

October 18, 2021

Office of Management and Budget
Office of Information and Regulatory Affairs
725 17th Street NW
Washington, DC 20503

Dear Ms. Sofie Miller and colleagues,

The undersigned organizations represent the food and beverage, retailer, agriculture and consumer packaged goods industries. We appreciate the opportunity to provide oral comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, as it considers the Occupational Safety and Health Administration's (OSHA's) "COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) Rulemaking." This letter summarizes the comments made in our meeting.

Throughout the pandemic, the food industry, part of our nation's critical infrastructure, provided the food and beverage staples Americans needed. Delivering these products continues to be challenging and, despite seeing products on the retail shelves, our industry has struggled to maintain a robust supply of affordable food to consumers directly and through various federally supported feeding programs.

The nature of food supply chain stress that exists today differs from the early days of COVID shutdown, when milk was dumped and some crops were plowed under. Still, the food supply chain continues to face immediate and longer-term stress due to labor shortages, challenges sourcing ingredients consistently, and other supply chain bottlenecks that are even more significant than those at the outset of the pandemic. Our critical workforce has never stopped working through this crisis. America's food workers are putting in extended overtime for prolonged periods and, while proud of their role in meeting America's food needs, are working to their limits.

We have grave concerns about aggravating this situation with an ETS that may trigger additional labor and supply chain disruption. The food industry has been a leader in encouraging COVID vaccination and has supported the Administration's goal of increased vaccination rates, but based on the experience of our industry, we anticipate significant loss of personnel to businesses exempt from the ETS requirements, as well as substantial numbers of employees who simply refuse to work in the context of ETS requirements.

Furthermore, our businesses are concerned that labor will be disrupted due to logistical aspects of the vaccine mandate – including the availability of testing resources for those who choose to remain employed with the added measure of regular testing. Even a modest additional disruption in labor supply is likely to cause disruption in supplies of some foods, additional price inflation, and a return to upstream supply chain disruptions experienced during the early days of the COVID-19 pandemic.

Finally, while worker and product safety remains the foremost goal of the food industry, we must note that extended overtime worked over prolonged periods is the sort of stress that threatens the effectiveness of even the world's finest food safety systems.

Accordingly, we respectfully recommend that to the extent food critical infrastructure is subject to the ETS, OSHA provide:

- a. As much clarity as possible in the requirements of the ETS. Please see the attached letter submitted last week to Mr. James Frederick at OSHA for an extensive list of clarifying questions industry needs addressed; and
- b. As much flexibility as possible in how ETS requirements may be achieved.

As the administration considers an ETS requiring employers to mandate vaccination or testing of workers, we urge you to recognize the importance to Americans of the products we produce and the diversity of critical infrastructure within the food and agriculture industries that keep Americans fed.

Thank you for your consideration of our views.

American Bakers Association

American Frozen Food Institute

Consumer Brands Association

Corn Refiners Association

FMI – the Food Industry Association

Global Cold Chain Alliance

International Dairy Foods Association

National Automatic Merchandising Association

National Grocers Association

North American Meat Institute

North American Millers Association

United Fresh Produce Association

October 15, 2021

James Frederick
Acting Assistant Secretary
Occupational Safety and Health Administration

Dear Mr. Frederick:

The undersigned organizations represent the consumer packaged goods, food and beverage, retailer and agriculture industries. Our members have worked tirelessly these last 18 months to deliver against incredible demand as COVID-19 underscored the importance of essential products during times of national emergency. Throughout the pandemic, Americans looked to our industries to keep the shelves stocked with cleaning supplies and disinfectants, personal care products, and food and beverage staples.

As the Occupational Safety and Health Administration continues to develop the Emergency Temporary Standard outlined in President Biden's [COVID-19 Action Plan: Path out of the Pandemic](#), we respectfully request that you consider the questions provided below that will begin to provide necessary clarity to how companies can support implementation. These concerns are not unique to our industries but are critical to realize our shared goal of increased vaccination rates. These questions may be addressed in the ETS that is currently under review. If not, to support the private sector's ability to plan, we request these questions be addressed in additional guidance and FAQ from OSHA, as soon as possible.

As a willing partner and representative of the manufacturers and retailers of consumer essentials, the undersigned organizations look forward to working together as you address workforce safety through the ETS. Please contact us with any questions or to continue this important dialogue.

Sincerely,

Donna Garren
EVP, Science & Policy
American Frozen Foods Institute

Michael Dykes
President and CEO
International Dairy Foods Association

Betsy Booren
SVP, Regulatory Affairs
Consumer Brands Association

Chris Jones
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National Grocers Association

John Bode
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Senior Director, External Affairs
National Automatic Merchandising Association

Amanda Nguyen
VP, Government Affairs & Legal
Fragrance Creators Association

Jane B. DeMarchi
President
North American Millers' Association

Christine LoCascio
Chief of Public Policy
Distilled Spirits Council of the United States

Elizabeth Avery
President and CEO
SNAC International

Private Sector Questions Regarding Contemplated OSHA Emergency Temporary Standard on COVID-19 Vaccination or Testing for Employers of 100 or More as Outlined by President Biden's [COVID-19 Action Plan: Path out of the Pandemic](#)

General/Operational

1. Who is covered?
 - a. Will both salaried and hourly employees be covered?
 - b. Will both union and non-union employees be covered? Will the duty to bargain with employees subject to a collective bargaining agreement apply to this ETS?
 - c. Will independent contractors (*i.e.*, 1099 or agency workers) be covered? If an agency is the employer of record, who will bear legal responsibility for compliance with the ETS?
 - d. If the employer uses a professional employment organization (PEO) to act as the employer of record, who will bear legal responsibility for compliance with the ETS?
 - e. Will remote employees count? If not, will there be a maximum number of hours when employees may be at an employer facility in order to qualify as "remote"?
 - f. Will employees of a U.S. employer based outside the U.S. be covered? Will it matter if such employees are U.S. citizens?
 - g. Will employees of a non-U.S. employer that is a subsidiary of a U.S.-based company be covered? Will it matter if such employees are U.S. citizens?
 - h. Will non-U.S. citizens working in the U.S. be covered?
 - Will the answer depend on visa status or length of stay?
 - Will the answer depend on green card status?
 - i. In counting whether an employer has at least 100 employees, will independent contractors, agency employees, PEO employees, or employees working remotely or outside the U.S. count? Will employees of subsidiaries count?
 - j. How often must the count occur? For example, what if an employer has 95 employees when the ETS goes into effect and then 6 are added later? What if 6 non-U.S. employees join the U.S. workforce temporarily?
 - k. Why is this policy limited to companies with over 100 people? Is there any prospect that this threshold will change; for example, is there any contemplation to changing or lowering that threshold?
 - l. Will an employee be covered if the employment is temporary? Will the length of temporary employment matter (*e.g.*, seasonal employees, seconded employees, or visitors working for other employers but temporarily on site)?
 - m. Will "man in plant" employees count (*i.e.*, employees of a second employer who are either temporarily or permanently assigned to the first employer's workplace to supervise work that the first employer is doing for the second employer)?
2. How will this new ETS affect all previous OSHA guidance on this subject, including the prior ETS that says, "*Most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure*"?

3. What, if anything, will employers be required to do if an employee refuses to either provide proof of vaccination or be tested?
 - a. Progressive discipline?
 - b. Immediate termination?
 - c. If not immediate termination, will administrative suspension be required (*i.e.*, no participation in the workplace)? Will it matter to this question whether the employee is asymptomatic?
 - Will time spent in administrative suspension for refusal to comply be compensable?

4. Will the new ETS impose any sort of unique liability on companies for non-compliance or will the usual rules for non-compliance with an OSHA ETS apply?

5. Will there be a transitional period?
 - a. Will there be a period between the issuance of the rule and the date when compliance is mandatory?
 - b. Will there be a period of non-enforcement after the rule becomes mandatory to help employers adjust to the rule?

6. Pre-emption:
 - a. Will the ETS, as a federal requirement, preempt existing and inconsistent state-imposed obligations?
 - b. Will the ETS, as a federal requirement, supersede state expense reimbursement statutes? For example, if a state statute requires an employer to reimburse an employment-related expense, but the ETS requires the employee to either provide proof of vaccination or a test result, who must pay (or reimburse) for the vaccination or testing?
 - c. How will this ETS, as a federal requirement, apply in those states with an ETS of their own or an inconsistent vaccination/testing requirement (*e.g.*, California)?

7. Exemptions:
 - a. Will the ETS include exemptions based on religious beliefs and disabilities?
 - b. Must the employer accept any assertion of religious belief? Can the employer require written proof from a clergy member or applicable religious authority that (1) the employee is an adherent and (2) the dogma of the religion does not permit either vaccination or testing?
 - c. How will “disabilities” be defined?
 - d. Will there be other categories of exemptions? How will qualification be determined?

8. Will waivers be allowed if an employer is unable to locate sufficient employees willing to comply?
 - a. Will it matter for this purpose if the employer is part of an “essential” business? How will “essential” be defined? Will the CISA guidance be used to define “essential workforces”
 - b. Can employers self-identify as waivers, or will there be an application process?
 - c. What standard will govern the waiver determination?

9. Will employers be entitled to demand written documentation of compliance from employees?
 - a. What sort of documentation will suffice?
 - b. Does an employer have a duty to investigate the “bona fides” of provided documentation?
 - c. What if the employer believes that the documentation is false, but the employee insists it is real?
 - d. Will the ETS specify the time period for which documentation must be kept or the form in which it must be kept?
 - e. Must the employer keep originals of all employee-provided documentation?
10. If an employee is not eligible for new or continued employment because the employee refuses to get vaccinated or tested on a weekly basis, will the employee be eligible for federal benefits, including unemployment benefits?
11. Will there be additional changes to the tracking and reporting responsibilities for employers (e.g., health assessment/tracking, close contact tracing, state reporting requirements)?
12. Will the ETS address the employer’s liability, if any, if an employee ends up having an adverse reaction to a vaccine obtained only because the employee did not want, or want to bear the expense of, weekly testing?
13. Will the time spent recovering from an adverse reaction to a vaccine, obtained only because the employee did not want, or want to bear the expense of, weekly testing, be compensable?
14. Will an employer have an ability to insist on one option or the other (e.g., vaccination for all employees or testing for all employees—even vaccinated ones)?
15. Once the ETS is in place, will masks or physical distancing still be required? What if the source of a mask or distancing requirement is a state law or regulation?

Vaccinations

1. Does the government have plans to centralize tracking of vaccinations or is it on the employers to manage?
2. Will any vaccine count?
 - a. Will it have to be a fully approved vaccine or will a vaccine with emergency use approval qualify?
 - b. What if the vaccine is approved and obtained abroad (the Chinese or Soviet vaccine, for example)?
3. What will count as “vaccinated”?
 - a. Will a single shot of a normally two-shot vaccine (e.g., Pfizer/BioNTech or Moderna) suffice?
 - b. Will someone taking a two-shot vaccine be deemed “vaccinated” during the period between the first and second shots?
 - c. How long will someone who was vaccinated continue to carry “vaccinated” status?
 - d. Will boosters be required to maintain “vaccinated” status? How often?
 - Will the dose of the booster compared to the original dose matter?

4. Can natural immunity be considered a substitute for vaccination?
 - a. How can natural immunity be demonstrated?
 - b. Will testing be required to establish or maintain natural immunity status?
 - c. How long will someone who has established natural immunity be entitled to maintain that status?
5. If the employer offers vaccination in order to ease compliance with the ETS, will the employer be liable for adverse reactions, side effects (even ones that emerge months or years later), or “breakthrough” cases of COVID-19?

Testing

1. What is the federal government doing to ensure an adequate supply of tests and testing capacity at laboratories? This requirement would introduce an enormous demand for tests.
2. Types of tests:
 - a. Will the employer have the right to specify tests it deems acceptable?
 - b. Will the ETS exclude or mandate any particular type or form of test?
 - c. Will the ETS set standards for acceptable tests?
 - d. Will self-administered tests be acceptable? For self-administered tests, what sort of proof will be required, if any, that the test was performed properly, and the result was negative?
 - e. If the test must be performed by someone other than the employee, must the tester have a professional license of some kind (e.g., doctor, nurse, pharmacist, lab technician at a licensed laboratory)?
 - Can the tester be employed by the employer?
 - Can the tester be paid by the employer even if not employed?
 - f. What if a required test is unavailable?
 - g. What if no test is readily available?
 - h. What if weekly testing with a mandated test is too expensive? Will an alternate, less expensive type be acceptable? How will “too expensive” be measured?
3. Will time spent testing be considered compensable time?
 - a. Will it matter for this purpose whether the testing is done on site?
 - b. If off-site testing is compensable, can the employer require proof of the amount of time spent?
 - c. If off-site testing is compensable, will travel to and from the testing site also be compensable?
4. If the requirement to be tested is on the employee rather than the employer, will the employer be required to provide testing if the employee claims an inability to obtain a test?
5. If an employee refuses a company-funded vaccination and does not otherwise meet the “vaccination” option, can the employer impose the responsibility for, and cost of, testing on the employee?
6. How long will documentation on test results need to be held for?

7. If an employer or employee is using the self-administered test, how do they/we document the test results?
8. Does an employee have a duty to report a positive test if a subsequent test is negative?
9. Can an employer accept a negative test if an earlier test was positive?
10. Can an employer impose on an employee the cost of an employer-provided test?
11. If an employee takes a COVID-19 test but the results are not yet available, can the employee continue to work pending the results?
12. Must “weekly” tests be provided/taken at the same day or time each week?
13. Must tests done on-site be provided prior to the start of work?
 - a. Will it matter to the prior question whether the test is administered before the expiration of a week from a prior negative test?
 - b. If an employee takes a COVID-19 test but the results are not yet available, is the employee allowed to continue to work pending the results? Does it matter if other engineering and administrative controls are in place?
14. Will employers be obliged to provide paid time off to obtain off-site testing?
15. How, if at all, will the ETS address the disincentive a weekly testing option will have on encouraging people to get vaccinated? Will weekly testing instill a false sense of security?
16. The plan indicates that self-tests will be shipped to food banks, community centers, and available at cost via three retailers. When will this happen? Where do we report a lack of testing availability? Are fines suspended if tests are not available? Will testing remain mandatory if testing is not readily available or if the price of testing rises substantially?
 - a. Will the ETS become mandatory before adequate testing is available? What if testing availability in the employer’s area is inadequate even if generally available? How far and wide must tests be searched for?
 - b. Who—the employer or the employee—will bear the responsibility to locate tests?