

CONSTRUCTION INDUSTRY SAFETY COALITION

January 19, 2022

The Honorable Douglas L. Parker
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Construction Industry Safety Coalition
COVID-19 Vaccination and Testing: Emergency Temporary Standard
Docket No. OSHA-2021-0007

Dear Mr. Parker:

The Construction Industry Safety Coalition (“CISC” or the “Coalition”) respectfully submits these comments in response to the Occupational Safety and Health Administration’s (“OSHA” or the “Agency”) COVID-19 Vaccination and Testing: Emergency Temporary Standard (“ETS”). 86 Fed. Reg. 61,402 (Nov. 5, 2021). The CISC appreciates OSHA’s consideration of these comments.

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. Furthermore, the CISC supports President Biden’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.

At the outset, as OSHA is well aware, the U.S. Supreme Court has just ruled that the ETS is not authorized by the Occupational Safety and Health Act of 1970 (“OSH Act” or “Act”), and the Court has therefore stayed enforcement of the ETS in its entirety. The Court’s stated ground for its ruling was that the Act only empowers *workplace* safety standards, not broad public health measures.” *Nat’l Fed’n Indep. Bus. v. Dep’t of Labor*, 595 U.S. ____ (Jan. 13, 2022) (Slip Op. at 6) The Court also required OSHA to target its standard to the particular features of an employee’s job or workplace, and specifically found that “OSHA’s indiscriminate approach fails to account for [the] crucial distinction – between occupational risk and risk more generally –” *Id.* at 7. It is thus clear from the Supreme Court’s decision that the ETS in its present form cannot be enforced and should be withdrawn. In the event OSHA still intends to pursue a permanent standard addressing COVID-19 in the workplace, a new request for comments should be issued so that the agency can receive input into the types of standard, if any, that would appropriately focus on workplace safety and would be targeted to the particular features of different industries, recognizing of course the unique features of the construction industry.

With the foregoing overriding concerns regarding OSHA’s current standard and the comments previously requested by the agency concerning whether to make the ETS a permanent standard, in this comment letter, we: (1) reiterate the proactive measures taken by the Coalition and the construction industry to address COVID-19, including the CISC’s efforts to increase vaccinations among the construction workforce; (2) discuss the CISC’s concerns regarding the lack of stakeholder involvement in OSHA’s development of the ETS; (3) describe how and why the construction industry is low risk and, thus, applying the ETS to the construction industry is not appropriate under the OSH Act; and (4) discuss some additional issues with the ETS as applied to the construction industry.

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

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”)¹ 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 vaccinations and the ETS, 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.

Irrespective of the ETS and this rulemaking, the CISC will continue to seek ways to encourage construction workers to get vaccinated.

2. OSHA Should Engage Stakeholders and ACCSH Before Issuing an ETS.

The CISC is disappointed that OSHA did not seek any stakeholder input or consult with the Advisory Committee on Construction Safety and Health (“ACCSH”) before issuing the ETS. The ETS is one of the most significant – and controversial – rulemakings in OSHA’s history. It raises

¹ See <http://www.buildingsafely.org/covid-19-coronavirus/>.

numerous legal issues, including as the rule relates to “grave danger,” significant risk, and technological and economic feasibility.

While the CISC understands that OSHA is under no legal obligation to obtain stakeholder input in advance of the issuance of an ETS, the CISC objects to what appears to be OSHA’s practice of complete non-engagement with affected industries. This practice began when OSHA was preparing the healthcare ETS and refused to open a public docket to receive comment in advance of issuance. And it continued with this ETS. Indeed, several groups, including the CISC, sent written letters to OSHA providing feedback. The CISC, however, was told that OSHA was not receiving and would not consider this input. Respectfully, this was a mistake, as the Supreme Court’s ruling has clearly demonstrated.

In addition, the CISC objects that OSHA did not consult with ACCSH in advance of publication of the ETS, which will have a significant impact on the construction industry. While the consultation requirement in 29 C.F.R. § 1912.3 does not apply to interim final rules, the spirit of the requirement is for OSHA to meaningfully engage with ACCSH on any proposed rule applicable to the construction industry. Unfortunately, in the CISC’s view, the Agency has paid lip service to this requirement in the last several rulemakings.

ACCSH is a balanced advisory committee with significant experience in construction issues. OSHA should meaningfully engage with the Committee before publishing any significant rule. The CISC was disappointed that this did not happen here.

3. There is No “Grave Danger” in Construction Justifying the ETS.

Even though the construction industry has supported the CDC’s vaccination efforts across the country, the ETS as applicable to construction is unsupported. An ETS is only permitted upon a showing that there is a “grave danger” from exposure to a hazard in the workplace and the ETS is immediately needed to address the hazard. OSHA has not made this showing in the construction industry.

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

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.”² 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.

² Guidance on Preparing Workplaces for COVID-19, OSHA (2020) (available at <https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf>).

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.”³

In the June ETS published by OSHA applicable to healthcare services and healthcare support services, the Agency described the high risk of COVID-19 transmission posed by indoor work environments with close human contact. The preamble to that ETS acknowledged 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).”⁴ OSHA later referenced 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 acknowledged that “there are 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).”⁵ While these factors may be commonly present in healthcare settings, they *certainly are not common occurrences in construction environments*.

OSHA initially proposed in a draft rule submitted to the Office of Management and Budget to include all of industry in the healthcare ETS. OSHA reconsidered this, however, and ultimately limited the 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. Instead, this rule seems to be an attempt by OSHA to regulate “the hazards of daily life” which occur everywhere. This is beyond OSHA’s regulatory authority.⁶ 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.⁷

³ COVID-19 Control and Prevention: Construction Work, OSHA (last visited Feb. 23, 2021) (available at <https://www.osha.gov/coronavirus/control-prevention/construction>).

⁴ 86 Fed. Reg. 32,376, 32,392 (June 21, 2021).

⁵ *Id.* at 32,393.

⁶ *Nat’l Fed’n Indep. Bus. v. Dep’t of Labor*, 595 U.S. ____ (Jan. 13, 2022) (Slip Op. at 6) (“Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.”).

⁷ 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

B. The Evidence in the Preamble of “Grave Danger” in Construction is Unpersuasive.

In order to attempt to justify broad application of the ETS to all industries – including construction – OSHA points predominately to evidence of “outbreaks” recorded throughout the course of the pandemic. *See* 86 Fed. Reg. at 61,411-61,413. The discussion in the preamble simply lists industries where “outbreaks” occurred and provides raw case numbers. There is no description of the circumstances of the outbreaks in the industries cited, the conditions in the work environments, or the methodology utilized to determine the work-related aspects of the outbreaks. Without more, this information is meaningless in justifying “grave danger.”

Furthermore, much of the information gathered was from 2020 and early 2021, not recent information reflecting the extent of risk currently in the industries affected. In fact, the information cited was available to the Agency in early 2021 when OSHA promulgated the healthcare ETS. After reviewing this same information in the Spring, OSHA concluded that there was no evidence to support a “grave danger” in construction. Now, less than six months later, OSHA is citing the same information for the proposition that there is a “grave danger” in construction. This makes no sense and cannot withstand legal scrutiny.

To justify the need for the rule in construction, OSHA also cites to a study by Pasco *et al.* which purported to examine the association between construction work and COVID-19 cases in Austin, TX. 86 Fed. Reg. at 61,415. According to OSHA, the study authors concluded that “construction workers had a nearly 5-fold increased risk of hospitalization in central Texas compared with workers in other occupations.” *Id.* The CISC disagrees that the study supports a “grave danger” finding in construction.

As an initial matter, the study itself was conducted from March to August 2020, when the pandemic was at a different stage and during which time most occupations were on lockdown. In fact, the study itself notes that for a seven-day period during the study, only critical infrastructure work was permitted and both commercial and residential construction were barred under a governor’s order. It is not appropriate to base a finding of “risk” in the construction industry on a study conducted while the comparison occupations were operating remotely. Also, during this time, the protective measures implemented by construction employers were uneven, as the nation was still learning about the virus and vaccines were not yet available to the public. Such a study cannot support a finding of “grave danger” at this later stage of the pandemic.

C. The Exclusion in the ETS for Outdoor Work Supports the CISC’s Position.

OSHA’s overall approach to coverage of the ETS actually undercuts its grave danger finding with respect to construction. OSHA has excluded from coverage employees who work exclusively outdoors. In justifying this exclusion, OSHA states that “[e]mployees who work exclusively

promulgation are much higher than those required by Section 6(b)(5). OSHA cannot meet those high standards here.

outside face a much lower risk of exposure to SARS-Co-V-2 at work.” *Id.* at 61419. OSHA goes further and concludes:

OSHA recognizes that outdoor transmission has been identified in a few specific incidents However, general reviews of transmission studies that include large-scale and high-density outdoor gatherings indicate that indoor transmission overwhelmingly is responsible for SARS-CoV-2 transmission. Additionally, the lack of evidence tied to specific case studies illustrating outdoor transmission in comparison to the bevy of case studies on indoor transmission *makes it difficult to support a conclusion that outdoor transmission rises to the level of a grave danger.*

Id. (emphasis added.)

Despite making this conclusion, OSHA contends that construction work on the whole constitutes a “grave danger,” even though OSHA itself has stated that the work is predominately performed outdoors and is otherwise “low risk.” This inconsistency cannot survive scrutiny.

4. Other Issues of Concern.

Irrespective of the legal authority that OSHA has to promulgate the rule, the CISC is concerned with several aspects of the ETS.

A. Workforce Shortages.

The ETS requires 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.⁸

The construction industry has experienced significant workforce shortages. For example, in 2021, it was estimated that construction companies would 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.⁹ In residential construction, one of the primary headwinds in the housing market is the ongoing, chronic labor shortages and availability of skilled workers.¹⁰

This rule, as developed by OSHA, will serve to exacerbate these workforce issues. In particular, the CISC is very concerned with vaccine-hesitant workers leaving the construction industry in an effort to avoid the vaccine mandate. The Center for Construction Research and Training, a

⁸ <https://www.sba.gov/document/support--table-size-standards>.

⁹ <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>.

¹⁰ <https://eyeonhousing.org/2021/09/builder-confidence-steadies-as-material-and-labor-challenges-persist/>; <https://nahbnow.com/2021/07/labor-scarcity-will-increase/>.

construction safety research group, found that only approximately 57% of workers in construction are vaccinated as of December 2021, compared to a vaccination rate of roughly 84% for all other industries.¹¹ Given the transient nature of the construction industry workforce, there is a very real likelihood that many of these vaccine-hesitant workers will leave the construction industry to find work with a smaller employer who does not fall under the scope of the rule in order to avoid the rule’s vaccine-or-test mandate.

OSHA acknowledges there is a risk that workers will quit their job to avoid the rule’s vaccine mandate. 86 Fed. Reg. at 61,475. While OSHA estimates that only 1% to 3% of workers will actually leave their jobs in response to the mandate, *Id.*, this estimate is artificially low. OSHA bases its estimate on a single article that discusses the data of healthcare workers at five facilities who quit their job in response to a vaccinate mandate. *Id.* This limited study focused on the healthcare industry, which is largely covered by a separate ETS, is not representative of the United States’ workforce as a whole, much less the construction industry. OSHA must consider this impact on the construction industry workforce as it determines whether it should make the ETS permanent or withdraw it entirely.

B. Scarcity of COVID-19 Tests.

The ETS’s requirement for weekly testing of unvaccinated workers fails to meet the Supreme Court’s standard. It is also infeasible during the current shortages and excessive costs of testing kits around the country. Weeks before the February 9, 2022 deadline for compliance with the ETS’s weekly testing requirement, employers have already seen a “run on the markets” for testing supplies which have become increasingly scarce. OSHA estimates employers and employees will require 6.3 million tests per week to comply with the ETS. 86 Fed. Reg. 61,484. Lack of availability of COVID-19 testing will be a barrier to compliance for many employers. In fact, this is something that California employers have already encountered.

Under Cal/OSHA’s ETS, employers are required to test employees in the event of a worksite outbreak. Even though testing is only intermittently required in California, the struggle to line-up testing resources has been an issue for employers of all sizes since the ETS went into effect in late November 2020. Difficulties exist with seemingly every testing option available. Companies that select on-site testing vendors to reduce worker absence due to time spent testing off-site grapple with testing “minimums” (e.g., vendors who require a minimum number of tests per day, per worksite) and weeks-long lead times to secure testing services. Employers that pursue the “rapid test” option, or antigen home test kit, encounter ongoing supply issues and purchase volume limits (i.e., a cap on the number of kits a single company may purchase) or, alternately, purchase volume minimums which force employers to buy more test kits than they need in order to have access to any tests at all.

Geographic location is another factor that dictates testing availability. Employers located in urban areas theoretically have access to more testing facilities than those in rural areas of the

¹¹ <https://www.cpwr.com/research/data-center/data-dashboards/covid-19-vaccination-dashboard/>

country. However, employers in large cities relying on third-party testing sites to satisfy employee testing requirements are experiencing reduced testing availability and significant wait times for appointments. Further, an increase in mandated testing under state and local orders (e.g., required testing for return to school) has further strained existing testing resources. The demand on antigen test manufacturers, testing providers and on-site testing vendors that will be created by the ETS's intermittent testing requirements will far exceed the demands already experienced by California employers.

C. *Paperwork Burden.*

The CISC is alarmed by the paperwork burden imposed on employers by the ETS. Of note, the rule requires covered employers to:

- Draft and maintain a written vaccination policy;
- Maintain a record of each employee's vaccination status and preserve acceptable proof of vaccination;
- Maintain a roster of each employee's vaccination status; and
- Maintain documentation of certain COVID-19 test results.

These paperwork burdens will put a large strain on small businesses, in particular, who do not have extensive internal resources to manage these recordkeeping requirements. Indeed, the Agency even estimates that the cost of recordkeeping *alone* for all affected industries is just short of \$1 billion. As indicated above, the SBA definition of small businesses in construction is generally not dictated by number of employees. Thus, the rule will necessarily apply to some small construction employers. The CISC encourages the Agency to re-examine the need for these requirements if it were to make the ETS permanent.

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

The CISC is disappointed that OSHA did not include in the ETS a provision memorializing the Agency's recent determination that adverse reactions from employer-mandated vaccines should not be considered OSHA recordable events.¹² The CISC encouraged the Agency to take this position in previous correspondence and meetings and applauded the Agency's decision to do so. OSHA has stated, however, that this position is based on the Agency's enforcement discretion and will be reevaluated in May of 2022.

OSHA had an opportunity in the ETS to permanently include the exemption 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 have provided certainty to employers and further encouraged vaccines in the workplace. Should

¹² <https://www.osha.gov/coronavirus/faqs#reporting>.

OSHA determine to make the ETS permanent, the CISC strongly encourages the Agency to specifically add this exemption in the rule.

E. Flawed Assumptions in Cost Analysis.

The CISC appreciates OSHA's efforts to attempt to capture the costs of the rule – particularly without engaging stakeholders in advance of publication of the rule. As OSHA notes, it “has limited data on many of the parameters needed in this analysis and has estimated them” based on the “best available evidence.” 86 Fed. Reg. at 61,475. Unfortunately, OSHA has underestimated the costs in several ways and used flawed assumptions to understate the true financial impact of the rule on employers.

In particular, OSHA does not assume any costs for employers to provide paid time off to any employee for removal from the workplace as a result of a positive COVID-19 test or diagnosis of COVID-19, as the rule does not specifically require such paid time off. However, OSHA notes in the preamble that other federal and state laws, or collective bargaining agreements, may require such paid time off. To the extent the rule requires removal and OSHA knows that employers may be required by other laws or regulations to pay for the time off, OSHA should consider these costs to the employer of the rule. OSHA similarly assumes no costs associated with employers paying for face coverings or employee time spent obtaining vaccinations outside of working hours because these payments are not directly required under the ETS, while acknowledging that compliance with the ETS may trigger these payment obligations under other federal, state, or local law, or an employer's contractual obligations. OSHA should likewise consider the costs to the employer associated with these items.

OSHA's inputs for various costs are also understated. For example, OSHA estimates firms will only require one hour of management labor for familiarization with the rule. This estimate is undeniably low, as the rule published in the Federal Register is 154 pages long. As a benchmark, OSHA estimated 1.5 hours of management labor for familiarization with the Healthcare ETS. To explain the difference, OSHA states that this ETS is a “simpler standard” but offers no explanation for this conclusion. OSHA estimates it will take employers a mere five hours to develop a policy under the ETS, including the time needed to set up recordkeeping systems under the rule. In comparison, OSHA previously estimated firms could require up to 40 hours to develop a policy under the Healthcare ETS. The underestimates do not stop there. OSHA assumes that the pre-shot wait time per employee of covered firms is just 5 minutes. There is no basis for this assumption and it is inconsistent with employer and employee experiences who have received the vaccine. And despite requiring employers to allow up to four days of leave in support of employee vaccination,

OSHA assumes costs associated with this requirement are equal to the costs of only 0.36 days of leave per employee for only 12 percent of covered employers.

If OSHA were to determine to make the ETS permanent, it must accurately capture the costs to employers. OSHA has not done so here.

F. Unlawful Anti-retaliation Provision.

In addition, the CISC strongly objects to the provision in the rule cross-referencing OSHA's unlawful anti-retaliation provision in 29 C.F.R. § 1904.35(b)(1)(iv). That provision was added to OSHA's recordkeeping rule in 2016 – "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624, 29,627 (May 12, 2016). That provision gives OSHA the authority to address alleged instances of retaliation for reporting work-related injuries and illnesses through the Citation and Notification process, instead of through Section 11(c) of the OSH Act.

Congress provided clearly and unambiguously that discrimination complaints must proceed under Section 11(c) of the OSH Act, explicitly rejecting civil penalties and administrative review for discrimination claims. Section 11(c) of the OSH Act protects an employee from retaliation on the basis of filing a complaint, testifying with respect to a Section 11(c) proceeding, or exercising any right afforded by the Act on behalf of himself or others. 29 U.S.C. § 660(c)(1). The scope of rights protected implicitly and explicitly under the Act is broad. Sections 11(c)(2) and 11(c)(3) outline the procedural process Congress explicitly created for employees who believe they have been discriminated against. *See* 29 U.S.C. §§ 660(c)(2) and 660(c)(3). Congress provided that an employee must file a complaint with the Secretary within 30 days of the violation occurring. 29 U.S.C. § 660(c)(2). The Secretary then must investigate the complaint and, if the Secretary determines that a violation has occurred, pursue an action in a United States district court to seek appropriate relief, including rehiring or reinstatement of the employee to his or her former position with back pay. *Id.* Congress specifically gave the Secretary 90 days to complete the investigation and notify the complainant of his or her determination regarding the allegations in the complaint. 29 U.S.C. § 660(c)(3).

Through these Section 11(c) provisions, Congress provided procedures to address all alleged discrimination by employers against an employee for exercising rights under the Act. OSHA's rule creating an alternative process is unlawful and the ETS's cross-reference to it is inappropriate.

G. Possible Extension to Even Smaller Employers.

And finally, as discussed above in the context of worker shortages, the ETS requires that employers, including small businesses, with 100 or more employees either mandate vaccines or require weekly testing of unvaccinated employees. Given existing concerns with the ETS and difficulties with compliance, OSHA should not extend the ETS to include employers with *under* 100 employees.

Concerns that affect already-covered employers would have an even greater impact on companies with under 100 employees. As just one example, the already under-estimated costs of compliance with the ETS will be far greater for smaller employers due to the economies of scale. For example,

the loss of five employees due to vaccine or testing opposition would be a greater hit to an employer with only 12 employees, compared to an employer with 112. A smaller company of this size is unlikely to employ someone with a designated talent-finding function, and it will have to divert some of its remaining employees to replacing the lost talent. New employees must be trained, and the company may be less productive until new hires are performing at the level of the talent they replaced. All of this imposes a cost burden on the employer, which will be exacerbated for the smallest of companies.

In addition, OSHA excluded employers with under 100 employees from coverage under the ETS, in part, to allow time “to assess any impact the new requirements may have on the testing infrastructure and related supply chains before considering extending those requirements to additional employers.”¹³ Issues with lack of availability of testing, both for employer access and the general public, have materialized even before OSHA’s February 9, 2022 compliance deadline for testing unvaccinated workers in the workplace. This is a bad omen for what is to come and cautions against OSHA’s extension of these requirements to even more employers.

H. Community Spread.

Further, OSHA finds support for its ETS in data from 2020 and early 2021, which varies significantly from the best evidence available on COVID-19 transmission today. In recent months, significant changes in the circumstances surrounding COVID-19 transmission have emerged. The 2020 and 2021 data reflects a time when the Delta variant swept through the country. The Delta variant was far more deadly than the Omicron variant which is accountable for most current COVID-19 infections. OSHA must consider the differences between the nature of the variants and levels of community transmission in determining whether a COVID-19 standard is appropriate.

According to CDC data, as of the week ending January 8, 2022, only 1.7 percent of COVID-19 cases in the United States were due to the Delta variant, while 98.3 percent of cases were attributable to the Omicron variant.¹⁴ The prior week showed 7.7 percent of COVID-positive individuals in the United States were infected with the Delta variant, and 92.3 percent were infected with the Omicron variant.¹⁵ This trend shows that Omicron, which is more contagious but far less lethal than Delta, has become the dominant variant. In fact, it is so contagious that Dr. Fauci famously stated that “just about everybody” will be infected by it.¹⁶ In addition, the Omicron variant “seems to cause fewer hospitalizations and deaths than previous mutations of the virus.”¹⁷

¹³ 86 Fed. Reg. 61,402, 61,512.

¹⁴ CDC, COVID-19 Data Tracker, Variant Proportions (last visited Jan. 14, 2022) (available at <https://covid.cdc.gov/covid-data-tracker/#variant-proportions>).

¹⁵ *Id.*

¹⁶ See Lexi Lonas, *Fauci: Omicron will infect ‘just about everybody’*, The Hill, Jan. 12, 2022 (available at <https://thehill.com/policy/healthcare/589344-fauci-omicron-will-infect-just-about-everybody>).

¹⁷ *Id.*

This, coupled with the fact that almost two years into the pandemic lockdown orders have long been lifted across the country, suggests that individuals can no longer be said to have a higher risk of COVID-19 infection from workplace exposure as opposed to some other community-based exposure. Given these circumstances, the CISC respectfully requests that OSHA permit the ETS to expire without renewing it as a permanent standard.

5. Conclusion.

The CISC appreciates OSHA's consideration of these comments. Construction is generally low-risk for COVID-19 exposure and the industry has been proactive at protecting its employees throughout the pandemic. Consistent with the Supreme Court's decision in *NFIB v. DOL*, the standard must be withdrawn and/or substantially rewritten to be made consistent with OSHA's limited authority to protect only workplace safety and health and to adapt the standard to the specialized needs of different, lower risk industries like construction. Application of the ETS to construction is unnecessary and is unsupported. Likewise, renewal of the standard after the ETS's six-month expiration is unnecessary and unsupported.

Sincerely,

The Construction Industry Safety Coalition

American Road and Transportation Builders Association
American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors
Association of the Wall and Ceiling Industry
Concrete Sawing & Drilling Association
Construction & Demolition Recycling 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 Demolition Association
National Framers Council
National Roofing Contractors Association
Natural Stone Council
Tile Roofing Industry Alliance