



September 21, 2021

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

Mr. James Frederick
Acting Assistant Secretary of Labor for
Occupational Safety and Health Administration
Occupational Safety and Health Administration
200 Constitution Ave NW
Washington, DC 20210

Dear Secretary Walsh and Acting Assistant Secretary Frederick:

On behalf of the Retail Industry Leaders Association (RILA) and the National Retail Federation (NRF), we are writing regarding the Department of Labor's implementation of the President's COVID-19 Action Plan, Path Out of the Pandemic. Specifically, we write to share questions our members have posed that will provide important insight for developing standards and guidance outlined in the President's plan. We also ask the Department to provide employers with ample time to implement the requirements of any Emergency Temporary Standard (ETS).

Retailers remain committed partners in the fight against COVID-19 and want to work collaboratively with the Administration to create workable standards and guidance. Since the onset of the pandemic, retailers have rapidly implemented evolving recommendations issued by the Occupational Safety and Health Administration (OSHA), Centers for Disease Control (CDC), National Institute for Occupational Safety and Health (NIOSH) and others to provide a safe environment for employees and customers. Retailers have also been at the forefront of the vaccination effort by providing financial incentives, information and access to vaccination locations and paid time off to ensure retail employees have ample opportunity to get vaccinated.

As we have navigated federal and state requirements, recommendations, and protocols, we have learned that it takes time to implement successful testing and vaccination programs—particularly in the face of challenges related to availability, access, and verification. As a result, we urge OSHA to consider the extensive measures that every company will need to undertake to implement the requirements of any ETS. Further, regulators should consider the stress this action will place upon availability of and access to vaccines and tests. Accordingly, we strongly encourage the agency to provide a 90-day implementation timeline to allow retailers and other employers to create the systems necessary to meet the ETS requirements. This lead time will also offer an opportunity for the Administration to receive important feedback from stakeholders to ensure the ETS requirements are feasible and effective. Ultimately, the more time retailers have to

understand and adopt the ETS requirements, the better it will be for the health and productivity of the industry and the country.

We also want to share questions our members have posed about the operational complexities that may arise under the ETS. It is our hope that the Department will address these vital concerns in the ETS to ensure its overall operability and success.

- How will employers track, verify and record whether an employee has satisfied the requirement, including verifying vaccination status and test results and addressing the potential for fraud? With respect to records, what records will employers need to keep, and will these requirements be consistent with other laws governing employee records, such as the Health Insurance Portability and Accountability Act (HIPAA)?
- What remedial actions can be taken in situations in which employees refuse vaccinations and testing?
- How will the Administration ensure the availability of adequate testing capacity to satisfy the significant increase in demand the ETS will create? Applying the national figures to the retail workforce, there could be as many as 4 million retail workers who may need to be tested on a weekly basis; these employees are not dispersed evenly across the country.
- What will OSHA consider “vaccinated” with regard to the number of shots, boosters and related waiting periods—especially in light of the recent Food and Drug Administration’s decisions to only allow boosters for a specific segment of the U.S. population? Will workers need to produce negative COVID tests every week during the entire vaccination process? How will the standard address natural immunity? Should employees who have contracted COVID-19 be considered vaccinated?
- How should employers adjudicate requests for health or religious-based exemptions?
- Who will incur the costs of testing? Will employers have the option to pass along the costs of tests to employees who refuse the vaccine to further incentivize vaccination?
- For self-administered tests, will the mandate release the employer from “working off the clock” liability as defined under FLSA?
- Will the ETS include language that the ETS preempts state and local laws governing payment for all hours worked, including California’s *de minimis* standard which could potentially interpret at home testing as work related and on the clock?
- Will the ETS state that it preempts state expense reimbursement statutes?
- What actions must an employer take if an unvaccinated employee cannot access a test in a week? Is that employee eligible to work?

- Does the employer incur a fine for not getting the employee tested if there is a lack of adequate testing or are the fines suspended?
- How should an employer apply the ETS to minors? In the retail sector, there are thousands of teenage workers who would need parental consent for the vaccine and testing.
- Will the ETS define remote workers as any worker who does not physically interact with other workers?
- How is an employee defined? Does it include temporary, seasonal, or contingent workers? How should employers apply the new vaccination standard to independent contractors?

The retail industry commends the Administration's commitment to defeating the virus. Requiring employers to mandate vaccination and testing of all employees will require extensive coordination with employers and all levels of government. We look forward to working with the Administration to accomplish the goal of these new requirements: beating the virus.

Sincerely,



Michael Hanson
Senior Executive Vice President
Public Affairs
Retail Industry Leaders Association



David French
Senior Vice President
Government Relations
National Retail Federation

RILA is the U.S. trade association for leading retailers. We convene decision-makers, advocate for the industry, and promote operational excellence and innovation. Our aim is to elevate a dynamic industry by transforming the environment in which retailers operate. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

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.