be considered "fully vaccinated" under the ETS if they have received a full course of certain vaccines not yet approved by the US FDA.

Coalition members also recommend that OSHA incorporate into the ETS's definition of "fully vaccinated" the footnote to the CDC's current definition of that term, which recognizes and accepts certain vaccines that have been listed for emergency use by the World Health

Organization (WHO), as well as those used in vaccine trials. Specifically, CDC's guidance regarding the definition of "fully vaccinated" includes a footnote that states that it "applies to COVID-19 vaccines currently approved or authorized for emergency use by the US Food and Drug Administration (Pfizer-BioNTech, Moderna, and J&J / Janssen COVID-19 vaccines) and ***some vaccines used for U.S. participants in COVID-19 vaccine trials*** (such as Novavax)," and that it "can also be applied to COVID-19 vaccines that have been listed for emergency use ***by the World Health Organization*** (such as AstraZeneca/Oxford)." *See* CDC When You've Been Fully Vaccinated (updated Sept. 16, 2021) (emphasis added).

CDC's guidance regarding international COVID-19 vaccines states that "[p]eople who were vaccinated outside the United States with a currently FDA-approved or FDA-authorized COVID-19 vaccine or a World Health Organization-emergency use listed COVID-19 vaccine[*] and who have received all the recommended doses **do not need** any additional doses." *See* CDC, "Interim Clinical Considerations for Use of COVID-19 Vaccines" (last updated Sept. 27, 2021) (emphasis in original). Furthermore, CDC's guidance provides that "[c]linical trial participants from U.S. sites who received all recommended doses of a COVID-19 vaccine that is neither approved nor authorized for use by FDA but is listed for emergency use by WHO do not need any additional doses of an FDA-approved or FDA-authorized COVID-19 vaccine. Once it has been confirmed that a U.S. participant in a COVID-19 vaccine trial received [']active['] vaccine, and not placebo, the participant can be considered fully vaccinated 2 weeks after they completed the vaccine series." *See id.* It also provides that "[i]f a clinical trial participant from a U.S. site has been documented to have received the full series of an [']active['] (not placebo) COVID-19 vaccine candidate, and vaccine efficacy has been independently confirmed (e.g., by a data and safety monitoring board), the participant can be considered fully vaccinated 2 weeks after they completed the vaccine series." *See id.*

Many employers have international employees and contractors who have occasion to work on-site at US work locations. Many of our Coalition members routinely host workers from abroad, and thus it would be helpful to have ETS criteria that account for the differences in vaccine type and availability around the world. This will be especially important for migrant workers who come to work in the US seasonally or otherwise. Defining fully vaccinated in this way, therefore, would further open up the applicant pool available to U.S. employers, some of which have many open positions they are seeking to fill.

OSHA should not impose additional compliance burdens on employers by requiring employees who meet the required criteria established by the CDC to receive additional vaccine doses. Undoubtedly, employers would be met with stiff resistance from vaccinated employees, only adding to what will already be a daunting challenge for US companies under this ETS.

V. Scope of Covered Employers

A. The 100-employee threshold should be based on the employee-count used for 300A Annual Summaries under OSHA's Section 1904 Recordkeeping Regulation.

When determining how to calculate whether an employer has reached the 100-employee threshold, the count should be based on the employer's peak employment from the prior

calendar year. Employers already have that data point available from their 300A Annual Summaries, so they will not need to undertake another complicated human resource calculation. And, using this threshold will avoid the potentially very onerous burden of maintaining a day-by-day employee count to catch situations in which a company moves from 98 employees mid-year to 100 employees. Any threshold that would require such real-time calculations would be completely unworkable and unnecessarily onerous.

B. The 100-employee threshold for coverage under the ETS should count remote workers and all workers who the employer supervises on a day-to-day basis.

Remote Workers/Teleworkers: Our Coalition recommends that employees working remotely should be included in the count towards the 100-employee threshold for coverage under the ETS both for the sake of simplicity and because the broader coverage of the rule resulting will level the playing field for US employers thereby minimizing the disruptive consequences of labor volatility. To further President Biden's goal of encouraging as many remaining unvaccinated employees to become vaccinated as possible, the ETS also should mandate that remote and/or telework employees be eligible for the PTO for vaccination or vaccine recovery time required by the ETS.

However, remote employees should not be covered by the vaccination/testing mandate elements of the ETS, unless or until they have occasion to report to the workplace or otherwise interact in-person with co-workers or third parties for work. Since unvaccinated remote employees do not pose any risk to anyone in the workplace, having to verify vaccination status and/or coordinate testing efforts places an extraordinary burden on employers (more of a burden even than for employees who do report to the workplace) with no commensurate workplace safety benefit.

Temporary Workers: Our Coalition recommends that calculation of the 100-employee ETS coverage threshold include all workers who the host employer supervises on a day-to-day basis, in the same familiar way we determine on which employer's 300 Log recordable injuries or illnesses belong. This would result in including temporary workers from a staffing agency, but only those whose work activities the host employer supervises on a daily basis.

Even though we recommend counting temporary workers for determining ETS coverage, we strongly recommend *against* host employers having to manage vaccination and testing, or the verification of vaccination and testing status, for workers supplied through a staffing agency. The primary reason host employers utilize staffing agencies is to delegate human resource functions relative to workers who may be onsite for a short period of time, in many cases for even just one day. The administration of the vaccination/testing requirements of this ETS will be quintessential HR functions. It should be left to the employer that owns HR responsibilities to track vaccination status, to track negative test results, and to supply to host employers only workers who are eligible to report to their workplaces pursuant to the ETS. It would be wholly unworkable for a host employer to track vaccination-status or to incorporate into vaccination and testing programs those temporary workers who move around from one host employer to another.

Vendors, Independent Contractors, and Guests: Even if a particular vendor, independent contractor, or guest is regularly at the worksite, we urge that these individuals not be counted towards the 100-employee threshold, nor should they otherwise be covered by any aspect of the ETS. Their own employers should be responsible for any compliance, monitoring, and recordkeeping required under the ETS.

VI. Who Pays for Testing

A. *The ETS should not require employers to pay for employee-time spent getting tested.*

Under the urgent circumstances facing the Administration to promulgate this ETS, the Coalition has chosen to limit its comments to only those recommendations and points it considers critically important. None are more important than this. While the President's Action Plan has made clear that employers should provide for paid time off for employees to get *vaccinated* and recover from any short-lived adverse side effects of immunization, extending paid leave for employees to get tested will not only place an extraordinary burden on employers, it will without a doubt create an incentive for those vaccine-resistant workers to remain unvaccinated. Employees who are not yet vaccinated are, by and large, individuals who have made a personal choice that they will not become vaccinated. To offer them paid time to leave work to get a weekly test, or paid time to get tested at work or home; i.e., paid time to do something other than performing work, will – absolutely and undoubtedly – ensure that an *enormous portion* of workers covered by the ETS's soft mandate will opt for testing rather than immunization. To expect otherwise ignores reality. OSHA should not reward the very behavior the President is seeking to change. ***Accordingly, the ETS must not require employers to pay for employee-time associated with COVID-19 testing.***[4]

Beyond creating an incentive to not get vaccinated, requiring employers to pay for time unvaccinated employees spend getting tested (or the costs associated with testing materials, as discussed below) will impose a massive financial burden on employers. Coalition members report having spent hundreds of thousands of dollars on testing, for example, for close contact exposures or in Cal/OSHA-defined outbreak situations. If those same employers had to pay each employee an additional 2 to 4 hours of time each week for testing, they will find themselves in an untenable position.

Requiring unvaccinated workers to get tested during their regular working hours is no better, as it would take millions of individuals away from their job duties, interrupting production, impacting operations, and undoubtedly further compromising the already tenuous supply chain. As such, the only viable option is to explicitly provide in the ETS that time spent getting tested—including time spent finding a testing site, time spent traveling to the testing site and time spent waiting to get tested—is not required to be compensable time.

[4] Our recommendations here address only those employees who make a voluntary, personal choice not to be vaccinated. We acknowledge that employees who have a legitimate medical or *legitimate* religious basis preventing them from being vaccinated may be treated differently— if testing is an accommodation offered for that extremely small segment of the population, then time taken by those employees to get tested each week may be compensable.

A useful analogy for drawing this line regarding payment for testing is OSHA's payment requirements for PPE. Employers are required to supply and pay for all forms of PPE, except for protective work shoes. The reason OSHA does not require employers to pay for employees' protective work shoes is that employees can use the shoes just as easily away from work as they can at work; i.e., the shoes serve employees in both their personal and professional lives. Similarly, COVID-19 is not a uniquely workplace hazard, and so getting tested to verify you are not infectious is not a uniquely workplace protection. It equally protects employees and their co-workers at work, as it protects employees and their families and friends away from work.

There should be no doubt that OSHA has authority to declare this testing time to be non-compensable time. We are, of course, aware of the Department of Labor's FAQ regarding application of the Fair Labor Standards Act to employee time spent getting employer-required medical tests or attention. But the federal courts have clarified that this obligation does not apply when the time at issue, even if it is in connection with work, is actually required by a federal regulation, and not the employer's choosing. The Ninth Circuit recently affirmed the dismissal of a wage and hour lawsuit that alleged an employee should have been paid for time spent waiting in the TSA security line at an airport in connection with work-related travel. The court held, in part, that since the security screening is mandated by federal law, the company exercised no control over the employee during that screening process and thereby was *not* responsible for paying the employee for that time.

That rationale is directly applicable to government mandated COVID-19 testing under this ETS. In this context, testing of unvaccinated workers is not the employers' choice. Indeed, every employer in our Coalition would prefer that no employee made the choice to get tested in lieu of getting vaccinated. Rather, the testing will be the result of a combination of a federal government mandate and an employee's voluntary choice to not get vaccinated. Thus, OSHA is not limited in its legal authority to assign responsibility and the costs of testing to the employees who make their own voluntary choice to not get vaccinated.

The Coalition recognizes that it will be a challenge for OSHA to navigate a path that recognizes the rare circumstances of an employee with legitimate medical or religious basis for not becoming vaccinated under the ADA or Title VII, but does not reward the many such requests for religious exemptions that are insincere. As evidenced by the tidal wave of religious exemption requests and the cottage industry that has sprung up around this issue, it is clear that the protections of Title VII are being abused, and OSHA must find a way to not facilitate that abuse. Setting a blanket requirement in the ETS for employers to compensate employees for testing if they decline to be vaccinated based on a "sincerely held religious belief" will undermine the entire purpose of this ETS and the President's agenda.[5]

[5] OSHA should work closely with the Equal Employment Opportunity Commission (EEOC) to coordinate on additional EEOC guidance regarding employers' ability to scrutinize requests for religious accommodations in this area specifically.

B. Employers should not be required to pay for COVID-19 tests for unvaccinated workers.

Requiring employers to pay for the literally tens of millions of COVID-19 tests that inevitably will be necessary to meet the ETS obligations would unfairly shift the financial burden of testing from those employees who make the personal choice to not get vaccinated to employers, many of whom have done everything in their power to increase vaccination rates at their workplaces. Assuming the ETS requires every unvaccinated worker to be tested on a weekly basis, any employer with a significant number of unvaccinated workers—particularly mid-sized and large employers—will likely be forced to pay millions of dollars to subsidize choices that are against public health and the public interest. Just as those individuals who opt not to get vaccinated should not be paid for the time they spend not working to get tested, they should not be reimbursed for the cost of the test they need because of the poor *personal choice* they make.

Presently, the cheapest over the counter COVID-19 test that has FDA approval or EUA status is the Abbott Laboratories BinaxNOW® two-pack for $24. Close behind are Quidel's QuickVue® tests at $15 each. A manufacturer with 5,000 unvaccinated workers that offers a testing option would be responsible for covering the cost of more than 20,000 COVID-19 tests each month. Taking the least expensive test option would cost that employer close to $250,000 each month, reaching $1.5M during a six-month term of an ETS. Even if the Administration is able to deliver on its promise to make testing more affordable and can flood the marketplace with $8 tests, that same manufacturer would still incur at least $160,000 in testing costs each and every month. This is simply untenable, beyond unfair, and, as with paying for time to get tested, will upend and undermine the entire purpose of the ETS.

An individual who is given the option of being vaccinated for free (and compensated for his or her time to get the immunization), but who chooses to remain unvaccinated, should be expected to bear the costs associated with making the disfavored choice. Perhaps these individuals, when faced with the realization that they will have to pay for weekly testing and get that testing on their personal time, will choose vaccination. The ETS should be written in a manner that facilitates the Administration's objectives and establishes an appropriate set of incentives. And, under these circumstances, for this rule, OSHA should avoid any tendency it might have to favor placing the financial burden of compliance on the employer.

To the extent OSHA is reluctant to assign these costs to employees because it may be too expensive for individuals, recall that they will always have an option that is completely free – getting vaccinated – and recall the Administration's recent announcement all but guaranteeing a supply of readily available, cost-effective (if not free) testing for anyone who wants to be tested. That initiative could surely be leveraged to ease the cost burden on employees who opt for the testing option instead of the free vaccine.

Finally, because of the extreme administrative challenge of managing a large-scale prophylactic testing program, employers will work to find the most reliable way to ensure that it is done in a manner that, as best as possible, minimizes staffing disruptions and operational delays (i.e., to ensure tests are available and taken, to ensure results are

accessible in time to avoid disruption, and to minimize the potential for employees producing fraudulent test results). This means that many employers are likely to assume the administrative aspect of the testing. In that circumstance, the employer should still not bear the cost of the testing, and the ETS should make clear that employers may front the cost of testing, and deduct the hard costs of the testing from the paychecks of those employees who decline to get vaccinated.

C. *Employers should receive a tax credit for wages paid and/or costs incurred relating to testing under the ETS.*

If, contrary to the urging of the Coalition, the ETS includes a requirement that employers pay workers for time spent getting tested and/or for the test materials (or if employers do so voluntarily), similar to our recommendation regarding PTO costs, OSHA should, at minimum, work with the Administration to ensure that employers receive a tax credit for any and all such wages paid to employees related to COVID-19 testing and costs incurred obtaining, providing and/or reimbursing employees for the test themselves.

VII. Documentation and Record Preservation of Vaccination Status and Test Results

A. *Employers should be afforded flexibility in how to document vaccination status and test results.*

To the extent the ETS requires employers to document employee vaccination-status and proof of negative test results, the Coalition urges OSHA to provide employers with flexibility as to how they do so. OSHA should adopt a broad definition of what constitutes authorized verification documentation. In addition to taking copies of vaccine cards, records of vaccination from health departments, and laboratory reports of test results, acceptable documentation of vaccine status and negative tests under the ETS should include employees' completed self-attestations (taken in writing or electronically), an employer-generated record confirming the employer observed proof of vaccination or a negative test, or other reasonable proof.

If the ETS does not provide this flexibility and requires employers to obtain an actual "vaccination record," or if that is the option an employer chooses, it is critical that this requirement not be applied retroactively. That is, the ETS should accept whatever form of proof of vaccination status employers have documented prior to the effective date of the ETS. To require employers to re-verify vaccination status for millions of workers whose status has already been confirmed based on employers' own confirmation requirements or those of state and local governments by a new methodology would impose a huge burden on employers, and would aggravate already highly strained employee relations in this area.

B. *Documentation taken pursuant to the ETS should not be subject to the record-preservation requirements of 29 C.F.R. Section 1910.1020.*

The ETS should expressly exclude vaccination and testing records from the record-retention obligations of 29 C.F.R. Section 1910.1020 – OSHA's regulation for Access to Employee

Medical Records. Section 1910.1020 requires employers to retain covered records for an employee's employment term plus thirty years. The purpose of the requirement is to ensure workers have access to exposure and medical records of occupational exposures and illnesses that could be useful in diagnosing and treating adverse health effects that materialize after decades-long latency periods, many years after an employee's tenure at the workplace. Vaccination records and COVID-19 test results provide no such information or insight into any occupational illness or occupational exposures, and are quite different than the types of records that were intended to be covered by 1910.1020. Yet, technically, in light of the broad definition of covered medical records under Section 1910.1020, vaccination cards and COVID-19 test results could fall within the scope of that standard.

To require employers to retain copies of employees' vaccine cards or other similar records prepared by Walgreens, CVS, an employee's doctor's office, or the County Department of Health for 30+ years would serve no workplace or even public health purpose. And it would be completely unnecessary; unlike other employer-retained medical records, employees' vaccination records are not the only means and certainly not the best means of long-term public tracking of vaccination status—public health departments maintain full vaccination records, regardless of employment status.

Accordingly, requiring employers to maintain vaccination records pursuant to 1910.1020 would be completely unnecessary and unwarranted, and would add an enormous administrative burden to employers. OSHA should exempt these records from Section 1910.1020 requirements via express language included in the ETS.

To the extent OSHA does not exclude vaccination and COVID-19 testing records from coverage under 29 C.F.R. Section 1910.1020, OSHA should set a specific, shorter retention time period for which vaccination records must be retained by employers. Section 1910.1020 sets 30+ years as the default retention period, unless a more specific regulation establishes a different period, in which case, the more specific retention period governs. Here, if records made or taken pursuant to this ETS are to be retained for any period, at the very most, such records should be kept for a minimal time period specifically set out in the ETS, no more than 1-2 years beyond the expiration of the ETS and more reasonably, just six months beyond its expiration. This would greatly lessen the administrative burden.

VIII. <u>Enforcement Issues</u>

A. Account for Unavailability of Tests and Delays Obtaining Test Results.

The Coalition members are encouraged by the President's COVID-19 Action Plan with regard to the Administration's efforts to make COVID-19 testing more accessible and affordable, including the anticipated availability of a new supply of COVID-19 rapid antigen test kits in the coming months. However, it has been the experience of our Coalition members that in many parts of the country, especially in locations with jurisdictional vaccine-testing mandates like the one OSHA is developing, testing is not readily available and/or employers have experienced extremely slow turnaround times for receiving test results, which make weekly testing programs infeasible. As a result, many of our Coalition member companies

have attempted but have been unable to procure large orders of test kits for their employees to use. Other Coalition members have been quite reasonably reluctant to attempt to make large investments in testing supplies before we have clarity about what types of tests will be permissible under the ETS, who will be directed to pay for the testing, and what type of test-related documentation will be required to comply with the ETS.[6]

Our Coalition, therefore, recommends first that OSHA include in the ETS acceptance of any form of COVID-19 test that has FDA approval or is the subject of an FDA emergency use authorization, including the use of home rapid screening antigen tests. That is precisely how the existing soft vaccine-mandate for federal employees and on-site federal contractors has been implemented since much earlier this year. *See [The Safer Federal Workforce Task Force's FAQs](#)*.

More importantly, even with the broadest definition of acceptable form of testing under the ETS, there will inevitably be shortages and unavoidable delays in receiving test results. Accordingly, our Coalition recommends that in locations and at times when employers or employees are experiencing demonstrable testing supply limitations or unusually long delays in obtaining test results, unvaccinated employees who are participating in a regular testing program should be permitted to continue to report to work in the absence of a confirmed negative test result, provided that the unvaccinated workers pre-screen for COVID-19 symptoms before entering the workplace, wear face coverings, and socially distance when feasible. The unavoidable delays in receipt of test results and unavailability of test kits beyond the employers' and employees' control should not prevent employees from working. Not accounting for this could result in catastrophic operational disruptions for businesses and corresponding extreme harm for their employees.

OSHA should also, simultaneously with issuance of the ETS, issue guidance to OSHA's enforcement personnel to exercise enforcement discretion (i.e., to not issue citations for non-compliance) if employers/employees can demonstrate good faith efforts to obtain tests for use to comply with the ETS, or that receipt of a timely test result was delayed by a third party, or that testing was unavailable in a particular community during a specified time period.

B. The ETS should allow for a progressive employee-compliance process.

OSHA's ETS should acknowledge a company-internal compliance process for their employees that mirrors that provided for Federal employees covered by President Biden's Executive Order 14043. For at-will employees who do not qualify for a legitimate religious or medical exemption and who fail to provide proof of vaccination or who do not produce a negative test result by any applicable deadlines mandated by the ETS, the ETS should provide private employers flexibility to implement a discipline process that will encourage employee

[6] This also further supports our recommendation in Section I, that a meaningful time period to implement these provisions is needed to allow for procurement of acceptable tests and development of appropriate IT or administrative recordkeeping methods.

compliance through early education and counseling, but with continued non-compliance to be addressed by a period of suspension/removal from the workplace and/or termination.

Flexibility to implement a progressive compliance process like that will help employers avoid significant disruption in staffing while encouraging and facilitating compliance by employees, and only enforcing compliance by removal from the workplace after multiple failures by employees to comply.

Moreover, a significant number of the Coalition members have unionized workforces and the ability to negotiate a progressive discipline approach that is deemed compliant with OSHA's ETS will be incredibly important to assist unions and employers in reaching agreements on how the OSHA ETS will be implemented in relation to a specific bargaining unit.

IX. Injury and Illness Recordkeeping Recommendations

A. Memorialize in the ETS OSHA's current guidance that adverse reactions to COVID-19 vaccines do not need to be recorded on 300 Logs.

In May 2021, OSHA issued an FAQ addressing the question "[a]re adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?" by confirming that:

> *DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations.* ***OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination through May 2022****. We will reevaluate the agency's position at that time to determine the best course of action moving forward.*

In this guidance, the agency recognized the importance of removing any disincentives for employers to work to get their employees vaccinated. One of the ways OSHA removed disincentives, or more accurately, created incentives for employers to encourage or require employee vaccinations, was to declare that employers would not have to record adverse effects of the vaccines regardless of any role the employer played in the vaccination effort. Specifically, under the May guidance, days away from work or medical treatment in response to adverse effects of a COVID-19 immunization is not recordable on the 300 Log, no matter what.

The only circumstances relative to vaccination efforts that have changed since that May 2021 guidance is that the Administration's efforts to vaccinate the Nation have intensified. The President has now instructed OSHA to issue another emergency standard specifically focused on that objective, and OSHA is, for the second time in a year, relying on rarely used emergency rulemaking authority to advance the effort to get workers vaccinated. The Administration's interest in encouraging employers to incent their employees to get vaccinated is at a peak. The agency should therefore unequivocally affirm the May recordkeeping policy, and remove any doubt, as well as any risk, that this policy will change on a whim (without stakeholder input), by memorializing this guidance into law. That is,

OSHA should include in the regulatory text of the ETS that adverse effects of the COVID-19 vaccinations that result in one of the general recording criteria, need not be recorded on OSHA 300 Logs, no matter what.

It is notable that OSHA's current policy on not recording adverse reactions to vaccines indicates that the next time the agency will even consider changing that policy is May 2022, which would perfectly coincide with the expiration in six months of this new ETS, should it be adopted in the next month or so.[7]

B. Amend 29 C.F.R. Section 1904, by way of this ETS, to make COVID-19 confirmed cases recordable only if a case involves an unvaccinated employee.

To significantly motivate employers to assist the Administration in "moving the needle" on employee vaccinations (e.g., by implementing hard mandates, setting incentives, hosting on-site vaccine events, or otherwise facilitating employees' access and opportunity to get vaccinated), OSHA should expressly include in the ETS an exception to recording on the 300 Log those COVID-19 cases that involve workers who are fully vaccinated.

It is hard to imagine a more appropriate and effective incentive for employers to ensure they have a vaccinated workforce than by amending 29 C.F.R. Section 1904, by way of this ETS, to exclude from 300 Log recordkeeping COVID-19 cases involving fully vaccinated workers; i.e., to make being unvaccinated an explicit criterion or element of a COVID-19 recordable event. Specifically, OSHA should include in the ETS the following elements of determining recordability of COVID-19 cases:

1. It is a confirmed case – meaning the COVID-19 diagnosis is confirmed by an FDA-approved laboratory-based PCR test; and
2. The case meets one of the 29 C.F.R. Section 1904 general recording criteria; and
3. The case is determined to be work-related, including that the employer has identified no alternative, non-work explanation for the infection; and
4. The employee whose case would be recordable is not fully vaccinated.

This revision to the recordkeeping regulation makes eminent sense based on the data for breakthrough cases. The portion of current COVID-19 infections among the fully vaccinated is still relatively small and there is a lower likelihood of causing infection or contracting COVID-19 by those who are vaccinated.

X. Preemption of Conflicting State Laws

The single greatest compliance challenge faced by national employers with facilities across the country over the last year and a half has been to navigate the complex patchwork of competing

[7] For these same reasons, and for consistency, OSHA also should include in the ETS (or at least in guidance) that injuries that occur to an employee while traveling to or from a vaccination site should similarly not be treated as recordable work-related injuries.

and at times contradictory mandates, restrictions, requirements, and guidance issued by local and state health departments, governors' executive orders, state OSH Plan emergency rules, the CDC, and OSHA. Indeed, this "patchwork" problem has been described by members of our Coalition as "unimaginably difficult and exorbitantly expensive." With a number of states already introducing some form of ban on mandatory vaccine requirements for employees (e.g., Texas, Montana, Arkansas, Tennessee, Georgia), and similar laws expected as this ETS rolls out (e.g., South Carolina), the Coalition worries that this patchwork problem will only be exacerbated. To drive better consistency, and again, in order for the ETS to have the broadest application possible, our Coalition recommends not only that OSHA require its approved State OSH Plans to adopt an identical ETS, but that the ETS include explicit language regarding its intention to preempt and supersede any conflicting state or local law, whether it is a state OSH Plan state or a state under federal OSHA's exclusive jurisdiction.

Under the doctrine of preemption, federal law supersedes state law, but only under certain circumstances, such as where, for instance, there exists a direct conflict between federal and state law, where the state law would interfere with the objective of the federal law, and where the federal government's intention to preempt conflicting state laws is clear. Some states are planning to limit or have already limited employers' ability to inquire about vaccination status and/or change the criteria for religious and medical exemptions by allowing for accommodations for "personal conscience." Without clear preemption language in the ETS, employers will again find themselves between a rock and a hard place, trying to determine which set of laws they should follow, especially as lawsuits linger in both federal and state courts (possibly for the life of the ETS). Coalition members have been receiving requests for accommodations from employees who seek to avoid vaccination for personal, philosophical, or political views that are not valid reasons for a religious or medical exemption under federal law; these requests surely frustrate the purpose and objective of the ETS. Employers with workers in more than one state are particularly concerned, as they strongly prefer to have a uniform COVID-19 vaccination policy. It is critical, therefore, for OSHA to refer to the applicable EEOC guidelines both in the ETS and accompanying guidance so that employers and employees clearly understand the parameters for employee requests for accommodations to vaccination requirements. In short, the ETS must be clear in its intention to preempt and supersede any state or local law that would conflict with this ETS, frustrate the objective of this ETS, and/or alter the landscape of exemptions that would apply to the requirements of this ETS.

Additionally, according to OSHA's policies on emergency standards, State Plans are required to have an ETS that is ***at least as effective*** as an ETS issued by federal OSHA 30 days following publication. *See* OSHA "OSHA Standards Development." Per Section 18(f)of the OSH Act:

> [T]he Secretary shall, on the basis of reports submitted by the State agency and his own inspections, make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a ***failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect***, but the State may retain jurisdiction in any case commenced before the withdrawal of

> the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

OSH Act, Sec. 18(f) (emphasis added). Thus, OSHA has legal authority to ensure its vaccine ETS is applied consistently across the country, including in state OSH Plan states, and it should make clear its intention that it will use such authority if needed in the ETS itself.

XI. Qualified Exemption for Workers Vital to the Nation's Food Supply Chain

A. The ETS should provide a narrow carveout for truck drivers and other key jobs vital to maintaining the stability of the US food supply chain.

Our Coalition includes both individual employers as well associations whose members are a critical part of the food supply chain and other critical infrastructure supply chain comprising warehouses and transportation providers handling perishable commodities and other vital goods across the Nation, as well as agriculture and food manufacturing that are integral to this country's essential food supply chain. While we support vaccination efforts, and we continue to be deeply committed to increasing vaccination rates among our workforces, our members are very concerned about the potential impacts of any sort of a mandated vaccination requirement, even if there is a testing option, on a narrow slice of US jobs that are necessary to maintain the stability of our Nation's critical food supply chain. Our concern stems primarily from data, experience, and anecdotal information gathered by our members regarding staunch opposition to the COVID-19 vaccine among truck drivers (both local and long-distance operators) and agriculture and food industry workers in rural communities. The impact of that resistance to a vaccine-mandate among these workers on our Nation's supply chain potentially could be disastrous.

Given the nature of the work performed by the majority of truck drivers and the manner in which it is performed—mostly in complete or near-total isolation—unvaccinated drivers pose a far lower risk to their coworkers and other members of the public with whom they may interact during the course of their workday. Typically, a driver will, at most, briefly interact with dispatch at the start and end of their shift, occasionally interact with other drivers and/or support personnel such as mechanics or material handlers, and in most cases have (at most) similarly limited interactions with those to whom they are delivering or from whom they are picking up their shipments.

Another important reason that truck drivers need to be treated as unique in this context is that having to backfill any material number of vacated truck driver positions cannot be done in a timely or feasible manner. Drivers of large tractor trailers require a special commercial driver certification and extensive training. Our Coalition members report that, in general, when there is not a labor shortage, it takes at least 6-8 weeks to get a new employee certified and ready to drive. A mass resignation in that space, or even a loss of any non-de minimis percentage of drivers would create a crisis that could not be timely resolved. The impact of this on the Nation's supply chain would be immediate and significant.

A similar rationale – with an even greater potential impact – applies to food manufacturers, including agribusiness, and food warehousing and distribution,[8] especially in rural communities in the US. Those jobs are very difficult to fill right now; the availability of adequately trained and experienced staff across the food industry is vital to food safety and the resiliency of the Nation's food supply chain.

The Coalition does not offer this suggestion lightly—indeed it is made reluctantly given our support for the Administration's efforts to get as many Americans vaccinated as possible. We do so because there is no denying the reality facing our Nation's food supply chain. Multiple coalition members, after conducting extensive internal polling, determined that well fewer than 40% of their truck drivers are currently vaccinated, despite a comprehensive campaign to encourage vaccination that included a variety of incentives, education, and outreach, and efforts to make vaccination accessible and convenient. Other members report widespread sentiment among their drivers that they would rather retire or resign—in some cases to accept a position with a smaller company that will be exempt from the ETS—or to become independent contractors in the gig economy. It should be noted that many smaller employers have experienced challenges over the past 18 plus months when attempting to hire and retain drivers and continue to face such challenges; as such, there will likely be an ample supply of vacant positions awaiting the drivers who leave covered employers if required to get vaccinated or submit to weekly tested.

We understand that the point of this ETS is to move the needle on vaccination rates among the very communities we are describing, and we support that wherever it can be done without creating a crisis for our supply chain. But under the circumstances, employers of food supply chain truck drivers, who work mostly alone, and food manufacturers, agribusiness, and food warehousing and distribution, should be permitted a limited, qualified exemption from the vaccine-mandate elements of the ETS when it can be demonstrated – as it clearly can – that they would face crisis staffing levels otherwise.

There is, of course, recent precedent for making exceptions to important public safety requirements in the interest of preserving the integrity of the supply chain when facing crisis staffing. For much of the pandemic, the CDC advised that critical infrastructure workers may be permitted to continue work following close contact exposures, provided they remain asymptomatic and adhere to additional precautions to protect themselves and the community, including: (i) pre-work screening for COVID-19 symptoms; (ii) regular monitoring to ensure symptoms have not onset while working; (iii) wearing a mask at all times while in the workplace for at least 14 days after exposure; (iv) physical distancing from others in the workplace; and (vi) regular disinfecting and cleaning areas contacted by the critical infrastructure employee. The CDC made clear that this advice was given in an effort to ensure continuity of operations of essential functions. If the CDC believes that maintaining the Nation's supply chain is of sufficient import to justify allowing individuals working in a

[8] We also encourage OSHA to consider other aspects of the nation's supply chain and critical infrastructure in this context. Our Coalition believes that OSHA should take steps to ensure that its regulation does not result in crisis staffing levels for any aspect of our nation's critical infrastructure, just as CDC has done with its guidance about quarantine and return to work.

variety of industries, including certain retail sectors, to continue working after having experienced a close contact with a confirmed positive individual, OSHA would be well-advised to make similar allowances for certain types of workers whose exodus from the workforce could have dire consequences for our country.

In fact, the vital importance of protecting the country's supply chain was acknowledged by President Biden in his Executive Order 14017, when he noted "that creating resilient supply chains will foster collective economic and national security and strengthen the capacity to respond to international disasters and emergencies." As the US continues ahead on its Path Out of the Pandemic, it strikes our members as unwise to risk significant disruption to the supply chain resulting from mass resignations by the drivers that are so essential to its operation.

The Coalition is not recommending giving these drivers a pass. Rather, we recommend in lieu of application of the soft vaccine mandate (i.e., vaccination or testing), that those covered by this carveout be required to conduct daily symptom screening—which could be documented—and regular monitoring throughout each shift. Additionally, drivers could be required to wear a suitable face covering whenever they are not alone in their vehicle. For carefully screened drivers who self-monitor throughout their shifts, which involves almost entirely work in isolation, and who remain in face coverings whenever interacting with dispatch, maintenance, coworkers or customers, the risk of transmission will be as low or lower than an employee working around others all day, regardless of whether he is vaccinated or tested.[9]

By allowing an exemption for employees who fall within this narrow, clearly defined critical infrastructure sector, the ETS would avoid a significant unintended adverse consequence—a crisis in the food supply and/or exacerbate an already existing shortage of transport and supply chain capacity, further slowing delivery times and driving up costs for retailers and manufacturers alike.

XII. <u>Limit the Scope of this ETS To Only Vaccination and Testing</u>

As a final note about the scope of this rulemaking, we urge OSHA to recognize that issuance of an ETS is an extraordinary tool, available to OSHA only in the rarest circumstances, when employees are exposed to a "grave danger" and this particular emergency standard is "necessary" to protect employees from such danger. *See* 29 USC §655(c)(1). The agency's rare use of its emergency rulemaking authority, as well as the history of litigation when it has been used, demonstrate that the legal threshold for justifying an ETS is extremely high. To the extent such circumstances exist at this point in the pandemic, they relate narrowly and exclusively to the Administration's effort to "move the needle" on the percentage of fully vaccinated US workers.

[9] If OSHA cannot see fit to include a carveout for this narrow group of workers, we recommend that OSHA craft a definition of "Remote Workers" that includes truck drivers who spend virtually their entire work shift alone in the cab of a vehicle. And as discussed earlier in these comments, we reiterate in this context, remote workers should not be covered by the soft vaccine-mandate elements of the ETS.

Reportedly, some 75 million workers in private workplaces across the country continue to show resistance or reluctance to the COVID-19 vaccines, and thus continue to present a potential risk to a broad swath of US workplaces. Based on this public health threat, President Biden instructed OSHA to develop a second ETS narrowly focused on efforts to get more workers vaccinated. Any move by OSHA to expand the ETS to include a panoply of COVID-19 mitigation protocols, such as requirements for a written program, training, and implementation of specific administrative and engineering controls (e.g., masking, ventilation, disinfection, etc.), would not only be beyond the narrow scope proscribed by the President, but also would likely make the ETS vulnerable to a successful legal challenge.

As we all know, OSHA delivered to the Office of Management and Budget for review earlier this year, a broad proposed COVID-19 emergency rule that would have established myriad COVID-19 requirements for employers of all sizes in all industries. The Administration chose to significantly narrow the scope of that ETS to cover only the healthcare industry. That decision had to have been made for one (or both) of two reasons – either the Administration determined a broad programmatic ETS was unnecessary from a scientific standpoint, and/or the virus did not meet the extremely high "grave danger" standard, both based on the status of the pandemic and the workplace controls already voluntarily implemented by most US employers.

As for the necessity for a broad rule now six months later, despite an explosion of the Delta variant over the summer, the landscape has once again dramatically improved. The 7-day average of new cases, test positivity, number of hospitalizations, and deaths per day are all rapidly declining. The 7-day cumulative number of COVID-19 cases per 100,000 people in the US currently stands at approximately 200, down from 230 last week, and 260, 315, 310, and 345 the four weeks prior. The national test positivity rate has been cut in half over the past month and a half – currently 5.9%, down from 6.8% last week, and 7.9%, 8.7%, 10.1%, 10.5%, 11.1%, and 11.4% the six weeks prior. There are currently 68,000 people hospitalized in the US with COVID-19, down from 75,000 last week, and 85,000, 95,000 and 102,000 the three weeks prior. And the good news has been experienced almost everywhere in the country, with 39 states realizing decreased caseloads this week. The improving landscape, which also includes the virtual disappearance of the concerning Mu variant and growing availability of better treatments (e.g., a new oral antiviral), places us in an even better situation than this Spring, when the Administration chose to forego a broad ETS covering all US workplaces.

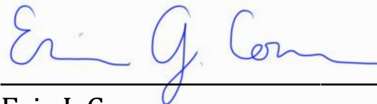
Finally, according to the President himself, what is necessary now to move us beyond the pandemic is an ETS focused only on vaccinations. To put an even finer point on it, during a trip to Chicago last week, President Biden said in a speech that "***there is no other way to beat the pandemic than to get the vast majority of Americans vaccinated***." At this point, it simply is not necessary to impose expensive "one size fits all" programmatic mandates based on the state of the pandemic and the President's own recognition that vaccination is the best tool to finish the fight.

For these reasons, we urge OSHA to avoid any temptation to layer on obligations in this rulemaking that may serve to distract or redirect resources from vaccination efforts, and instead remain focused on the narrow mission outlined by the President.

CONCLUSION

The Coalition respectfully requests that the Administration give meaningful consideration to the comments and recommendations provided as the agency moves ahead with issuing an emergency temporary standard.

Sincerely,



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On Behalf of Employers COVID-19 Prevention Coalition

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