

January 11, 2022

Mr. Douglas L. Parker
Assistant Secretary
United States Department of Labor
Occupational Safety and Health Administration
200 Constitution Avenue NW
Washington, D.C. 20210

Dear Assistant Secretary Parker:

Re: Docket No. OSHA-2021-0007; RIN 1218-AD42; Comments on COVID-19 Vaccination and Testing; Emergency Temporary Standard; 86 Fed. Reg. 61,402 (Nov. 5, 2021)

Thank you for the opportunity to comment on the Emergency Temporary Standard (ETS) that was promulgated by the Occupational Health and Safety Administration on November 5th. The Auto Care Association is a national trade group representing companies that manufacture, distribute, retail and install automotive parts in the United States. Since a sizable number of auto care businesses will be impacted by the ETS, we are submitting the following comments on behalf of our members:

The ETS Will Create Workforce Issues for Many Small and Medium Sized Businesses

Due to the importance of our industry to the mobility of American families, repair shops and their supply chain were considered essential by federal, state and local governments at the outset of the COVID-19 pandemic in 2020. Contingent on that designation, our members implemented extensive health and safety protocols at the beginning of the pandemic aimed at protecting both their employees and customers. As a result, the auto care industry was able to stay open, ensuring that families could continue to get to work, the store and medical appointments. Further, our industry played an important role in enabling first responders to provide emergency services during pandemic.

Understanding their role in keeping American moving forward, our members have recently taken steps to strongly encourage their employees to obtain vaccination, including flexible leave policies, financial incentives and in some cases in-house clinics. Notwithstanding these efforts, our members tell us that there is a sizable number of their employees that refuse to be vaccinated. Many of our members further report that their unvaccinated employees have told them that they will likely resign if the mandate is put in place. While the range of projected worker losses varies among our members, many companies in our industry predict that labor losses could range between 20-40%. No matter which number proves to be correct, there is little doubt that the mandate will place a significant strain on our member's businesses that already are experiencing a tight labor market and significant supply chain issues.

Further, OSHA must recognize that the impact of the ETS will fall directly on many small and medium sized businesses. While, at the moment, companies employing less than 100 people are not required to comply, many small businesses as defined by the Small Business Administration (SBA) will be impacted by this ETS. For example, a small business auto parts wholesalers is defined by SBA as having under 200

employees, meaning that many, if not most parts wholesalers and distributors will be covered by this rule. These companies have limited resources and are currently struggling to find employees meaning that the loss of even a small number of employees will disrupt their operations. For this reason, If OSHA moves forward with developing a permanent rule on vaccination and testing, or with revisions to the ETS, OSHA should do so in accordance with the procedures required under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

Notwithstanding the ETS Provisions, Employers Will Be Saddled with Cost of Testing

While the ETS does not require that companies pay for the testing of their employees, the need to retain their workforce and the likelihood that many employees will continue to refuse to be vaccinated realistically means that these companies will be forced to pay for testing in order to retain their workers and minimize disruptions to their operations, no matter what the ETS states. Based on the weekly testing requirement in the ETS, this cost will be sizable and must be taken into account by OSHA in future regulatory actions regarding the ETS.

Self-Administered Testing Should be Permitted

One action that OSHA could take to reduce the cost on small businesses of the testing requirement is to permit employee self-administered and self-read tests without employer observation or telehealth proctoring. This would significantly reduce cost for the regulated community and ease unnecessary administrative burdens. In not permitting self-testing as part of the ETS, OSHA cited the potential for employee misconduct. However, in other parts of the ETS, OSHA permits self-certification including the confirmation of vaccination status even if proof of vaccination is lost, by permitting the employee to sign an attestation to the fact that they were vaccinated. A similar type of self-certification by employees should be permitted and would go a long way to reducing costs for employers.

100 Employee Threshold Should Be Based on Location Not Corporate Entity

We also urge that the 100 employee threshold be based on a per-location count rather than a company-wide standard. The fact that employers must count employees at all locations in determining whether they need to comply is not even part of the ETS, but is found as part of OSHA's Frequently Asked Questions document. Further, it is unclear from the ETS as to the methodology behind the 100 per company requirement other than concern regarding the impact on small businesses. However, the decision to count all locations ignores the fact that compliance with the ETS will be felt by companies at the local level since it is the people on the ground at each facility that will be forced to contend with the vaccination verification requirements, as well as the administration of the weekly testing mandate. Thus, in order to ensure that small operations are not adversely impacted, we urge that ETS compliance be applicable based on the numbers of employees at each location rather than the total number of employees at an entire company.

Employers Should Not Be Penalized for Shortage of Testing Access

Finally, any standards promulgated by OSHA should include options for good-faith effort, particularly where COVID-19 tests are unavailable or extremely difficult to obtain. In January, due to the Omicron

variant, obtaining testing was extremely challenging for both individuals and companies. Should the ETS be permitted to move forward, the requirement for testing or vaccination is likely to make the testing kits even more difficult to obtain. However, a business attempting to obtain testing kits, but failing to be successful will be forced to lose employees or violate the ETS. OSHA should not issue citations to offenders where the employer can show substantial and concrete efforts to comply with the ETS, but which may have been frustrated due to obstacles outside the employer's control.

Thank you again for the ability to comment on the ETS. Please feel free to reach out should you have any questions or comments.

Sincerely,



Aaron M. Lowe
Senior Vice President
Regulatory and Government Affairs