

CONSTRUCTION INDUSTRY SAFETY COALITION

September 27, 2021

James “Jim” Frederick
Principal Deputy Assistant Secretary
U.S. Department of Labor
Occupational Safety and Health Administration
Room: S2315
200 Constitution Ave., NW
Washington, DC 20210

Re: Construction Industry Safety Coalition
Emergency Temporary Standard on COVID-19 – Vaccines/Testing

Dear Mr. Frederick:

The Construction Industry Safety Coalition (“CISC” or the “Coalition”)¹ respectfully submits this letter to the Occupational Safety and Health Administration (“OSHA” or the “Agency”) for the Agency’s consideration as it works to implement President Biden’s “Path out of the Pandemic COVID-19 Action Plan (the “Plan”).” As part of that Plan, President Biden has directed OSHA to develop a rule to “require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work.”² The rule will also require employers with more than 100 employees to provide paid time off for the time it takes for workers to get vaccinated or to recover if they are “under the weather” post-vaccination.

The CISC supports the President’s goal of increasing vaccinations among the population and has undertaken numerous efforts to increase worker awareness of – and access to – vaccines in the construction industry. However, the Plan provides little detail as to how OSHA is to apply and craft the regulatory approach to implement President Biden’s mandate. How OSHA applies the standard will have significant implications for the construction industry and for the construction workforce, particularly since OSHA has generally characterized the construction industry as low risk. Given the importance of this initiative, the CISC is submitting this letter to ensure that OSHA understands some of the key issues of concern to the construction industry.

Disappointedly, OSHA has stated that it will not be accepting formal public comment as it develops the Emergency Temporary Standard. The CISC respectfully requests that OSHA reconsider this and open a public docket to receive comments from the public as it considers how

¹ The CISC is comprised of numerous trade associations representing virtually every aspect of the construction industry. Workplace safety and health is a priority for all members of the Coalition, and each is committed to helping create safer construction jobsites for workers.

² See <https://www.whitehouse.gov/covidplan/>.

to proceed with this important initiative. Even a short comment period would allow stakeholders with experience with vaccinations and testing to provide information to OSHA, which would be very valuable as OSHA considers the ETS.

In this letter, we reiterate the proactive measures taken by the Coalition and the construction industry to address COVID-19. This includes the CISC's efforts to increase vaccinations among the construction workforce. We also describe how and why the construction industry is low risk and, thus, applying the ETS to the construction industry would not be appropriate under the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act"). There is no "grave danger" in the construction industry that would warrant applying the ETS to the industry. And finally, we discuss some key considerations related to how OSHA should craft any standard related to vaccinations and testing based upon the experience of CISC members and member companies.

1. The Construction Industry's Proactive Efforts to Mitigate the Impact of COVID-19 on Construction Workers.

As you know, from the outset of the pandemic the construction industry has been at the forefront of efforts to protect construction employees from the virus. The CISC developed a "COVID-19 Exposure Prevention Preparedness and Response Plan" (the "Response Plan")³ in March of 2020, which has been made available in both English and Spanish and provided at no cost to the construction industry. The CISC updated the plan four times to account for changes in guidance from the Centers for Disease Control and Prevention ("CDC"). The Response Plan is tailored to the construction environment, which OSHA has generally classified as low risk (*see* discussion below). In addition to the Response Plan, the CISC organized two safety stand downs related to COVID-19, one in April 2020 and the other in January 2021.

Of particular relevance to the President's Plan, from April 19-23, 2021, CISC members partnered with the CDC to conduct a "Vaccine Awareness Week in Construction" campaign to raise awareness of the safety, effectiveness, and benefits of COVID-19 vaccination among construction workers. The CISC encouraged participation in Vaccine Awareness Week, distributed education materials and a new industry public service announcement, and encouraged participation in the CDC and National Institute for Occupational Safety and Health ("NIOSH") vaccination education webinars for the industry.

2. The Construction Industry is Low-Risk for COVID-19.

Even though the construction industry has supported the CDC's vaccination efforts across the country, any COVID-19 ETS applicable to construction is unsupported at this time. An ETS is only permitted upon a showing that there is a "grave danger" from exposure to a hazard in the

³ See <http://www.buildingsafely.org/covid-19-coronavirus/>.

workplace and the ETS is immediately needed to address the hazard. OSHA cannot make this showing in the construction industry.

As a general matter, construction operations are low risk with respect to the transmission and spread of COVID-19. Early in the pandemic, OSHA explained that the level of risk of occupational exposure to COVID-19 “depends in part on the industry type, need for contact within 6 feet of people known to be, or suspected of being, infected with SARS-CoV-2, or requirement for repeated or extended contact with persons known to be, or suspected of being, infected with SARS-CoV-2.”⁴ Workers, such as construction workers, that have minimal occupational contact with the general public or other coworkers are generally considered to have a low exposure risk.

OSHA established a webpage further analyzing when certain types of construction work fall into the various COVID-19 risk exposure categories. According to OSHA’s own assessment, most construction work poses “low exposure risk”; construction work only crosses into “high exposure risk” when it takes place at indoor work sites occupied by people such as other workers, customers, or residents *suspected* of having or *known* to have COVID-19, including when an occupant of the site reports signs and symptoms consistent with COVID-19. Therefore, construction work is unlikely ever to pose a “high exposure risk” or “very high exposure risk.”⁵

In the June ETS published by OSHA applicable to healthcare services and healthcare support services, the Agency describes the high risk of COVID-19 transmission posed by indoor work environments with close human contact. The preamble to the ETS acknowledges that “the primary way the SARS-CoV-2 virus spreads from an infected person to others is through the respiratory droplets” and that “most commonly this occurs when people are in close contact with one another in indoor spaces (within approximately six feet for at least fifteen minutes) (CDC, May, 2021).”⁶ OSHA later references a study by the European Centre for Disease Prevention and Control, which found that “indoor settings contributed to 95% of reported clusters.” And the preamble further acknowledges that “a number of factors – often present in healthcare settings – that can increase the risk of transmission: Indoor settings, prolonged exposure to respiratory particles, and lack of proper ventilation (CDC, May 6, 2020).”⁷ While these factors may be commonly present in healthcare settings, they *certainly are not common occurrences in construction environments*.

Indeed, the low-risk nature of construction work was further recognized in the recent CDC guidance on vaccine booster shots. In that guidance, the CDC recommended that certain occupations at increased risk for COVID-19 exposure and transmission should receive booster shots. This included the following occupations:

⁴ Guidance on Preparing Workplaces for COVID-19, OSHA (2020) (available at <https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf>).

⁵ COVID-19 Control and Prevention: Construction Work, OSHA (last visited Feb. 23, 2021) (available at <https://www.osha.gov/coronavirus/control-prevention/construction>).

⁶ 86 Fed. Reg. 32376, 32392 (June 21, 2021).

⁷ *Id.* at 32393.

- First responders (healthcare workers, firefighters, police, congregate care staff)
- Education staff (teachers, support staff, daycare workers)
- Food and agriculture workers
- Manufacturing workers
- Corrections workers
- U.S. Postal Service workers
- Public transit workers
- Grocery store workers

Notably, the construction industry is *not* included on this list of high-hazard industries.⁸

OSHA initially proposed in a draft rule submitted to the Office of Management and Budget to include all of industry in the ETS that is currently in effect. OSHA reconsidered this, however, and ultimately limited the June ETS to just health care services and healthcare support services. Even with current COVID-19 case counts, there is no evidence to support a finding of a “grave danger” within the low-risk construction industry. OSHA lacks the authority to issue an ETS mandating vaccinations – or any requirements through an ETS – unless it can demonstrate that the statutory requirements are met. OSHA cannot do so here.⁹

3. Key Issues of Concern.

Irrespective of the legal authority that OSHA has to promulgate the rule, the CISC is concerned with how OSHA approaches any ETS and the potential impacts on the construction industry and the construction workforce. The Plan leaves many unanswered questions. For example, who is responsible for paying for and managing weekly testing? Will employees be able to opt out of testing for any reason, or only those reasons recognized by other federal law? What kind of tests will be permitted and what proof of testing will be required? What does “under the weather” mean for purposes of paid time off following vaccinations?

Despite the efforts of a range of stakeholders, vaccine hesitancy remains an ongoing, complicated reality in the industry. How the ETS is crafted will have significant, lasting impacts. The CISC details a few of its concerns below.

A. Workforce Shortages

⁸ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html>.

⁹ As the CISC has previously stated to OSHA, the issue before the Agency is whether conditions support the development of an ETS, not whether OSHA might have the rulemaking authority to issue a standard pursuant to Section 6(b)(5) of the OSH Act. Because an ETS deprives the public of notice and an opportunity for comment and takes effect immediately, the legal standards for promulgation are much higher than those required by Section 6(b)(5). OSHA cannot meet those high standards here.

The Plan calls for OSHA to issue an ETS requiring that employers with 100 or more employees either mandate vaccines or require weekly testing of unvaccinated employees. The construction industry is dominated by small employers, although the Small Business Administration (“SBA”) definition of a “small business” in construction is not generally determined by the number of employees. Thus, many SBA-defined small businesses have over 100 employees.¹⁰

The construction industry has experienced significant workforce shortages. For example, in 2021, it is estimated that construction companies will need to hire *430,000 more workers* than they employed in 2020, according to an analysis of U.S. Bureau of Labor Statistics data performed by the Associated Builders and Contractors.¹¹ In residential construction, one of the primary headwinds in the housing market is the ongoing, chronic labor shortages and availability of skilled workers.¹²

Any rule that is developed by OSHA must be crafted in a way so as not to further disrupt the make-up of the construction workforce. This could arise through vaccine-hesitant workers potentially leaving the industry depending upon how any vaccine mandate is specifically implemented. This is of particular concern to the construction industry that already has a very transient workforce. OSHA must consider the impact on the workforce as it finalizes any ETS.¹³

B. Employer and Employee Obligations for Vaccinations and Testing

Further to the above, how OSHA specifically apportions the cost of testing will potentially impact how the workforce reacts to the mandate and, indeed, how effective the rule will be in actually increasing vaccinations among workers.

According to the Plan, the rule will require employers to ensure their workforce is vaccinated or require any unvaccinated employee to “produce a negative test result on at least a weekly basis.” The language in the Plan does *not* mandate that employers pay for and manage the weekly testing process. In fact, it suggests that *employees* would be responsible for producing the test result. Since the Plan separately requires employers to pay for time off for vaccinations and any adverse side effects from vaccinations, the failure of the Plan to specifically apportion the cost for testing is significant. A regulatory approach that (1) permits employees to opt out of mandatory vaccinations for any reason in lieu of weekly testing, *and* (2) requires employers to pay for the

¹⁰ <https://www.sba.gov/document/support--table-size-standards>.

¹¹ <https://www.abc.org/News-Media/News-Releases/entryid/18636/abc-the-construction-industry-needs-to-hire-an-additional-430-000-craft-professionals-in-2021>.

¹² <https://eyeonhousing.org/2021/09/builder-confidence-steadies-as-material-and-labor-challenges-persist/>; <https://nahbnow.com/2021/07/labor-scarcity-will-increase/>.

¹³ The CISC notes that OSHA has not previously limited application of a safety and health standard to employers with over 100 employees. Thus, the Agency does not have experience in assessing the impact of such a limitation on workforce mobility. OSHA must consider this in its economic analysis of the impacts of the rule.

testing will place a significant burden and cost on employers and will also not accomplish the President’s goal of increasing vaccinations.

Vaccine hesitancy among workers is a complicated issue and, based upon the experience of CISC members, if given the choice many currently unvaccinated workers will choose to be tested weekly, rather than get the vaccine. This is particularly the case if employers are required to manage and pay for the testing. Placing an administrative and financial responsibility on workers – who choose not to get vaccinated – to get tested and produce the results weekly, may encourage these same workers to get the vaccine instead. This policy would also best support the President’s goal of increasing vaccinations.

C. Paperwork Burdens

The Plan is silent on how OSHA may (or may not) require employers to document vaccines or weekly testing. This is another area that OSHA must “fill-in-the-gaps” with respect to the ETS. The CISC strongly encourages OSHA to consider the paperwork burdens of any approach it takes.

Mandating and recording proof of vaccinations is a significant undertaking in its own right, particularly in the construction industry that has a highly transient workforce. Requiring employers to document and maintain records of weekly testing would be an incredibly difficult burden to meet.

The CISC also notes that even if OSHA were to be silent in the ETS on documenting proof of vaccinations or weekly testing, during the course of an OSHA inspection compliance officers may request such documentation. Absent direction to the contrary, OSHA enforcement of the rule may result in unintended paperwork burdens, which OSHA must also consider.

D. Recordability of Adverse Reactions to the COVID-19 Vaccine

OSHA recently determined that adverse reactions from employer-mandated vaccines should not be considered OSHA recordable events.¹⁴ The CISC appreciates OSHA’s position on this and encouraged the Agency to take this position in previous correspondence and meetings with the Agency. OSHA has stated, however, that this position is based on the Agency’s enforcement discretion and will be reevaluated in May of 2022.

When OSHA implements the ETS mandate, the CISC strongly encourages the Agency to specifically include in the rule an exception to work-relatedness for employees who experience adverse reactions to the mandatory vaccines, should those reactions result in medical treatment beyond first aid, days away from work, or restricted duty. This would provide certainty to employers and would further encourage vaccines in the workplace, which is the overall policy objective of the Plan.

¹⁴ <https://www.osha.gov/coronavirus/faqs#reporting>.

E. Cost of Paid Time Off for Vaccinations and Adverse Reactions

The Plan calls for employers to provide paid time-off for vaccinations *and* when employees are “under the weather” from adverse reactions to the vaccine. This requirement will have a significant economic impact on the construction industry, particularly if it is coupled with a requirement that employers manage and pay for alternative weekly testing (see discussion above). COVID-19 vaccines have been widely available for at least six months. The vaccines are free. For the last six months, construction workers have been able to access the vaccines. A worker’s decision not to do so at this point, is not due to availability or the need to take time off from work to do so. In CISC member experience, it is due to a *decision* not to take the vaccine.

Moreover, the CISC is concerned with the Plan’s direction for employers to pay for time off for employees that are “under the weather.” While the CISC understands that individuals may experience adverse reactions from taking vaccines and this may limit their ability to work, it is important that OSHA specifically define and limit this requirement in any ETS. Without this, employers will be left trying to implement a vague and potentially expensive provision with no direction from the Agency.

F. Availability of Testing Kits

And finally, CISC members are reporting that testing kits remain difficult to obtain. As you know, the State of California has had extensive testing requirements for months due to its COVID-19 Emergency Temporary Standard. These requirements have proven almost impossible to comply with, as the demand for testing and testing kits has surpassed the supply. The CISC is very concerned that a federal OSHA standard will put further strains on test kit availability, making it infeasible for employers to comply with the rule.

Furthermore, there are significant concerns with testing reliability, which can impact costs. OSHA needs to review and assess what tests would be “acceptable” for purposes of any weekly testing requirement. The more reliable the tests, the more expensive they may be. These issues must be analyzed by the Agency before publishing any final rule.

4. Conclusion.

The CISC appreciates OSHA’s consideration of this information. Construction is generally low-risk for COVID-19 exposure and the industry has been proactive at protecting its employees throughout the pandemic. OSHA must ensure that it fully considers all of the very difficult issues involved in implementing the Plan through an ETS. The CISC has significant concerns with this overall rulemaking effort and, again, requests that OSHA seek formal public comment on the rule.

Sincerely,

The Construction Industry Safety Coalition

American Road and Transportation Builders Association
American Society of Concrete Contractors
American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors
Association of Equipment Manufacturers
Association of the Wall and Ceiling Industry
Concrete Sawing & Drilling Association
Construction & Demolition Recycling Association
Distribution Contractors Association
Independent Electrical Contractors Association
Interlocking Concrete Pavement Institute
International Council of Employers of Bricklayers and Allied Craftworkers
Leading Builders of America
Mason Contractors Association of America
National Asphalt Pavement Association
National Association of Home Builders
National Association of the Remodeling Industry
National Demolition Association
National Framers Council
National Roofing Contractors Association
National Utility Contractors Association
Natural Stone Council
Natural Stone Institute
Specialized Carriers & Rigging Association
Tile Roofing Industry Alliance