



November 9, 2021

The Honorable Joseph R. Biden, Jr.
President of the United States of America
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20001

Doug Parker
Assistant Secretary of Labor
Occupational Safety and Health Administration
200 Constitution Ave NW, Room N3626
Washington, DC 20210

Re: COVID-19 Vaccination and Testing Emergency Temporary Standard

Dear President Biden and Assistant Secretary Parker:

The National Retail Federation (“NRF”) requests an opportunity to meet with the White House and Department of Labor to discuss relief for retailers from the most burdensome and immediate requirements of OSHA’s Emergency Temporary Standard for COVID-19 Vaccination and Testing (“ETS”).¹ NRF and its members share the Administration’s desire to keep employees safe from COVID-19, but worry that compliance with the existing timelines in the ETS is virtually impossible for our members given its considerable administrative burden and the fact that compliance must start while retailers enter the busy holiday shopping season. NRF requests this meeting out of our desire to continue to provide as many opportunities as possible for retail employees to obtain vaccinations—as our members have been doing for months, through incentives, paid time off, and on-site clinics, to name just a few of the ways that retailers have been strongly encouraging their employees to get vaccinated.

Since the publication of the ETS, NRF members have developed deep concerns about the ability to comply with the ETS during the busiest time of year, when our members are already facing workforce shortages and supply chain challenges. These compliance concerns arise despite the efforts of retailers to prepare for the ETS since the Administration’s Sept. 9, 2021 announcement of its intent to pursue this rule.

Moreover, there are substantial, unresolved legal and practical challenges that make the ETS’s January 4, 2021 testing deadline unworkable. Most NRF members cannot obtain enough reliable,

¹ This letter is a follow-up to NRF’s earlier letter on the same topic to President Biden, dated November 5, 2021.

approved COVID tests to conduct instant testing on-site. If NRF members need to allow their employees to obtain outside testing to comply with the ETS, then unresolved legal questions related to compensable time could expose retailers to significant financial liability under the Fair Labor Standards Act (“FLSA”) and related state laws. It is not fair to ask retailers and other employers to assume legal liability risk under one federal law in order to comply with another.

Practical Concerns with ETS Implementation

Retailers face several practical concerns in attempting to comply with the ETS as the Department of Labor currently intends to enforce it. First, the ETS requires employers to determine and gather proof of employee vaccination status by December 6, 2021. This is a tremendous administrative burden. Many of NRF’s members employ thousands or hundreds of thousands of employees. It would be difficult enough to obtain the same, non-confidential, non-controversial documents from that many people in one month. But the ETS’s burden is even greater as retailers must find a way to collect this specific subset of medical information, scrutinize the documents to ensure they pass muster under the ETS, maintain them confidentially to comply with OSHA’s detailed privacy protections, and aggregate them to determine the percentage of their employees who qualify as fully vaccinated. Many employees in our industry have the view that asking for this information is intrusive and violates their rights; so, our members must navigate this highly politicized issue in a way that preserves the employer/employee relationship. This effort will take time. Yet, if employers fail to complete these requirements by December 6, they could, in theory, violate the ETS on December 7 if an employee, employee representative, or the agency requests data about the employer’s aggregate vaccination rates and the employer cannot provide an accurate answer.

This compliance concern exists irrespective of employer resources and advanced planning. Retailers that made arrangements with vendors weeks ago to handle the anticipated data collection requirements of the ETS have been told it is impossible to gather, process and maintain the required vaccination documentation by the December 6 deadline. Thus, while employers knew an ETS was coming, they did not have sufficient notice to put systems in place to comply with the rule under the current deadlines. Even employers who attempted advanced planning do not believe compliance is possible on the current timeline.

The ETS also presents particular problems for retailers, who will hire millions of temporary, seasonal workers in the next 8 weeks. The ETS provides no exceptions or special treatment for these workers. Most of these workers will complete their employment before the January 4 testing deadline, yet the ETS requires employers to gather and maintain vaccination documentation for each of them. The ETS currently puts employers in legal jeopardy if they hire a seasonal employee on December 8 to work through December 31 and do not require proof of vaccination at hiring. It also requires employers to receive and consider accommodation requests for these employees despite the fact that their employment will end before any testing mandate starts. This unnecessary recordkeeping burden hits retailers harshly because of its unique staffing model, and could be solved with specific guidance for seasonal workers.

Retail employers also face the difficult decision whether to allow a testing exception or require full vaccination. If they elect to take a vaccination-only approach, they risk resignations at their busiest time of year. Even though the vaccination requirement would not start until January, anticipatory or protest resignations from even a small percentage of the workforce could cripple retailers' ability to serve their customers, as they already are facing a labor shortage. If employers elect a vaccine-or-testing option, then they must obtain the testing infrastructure necessary to implement the requirement. Although the ETS allows employers to ask employees to pay for their own tests, other laws do or may require employers to pay for the tests. And, while retailers would like to provide resources for employees to test at work, the affordable, fast tests the Administration promised when it announced its intent to enact the ETS have not materialized. So if employers commit to a vaccine-or-test policy by the December 6 deadline, then they may be left without a means to comply with their own policy when testing starts on January 4, 2022.

Our immediate concerns relate to timing, but we also would like you to consider lifting the onerous obligation that all rapid tests be proctored. The obligation to proctor all rapid tests requires our members to place an additional obligation to monitor testing on over-stressed managers or hire contractors to do so at additional expense. Our members trust their employees to bring in test results that they took themselves, show a picture of the negative test or certify that they have a negative test. This proctoring obligation takes an emotionally and politically charged issue and makes it even more divisive from an employee relations standpoint.

Legal Concerns with ETS Implementation

NRF members have also expressed significant legal concerns related to the ETS. Even if the ETS is enforceable, it creates unresolved questions related to its implementation. Most notably, employers face significant potential liability on questions of compensable time. If an employer requires vaccination, and it takes more than 4 hours for an employee to complete each of their primary vaccination doses, does the employer need to compensate the employee for any additional time spent getting vaccinated? Or, what if the vaccination took place after work hours? The ETS does not impose these obligations, but under the FLSA, the answer is less clear.

Time spent testing creates the same conundrum. The ETS says employers do not have to pay for testing, but if employers require testing for unvaccinated workers, the FLSA suggests time spent testing could be compensable. *See, e.g.*, Department of Labor Wage & Hour Division, COVID-19 and the Fair Labor Standards Act Questions and Answers, available at <https://www.dol.gov/agencies/whd/flsa/pandemic> (finding "your employer is required to pay you for time spent waiting for and receiving medical attention at their direction or on their premises during normal working hours"); 29 C.F.R. §785.43; FLSA Fact Sheet #22 (stating time is not compensable if it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed). In any event, the area is ripe for class action lawsuits from aggressive, opportunistic plaintiffs' attorneys. As a result, retailers either take on liability risk, or assume additional costs under the ETS that OSHA clearly did not intend.

Finally, the cost of the tests themselves is an issue. It remains an open question whether testing would be considered a "mandatory medical test" or a "term and condition of employment" under

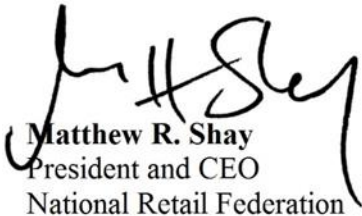
state laws requiring payment for medical tests. Could OSHA consider adding an FAQ that would clarify that this is a government requirement, not an employer requirement, and/or that because an employee can chose to be vaccinated or test, it is not a mandatory test? That would provide some assistance for retail employers as they determine how to handle this issue, which also creates liability risk.

NRF wants to work on these issues amicably. Our members have strong viewpoints that OSHA may not be able to satisfy the “grave danger” standard to invoke the emergency procedures. 29 U.S.C. § 655(c)(1). The application of this rule to workplaces with just one or two employees, plus decreasing COVID-19 case rates and increased vaccination rates, create legitimate questions about whether a grave danger lingers. Also, supply chain issues and the questions about costs raised above create feasibility arguments against the rule. In order to help our industry through the holiday season, NRF seeks compromise on these issues.

NRF continues to receive voluminous feedback, including questions and concerns regarding the ETS, from its members. By this letter, we are asking for the opportunity to discuss these issues with the White House and/or the Department of Labor. We hope we can collaborate on how to reduce the compliance burdens on retailers, ensure a successful holiday shopping season, and implement the requirements of the ETS on a timeframe that meets the needs of employees, employers, the public and the government.

Thank you for your consideration of this request. NRF applauds the Administration’s efforts to keep employees safe and hopes it can share its experiences and industry knowledge to further the interests of all interested parties.

Sincerely,



Matthew R. Shay
President and CEO
National Retail Federation