



January 19, 2022

The Honorable Douglas Parker
Assistant Secretary
United States Department of Labor
Occupational Safety & Health Administration
200 Constitution Avenue, NW
Washington, D.C. 20210

By electronic submission to regulations.gov
Docket No. OSHA-2021-0007

Re: Comments on OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard; OSHA-2021-0007

Dear Assistant Secretary Parker:

The National Retail Federation (“NRF”) submits these comments in response to the Occupational Safety & Health Administration’s (“OSHA” or “Agency”) November 5, 2021, Emergency Temporary Standard on COVID-19 Vaccination and Testing (“ETS”). NRF recognizes that the ETS has been stayed by the United States Supreme Court. NRF submits these comments to provide information to OSHA regarding the type of substantial operational and financial burdens on retail businesses that are created by the rule in the event that the rule becomes enforceable in the future. NRF also urges the Agency to consider the issues raised in this letter when considering a permanent infectious disease standard.

I. NRF Background

NRF is the world’s largest retail trade association, representing all aspects of the retail industry. Its membership includes discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers. Retail is the nation’s largest private sector employer, supporting one in four U.S. Jobs – 52 million working Americans. Contributing \$3.9 trillion to annual GDP, retail is a daily barometer for the nation’s economy. NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including before the legislative, executive, and judicial branches of government.

II. Summary of NRF Position

NRF shares OSHA’s interest in providing safe workplaces. To that end, NRF welcomes OSHA’s expertise in the form of industry-specific guidance to help American workers and businesses navigate the remaining threats posed by COVID-19. NRF would welcome the opportunity to share its experience and industry knowledge to safeguard the interests of its members. NRF would be particularly interested in sharing lessons learned from COVID-19 to

assist the agency with any consideration of rulemaking associated with a permanent infectious disease standard.

III. The ETS Will Place Unnecessary Strain on an Understaffed Retail Workforce

NRF opposes the ETS, because it will exacerbate existing labor shortages and supply chain problems. As of September 2021, there were over 10 million open jobs across the economy, more than a million of which were in the retail industry.¹ The nation remains 4.2 million jobs short of pre-pandemic levels. Labor force participation remains depressed.² As a result, retailers nationwide are struggling to find and retain employees to meet demand. It is against this backdrop that our industry raises several concerns related to these mandates.

First, obtaining confidential medical information from all employees, scrutinizing the integrity of documentation provided, and dealing with objections to such requests is a time-consuming process. Large, sophisticated retailers with thousands of employees who have planned for the ETS for months reported to us that their vendors cannot process vaccine documentation in a month. For smaller retailers, similar hurdles exist as they attempt to develop systems to handle this incredible volume of confidential information in a matter of weeks. Because they must, retail employers have begun these steps and have shared with NRF the enormous strain this extra work has placed on human resources personnel and members of management. This work is diverting their time from mission critical issues such as filling open job slots and addressing supply chain disruptions towards collecting vaccination status information. Regrettably, obtaining vaccination data is not just a simple administrative exercise, particularly given some employees are reluctant to even share vaccine information.

This reluctance is part of the overall issue of vaccination hesitancy. Tellingly, nearly 5% of federal government workers have refused to comply with President Biden's federal worker vaccine mandate.³ The retail industry directly employs nearly ten times as many workers as the federal government: 32 million.⁴ Even assuming retail achieved 95% compliance, much less likely in the private sector, nearly 2.6 million retail workers would be out of compliance with a vaccine mandate. This leaves retailers with the choice of implementing a costly, likely infeasible testing program or terminating workers.

¹ See U.S. Bureau of Labor Statistics, Job Openings and Labor Turnover Summary – November 2021, available at <https://www.bls.gov/news.release/jolts.nr0.htm> (last accessed January 17, 2022).

² See U.S. Bureau of Labor Statistics, Employment Situation Summary, *The Employment Situation, October 2021*, available at <https://www.bls.gov/news.release/empsit.nr0.htm> (last accessed Nov. 17, 2021) (finding labor force participation 1.7 percent lower than February 2020).

³ See <https://www.whitehouse.gov/omb/briefing-room/2021/11/24/update-on-implementation-of-covid-19-vaccination-requirement-for-federal-employees/> (last accessed Nov. 29, 2021).

⁴ <https://nrf.com/insights/economy/about-retail-jobs> (last accessed Nov. 29, 2021).

Going forward, OSHA should factor consideration of seasonal labor shifts into the crafting of its rules. The retail workforce is in flux during the critical holiday season.⁵ During this season, the industry hires more than 500,000 seasonal workers to handle increased demand.⁶ The ETS makes no distinction between these temporary, seasonal employees and full-year employees, and, in so doing, forces retailers to collect unneeded medical information and incur unnecessary compliance costs.

Moreover, the ETS forces retailers to make the difficult decision whether to require all employees to be vaccinated or to allow a testing exception. If they mandate vaccinations, they risk employee resignations.⁷ Resignations from even a small percentage of the workforce will meaningfully disrupt retailers' ability to serve their customers. If retailers decide to allow testing, then they take on significant administrative burdens and potential legal liability related to cost of testing and compensable time. As described more fully below, this places retailers between a rock and a hard place.

Indeed, either option poses an additional burden that is now very familiar to the federal government – evaluating reasonable accommodation requests. On the eve of the effective date of the federal worker mandate, federal agencies had thousands of reasonable accommodation requests.⁸ The Bureau of Prisons alone is reported as having thousands of religious exemption requests.⁹ Each of those requests must be individually reviewed and discussed with the employee, and the conclusion must be determined by the appropriate group of HR managers and leadership.

At first blush, it appeared that the vaccinate-or-test option would eliminate this overwhelming burden. Specifically, employers would have to adjudicate a tidal wave of accommodation requests only if they mandated **vaccination**. OSHA, however, saw fit to include in the rule that employees may submit an accommodation request for **testing**. This unnecessary inclusion guarantees that even employers who elect the vaccination-or-test option will be inundated with accommodation requests. Imagine a small retail store of one or two managers and a dozen employees. Those managers must collect vaccination records, oversee testing, document testing, adjudicate testing accommodation requests. When such requests are denied, the resultant acrimony could hinder their ability to continue to work harmoniously as a team. Essentially,

⁵ See Sapna Maheshwari and Michael Corkery, *Retailers Scramble to Attract Workers Ahead of the Holidays*, THE NEW YORK TIMES (Nov. 8, 2021) available at <https://www.nytimes.com/2021/11/08/business/retail-hiring-holidays-workers.html>.

⁶ *Id.*

⁷ Chris Isidore and Virginia Langmaid, *72% of unvaccinated workers vow to quit if ordered to get vaccinated*, CNN (Oct. 28, 2021) available at <https://www.cnn.com/2021/10/28/business/covid-vaccine-workers-quit/index.html>.

⁸ Lisa Rein, Ian Duncan and Alex Horton, *Nearing Monday coronavirus vaccine deadline, thousands of federal workers seek religious exemptions to avoid shots* (November 7, 2021), available at https://www.washingtonpost.com/politics/federal-workers-vaccines-exemptions/2021/11/07/761eb9d8-3da3-11ec-8ee9-4f14a26749d1_story.html.

⁹ *Id.*

OSHA did not consider the realities of what already has been happening with accommodation requests in the public and private sector when it opened this door to testing accommodation.

IV. The ETS Does Not Remedy a “Grave Danger”

A. The Present Nature of COVID-19 Undermines the Assertion of Grave Danger

Congress granted OSHA limited authority to enact emergency temporary standards to respond to “grave danger” to employees from work-related exposure to substances or agents.¹⁰ Emergency standards must also be necessary to address the danger. *Id.* If OSHA cannot show that *workplace exposures* create a grave danger to employees, then it cannot enact an ETS.

OSHA spends much time and energy explaining why it believes COVID-19 meets the grave danger requirement. *See* ETS, Executive Summary & Request for Comment. NRF does not dispute that the SARS CoV-2 virus that causes COVID-19 can pose significant danger to people, but as courts have previously found with respect to emergency standards, OSHA must show more.¹¹ OSHA, however, fails to demonstrate anything particular about the workplace that makes exposure at work a “grave danger” to employees.

Moreover, the country has been living with COVID-19 for nearly two years. No one doubts the danger that the pandemic wrought upon our population, but the threat that the disease poses today is significantly reduced and will continue to subside as more Americans receive the vaccine and build immunity.

B. Exclusion of Employers Under 100 Employees Belies the Assertion that the ETS is Necessary to Address a Grave Danger

Approximately 40 million Americans work for a company with 100 or fewer employees. Indeed, almost 98% of American companies employ 100 or fewer workers. Despite this, OSHA’s rule does not apply to these workers. OSHA’s arbitrary coverage threshold leaves millions of Americans without the purported protection of the rule. This limited application casts significant doubt about the gravity of the danger posed to American workers. *See BST Holdings*, No. 21-60845 at 6-7 (noting that the “ETS purport[s] to save employees with 99 or more coworkers from a “grave danger” in the workplace, while making no attempt to shield employees with 98 or fewer coworkers from the very same threat.”). Certainly, NRF does not want this unduly burdensome rule to be imposed on even more employers, but the fact that OSHA did not do so is deeply damaging to its grave danger premise.

¹⁰ *See* 29 U.S.C. § 655(c)(1).

¹¹ *See Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 424 (5th Cir. 1984) (granting a stay of emergency temporary standard related to asbestos exposure even though “no one doubts asbestos is a gravely dangerous product” because of insufficient evidence that workplace-specific exposure risk constituted a grave danger).

OSHA cites no science justifying the establishment of this 100-employee threshold. Rather, OSHA maintains that the threshold is based on cost of compliance concerns. NRF applauds OSHA's inclusion of exceptions in the ETS for employees who work alone or exclusively outside, but the ETS fails in its lack of any further qualifiers. For example, many retailers may have 100 or more employees spread across the country but may employ only a few workers at particular locations.

Indeed, OSHA's own FAQs demonstrate the problem with this position. OSHA says "if a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered even if some of the locations have no more than one or two employees assigned to work there."¹² OSHA cannot logically claim that *workplace exposure* creates a grave danger related to COVID-19 for employees who work around just one other person. Indeed, those employees face potential virus exposure from many more people in their everyday activities. Many employees face more exposure around their own dinner table. Yet, the ETS treats them in the same manner it treats employees who may work in crowded spaces.

In short, the ETS' failure to recognize the varying levels of risk posed in different work environments suggests that the 100-person threshold was determined without any meaningful assessment of the gravity of danger at each establishment.

V. The ETS is Not Feasible

OSHA rightly recognizes that any proposed rule, temporary or permanent, must be feasible to implement.¹³ To be feasible, a standard must address the purported hazard in a manner that is "capable of being done, executed or effected," both technologically and economically.¹⁴ If a standard is not feasible, then it cannot be "reasonably necessary or appropriate" under the OSH Act.¹⁵ For multiple reasons, OSHA's feasibility analysis from the preamble to the proposed rule fails to account for the major technical, economic and practical challenges the ETS poses for employers in all industries, particularly our industry where many companies have thin profit margins.

A. Implementing the Rule Will Present Logistical Challenges for Employers

To implement the ETS, retailers will need to assess their entire workforce to determine who is and who is not vaccinated, create a weekly testing regime for unvaccinated employees, review

¹² See OSHA COVID-19 Vaccination and Testing ETS, Frequently Asked Questions, Paragraph 2.A.2., available at <https://www.osha.gov/coronavirus/ets2/faqs> (last accessed Nov. 17, 2021) (emphasis added).

¹³ 29 U.S.C. § 655(b)(5)

¹⁴ Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Occupational Safety & Health Admin., U.S. Dep't of Lab., 965 F.2d 962, 980 (11th Cir. 1992)

¹⁵ *Id.*

and adjudicate requests for religious and disability-based exemptions to the mandate, establish new paid time off policies for employees to receive the vaccine, and begin new extensive recordkeeping processes. Employers will bear unrecoverable costs with little, if any, increase in workplace safety.

1. Worker Resignations

OSHA claims the ETS is feasible in part because few, if any, workers will resign if forced to comply with a vaccine mandate,¹⁶ but the evidence used to support this claim is misleading. OSHA acknowledged that studies show that between 38-50% of unvaccinated workers report that they will quit before complying with a vaccine mandate.¹⁷ In the ETS, OSHA rejects this survey and claims that when actually pressed to make a decision, the rate of worker resignations drops to 1-3%. OSHA relied on a single article that cites data both supporting and refuting the potential for mass resignations.¹⁸ If anything, the article shows tremendous uncertainty in how particular employees will react to vaccine mandates.

2. Industry & Workplace Risk Variances

Aside from worker resignations, OSHA claims that the ETS is feasible, because it does not apply to companies with fewer than 100 employees, to workers who work alone, or to outdoor worksites. As already stated, the NRF appreciates OSHA's compromises in this regard but believes OSHA could do much more to inspire confidence that the ETS appropriately accounts for industry and worksite distinctions in relative risk. The ETS does not attempt any distinctions per industry, applying broadly to the entire economy. It also neglects to include exceptions for companies with employees spread across many locations, with only a handful of employees at each location. Just as these analytic failures implicate a flawed danger analysis, they also impact OSHA's feasibility arguments by refusing to account for the lower risk of transmission in certain environments.

B. The Rule Will Needlessly Increase Costs for Employers

Approximately 64% of Americans are fully vaccinated, and 76% have received at least one dose of a vaccine.¹⁹ Despite these encouraging numbers, OSHA is mandating that employers spend, by its own estimates, nearly \$1 billion to improve the country's vaccine rate. Even if OSHA's estimate were accurate, the Agency critically fails to account for compliance costs with other

¹⁶ ETS, Federal Register, Vol. 86, No. 212 at 61475, n. 42.

¹⁷ *Id.*; see also <https://www.gspublishing.com/content/research/en/reports/2021/09/13/cd67a3b5-bb9e-4659-b605-6618d5aa825f.html> (noting "roughly 7mn workers subject to Biden's mandate state that they will definitely not get the vaccine.") (last accessed Nov. 29, 2021)

¹⁸ See Jack J. Berry, Ann Christiano, Annie Neimand, *Unvaccinated Workers Say They'd Rather Quit than Get a Shot, but Data Suggest Otherwise*, SCIENTIFIC AMERICAN (Sept. 24, 2021) available at <https://www.scientificamerican.com/article/unvaccinated-workers-say-theyd-rather-quit-than-get-a-shot-but-data-suggest-otherwise/> (last accessed Nov. 17, 2021).

¹⁹ See <https://usafacts.org/visualizations/covid-vaccine-tracker-states/>

laws, such as the Fair Labor Standards Act (“FLSA”) and state laws, that are implicated by the ETS’ requirements.

OSHA attempts to remove one barrier to economic feasibility by passing the responsibility to pay for COVID testing from employers to employees, but OSHA’s attempt to save employer testing costs is illusory because of conflicting federal guidance and state laws related to both the cost of the test themselves, and the compensability of time employees spend getting tested.

The FLSA requires employers to pay employees for tasks that are required to perform their jobs safely and effectively.²⁰ Thus, employers who decide to implement testing may have the additional cost of paying workers for such time away from work. Indeed, the Department of Labor’s *own guidance* states that employees must be compensated for time spent testing. On the Wage and Hour Division’s website, the Department of Labor posted the following Q&A:

7. If my employer requires COVID-19 testing during the workday, do I need to be paid for the time spent undergoing the testing?

Yes, under the FLSA, your employer is required to pay you for time spent waiting for and receiving medical attention at their direction or on their premises during normal working hours. Other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.²¹

The Wage and Hour Division guidance suggests that either the Department of Labor is taking conflicting positions for the purposes of the FLSA and the ETS or that the ETS ignores this additional compliance cost that the Department places on employers who adopt a testing option. The Department of Labor should not leave employers in a position where they receive conflicting guidance on the same topic from different arms of the agency.

The requirement to pay for time spent testing can also apply outside of work hours.²² 29 C.F.R. §785.27 states that attendance at lectures, meetings, training programs and similar activities would only not be counted as working time if all four of the following criteria are met:

- Attendance is outside normal hours.
- Attendance is voluntary.
- The activity is not job-related.

²⁰ See Department of Labor Wage & Hour Division, COVID19 and the Fair Labor Standards Act Questions and Answers, available at <https://www.dol.gov/agencies/whd/flsa/pandemic> (finding “your employer is required to pay you for time spent waiting for and receiving medical attention at their direction or on their premises during normal working hours”).

²¹ <https://www.dol.gov/agencies/whd/flsa/pandemic#7> (last accessed Nov. 29, 2021).

²² *Id.* at #8.

- No other work is concurrently performed.

Applying 29 C.F.R. §785.27 to this testing mandate may lead a court to conclude that the employee is entitled to compensation for time spent receiving a test.

The confusion about compensable time related to COVID-19 testing under the ETS will serve as chum in the water for aggressive plaintiffs' lawyers. The ETS leaves employers who adopt a testing mandate with two choices: pay employees for all time associated with weekly COVID testing or risk class-action lawsuits with the potential for millions of dollars in damages if they do not pay employees for that time. Moreover, in certain instances, time spent testing could push employees into working overtime, escalating employer costs and litigation risk. This parade of horrors is hardly theoretical—employers regularly face massive judgments for minor, good-faith errors under the FLSA.²³

Employers should not be forced to risk FLSA legal liability to comply with another rule issued by a Department of Labor subagency. At a minimum, OSHA should clarify, through partnership with the Wage and Hour Division, that testing time is not compensable under the FLSA, because employees are making a choice to test rather than receive vaccination.

Even if OSHA clears up the FLSA issue, employers in many states may still be required to pay for the cost of tests. In dozens of states, employers are required to pay for any “mandatory medical test” or any test required as a “term and condition of employment.”²⁴ Like the compensable time issue, the legal obligations of employers in this area are also unclear. For example, under Maine law, employers may not “require any employee or accepted applicant for employment to bear the medical expense of an examination when that examination is ordered or required by the employer.”²⁵ Maine employers could argue that the law should not apply, because OSHA, not the employer, requires the test. Ultimately, however, interpretation of this law will lie with the courts and regulators in the state. Similarly, in New Jersey, employers must pay for tests “when such examination is made at the request or direction of the employer... as a condition of entering or continuing employment.”²⁶ In that case, would the COVID test occur at the “direction of the employer” if the employer elected to adopt a testing option under the ETS? Or would the obligation come from OSHA under the ETS? The ETS does not, and cannot, answer these questions, leaving employers to fend for themselves as they attempt to comply with

²³ See e.g., *Augustus v. ABM Security Services, Inc.* 385 P.3d 823 (Cal. 2016) (awarding \$89.7 million to security guard plaintiffs for having to carry their walkie-talkies during rest breaks); *Ridgeway v. Walmart Inc.*, 2020 WL 55073 (9th Cir. 2020) (affirming award of \$54.6 million to 839 truckers who claim they were not paid for pre and post trip inspections).

²⁴ NRF is aware of laws requiring payment for medical testing in New Jersey, Virginia, Kentucky, Illinois, Louisiana, Oklahoma, Arkansas, California, Maine, Massachusetts, Vermont, New Hampshire, West Virginia, Illinois, Michigan, and Ohio. This list is not intended to be all-inclusive.

²⁵ <https://legislature.maine.gov/statutes/26/title26sec592.html>

²⁶ NJ Rev Stat § 34:11-24.1.

the ETS on OSHA's compressed timeline. As a result, the ETS creates another situation whether the employer can choose between legal risk and a significant economic burden.²⁷

The ETS specifically says it does not preempt these state laws, so employers are left with a patchwork of regulations to navigate to determine whether they have payment obligations for testing. Under the plain terms of most of these state laws, it presents yet another open legal question. As a result, employers face substantial litigation risk and possible liability if they do not pay for COVID tests in those states, despite the ETS's intent to relieve employers of that burden.

To avoid the risk of class action wage/hour litigation, some of our large members who can bear the cost have decided they will purchase antigen tests and administer them on-site. The test cost and compensable time costs are already overwhelming, but this option also carries an additional regulatory and financial burden. OSHA has been maddeningly unclear regarding whether the bloodborne pathogen standard will apply to proctoring these tests. The rule on its face only covers saliva in dental procedures and mucus only if it contains blood,²⁸ but, of course, no employer can know whether any of those test samples contain blood. As such, all will have to comply with the bloodborne pathogen standard to avoid OSHA citation. Also, the CDC takes the position that positive tests are biohazards.²⁹ Few of our members have any experience with biological waste procedures. They do not have pre-existing business partners on these issues and have no knowledge or experience regarding the substantial legal requirements associated with biohazard disposal. Furthermore, the cost is astounding. Already one of our members has paid \$83.00 for just one gallon of biowaste disposal. Yet, at no point has OSHA addressed this issue in its rulemaking.

Finally, new HHS rules require insurance plans to pay for up to eight COVID-19 tests per month,³⁰ but "plans are not required to provide coverage of testing (including an at-home over-the-counter COVID-19 test) that is for employment purposes."³¹ According to some data compilations, 82 percent of large employers are at least partially self-insured.³² This means that most of the large employers covered by the ETS must pay for twelve tests a month for an unvaccinated worker – eight under the health plan and four more for the weekly testing of the employee. Employers know that few employees who are not yet vaccinated are going to change their mind at this point. The only possibility that they would do so is if they would have to pay for the weekly tests themselves, and that payout might incentivize their change of heart. Not

²⁷ While the Biden Administration promised affordable COVID tests with the roll-out of the ETS. Single, over-the-counter test kits currently cost around \$20. For a single employee, that means \$80/month in testing costs. If an employer with 100 employees has 30 unvaccinated workers, that means \$2,400/month in direct testing costs. For an employer with 10,000 employees, the cost balloons to \$240,000/month.

²⁸ 29 C.F.R. §1910.1030.

²⁹ <https://www.cdc.gov/coronavirus/2019-ncov/lab/lab-biosafety-guidelines.html>

³⁰ <https://www.hhs.gov/about/news/2022/01/10/biden-harris-administration-requires-insurance-companies-group-health-plans-to-cover-cost-at-home-covid-19-tests-increasing-access-free>

³¹ <https://www.cms.gov/how-to-get-your-at-home-OTC-COVID-19-test-for-free>

³² See, e.g., <https://www.kff.org/report-section/ehbs-2020-section-10-plan-funding>

only is that not true given state law issues addressed above, but, pursuant to the HHS rules, self-insured employers now will be paying for *three times* the number of tests for their employees who are unvaccinated.³³

In short, the only incentive under the ETS to motivate an unvaccinated worker to be vaccinated has disappeared, and employers' costs have dramatically increased in the meantime. If OSHA ever were to address this issue again, it must factor in these related costs when looking at the financial burden it imposes upon employers and whether that financial burden will make any difference at all to mitigate the health risk. Unvaccinated employees will be provided free tests and will be paid for the time spent testing, and that pay may push them into overtime status each week. This perversely encourages employees to stay unvaccinated.

C. Employers cannot bargain collectively by the established deadlines

The National Labor Relations Board has already released guidance that employers must bargain over implementation of the ETS and effects of employer policies.³⁴ Collective bargaining is a painstaking, time-consuming process in ordinary circumstances. When the topic involves compulsory vaccination, it creates even more tension. The Agency expected retailers with unionized workforces to be able to bargain over, agree upon and implement a mandatory vaccination policy in an unrealistic and unreasonable timeframe.

VI. Conclusion

Over the past 22 months, retailers have invested tens of billions of dollars to mitigate the spread of COVID-19. Our members have implemented mask requirements, capacity limits, social distancing rules, traffic flow floor markings, and plexiglass partitions. We have consulted with the CDC, the National Institute of Occupational Safety and Health, state and local health agencies, our own safety and health experts, and OSHA itself to learn as much as we can about the virus and how to stop its spread. Since the introduction of the vaccines, retailers have distributed vaccine vials to every corner of this nation, informed our employees about and encouraged them to take the vaccine, and offered significant financial incentive for vaccination. This combination of safety practices and increased vaccinations has resulted in dramatically safer workplaces.

NRF seeks to continue this hard work to ensure that retailers' workplaces are safe for both workers and customers. To further that goal, NRF welcomes additional industry guidance from OSHA. The current ETS, however, is impractical, infeasible, and unnecessary and will needlessly aggravate our already depleted workforce and ruptured supply chain. Accordingly,

³³ This number of test kits does not exist in the market and is unlikely to exist in the near future. *See, e.g.*, <https://www.nytimes.com/2021/12/18/world/a-surge-in-demand-for-virus-tests-is-swamping-the-us-system.html> and many similar articles.

³⁴ <https://www.huntonlaborblog.com/2021/11/articles/labor-unions/nlr-general-counsel-issues-memo-regarding-bargaining-obligations-for-vaccine-mandate/>

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OSHA should rescind it in its entirety without being forced to do so in litigation. NRF respectfully requests that the points raised in this letter be considered in any future rulemaking on infectious disease.

NRF thanks OSHA for the opportunity to provide the above information. If you have any questions regarding NRF's comments, please contact Edwin Egee, Vice President, Government Relations and Workforce Development at EgeeE@nrf.com.

Sincerely,

A handwritten signature in black ink, appearing to read "David French".

David French
Senior Vice President
Government Relations