



October 12, 2021

The Honorable Marty Walsh
Secretary
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Dear Secretary Walsh:

On September 9, 2021, President Biden issued Executive Order 14042, “Ensuring Adequate COVID Safety Protocols for Federal Contractors.” Pursuant to the order, the Safer Federal Workforce Task Force (“Task Force”) released initial guidance for contractors on September 24, 2021. Department of Labor (“DOL” or “the Department”) staff have maintained that the Task Force guidance will be consistent with the forthcoming Occupational Safety & Health Administration (“OSHA”) emergency temporary standard (“ETS” or “the rule”) requiring all employers with 100+ employees to ensure their workers are vaccinated or tested weekly. In light of the Task Force guidance, the National Retail Federation (“NRF”) would like to respectfully provide the following suggestions based on the industry’s experience with ongoing and front-line efforts to mitigate hazards posed by COVID-19.

NRF is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and internet retailers from the United States and more than 45 countries. 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.

The importance of the Department promulgating a standard that is feasible for employers to implement cannot be overstated. Just this past weekend, Americans were alerted to the implications of workers shortages resulting from vaccination mandates as dozens of airline flights were canceled. The staffing shortages already being experienced in the airline industry may soon impact American consumers across the economy, including in the retail industry. Retailers are particularly concerned about the disruption caused by the imposition of a complex new mandate during the critical holiday shopping season.

OSH Act Authority

While Section 6(c) of the Occupational Safety and Health Act of 1970 gives OSHA the ability to promulgate an ETS and avoid the normal review and comment process of rulemaking, it does require that OSHA demonstrate that employees are exposed to “grave danger” from

exposure to substances or agents determined to be toxic or physically harmful and that an ETS is “necessary” to protect employees from such danger. We urge that any the ETS requirements are narrowly tailored both in scope and duration and justified by data in order to meet this legal standard.

On the date the President announced the new ETS, the seven-day average number of cases was 147,831 per day. Today, that number is less than 90,000, a 40% decline since the announcement. The Department should explain how the ETS is still necessary given the significant decline in case numbers since the announcement.

Over the past 17 months, retailers have invested tens of billions of dollars to mitigate the spread of the virus. Our members’ unprecedented efforts to keep employees and customers safe over the past 18 months have included mask requirements, capacity limits, social distancing rules, traffic flow floor markings, and plexiglass partitions. We have repeatedly and extensively consulted with the Centers for Disease Control and Prevention (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. The Department should explain why these extensive efforts to mitigate the spread of the virus, especially when combined with expanded vaccinations, are insufficient to protect workers from COVID-19 and why an ETS is therefore necessary.

The administration’s mixed messaging on COVID-19 continues to create unnecessary challenges for employers. On May 13, 2021, the CDC released new guidance clarifying that “fully vaccinated people no longer need to wear a mask or physically distance in any setting, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.” On June 10, OSHA issued what it called a “tailored standard” aimed at “the workers most in danger of contracting the virus,” namely, health care workers. The Department should articulate how issuance of a broad new ETS covering employees across the private sector is consistent with its past positions and those of the CDC and ensure that any change in position is supported by current data and information regarding mitigation of COVID-19, including available medical treatments.

Vaccinations

The federal government has not to date provided any guidance on how employers should differentiate between vaccinated and unvaccinated employees. This is particularly important given federal and state laws governing health care information and differentiated treatment based on health conditions, such as the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act and the Health Insurance Portability and Accountability Act. DOL should instruct employers how to differentiate between vaccinated and unvaccinated workers.

Similarly, the Department will have to explain to employers how to document vaccination status. NRF suggests that the Department permit a variety of verification techniques. Employers should be able to fulfill the vaccination mandate requirement by simple employee attestation, as Cal/OSHA currently does. Collecting scans of vaccination cards or using a vaccination credentialing service should also be permitted. Regardless, employers should not be required to collect, upload or preserve vaccination credentials.

NRF members that have already implemented vaccine mandates have had to process numerous requests for exceptions. Religious exemption requests (some of which are bona fide, some of which are not) are particularly challenging to adjudicate. The Department should provide guidance to employers as to how to establish systems to collect and review these requests.

The Department must clarify what is considered “vaccinated” and whether that standard is met once an employee begins the vaccine regimen or two weeks post-completion. If the Department decides that workers reach “vaccinated” status two weeks after completing the regimen, it must allow employers a significant time period to implement the mandate. NRF suggests a 90-day implementation period. The Department should also clarify that individuals will not lose their “vaccinated” status should the federal government decide that booster shots are required. Employees, once considered fully vaccinated, should remain as such. Similarly, the Department should instruct employers how to treat individuals with “natural immunity” that has been conveyed by a recovery from a COVID-19 infection.

The Department will need to clarify exactly which employees need to be vaccinated. DOL staff has already said that home-based employees will not be covered but has not addressed employees who only occasionally report to a workplace or otherwise do not encounter other workers. The Department should state clearly that vendors, contractors and other individuals present at a worksite but not employed by the worksite operator should be subject to their own employer’s vaccination policy and not the policy of the worksite operator.

Regarding vaccination documentation, NRF fears that the forthcoming ETS may impose onerous recordkeeping requirements on retailers despite the lack of evidence showing a nexus between the spread of COVID-19 and retailers’ operations. To mitigate this burden, NRF recommends that the Department not alter its current recordkeeping guidance, whereby employers only need to report a COVID-19 exposure if they know for a fact that the transmission occurred inside the workplace. Further, OSHA should clarify that vaccination verification information should not be regarded as a safety record that needs to be retained by the employer. There is no reason employers should be required to maintain such records for 30 years, as is sometimes required by OSHA policy.

The ETS could significantly diminish the labor pool, particularly in some geographic areas and amongst some demographics in which vaccine hesitancy is widespread. NRF members,

like employers across the economy, are already struggling to find workers. The Department should consider the impact of the ETS on employee recruitment and retention. Specifically, there are also numerous individuals who have recovered from a prior COVID-19 infection, who may have received medical information from their trusted doctors that may differ from the rigid requirements of the ETS.

The Department should state clearly that employers who, acting in good faith in attempting to implement the OSHA mandate, terminate or otherwise discipline an employee for lying about their vaccination status or refusing to provide proof of vaccination or test weekly should not face liability.

Mandatory Paid Leave

In announcing the ETS, the President also stated that employers would be required to provide paid time off for employees to get the COVID-19 vaccine and/or to have their “loved ones” vaccinated. Should the Department indeed include a requirement in the ETS that employers maintain the pay and benefits of employees who get the vaccine, such an action would violate Section 4(b)(4) of the OSH Act. Section 4(b)(4) prohibits any OSHA standard from affecting in any manner “any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.” 29 U.S.C. 653(b)(4). The Department must explain the legal rationale whereby it claims the statutory authority to mandate that employers provide paid time off to employees.

Should the Department proceed in its attempt to include a paid leave mandate, NRF is concerned that employees could attempt to use that time to avoid work. NRF members have already encountered this issue in states where there is an existing vaccine time-off law. The Department should include language limiting the time off to recover to within a week of getting the shot. Further, the Department should include a grandfather clause for employers that already grant paid time off for employees to get the vaccine as well as language permitting employers to require employees to use existing paid time off to receive the vaccination.

Testing

In his speech announcing the ETS, the President stated that unvaccinated workers would need to “show a negative test at least once a week.” The White House estimates that 80 million workers would be covered by the new mandate. About 70% of the working age population is fully vaccinated. So, if the rule were enacted today, employers would have to procure approximately 24 million tests every week. While that number will be lower when the rule is finished, it will continue to be a challenge for employers to procure that many tests. Public-sector employers will also be increasing their testing of employees, further taxing the supply of

COVID-19 tests. If an employer cannot procure COVID-19 tests, the Department should not impose any penalties, especially if an employer has implemented health and safety protocols to mitigate transmission.

If, in fact, the Department codifies the weekly testing requirement, the Department will need to specify who will pay for this extensive testing. Any language forcing this cost onto the backs of employers amounts to an unfunded mandate, and NRF contends that the Federal Government should reimburse employers for this significant cost. However, NRF prefers that unvaccinated employees should pay for their own testing, which would further incentivize them to be vaccinated. The Department should also state clearly that the time an employee takes the test should not be considered compensable time under the Fair Labor Standards Act and that employers can require employees who object to vaccination without a bona fide exemption to pay for their own test.

If the Department decides that employees who have received the first shot of a multiple shot vaccine are “unvaccinated,” it must state whether employees need to take weekly tests until fully vaccinated.

Legal Concerns

Congress created OSHA to address occupational hazards, that is, those hazards that are related to one’s employment. COVID-19 is not a hazard endemic to or produced by any employer. OSHA reasonably expects employers to keep their workers safe while on the worksite; the agency cannot expect employers to control their employees’ behavior during their activities outside of work. Workers face the danger of COVID-19 wherever they go. They are endangered by COVID-19, because they are human beings going about the world, not because they go to work. NRF fears that if the rule includes reporting requirements, employers may be forced to report positive COVID-19 cases to the government, despite the fact that many, if not most, of these cases arose from exposures outside the workplace.

The Department must assist employers that will be greatly challenged to implement the standard in some states with laws that run counter to the aims of the ETS. For instance, under Montana law, requiring vaccines as a condition for employment is deemed “discrimination” and a violation of the state’s human rights laws. Similarly, the Department must clarify if the ETS will preempt stricter state and local laws. The New York City “Foodworkers’ Mandate,” for example, does not permit weekly testing in lieu of vaccination.

The Department should justify the 100-employee threshold articulated by the President. If enacted with this arbitrary threshold, the rule could put larger retailers at a significant disadvantage in hiring and retaining workers. If the Department is taking the position that workers at a facility with 100 employees face a “grave danger,” but workers at a facility with 99

National Retail Federation

October 12, 2021

Page 6

employees do not, it should explain precisely how it came to such a conclusion and the science behind the determination.

In closing, American retailers have prioritized and will continue to prioritize the health and safety of our employees and our customers. The federal government should take into consideration the entirety of efforts made by private-sector employers, the growing levels of vaccinated workers, and the best practices retailers have deployed to protect the health and safety of employees and customers. We appreciate the administration's focus on this issue and look forward to working together to ensure the safety of workers nationwide.

Sincerely,



David French
Senior Vice President
Government Relations