

January 19, 2022

Mr. Douglas Parker
Assistant Secretary of Labor for OSHA
Occupational Safety and Health Administration
U.S. Department of Labor - OSHA
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Impact of Supreme Court Decision on OSHA Rulemaking for a Permanent COVID-19 Vaccination, Testing, and Face Coverings ETS, Docket No. OSHA-21-0007

Dear Assistant Secretary Parker,

On behalf of the ***Employers COVID-19 Prevention Coalition*** (the Coalition), we submit this letter and the attached written comments to provide recommendations to OSHA about how it may best achieve the agency's mission vis-à-vis the COVID-19 hazard in the workplace, and to request that OSHA terminate, or at the very least suspend, the current rulemaking related to its "COVID-19 Vaccination and Testing: Emergency Temporary Standard," Docket No. OSHA-2021-0007, published in the Federal Register on November 5, 2021.

As a reminder, 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, 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.

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 two years, and since the rollout of safe and efficacious vaccines last year, the members of our Coalition have been deeply involved in the campaign to achieve a vaccinated US workforce. The recommendations and concerns we share today in this letter and the attached comments, represent the collective wisdom of employers and the essential employees who have worked through this national health crisis.

Suspend the Rulemaking for a Permanent COVID-19 Rule

We recommend that OSHA suspend this rulemaking and not otherwise pursue a permanent COVID-19 regulation based on OSHA's COVID-19 Vaccination, Testing, and Face Coverings Emergency Temporary Standard (ETS) because of the Supreme Court's January 13, 2022 decision in the consolidated cases, *National Federation of Independent Business, et al. v. Department of Labor* and *Ohio, et al. v. Department of Labor*, reinstating a nationwide stay of the ETS. Based on the reasoning in the Court's majority opinion, it seems clear that the Court intended to restrict OSHA's authority to implement any standard that regulates COVID-19 in a manner similar to the underlying ETS – whether it be an emergency temporary one or a permanent rule.

For purposes of the current rulemaking, it is important to recognize that the basis for the Supreme Court's decision was not one of form; i.e., OSHA's exercise of its *emergency* rulemaking authority, but rather one of subject matter. Accordingly, unless Congress provides to OSHA a more explicit delegation of authority to regulate the COVID-19 hazard in the workplace, as demanded by the Court, continuing this rulemaking process would not be an effective use of OSHA's or the regulated community's time and resources.

The Coalition understands that the Supreme Court's decision does not necessarily prohibit OSHA from regulating the potential hazard of COVID-19 in the workplace in all circumstances, specifically where there are "occupation-specific risks." But if OSHA wishes to pursue a programmatic standard that comports with the limitations set by the Supreme Court, the Coalition asserts that this should be done through a new proposed rule that comports with the Supreme Court's majority opinion. Agree or not, to pursue a rulemaking based on *this particular proposed rule* would be a waste of OSHA's precious resources and highly burdensome on the regulated community. To be found legally permissible, a final permanent COVID-19 standard would necessarily need to differ materially from the current ETS, and therefore could not be considered a "logical outgrowth" of the current proposal. Therefore, the current proposal should be withdrawn while OSHA regroups and considers the full legal ramifications of the Supreme Court's position on OSHA's authority to regulate COVID-19 in the workplace.

Under the circumstances, although the Coalition believes that the appropriate next step is a suspension or termination of this rulemaking, because the agency has yet to announce its intentions, and in the event OSHA is still intending to pursue a permanent COVID-19 rule similar to the Vaccinate-or-Test ETS, the Coalition submits the attached substantive comments responsive to OSHA's request in Docket No. OSHA-2021-0007.

Cooperative Programs and Alliances In Lieu of General Duty Enforcement

Following the Supreme Court's decision to stay the Vaccinate-or-Test ETS, Secretary of Labor Walsh issued a statement indicating that OSHA believes the Court's ruling was limited to only OSHA's rulemaking authority, and that the Court had not intended to also restrain OSHA's legal authority to enforce COVID-19 issues in the workplace:

“Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the Covid-19 National Emphasis Program and General Duty Clause.”

It is unclear to the Coalition whether the Supreme Court’s decision was intended to be limited to OSHA’s rulemaking authority. It is, of course, possible that the Court similarly intended to require a more explicit delegation of authority from Congress to allow OSHA to address this same hazard by enforcement. While that question may be left for another court and for another day, we encourage OSHA to work with the regulated industry and to rely primarily on the other tools it has available to address the COVID-19 workplace hazard.

For example, we recommend OSHA seriously consider the use of its Alliance Program to achieve its mission of protecting workers in this context. The creation of an Alliance(s) with OSHA, industry, and labor, and/or development of other cooperative programs to work together with employers and employees to evaluate and promote best practices and procedures to effectively address potential hazards of COVID-19 in varied work environments would be highly effective. In that regard, OSHA could consider an approach similar to, but less formal than its VPP and SHARP programs, where employers who voluntarily implement extra-regulatory COVID-19 controls (e.g., the kind of COVID-19 Prevention and Response plans called for by OSHA’s first COVID-19 ETS for healthcare), or provide vaccination-incentives (e.g., providing PTO and paid recovery time), are relieved of potential COVID-19 related enforcement.

The Coalition would welcome an opportunity to discuss with OSHA in more detail this and other recommendations we have.

However, to the extent OSHA does still intend to engage in enforcement of the COVID-19 hazard in general industry non-healthcare workplaces, either under the OSH Act’s General Duty Clause or other specific regulations, the Coalition strongly recommends that OSHA provide greater clarity as to its expectations of employers by way of updated COVID-19 workplace guidance that addresses at least the following issues:

- Acknowledge that employers may, in all instances, without individual updates from OSHA, follow updated CDC guidelines about isolation and return-to-work (and other COVID-19 prevention and response protocols), rather than risking enforcement by OSHA for not continuing to adhere to any stagnant, outdated workplace guidance that OSHA has issued or issues in the future. This will allow employers the flexibility to align with evolving recommendations from the CDC based on updated science about transmission and to account for the changing nature of new variants or other factors recognized more quickly by the CDC than by OSHA.
- Clarify OSHA’s own guidance about expectations for face coverings in workplaces to follow the approach adopted by OSHA in its Vaccination, Testing, and Face

Coverings ETS – that face coverings were intended only to be mandatory for workers who are not fully vaccinated – particularly where employers take steps to encourage vaccination (i.e., continuing to offer PTO to get vaccinated and paid sick leave to recover from any adverse effects of vaccination). In the collective experience of the Coalition, the ability of employees to work without a face covering has been by a large margin, the most effective incentive for employees to get vaccinated.

- We also encourage OSHA to clarify its expectations to include maximum flexibility about the types of face coverings that it deems sufficient in circumstances where masking may be required. Mandating certain types of masks, such as respirators or masks that meet an ANSI standard (through General Duty Clause or PPE enforcement) will only exacerbate the challenge of ensuring employee-compliance and/or result in diminishing supply where those types of respiratory PPE are most needed.
- Allow employers to credit N95 use to avoid a determination that a close contact exposure has occurred, even if the N95 use is on a voluntary basis, i.e., exempt from the definition of a close contact or from quarantine expectations, any employee wearing an N95 or higher form of respiratory protection, whether mandatory or voluntary-use. Thus, even if OSHA does not assert in its guidance that N95s must be used, employers will be encouraged to permit their use and, potentially, even supply them for voluntary use by employees.
- Express OSHA's intent to exercise (at least temporarily during the height of the Omicron surge) enforcement discretion about recording COVID-19 cases on 300 Logs to allow employers to redirect the substantial resources they are currently wasting on work-related assessments, to instead focus on responding to the challenges created by the highly infectious Omicron variant. The reason that recordkeeping has been so resource-consuming is that identifying the specific exposure that caused a COVID-19 infection is every bit as challenging as identifying the source of the common cold or the flu, especially during the nationwide Omicron surge. The viruses are invisible and ubiquitous, and spreading unabated in all areas where individuals may be present, certainly not just in workplaces. It was for that reason that, by regulation, OSHA exempted the cold and flu from injury and illness recordkeeping. There is also nothing to gain from recording these cases as the limited information on the 300 Log does not help improve workplace controls or really tell the employer anything about unique hazards in the work environment. Accordingly, at least until the Omicron surge abates, we strongly encourage OSHA to grant employers relief from having to assess every single COVID-19 case for recordability, and at least return to the COVID-19 recordkeeping guidance that had been in place at the very beginning of the pandemic.
- If the requirement to record COVID-19 positive cases is not wholly eliminated, at least limit recordkeeping and reporting requirements for COVID-19 positive cases to unvaccinated employees. Such a limitation would incentivize employers to encourage vaccination, while still ensuring the work-related cases that have the most potential for serious health outcomes are evaluated for work-relatedness and

recorded and/or reported to OSHA. This also provides an avenue to limit the extraordinary resources that are presently required to assess work-relatedness of every single COVID-19 positive case.

- Eliminate distancing and cleaning/disinfection recommendations from OSHA COVID-19 workplace guidance based on the current scientific understanding that these measures do not materially impact the potential for workplace spread of COVID-19. Although employers may choose to implement these measures as part of their overall engineering and administrative controls, the Coalition urges OSHA to be clear in its guidance that employers will not be expected to implement these methods in order to avoid a potential violation of the General Duty Clause, or any other relevant regulation.
- Memorialize that vaccination documentation and COVID-19 screening data do not need to be maintained as (or do not constitute) medical records under 29 C.F.R. 1910.1020(d)(1)(i), and therefore, do not need to be kept for the period of employment plus 30 years.

The Coalition welcomes the opportunity to provide additional information or more detailed recommendations if OSHA would find that helpful.

Sincerely,

A handwritten signature in blue ink that reads "Eric J. Conn". The signature is written in a cursive style and is positioned above a horizontal line.

Eric J. Conn
Chair, OSHA Practice Group
Conn Maciel Carey, LLP

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Re: Comments on OSHA's COVID-19 Vaccination and Testing; Emergency Temporary Standard; Docket No. OSHA-2021-0007

Dear Assistant Secretary Parker,

On behalf of the *Employers COVID-19 Prevention Coalition* (the Coalition), we submit the following comments on the Occupational Safety and Health Administration's (OSHA) "COVID-19 Vaccination and Testing: Emergency Temporary Standard" (ETS), Docket No. OSHA-2021-0007, published in the Federal Register on November 5, 2021.

In light of the Supreme Court's decision to issue a stay of the ETS and the reasoning and rationale therefore, it is unclear whether OSHA plans to proceed with its rulemaking to establish a permanent COVID-19 rule based on the ETS or whether it even has legal authority to proceed with that rulemaking. Out of an abundance of caution, however, the Coalition has prepared the comments below in the event a COVID-19 rulemaking moves forward.

Introduction

The Coalition is composed of a diverse group of national employers and trade associations representing many industries, including manufacturing, construction, petroleum refining, 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. A common thread among our Coalition members is that they care deeply about their employees' health and safety.

Our Coalition members implemented COVID-19 prevention plans well before the first state's COVID-19 emergency rule and well in advance of OSHA's ETS. They have worked to mitigate the spread of the coronavirus in their workplaces. Our Coalition members have been on the frontlines fighting this pandemic for nearly two years, 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 try to achieve a vaccinated (and now boosted) 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 tend to be most effective at increasing vaccination rates, as well as those that tend to be 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 comments we share here represent the consensus view of Coalition employers and the essential employees who have worked through this national health crisis. Our motivation here is to ensure that, assuming OSHA is able to move forward with this or a similar standard, either as an emergency or permanent standard, such a standard 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 multiple provisions included in the ETS that serves also as a proposed rule for a permanent standard, with recommendations for implementation and enforcement of the ETS, as well as how to incorporate these provisions most effectively into a permanent standard:

1. Eliminate the requirement that employers observe employees administer and/or read the results of an Over-the-Counter (“OTC”) COVID-19 test for it to be considered an acceptable form of testing within the ETS's definition of “COVID-19 test.”
2. Clarify how accommodations should be handled under the ETS or a permanent standard.
3. Allow use of progressive discipline combined with additional COVID protocols for unvaccinated employees who cannot or will not submit to COVID-19 testing rather than prevent them from working.
4. Address the virtually inevitable shortage of COVID-19 testing materials and unavoidable delays in obtaining test results that are occurring and will worsen upon implementation of the standard 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.
5. Maintain the ETS's definition of “face covering” so that it does not include a

- requirement that face coverings meet the ASTM F3502-21 standard.
6. Establish specific paid time benefits for recovery from the ill effects of a vaccine.
 7. Provide greater flexibility to employers in how they verify and document employee vaccination status.
 8. Memorialize in the permanent standard that adverse reactions to vaccination are exempt from OSHA injury and illness recordkeeping no matter the employers' vaccination policies.
 9. Memorialize in the permanent standard that confirmed, work-related COVID-19 cases are only recordable if the case involves an unvaccinated worker.
 10. Provide a narrow qualified carveout for truck drivers as vital to maintaining the stability of the US supply chain.
 11. Reevaluate the costs associated with the weekly testing requirement.

I. The Requirement to Observe OTC Tests Should Be Eliminated.

The test observation requirement of the ETS places a significant compliance burden on employers. The objective of this requirement can be met in an alternative manner that does not pose undue burden on employers that may make use of OTC tests – a form of COVID-19 testing in which the Administration has recently made significant investment – infeasible. As currently written, employers have three options to comply with the ETS's weekly testing requirement: (1) undertake the administration of COVID-19 testing themselves; (2) contract with a third party for testing; or (3) place the burden of compliance on employees.

Employers who undertake the first option will face many challenges, some of which may be insurmountable from an administrative and/or cost perspective. With approximately 40 percent of the United States population yet to be fully vaccinated, millions of employees will need to be tested weekly under OSHA's ETS. With this option, the most efficient way to accomplish testing would be to gather large numbers of employees in a single location that facilitates an employer representative, or multiple representatives, observing administration of the test, and ensuring that the tests are taken correctly (per the directions provided) to avoid having to constantly facilitate testing throughout the day/week. Even under this scenario, onsite testing presents a monstrous administrative challenge requiring significant resources, and also presents challenges from a virus transmission standpoint. The observation requirement also creates a potential COVID-19 exposure situation for employer representatives/observers. For instance, when the employee being tested removes their mask to complete the test and then remains in the same location as the observer for at least 15 minutes or more (the time it generally takes to get the results from an OTC test), the employer representative(s) designated to observe could be unnecessarily put at risk. Similarly, in-person administration and/or reading of test results requires a potentially COVID-positive individual to enter the workplace or some designated area of the workplace, placing anyone with whom they may have contact, including other workers gathered for the purpose of weekly COVID-19 testing, at risk beyond just the person observing the testing.

Beyond this, employers will face significant costs related to this observation requirement, particularly because of the potential that the testing period observed by the employer would be compensable time. Specifically, the Department of Labor (“DOL”) has guidance indicating that the Fair Labor Standards Act (“FLSA”) requires employers to pay for time spent waiting for and receiving medical attention at the employer’s direction or on the employer’s premises during normal working hours. In light of the likely testing bottleneck that will inevitably occur at many workplaces, the compensable time associated with this process will be considerable, creating a substantial added expense associated with compliance for a part of the standard that is not supposed to create any financial burden for the employer.

The manner in which testing observation would likely have to occur also threatens an employer’s ability to keep vaccination status and testing results confidential in contradiction of the clear expectations of the ETS. By definition, employees gathered for weekly testing are not vaccinated. To maintain confidentiality of testing results, employers must limit the number of representatives it authorizes to proctor COVID-19 testing and create an infrastructure that permits its individual employees to take a test and get results without revealing those results to others. Under these circumstances, even large employers would have great difficulty proctoring multiple COVID-19 tests simultaneously, each week, without potentially sacrificing the confidentiality of results, particularly if employees have to wait with their test results and each other for an extended period of time while the results are reviewed by the designated observer.

As to the remaining options for testing – hiring a third-party administrator or placing the burden on employees to have their individual test proctored – they would require either that the employer bear even more significant costs associated with testing or rely on their individual employees to timely complete proctored or lab testing every week to remain operational. For many employers, the costs associated with using a third-party would be insurmountable. For example, as part of its efforts to prepare for implementation of weekly testing, one Coalition member received a cost estimate from a third-party that included a \$10,000 fee to set up a portal through which it would share results. This fee did not even account for the cost of actually completing weekly testing thereafter. And having to depend on each individual unvaccinated employee to, on their own accord, schedule, complete, and obtain testing results every week to be permitted to come to the worksite would create constant staffing issues and likely slowdowns or even full stops in operations.

In sum, the proctoring requirement creates an administrative nightmare, adds significant additional compliance costs, and may increase potential transmission risks. And it is completely unnecessary. OSHA elsewhere addresses the concern that underpins the reason the agency included the proctoring requirement, which is that employers may be given fraudulent test results from their employees. In the Preamble to the ETS, OSHA explains that the reason for the proctoring requirement is “to ensure the integrity of the result given the ‘many social and financial pressures for test-takers to misrepresent their results.’” See [Vaccination and Testing Preamble](#) (pg. 357). However, this concern is already addressed by the ETS in 29 C.F.R. Section 1910.501(j)(4), which requires all employers to inform employees of the prohibitions of 18 U.S.C. Section 1001 and Section 17(g) of the OSH Act, both of which provide for criminal penalties associated with knowingly supplying false statements or documentation. Rather than

transfer the burden to employers to make sure employees don't provide misrepresentative or fraudulent test results, employers simply should emphasize to their employees that doing so will be taken very seriously by the employer and by the United States government and pose potential criminal exposure for the employee.

Accordingly, the Coalition recommends eliminating the requirement that employers must observe employees administer and/or read the results of an OTC COVID-19 test for it to be considered an acceptable form of COVID-19 testing under the ETS.¹

II. Clarify How Accommodations Must be Handled under the ETS.

A. Clarify that Employees Can Bear the Cost of the Testing Option as a Reasonable Accommodation to Vaccine Resistance Based on a Religious Belief.

The Coalition urges OSHA to clarify its expectations for how reasonable accommodations be provided under the ETS and encourages OSHA to work with other federal agencies, including specifically the Equal Employment Opportunity Commission ("EEOC"), to explain the cost burden associated with an accommodation, whether the ETS shifts that cost burden to employees, and the impact of the availability of no-cost or reimbursable-cost testing in the context of a reasonable accommodation. Generally, under the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act ("Title VII"), the employer bears the cost of a reasonable accommodation and must provide a reasonable accommodation unless it creates an undue hardship on the employer. Based on the language in the Preamble to the ETS and the standard itself, it is unclear whether OSHA intends that cost burden be shifted to the employee to further the purpose of the ETS – to vaccinate the unvaccinated.

The ETS very clearly recognizes that employees required to get vaccinated or participate in weekly testing may be entitled to an exception from these mandates based on disability or a worker's sincerely held religious belief. *See* 29 C.F.R. 1910.501(d)(2)(Note 1 to paragraph (d)). However, in the Preamble to the ETS, OSHA also states that an employer would have to "*agree* to pay for COVID-19 testing as part of a reasonable accommodation or some other reason required by law." *See* [Vaccination and Testing Preamble](#) (pg. 260) (emphasis added). This seems to indicate that the cost of testing – even as a reasonable accommodation – may not *automatically* transfer to the employer. Such an interpretation is further supported by the fact that OSHA did not figure the cost of such reasonable accommodations into the economic feasibility analysis for this rule, despite its potentially significant impact.

Transferring the cost of testing to the employer where an employee requests a reasonable accommodation from being vaccinated would contradict OSHA's intent to put the burden for testing on the employee to encourage vaccination. A reasonable accommodation, particularly one based on religion under Title VII, creates a route by which employees can circumvent their responsibility to pay for weekly testing.

¹ If this provision is not eliminated, OSHA should provide clearer guidance as to how employers can meet the requirement that it observe employees taking and/or reading OTC COVID-19 Tests. The regulated community needs to better understand whether the ETS requires observation of **both** the administration and reading of the test results if the results of the test would have to be self-read (i.e., the results are not digitally reported) or if observation of either would be sufficient.

If OSHA intended to require such a burden transfer with the following language – “employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements” – that position should be expressly clarified in the standard or in interpretive guidance. But employers will certainly be less motivated to adopt a hard vaccine mandate for their employees if they will be subject to costs associated with weekly testing nonetheless for those that require an accommodation from vaccination based on disability or religion. Thus, the Coalition encourages OSHA, itself or through a joint effort with the EEOC, to confirm that such a cost burden would not automatically shift to the employer and would, instead, be evaluated as part of the interactive process and the undue hardship analysis.

This is particularly important in light of the announcement from President Biden that (1) individuals will be reimbursed by their health insurance plans for over-the-counter tests; and (2) approximately 25 million COVID-19 tests will be available to the uninsured at no cost through community health centers. Allowing employers to accommodate employees through reliance on these no-cost weekly testing options would further the Administration's intent in facilitating the detection and prevention of COVID-19 cases over the winter months and also would remove the cost barrier for employers who wish to implement hard vaccine mandates. It would also make it more likely that testing as an accommodation would not put an undue hardship on the employer. The standard for establishing undue hardship under Title VII for accommodations based on a sincerely-held religious belief is “more than a de minimis cost” to the employer – a fairly low bar that would likely be met in many cases related to the accommodation of weekly testing. Thus, guidance that makes clear an employer can rely on the no-cost testing options available to its employees for this type of accommodation would decrease the possibility that it would be an undue hardship at least from a cost perspective.

B. Clarify that State Laws Expanding Applicable Accommodations Are Preempted by the ETS.

The Coalition also asks that OSHA be more explicit about the state laws the ETS preempts or a permanent standard would preempt as several states have drafted and begun passing laws that permit a broader spectrum of permissible accommodations beyond sincerely held religious beliefs and disabilities. Numerous states have laws limiting an employer's ability to shift the cost of medical examinations or testing to the employee even outside the context of an accommodation. In FAQ #1.A. on the ETS, OSHA explains that the ETS “supplants the existing State and local vaccination bans and other requirements that could undercut the effectiveness [of the ETS].” However, it is unclear exactly what laws fall into the category of “undercut[ting] the effectiveness” of the ETS, like state laws that expand on the permissible forms of accommodation identified in the standard.

With this additional clarity and guidance, employers can more effectively understand expectations related to accommodations, which also will likely impact the decision as to whether to implement a vaccine mandate versus the vaccination or testing option.

III. Allow the Use of Progressive Compliance to Address Employee COVID-19 Testing Failures If Employers Mandate Masking and Other Appropriate COVID-19 Protocols.

The Coalition urges OSHA to provide flexibility to employers in addressing employee failures or

refusals to participate in weekly testing under the ETS. Specifically, OSHA's permanent standard should allow an employer to follow the company's internal compliance process for their employees in enforcing the vaccination and testing requirements. For at-will employees who fail to provide proof of vaccination or a negative test result by any applicable deadlines mandated by the ETS, the ETS should provide private employers flexibility to implement a compliance process that will encourage employee compliance through early education and counseling, with continued non-compliance addressed by a period of suspension/removal from the workplace and/or termination for repeated failures to comply.

Flexibility to implement a compliance process will help employers avoid significant disruption in staffing while encouraging and facilitating compliance by employees and require removal from the workplace only after multiple failures to comply. This approach will give employers time to further educate employees about the vaccine and OSHA's new requirements and to encourage them to receive the vaccine or comply with the testing requirements. In lieu of keeping untested employees out of the workplace, an employer could mandate face masking requirements and social distancing for those employees, as well as implement and/or maintain engineering and administrative controls, such as, but not limited to, enhanced ventilation, physical barriers, limiting the number of workers assigned to a shift, and ensuring workstations are socially distanced. These temporary alternatives could be specified in the permanent standard.

Also, a significant number of the Coalition members have unionized workforces. The ability to negotiate a progressive discipline approach may be necessary to ensure consistency with collective bargaining agreements already in place. When new terms and conditions of employment, such as vaccination and/or testing requirements, are under consideration, voluntarily or by a mandate, employers must consider their duty to bargain.

On November 10, 2021, the NLRB Office of the General Counsel issued a memo (Memorandum OM 22-03) reminding employers that they must consider their bargaining obligations in light of the various federal and state mandates being issued. The General Counsel takes the position that covered employers have decisional bargaining obligations concerning aspects of the ETS that affect the terms and conditions of employment and that provide employers with certain choices regarding implementation. The General Counsel acknowledges that an employer has no duty to bargain where a specific change in terms and conditions of employment is statutorily mandated, but an employer cannot act unilaterally if it has some discretion in implementing those requirements, like the ETS provides. Undoubtedly, the ETS affects terms and conditions of employment, especially considering the potential to impact the continued employment of employees covered by it, as would be true for the permanent standard. As a result, removing an employee from the workplace or terminating their employment may not be so straightforward where there is a grievance process in place, and a progressive compliance process would address this issue.

Even more fundamental, if employers are unable to implement a progressive compliance process, it may be difficult to continue normal business operations where employees cannot or will not comply with the rule's requirements. A sudden loss of any portion of an employers' workforce could have enormous impacts on production and operational capabilities, especially given the severe labor shortage many industries are facing. The COVID-19 pandemic has exacerbated the pre-existing shortage in many industries, such as manufacturing, shipping, and

warehousing, and it is becoming increasingly difficult to attract and maintain talent. We have already witnessed and experienced what this labor shortage has done to employers and the United States economy. For example, the pervasive supply chain issues that have plagued the country for well over a year persist, and there appears to be no solution in sight. Further handcuffing businesses by forcing employees to comply with a vaccine or test mandate by a date certain will only increase the difficulties employers have faced in retaining talented employees and running a safe and successful business. A progressive compliance process will provide both employers and employees ample time to comply with the rule's requirements without causing significant disruptions or perhaps even closure of the workplace. It would also place employers on a more level playing field, considering that some regions of the country are more resistant to the vaccine than others, crippling the employers in those regions disproportionately if progressive compliance is not allowed.

There is also precedent for this type of flexibility in President Biden's Executive Order 14043. Specifically, the Safer Federal Workforce guidance indicates that, in instances in which a federal employee refuses to be vaccinated or provide proof of vaccination, the agency should initiate an enforcement process to work with employees to achieve their compliance:

[A]gencies 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.

The Executive Order recognizes the operational needs of the agencies and the reality that business cannot come to a complete halt. Implementing a similar progressive discipline and education process under the ETS will provide employers the opportunity to retain their workforce while fulfilling the purpose of the ETS.

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

Testing is not readily available at the level required by a permanent COVID-19 standard. The ETS has not yet been implemented and some employers have already experienced extremely slow turnaround times for receiving test results. Many of our Coalition member companies also have had some difficulty procuring large orders of test kits for their employees. Both the likely delays in receiving test results as well as the delays or unavailability of self-test kits, will severely frustrate weekly, prophylactic testing programs.

The Coalition urges OSHA to explicitly recognize in a permanent standard that in locations and at times when employers or employees are experiencing demonstrable testing supply limitations or unusually long delays in obtaining test results – as they likely would if the ETS's testing requirements were in effect today – it will refrain from instituting enforcement activities against the employer for permitting employees to return to the worksite without a negative test result where the employer can show good faith efforts to

comply and *as long as* the employer has implemented mandatory masking requirements indoors for those employees who cannot show proof of a negative test.

Another option to identify in the permanent standard is to permit the employer to use existing practices such as masking, social distancing, and sanitizing, as well as implementing a screening process for unvaccinated workers when testing supplies are unavailable to avoid a potential enforcement action for failure to test. Indeed, where employees are able to work at great distances from one another, such an administrative control would result in a safer workplace than point-in-time testing once per week. Specifically, employees who rarely encounter others or are able to socially distance while performing their job functions, likely benefit more from rules that promote continued distancing, limiting sources of exposure, rather than a rule that requires weekly testing. Thus, permitting those employees to continue to work where/when testing is unavailable is unlikely to impact their safety.

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 and that should be explicit in the permanent standard. Not accounting for this likely consequence of a permanent standard could result in catastrophic operational disruptions for businesses and corresponding extreme harm for their employees.

As to the current ETS, should the judicial Stay be lifted, the Coalition encourages OSHA to address this situation through its enforcement guidance. Specifically, the Coalition asks that OSHA issue guidance to its enforcement personnel directing them to exercise enforcement discretion (i.e., to not issue citations for non-compliance) if employers/employees, depending on who is responsible for obtaining the tests and results, can demonstrate (1) good faith efforts to obtain tests for use to comply with the ETS; (2) receipt of a timely test result was delayed through no fault of the employer or employee; or (3) testing was practically unavailable in a particular community during a specified time period *and* (4) the employer is requiring those employees who cannot meet the testing requirement to be masked inside the workplace.

The current FAQ that addresses this issue is ambiguous and insufficient. Explicit guidance is needed regarding how and when enforcement personnel must exercise discretion, as well as the type and form of support an employer/employee would be expected to provide to show its good faith efforts to comply. Never has the importance of this been clearer than after the recent shortages experienced nationwide in testing supplies and extended delays in testing results. Indeed, at the end of last month, President Biden acknowledged that the United States did not have enough COVID-19 tests to meet demand related to increased spread of the virus through the omicron variant, and this occurred ahead of the inevitable increase in demand that will occur should a weekly testing requirement be implemented. Thus, the Coalition urges OSHA to establish clear guidelines for enforcement recognizing the testing challenges in this circumstance.

V. Face Coverings Should Not be Required to Meet the ASTM Standard.

The Coalition urges OSHA to adopt the current ETS definition of face covering in a permanent standard and not require that face coverings meet the ASTM F3502-21 standard. Under the current definition, a “face covering” means “a covering that: (A) completely covers the nose and mouth; (B) Is made with two or more layers of a breathable fabric that is tightly woven (i.e., fabrics that do not let light pass through when held up to a light source); (C) Is secured to the head with ties, ear loops, or elastic bands that go behind the head. If gaiters are worn, they should have two layers of fabric or be folded to make two layers; (D) Fits snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and (E) Is a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.” See 29 C.F.R. Section 1910.501(c). The definition also “includes clear face coverings or cloth face coverings with a clear plastic panel that . . . otherwise meet [the] definition.” See *id.* OSHA provides that “[f]ace coverings can be manufactured or homemade, and they can incorporate a variety of designs, structures, and materials[,]” and that “[f]ace coverings provide variable levels of protection based on their design and construction.” See OSHA [Vaccination and Testing ETS FAQs #8.A.](#)

The Coalition believes that OSHA was well-informed to incorporate this definition of face covering in the ETS as it aligns with CDC recommendations. Per the CDC, different types of masks can be used to protect oneself and others from getting and spreading COVID-19. See CDC [Types of Masks and Respirators](#) (updated January 14, 2022); see also CDC [Your Guide to Masks](#) (updated October 25, 2021). These include cloth masks, disposable masks, and masks that meet a standard, such as ASTM F3502-21. See CDC [Types of Masks and Respirators](#) (updated January 14, 2022). Coalition members support the flexibility provided by the current ETS definition and CDC guidance.

The Coalition believes it would be unwise to restrict authorized face coverings to only those that meet the ASTM F3503-21 standard for a number of reasons. First, serious concerns exist or will soon develop regarding supply chain shortages if every unvaccinated worker were required to wear only ASTM F3502-21 masks. In discussing its consideration of the ASTM standard for purposes of the ETS, OSHA states that it:

has always considered recognized consensus standards, with design and construction specifications, when determining the PPE requirements of the agency's standards. The OSH Act (29 U.S.C. 655(b)(8)) requires the agency to generally give deference to consensus standards unless setting its own specifications would better effectuate the purposes of the Act . . . [T]he agency has determined that it is infeasible for the timeframe of [the] ETS to incorporate this consensus standard or to otherwise establish additional criteria for face coverings beyond that already recommended by the CDC due to the time needed to manufacture and distribute any new product.

See OSHA [Vaccination and Testing Preamble](#) (p. 430). This same concern would apply if a permanent standard included this requirement. Significant efforts would have to be made to ramp up production of ASTM F3502-21 face coverings to avoid possibly catastrophic shortages as were seen with respirators and fit-testing equipment through nearly all of 2020. Whether

such efforts could be made is yet to be seen, but it seems wholly unfounded and unnecessary to limit permissible face coverings in this manner.

Additionally, given that unvaccinated employees are (rightly) responsible for providing their own face coverings so as to incentivize vaccination under the ETS,² the Coalition is concerned that, if the Permanent Standard were to incorporate the ASTM 3502-21 standard, employees would buy the wrong type of mask or that the costs associated with such masks would be overly burdensome. As was seen with the shortage of respirators in 2020, there will likely be a proliferation of fraudulent ASTM 3502-21 face coverings, and possibly exorbitant price gauging. There may also be a problem with scarcity and inability to obtain this specific type of mask as demand increases. An easy way to avoid this, consistent with the science, is to provide flexibility with respect to the acceptable types of face coverings, as accomplished under the current ETS definition and CDC guidance.

Second, the Coalition urges against incorporation of the ASTM 3502-21 standard because the CDC acknowledges that the ASTM 3502-21 mask should not be worn under certain conditions or for certain people. Specifically, the CDC states that people should not wear an ASTM 3502-21 mask if they have certain types of facial hair. Accordingly, there is no one-size-fits-all approach to face coverings, and flexibility is necessary in this regard.

Finally, the Coalition believes it is significant that face coverings serve not only a workplace purpose, but a public health purpose. That is, there is nothing unique to the workplace that makes it more hazardous with respect to COVID-19 transmission other than the fact that other people might be present, as other people might be present in any public space. Indeed, OSHA acknowledges this, stating that “employees may use their personal face coverings in a variety of circumstances on and off the job site as part of their everyday protection.” See OSHA [Vaccination and Testing Preamble](#) (p. 432). Given this, any requirement that face coverings meet a certain standard for workplace purposes intrinsically interferes with employees’ choice of face coverings to protect themselves outside of the workplace. Again, because COVID-19 is not a unique workplace hazard, and because there is no scientific basis for requiring face coverings to meet the ASTM 3502-21 standard, the Permanent Standard should maintain the ETS definition of face covering so that it does not include a requirement that face coverings meet the ASTM standard.

² Importantly, OSHA states, “As a general rule, OSHA has authority to, and does, require employers to bear the costs for protective equipment, among other worker protections, required by an OSHA standard. See, e.g., 29 CFR 1910.1018(j) (requiring the employer to provide protective clothing at no cost to the employee). However, in limited circumstances, OSHA has chosen not to require employers to pay for some forms of non-specialized protective equipment, such as every-day clothing, products providing weather-related protection, and non-specialized equipment that the employee wears off the job site. See 29 CFR 1910.132(h)(2)-(5). Like the analogous situations listed above, here, employees may use their personal face coverings in a variety of circumstances on and off the job site as part of their every-day protection. Because the types of face coverings permitted under this ETS are widely used and readily available, (see Technological Feasibility (Section IV.A. of this preamble)), employees will have no difficulty obtaining them . . . OSHA does not believe it appropriate to impose the costs of personal face coverings on an employer where an employee has made an individual choice to pursue a less protective option. For these reasons, OSHA has determined not to impose the costs of face coverings on the employer as a requirement under this ETS.” See [Vaccination and Testing Preamble](#) (p. 432-33).

VI. Paid Time to Recover from Ill Effects of the Vaccines

A. The Permanent Standard should set specific caps on the amount of paid time employers must provide for recovery from vaccine side effects.

To the extent the Permanent Standard includes a provision requiring employers to provide paid time off (“PTO”) for employees to recover from any ill effects of immunization, as the ETS currently does, the standard should set a specific cap on that PTO. The Coalition understands OSHA’s decision to include a reasonable amount of PTO to recover in the ETS, however, the Permanent Standard, unlike the current ETS, should set a defined cap on this time. The Coalition also urges OSHA to consider setting a more explicit cap in its enforcement guidance for the ETS that reflects the Coalition’s recommendations herein.

As set forth under the ETS, “employer[s] must provide reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination dose to each employee for each dose.” See 29 C.F.R. Section 1910.501(f)(2). Additionally, OSHA provides that it will presume that, “if an employer makes available up to two days of paid sick leave per primary vaccination dose for side effects, the employer would be in compliance with this [ETS] requirement.” See [OSHA Vaccination and Testing ETS FAQs](#) #5.D. This presumption, however, substantially exceeds what is recommended based on the science and available data from the CDC.

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 only after the second dose of a two-dose vaccine. This data supports that time off to recover from vaccine side effects should differ based on the specific dose (first or second in a two-dose series) and be tied to symptom severity (moderate to mild symptoms may not necessitate time out of work). 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
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Although OSHA does not provide for a specified amount of paid leave in the ETS, it relies on data from a study that found “the average unanticipated paid administrative leave required by individuals experiencing side effects” was “1.66 days for the first dose and 1.39 days for the second dose.” See [Vaccination and Testing Preamble](#) (p. 392). On this basis, OSHA states that 2 days of paid leave would meet the “reasonable time” standard for 29 C.F.R. 1910.501(f)(2). However, only 4.9% of those surveyed actually took unanticipated paid administrative leave after the first dose – a very low percentage – and just under 20% of those surveyed said they required unanticipated leave with the second dose. See Levi et al., September 29, 2021. That same study also found that for the Pfizer vaccine “the overall mean (SD) length of absence was 0.1 days (0.61) for the first dose and 0.3 days (0.79) for the second dose” and for Moderna “the overall mean (SD) length of absence was 0.1 days (0.58) for the first dose and 0.4 days (0.81) for the second dose.” See Levi et al., September 29, 2021. This is substantially less than the two days proposed by OSHA in its guidance and closer to what

we have suggested below.

Accordingly, the Permanent Standard 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 PTO to recover from side effects
2. Second Dose: maximum of eight hours of PTO 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.

Notably, there is support for these timeframes where paid leave for recovery from vaccine side effects has been specifically provided. For instance, under Washington, DC's COVID Vaccination Leave Emergency Amendment Act of 2021, employers must provide for a maximum of 8 hours of paid leave during a 24-hour period for recovery from side effects of the COVID-19 vaccine per each dose. Although this law does not account for the substantially lower occurrence of systemic reactions to the first dose, the Coalition urges OSHA to rely on available data to make that distinction in its guidance for the ETS and in a permanent standard.

Finally, in conjunction with establishing appropriate caps for leave, OSHA should provide guidance on the ETS and specify in any permanent standard what it means by the "regular rate" in the context of paid leave. The ETS specifies that an employer must provide paid leave to employees for each primary vaccination dose at the employee's "regular rate," but does not define that term. Is the intent that "regular rate" be defined the same as it is under the Fair Labor Standards Act ("FLSA")? If so, or if some other definition will apply, OSHA should clarify its intent for employers. Similarly, OSHA does not specify which rate should be used for paid leave required for recovery from ill effects of the COVID-19 vaccine. In the context of the current ETS, OSHA can use guidance to provide clarification to employers and can specifically address both issues directly in a permanent rule.

B. 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. Thus, the Coalition encourages OSHA to establish a carve out for the PTO requirement where it provides on-site vaccination access in a permanent standard.

VII. Provide Greater Flexibility in How to Document Vaccination Status.

The Coalition urges OSHA to provide employers with greater flexibility as to how to document their employees' vaccination status. Specifically, OSHA should adopt a broader definition of what constitutes acceptable proof of vaccination status and allow employers to designate which methods of proof are permissible. In addition to examining paper or photographed copies of vaccine cards or other official records of vaccination (whether provided by pharmacies, laboratories, public health departments, healthcare providers, or telehealth proctors), the permanent standard should permit employers to accept any other reasonable proof of vaccination status, including, but not limited to, employees' completed self-attestations (taken in writing or electronically). Additionally, any form of verification recognized by a state or local government agency should suffice.

Currently, the ETS permits an employer to accept self-attestation from an employee as the proof of vaccination required by 29 C.F.R. 1910.501(e)(2) only if they cannot obtain and produce other "acceptable proof" of vaccination. However, this limitation undermines the intent of this standard and is unnecessary based on the required content of the self-attestation form. First, in the Preamble to the ETS, OSHA recognizes that it will be "challenging for some members of the workforce, such as migrant workers, employees who do not have access to a computer, or employees who may not recall who administered their vaccines" to secure an acceptable form of vaccination documentation. *See OSHA Vaccination and Testing Preamble* (p. 376). Yet, OSHA requires that all employees attempt to secure what it has designated as an "acceptable proof" of vaccination before they can be permitted to sign a self-attestation instead. The process of attempting to obtain some form of acceptable proof of vaccination could take significant time, requiring the employer to spend needless resources to accommodate weekly testing of a fully vaccinated employee or prohibit the employee from returning to the worksite until proof of vaccination is acquired. This would be particularly problematic for employers who rely heavily on those employee populations OSHA has recognized may have greater difficulty in obtaining vaccination documentation, like migrant workers or those who do not have access to a computer.

Second, requiring an employee to obtain and provide some official record to show vaccination status seems unnecessary due to the very clear and strong language required in a self-attestation form on the consequences of providing false information. In the Preamble to the ETS, OSHA explains its concern with fraudulent representations of vaccination status and acknowledges that there is evidence of such fraud having occurred. *See OSHA Vaccination and Testing Preamble* (p. 377). OSHA addresses this in the context of a self-attestation form by requiring the form to include a certification from the employee that the

information they have attested to about their vaccination status is “true and accurate” and that any false information “may subject [them] to criminal penalties.” OSHA explains that this language makes each employee who signs an attestation aware that they are being held to the same standard of truthfulness as if they provided another form of proof. *See OSHA Vaccination and Testing Preamble* (p. 378). Additionally, OSHA requires employers to share information with its employees regarding the criminal consequences of providing false information to an employer regarding his/her vaccination status. Employees will be well aware of the consequences of misrepresentation in this area. Accordingly, a self-attestation form should be permitted in the same manner as any other form of proof of vaccination status.

Ultimately, it should be the decision of the employer whether to permit employees to self-attest to their vaccination status and an employer can certainly choose to require employees to provide some official record of documentation. This is particularly true as there are not really adequate programs to track vaccination status (or testing records) in a manageable way, making it even more important for individual employers to have substantial flexibility in how they confirm vaccination status. The Coalition asserts that this decision should be within the discretion of each individual employer as the entity in the best position to know what will be most effective and feasible for its workforce.

Likewise, if an employer has a record that the employee was vaccinated or tested in the workplace, or the employer can and chooses to access an employee's vaccination records directly from a State's immunization database, the employer should not have any additional obligation to require some other proof directly from the employee. As long as the vaccination record contains the information specified in 29 C.F.R. 1910.501(e)(2)(v), the permanent standard should permit this type of documentation as well instead of limiting proof to documents or records provided by the employee.

VIII. 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 encourage their employees to get vaccinated. One of the ways OSHA removed disincentives, and in fact incentivized 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 2021 FAQ, days away from work or medical treatment in response to adverse effects of a COVID-19 immunization are not recordable on the 300 Log.

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. Indeed, the ETS specifically focuses on this objective. 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, without stakeholder input, by memorializing this guidance in a permanent standard. That is, OSHA should include in the regulatory text that adverse effects from COVID-19 vaccinations, even if they result in one of the general recording criteria, need not be recorded on OSHA 300 Logs.

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

Similarly, to continue to motivate and incent employers to assist the Administration in "moving the needle" on employee vaccinations (i.e., 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 permanent standard an exception to recording those COVID-19 cases that involve workers who are fully vaccinated on the 300 Log.

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 to exclude from 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 permanent standard the following required elements for a COVID-19 case to be recordable:

1. It is a confirmed case – meaning the COVID-19 diagnosis is confirmed by an FDA-approved laboratory-based PCR test;
2. The case meets one of the 29 C.F.R. Section 1904 general recording criteria;
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 low compared to the unvaccinated and there are exponentially fewer instances of serious illness resulting in hospitalization or death among the vaccinated. This last point is particularly important as, in many cases, vaccinated individuals are either asymptomatic or have minor symptoms that would not result in a recordable outcome if isolation – often resulting in days away from work – was not

required.

Moreover, when an employer has worked to encourage vaccination under the ETS, and employees have in fact been vaccinated as recommended by the ETS, it seems contradictory to the intent of the ETS and any permanent standard that would encourage vaccination to record cases of infection in vaccinated workers. In other words, the vaccinated employee (and the employer who encouraged, facilitated, or required the vaccination) has taken every recommended step by receiving the vaccine. To then include that infection as a recordable injury is recording an event that cannot be impacted any further, even by following exactly the recommendations of the ETS and the CDC. The goal of recordkeeping is to monitor trends that evidence a problem in the workplace in need of a solution by the employer. The infection of vaccinated workers is not a correctable problem in the workplace or in any other situation. Right now, vaccination is the absolute most effective solution to addressing the potential hazard from COVID-19 and there is nothing to gain by recording infections amongst the vaccinated population of workers.

Thus, this standard would still allow employers to capture cases of COVID-19 in the work environment, while also providing greater motivation to employers to promote or require vaccination among their workforce.

IX. The ETS and Any Permanent Standard Should Provide a Narrow Carve Out for Truck Drivers.

Our Coalition includes both individual employers as well as 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. While we support the Administration's vaccination effort and continue to be deeply committed to increasing vaccination rates among our workforces, our members are very concerned about the potential impacts of a mandated vaccination requirement -- even with a testing option included -- on a narrow slice of US jobs that are necessary to maintain the stability of our Nation's critical 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). The impact of that resistance to a vaccine mandate among these workers on our Nation's supply chain potentially could be disastrous, and the need for vaccination for this narrow, isolated group of employees is less than for those working inside highly populated buildings. As one member put it: "logistics and transport is performing very poorly right now and the last thing we need is another barrier to entry."

Additionally, drivers have specialized skills and licenses that cannot be easily or quickly backfilled with other non-driver employees. Replacing licensed and experienced drivers with non-driver personnel is a timely proposition, requiring extensive specialized training and obtainment of appropriate commercial driver certifications. 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. The industry is already feeling the impacts of "the Great Resignation." Another mass resignation in this space, or even a loss of any non-de

minimis percentage of drivers would create a nationwide crisis that could not be timely resolved. The impact of this on the Nation's supply chain, never mind individual companies, would be immediate and significant.

The Coalition acknowledges and appreciates that OSHA has now directly clarified that truck drivers are exempted from the requirements of the ETS under 29 C.F.R. 1910.501(b)(3) per FAQ #2.L, to the extent they do not work in teams or routinely enter buildings where other people are present. See [OSHA Vaccination and Testing ETS FAQs #2.L](#).³ The Coalition urges OSHA to make the exemption for truck drivers an express regulatory exemption in a permanent standard for the reasons provided in FAQ#2.L, but also per their essential role in maintaining the stability of the Nation's supply chain. By allowing an exemption for truck drivers who fall within this narrow, clearly defined critical infrastructure sector, the Permanent Standard would avoid a significant unintended adverse consequence—a crisis in the supply chain – 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.⁴

X. OSHA Significantly Underestimated the Costs Associated with COVID-19 Testing

Finally, in considering how it should implement a permanent standard, the Coalition seeks to make OSHA aware that it has vastly underestimated the cost to employers for weekly testing, even with the ETS allowing the burden of payment to be put on employees. Anecdotal but significant evidence collected by Coalition members to date demonstrates that, in many cases, employers will not be able to depend on their workforce to independently undergo and pay for COVID-19 testing. Thus, even though employers are authorized to place testing costs on their employees, the vast majority of our Coalition members, and we suspect US employers in general, are unwilling to do so, either because the cost burden employees would face is untenable for them or based of a concern that a significant portion of their employees simply will not comply with the testing requirement unless covered and controlled by the employer.

³ A similar justification as has been provided in FAQ #2.L for truck drivers would also support an exemption from the ETS's requirements for forklift drivers who operate in open air warehouses. Open air warehouses are often sprawling, usually 60,000 sq. feet or more, allowing forklift operators to work at great distances from coworkers. They typically have 18' sidewalls and multiple overhead doors of considerable size (such as 10x10' or 10x12') which remain open throughout the work hours, allowing for substantial air flow and ventilation. This is coupled with the fact that when not operating alone in the cab of the forklift inside the warehouse, the forklift driver is outside, loading the truck, and thus viewed identically to the truck driver's work outside the cab of the truck. For these reasons, OSHA should similarly consider a similar exemption for forklift drivers who operate in open air warehouses or include forklift drivers in the general truck driver exemption.

⁴ Additionally, the Coalition would like to flag an issue related to truck drivers and cross border traffic (i.e., travel from Canada or Mexico to the US not being allowed without proof of vaccination). To the extent that OSHA has any authority or influence over this issue, the Coalition asks for flexibility in allowing unvaccinated US truckers to cross borders, again, for all of the reasons set forth above. With about 95 percent of Canadian truckers vaccinated versus only about 50 percent of US truckers vaccinated, any rule barring US truckers from freely moving across borders without proof of vaccination would impose an enormous burden and disadvantage on US food supplies and the US economy.

And the costs to purchase tests to implement weekly testing for the significant portion of United States workers who remain unvaccinated is well beyond that contemplated by OSHA. For example, one Coalition member, a national retail chain with over 100,000 employees, estimates that weekly testing of unvaccinated employees (including the costs associated with observation/proctoring) will cost about \$4 million per week. Another coalition member, who researched different testing options, found the least expensive option would be a test proctored by a telehealth provider at a cost of \$7.00 per test. With about 50,000 unvaccinated employees, this would still generate a cost of about \$1.5 million per month.

A Coalition member, which operates in California, calculated that the cost burden for weekly testing would be just over \$2 million annually for just its California-based operations. Because the California Labor Code requires that employers pay for medical testing and the time it takes to actually get tested, the total cost burden would fall solely on the employer in that state. California is not the only state where such cost transfer laws exist; states such as Kentucky and Illinois also generally prohibit employers from requiring employees bear the expense of medical testing or examinations required as a condition of employment. For employers that employ part-time employees as a large part of their workforce, these costs are even more impactful because it would likely be economically infeasible for such employers to pay for testing for their workforce. But it would also be economically infeasible for many of those part-time workers to afford the cost of testing themselves, resulting in an inability to hire workers or a high attrition rate.

Accordingly, under the circumstances, OSHA's economic impacts analysis for the permanent standard should assume that a significant portion of medium to large employers will cover the costs of testing as this seems to be the only realistic way to remain operational. OSHA's cost assessment should therefore evaluate and account for both the costs of test kits as well as the cost to build an administrative program to implement testing. Certainly, 100 percent of these costs should be captured for covered employers in states that have medical testing cost transfer laws.⁵

Finally, OSHA's cost estimate does not effectively consider other potential associated costs to employers. For instance, staffing considerations, turnover, and related tracking challenges create additional expense. Specifically, in many industries, including retail, there is high skepticism and resistance to vaccination, resulting in a large portion of those employees being unvaccinated. This means that a substantial amount of the employee population is subject to weekly testing without access to alternatives such as remote work, as retail positions, like store associates and distribution center employees, cannot perform their required duties remotely. There also is significant turnover in this sector that would require tracking and retention of testing records for a much greater number of rotating employees. Thus, the administrative demands on employers in these industry sectors is greater and the cost of the necessary infrastructure, not to mention the effect of

⁵ OSHA should also include costs experienced by employers in State Plan states, such as California, which while not in the jurisdiction of federal OSHA will be subject to a state COVID-19 standard based on the OSH Act requirement that state plan states adopt a standard "as effective as" federal OSHA standards.

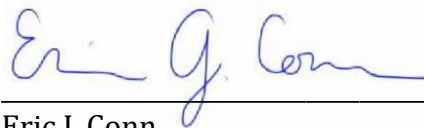
insufficient staffing, more substantial.

In addition, employers who use on site testing will have to account for the costs of waste disposal. Based on their use, it is likely that test swabs need to be handled as medical waste for disposal purposes. In most cases, this would entail hiring a third-party medical waste disposal service and it is our members' understanding that the expense of such a service can be very significant. All of these costs should be captured, assessed, and evaluated in OSHA's economic impacts analysis for a permanent standard.

CONCLUSION

The Coalition respectfully requests that the Administration give meaningful consideration to these comments and recommendations in considering future enforcement of the ETS, if it survives legal challenge, and in the development of any permanent COVID-19 standard.

Sincerely,



Eric J. Conn
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