

December 6, 2021

The Honorable Douglas Parker
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Filed at Regulations.gov

Re: **Emergency Temporary Standard re COVID-19 Vaccination and Testing**
86 Fed. Reg. 61402 (Nov. 5, 2021), Docket Nos. OSHA-2021-0007 and -0008

Dear Mr. Parker,

Business Roundtable commends the Biden Administration for its continued efforts to defeat the COVID-19 pandemic. We share the Administration's goal of getting as many eligible Americans vaccinated as quickly as possible, which is key to combatting COVID-19, keeping vulnerable Americans safe, and accelerating the economic recovery.

Since the pandemic began, Business Roundtable CEOs have worked to keep their employees and communities safe, while also keeping their essential businesses up and running. Business Roundtable member companies have used their expertise and capabilities to help end the pandemic, support their frontline workers, and reinvigorate the U.S. economy. In February, Business Roundtable launched "Move the Needle," a public campaign to support the rollout of COVID-19 vaccines, increase vaccine uptake, and encourage individuals to continue to wear masks and take other precautions during the vaccination effort. Business Roundtable companies have been "moving the needle" by producing, distributing, and administering the vaccine. Since vaccines became available to broad segments of the population, America's largest employers have led efforts to encourage employees and customers to get vaccinated. Many companies have made the decision to mandate vaccines for some or all their employees. We have encouraged policymakers, including at the state and local levels, to support – not impede – companies' ability to make such a decision.

As we work together to defeat the pandemic, Business Roundtable respectfully submits these preliminary comments on the emergency temporary standard regarding COVID-19 vaccination and testing that the Occupational Safety and Health Administration (OSHA) published at 86 Fed. Reg. 61402 (Nov. 5, 2021) (ETS). These comments are preliminary because Business Roundtable members believe that it is vital for OSHA to learn of the concerns expressed here as soon as possible. We may file additional comments before the end of the comment period. On November 16, Business Roundtable requested an extension of the comment period to provide necessary feedback on companies' implementation of the rule. We appreciate that, on November 30, OSHA announced a 45-day extension to allow stakeholders additional time to review the ETS and collect information and data necessary for comment.

Business Roundtable has acted and will continue to act as a constructive partner to defeat the COVID-19 pandemic. Indeed, Business Roundtable has been a strong and effective ally

of both the current and previous administrations in their efforts to combat COVID-19. We offer these comments in this same constructive spirit to assist OSHA in improving the standard and ensure this policy succeeds as intended.

I. OSHA Should Extend the Compliance Dates

Business Roundtable respectfully requests that OSHA extend all the ETS's compliance deadlines by 60 days from January 4, 2022 or whenever OSHA resumes implementation and enforcement activities after January 4. Currently, the ETS requires employers to comply with all requirements other than testing for unvaccinated employees by December 6, 2021. Testing for unvaccinated employees must begin by January 4, 2022. However, the ETS's administrative challenges – landing during the busiest time of the year in many industries – are proving overwhelming for many employers to implement in this timeframe. Employers must simultaneously make well-informed decisions and develop and implement new policies and procedures addressing a range of issues:

- Employers must first determine what their policies should be, and then memorialize them in written documents. Merely determining whether to require vaccination or allow for testing and face covering may be difficult and time consuming for employers, depending on a company's industry, workforce, workplace culture, and other considerations.
- After those hurdles are passed, employers must create a practical way to learn and record whether each employee has been vaccinated, and to then find and obtain a practical way to store and retrieve the required documentation of vaccination.

Employers must, at about the same time:

- Put into place systems on a workplace-by-workplace basis to update vaccination status information and documentation to be prepared to inform OSHA or other requesters of the aggregate number of fully vaccinated employees.
- Find a practical way to determine whether unvaccinated employees will agree to be vaccinated or will instead undergo weekly testing, to record that information and then, once the testing program begins, to record and retain documentation of each weekly test for each such employee.
- Design a testing program that accounts for federal, state, and local regulations, along with a process managing employees' requests for accommodations or exemptions.
- Implement a testing verification process to capture employees' test results in different work settings.
- Arrange for additional employees who test positive to be removed from the workplace and for additional replacements to be hired.
- Manage employees who are vaccine-hesitant or object to regular COVID-19 testing,

and who will quit or threaten to quit if such requirements are forced upon them.

Employers with unionized workplaces face the additional challenges of bargaining with employee representatives about many of these issues. The National Labor Relations Board's Office of General Counsel (OGC) recently opined that employers must bargain regarding all aspects of the ETS in which they retain some discretion in implementing.¹ Indeed, OGC has stated that, even where an employer does not retain any discretion under the ETS, "the employer is nonetheless obligated to bargain about the effects of the decision." This presumably includes issues like whether and when an employer may terminate an employee who refuses to comply with a vaccination mandate and the consequences of that termination.

These administrative challenges will require significant time and resources to navigate. Business Roundtable members have been moving swiftly and in good faith to implement these requirements, but more time is needed to achieve compliance. Similar challenges were taken into account when the federal government contractor vaccine mandate was delayed by over 30 days, on top of a 90-day implementation timeline.²

We also respectfully submit that OSHA has underestimated the current challenges related to procurement of testing supplies. OSHA stated that its review of the increasing rate of production of COVID-19 test supplies is "more than adequate to meet the rising demand related to compliance with the ETS...."³ The problem is not production capacity but procurement. The short deadline imposed by the ETS means that many employers are trying to obtain tests at the same time, causing difficulties for all. That on top of supply-chain issues caused by the pandemic and the shortage of truck drivers is making procurement difficult.

Moreover, Business Roundtable members are concerned that instituting the ETS requirements during the middle of the holiday season could have a significant adverse impact on companies' ability to deliver products and services. Redirecting resources to comply with the administrative requirements of the ETS could jeopardize operational performance during this crucial period of the year. Business Roundtable members are growing increasingly concerned that the already-uneven supply chain could become more strained under current holiday demand.

Finally, employers have been confused by the legal challenges to the ETS in the federal appellate courts, especially on the heels of the nation-wide stay issued by the Fifth Circuit Court of Appeals. Employers are also challenged by the need to understand and navigate the differences between state and federal laws. This has consumed additional resources by the persons who must guide and implement efforts to comply with the ETS.

We therefore request that OSHA extend all the compliance deadlines by 60 days – including what are now the December 6, 2021 and January 4, 2022 compliance dates.

¹ NLRB Office of General Counsel, Memorandum OM 22-03, "Responding to Inquiries Regarding Bargaining Obligations Under the Department of Labor's Emergency Temporary Standard to Protect Workers From Coronavirus" (Nov. 10, 2021), *available at* <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsels-office-issues-memorandum-on-covid-19-emergency>.

² 86 Fed. Reg. 63418, 63420 (Nov. 16, 2021); Safer Federal Workforce Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (updated Nov. 10, 2021).

³ 86 Fed. Reg. at 61452.

II. OSHA Should Open Channels of Communication with Stakeholders

Business Roundtable urges OSHA to open channels of communications with responsible stakeholders as soon as possible. We understand that an emergency temporary standard by its nature does not require prior notice and comment. However, neither the OSH Act nor the Administrative Procedure Act prevents OSHA from *voluntarily* opening communication with stakeholders during the drafting of an emergency temporary standard, the drafting of amendments to it, or the drafting of any permanent standard.⁴ Given the unprecedented and widespread impact of this ETS, Business Roundtable believes that there is a compelling reason to give the regulated business community ample time and opportunity, *outside of and in addition to* the opportunity to file public comments and participate at a hearing, to provide feedback and engage with the agency.

Business Roundtable stands ready to arrange for meetings and consultations with responsible employers to provide timely and constructive feedback at the agency's earliest convenience.

III. OSHA and the Administration Should Clarify Requirements Related to Bearing the Cost of COVID-19 Testing

OSHA states in a note that the ETS "does not require the employer to pay for any costs associated with testing; however[,] employer payment for testing may be required by other laws [or] regulations...."⁵ A major cause of uncertainty, and therefore administrative challenge, for Business Roundtable members is that employers cannot easily or reliably determine whether other federal or state laws or regulations require employers to pay for testing or the time employees spend testing.

OSHA also notes that it "has no authority under the OSH Act to determine whether such obligations under other laws [or] regulations ... might exist."⁶ While this may be true, OSHA's silence on the issue creates significant administrative and legal uncertainty for employers simultaneously navigating other federal laws, including the Americans with Disabilities Act, Title VII of the Civil Rights Act, and the Fair Labor Standards Act. Greater clarity on these overlapping requirements is critical to employers' ability to comply with the ETS. To be sure, OSHA cannot feasibly be expected to state its view of the matter with respect to collective bargaining and other agreements, or with respect to state laws not preempted by the ETS. But, given the Administration's strongly held view that the ETS is appropriate, the Administration should direct agencies across the federal government to consult with OSHA and provide employers concise, clear, and reliable guidance addressing issues related to the ETS. The NLRB OGC opinion cited above is an example of an agency

⁴ Although OSHA is currently conducting a comment period on the ETS as a proposed rule for a permanent COVID-19 standard, that fact does not limit OSHA's ability to communicate through other channels with stakeholders. See Jeffrey Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING 343 (6th ed. 2018) ("The APA places no restrictions on ex parte communications made during informal rulemaking."). See also ACUS Recommendation 2014-4, "'Ex Parte' Communications in Informal Rulemaking," at 2 ("Ex parte communications, which may be oral or written, convey a variety of benefits to both agencies and the public.").

⁵ 86 Fed. Reg. at 61553.

⁶ 86 Fed. Reg. at 61407 n.2.

attempting to give what it considers helpful guidance, but other agencies need to do so as well.

As just noted, employers face uncertainty under state laws requiring employers to pay for the cost of tests required by federal law. Many state statutory protections are triggered when an employer “requires” that an employee “pay” for or take a medical test. The ETS permits weekly testing as an option instead of mandatory vaccination – but apparently leaves open *who* is “requiring” a test or payment for it. Inasmuch as federal policy, as expressed by OSHA, is to prefer vaccination over testing,⁷ OSHA should fully support the federal purpose and state clearly that it is not the employer who is “requiring” payment for COVID-19 testing, but the employee, when the employee chooses that option.

If OSHA will not so clearly state that the employer is not requiring an employee to pay for testing, then OSHA should declare conflicting state laws preempted as obstacles to the achievement of the aims of the ETS. Specifically, state laws requiring employers to pay for federally required tests would stand as an obstacle to OSHA’s objective of vaccination.⁸ We encourage OSHA to consider amending the ETS to insert a preemptive statement to this effect, or otherwise authoritatively express the agency’s view of the matter. Further, OSHA should also consider amending the ETS to state explicitly what is implied and expressly stated in the preamble – that employers must bear any direct cost of vaccination (assuming that the vaccine is not supplied for free).

OSHA has stated that the ETS does not require employers to pay for any costs associated with testing. The question has been raised, however, whether OSHA would require employees to be paid for testing time. Although we think that there is no such requirement in the ETS, OSHA should address the point and make clear that there is no such requirement.

IV. OSHA Should Allow Employees to Self-Administer COVID-19 Tests and Self-Attest to the Results

The ETS defines “COVID–19 test” as a test for SARS–CoV–2 that is:

- (i) Cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the FDA to detect current infection with the SARS–CoV–2 virus (e.g., a viral test);
- (ii) Administered in accordance with the authorized instructions; and
- (iii) Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. Examples of tests that satisfy this requirement

⁷ For example, OSHA states that testing and face coverings are “less protective of unvaccinated workers than simply requiring all workers to be vaccinated” and that OSHA strongly prefers that employers adopt a mandatory vaccination policy, as vaccination is singularly effective at protecting workers from the severe consequences that can result from a COVID–19 infection.” 86 Fed. Reg. at 61439. OSHA also states that, “[g]iven the superior protectiveness of vaccination,” it is “OSHA’s intent ... to strongly encourage vaccination” and that “requiring employers to bear the costs of COVID–19 testing would be counter-productive.” 85 Fed. Reg. at 61532.

⁸ See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer.⁹

We ask OSHA to reconsider the prohibition in paragraph (iii) against a test being both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. Employers will rely heavily on at-home antigen test kits when the weekly testing mandate goes into effect. Stating that employees may not both self-administer the at-home test *and* read the test results themselves greatly undermines the simplicity and speed of the at-home test. Such tests are similar in substance to self-administered laboratory-analyzed testing, which the standard permits. The ETS already provides for an employee to submit a signed and dated statement to attest to the employee's vaccination status.¹⁰ OSHA should allow a similar process for employees to attest to a self-administered test. The ETS also requires that employees be informed that there are "criminal penalties associated with knowingly supplying false statements or documentation,"¹¹ which should discourage any false statements.

Alternatively, OSHA should confirm that an employer may accept an employee's photograph of the result of a self-administered, self-read test displaying the test's date, time, and negative outcome. OSHA should also clarify that tests that feature digital reporting of date and time stamped results would satisfy this requirement and are not considered to be self-read.

The ETS as now written is ambiguous as to whether an employer may test employees (or provide tests to employees) at facilities separated from other employees and customers, even if they are on the same worksite. To eliminate this ambiguity, OSHA should either provide firm guidance or amend the definition of workplace as follows: "*Workplace* means a physical location (e.g., fixed, mobile) where the employer's work or operations are performed. It does not include *a testing location provided by the employer separated from other employees and customers or an employee's residence.*" (Suggested addition shown in italics.).

V. OSHA Should Permit Greater Flexibility on Documentation of Self-Administered Testing

The ETS requires that employees provide "documentation" of each test result.¹² For self-administered tests, this could present a challenge, as at-home test kits do not result in a paper documentation or other permanent record of the test. Preventing at-home testing from counting under the ETS would cause serious test-supply problems. As stated above, OSHA should confirm that an employer may accept, as sufficient documentation of weekly

⁹ 29 CFR 1910.501(c).

¹⁰ 29 CFR 1910.501(e)(2)(vi).

¹¹ 29 CFR 1910.501(j)(4).

¹² See 29 CFR 1910.501(g).

testing, an employee's photograph of the result of a self-administered, self-read test displaying the test's date, time, and negative outcome. Smart phones with cameras are virtually ubiquitous and provide metadata regarding the owner of the phone and the day and time the photograph was taken. This would also create the same condition in which a self-administered laboratory analyzed sample is acknowledged.

VI. OSHA Should Clarify Requirements to Provide Paid Time Off for Vaccination Purposes

The requirements that employers provide employees paid time for vaccination purposes have proven difficult for employers to understand. The requirements state:

(1) *Time for vaccination.* The employer must:

(i) Provide a reasonable amount of time to each employee for each of their primary vaccination dose(s); and

(ii) Provide up to 4 hours paid time, including travel time, at the employee's regular rate of pay for this purpose.

(2) *Time for recovery.* The employer 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.¹³

One issue is the phrase "up to 4 hours of paid time." OSHA should confirm that "up to" means that an employee is entitled only to so much time as is required to receive a vaccination dose, up to a maximum of four hours, and that employers need not provide four hours of paid time off in every case.

Another issue is that paragraph (1)(i) speaks of a "reasonable amount of time" while paragraph (1)(ii) speaks of four hours. We understand that what is meant is that a reasonable amount of time must be afforded but only part of it (no more than four hours) need be paid. The same we believe was intended for paragraph (2); that is, it requires employers to provide employees with a reasonable amount of time to recover from side effects and paid sick leave for a reasonable portion of the recovery time. OSHA should restate and clarify these requirements to eliminate any confusion.

VII. Other Comments on Vaccination and Testing

Whether Employers Must Pay for Boosters. Questions have been raised as to whether the ETS requires employers to require (and pay for) boosters now that they have been approved by the FDA. Although Business Roundtable supports boosters, we believe the definition of "fully vaccinated" laid out in the rule currently is adequate. OSHA should eliminate any uncertainty – perhaps by clarifying in guidance or by amending the definition of "fully vaccinated" to indicate that the term does not include boosters.

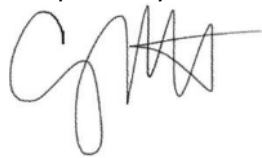
¹³ 29 CFR 1910.501(f).

Permitting Government Contractors to Opt Into EO 14042 Compliance Instead of ETS Compliance. Many government contractors find that not all their employees are “covered contractors” or work in “covered contractor workplaces” under the federal contractor vaccination requirements.¹⁴ To reduce confusion and regulatory overlap, OSHA should permit such employers to opt into the contractor requirements for all their employees, including those in non-covered workplaces. In those circumstances, OSHA should exempt that employer from complying with the ETS and make the ETS inapplicable. (Similarly, the Guidance should be amended to clarify that federal contractors who comply with EO 14042 on a companywide basis are not subject to the ETS.). These adjustments would provide the employer community with more certainty and would reduce regulatory overlap. They would also provide a further potential incentive towards increasing vaccinations.¹⁵

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Business Roundtable appreciates this opportunity to provide early comments on the ETS. Again, we urge OSHA to open channels of communications as soon as possible with responsible members of the business community. We stand ready to arrange for such meetings and consultations to discuss these important matters.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Corey Astill', with a stylized, cursive script.

Corey Astill
Vice President
Business Roundtable

¹⁴ Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors.

¹⁵ OSHA should also be mindful that some healthcare companies have found themselves laboring under greater than usual compliance demands and from a different sort of regulatory overlap: namely, the imposition on them of both the OSHA ETS and the Centers for Medicare & Medicaid Services’ Omnibus COVID-19 Health Care Staff Vaccination rule, 86 Fed. Reg. 61555 (November 5, 2021). Flexibility by the agency when evaluating compliance by such employers would therefore be in order.