



April 21, 2022

The Honorable Doug Parker
Assistant Secretary of Labor
for Occupational Safety and Health
U.S. Department of Labor
Washington, DC 20210

Submitted electronically via: www.regulations.gov

Re: Notice of limited reopening of comment period; 87 Fed. Reg. 16426 (March 23, 2022); Docket No. OSHA–2020–0004; RIN 1218–AD36.

Dear Assistant Secretary Parker:

The U.S. Chamber of Commerce (“Chamber”) submits the following comments on the Occupational Safety and Health Administration’s (“OSHA”) Federal Register “Notice of limited reopening comment period” (Notice) on the Healthcare ETS (ETS). The notice purports to reopen the comment period for the ETS notwithstanding that OSHA said previously the ETS was withdrawn. Even if the ETS could be modified, the notice is utterly lacking in critical components of a proposed rulemaking, including proposed regulatory text. Accordingly, OSHA must discontinue any effort to modify and finalize the ETS unless the agency issues it as a proposed rulemaking and follows the rulemaking requirements of the Occupational Safety and Health Act (OSH Act), and the Administrative Procedure Act (APA).

OSHA Withdrew the ETS After the Six-Month Effective Period Lapsed and Missed the Opportunity to Issue a Final Standard.

When OSHA issued the ETS, which also served as proposed rule, the Chamber’s comments urged OSHA to not proceed to a final rule after the statutory six-month period for the ETS lapsed on December 21, 2021.¹ OSHA seemed to do just that with an announcement on December 27 that “today...it is withdrawing the non-recordkeeping portions of the healthcare ETS,” and that going forward the agency would rely on the general duty clause as its source of authority for enforcement in cases of COVID-19 exposure.² While OSHA did not proceed to issue a formal Federal Register announcement of the withdrawal, neither did the agency issue a retraction of the withdrawal announcement. The clear impression employers were given is that the ETS was no longer a regulation that would be applied to them. OSHA did

¹ See, 29 U.S.C. § 655(c)(1).

² OSHA Statement on the Status of the OSHA COVID-19 Healthcare ETS, December 27, 2021, available at: <https://www.osha.gov/coronavirus/ETS#:~:text=However%2C%20given%20that%20OSHA%20anticipates,portions%20of%20the%20healthcare%20ETS> (last visited April 18, 2022).

not even preserve the “rulemaking” component of the ETS as it did when announcing the withdrawal of the Vaccination or Testing ETS.³ Now OSHA returns to the ETS as if it is still available for modification. This notion is inconsistent with the OSH Act, judicial precedent, and OSHA’s announcement.

The OSH Act permits OSHA to issue an ETS with very tight and specific parameters. It must respond to a “grave danger,” be “necessary” to address that grave danger, and be in effect for only six months, at which time it is to be replaced by a permanent standard that reflects the comments OSHA has received based on the ETS also serving as a proposed regulation. The statute is explicit that the final standard shall be promulgated “no later than six months after publication of the emergency standard...”⁴ That six-month date was December 21, 2021. With no final standard issued, by then the effective period for the ETS lapsed and OSHA rightfully announced its withdrawal, even noting this was being done because “OSHA anticipates a final rule cannot be completed in a timeframe approaching the one contemplated by the OSH Act.”⁵ OSHA’s added comment that it was continuing work on a final standard would, therefore, be inconsistent with the OSH Act’s explicit time table for issuing such a final standard.

The six-month time limit for the ETS is also supported by judicial decisions; under the OSH Act, an ETS expires six months from its promulgation. (*See Dry Color Mfrs’ Ass’n v. Dep’t of Labor*, 486 F.2d 98 (3rd Cir. 1973); *Fla. Peach Growers Ass’n.v. Dep’t of Labor*, 489 F.2d 120 (5th Cir. 1974); *Taylor Diving and Salvage Co., Inc. v. Dep’t of Labor*, 537 F.2d 819, fn3 (5th Cir. 1976); *Asbestos Info. Ass’n* (1984).

Therefore, OSHA’s statement in the Notice that “In accordance with 29 U.S.C. 655(c)(3), the agency is now preparing to promulgate a final standard” does not comport with what that statute section actually says which is that such a final standard is to be promulgated “no less than six months after the publication of the emergency standard.”⁶ The ETS is thus not available to OSHA to serve as the basis for a final standard unless OSHA was to repropose it consistent with requirements for an OSHA rulemaking found at 29 U.S.C. 655 (b) and the APA.

Even if the ETS Was Available to Become a Final Standard, OSHA’s Notice Lacks Critical Rulemaking Elements.

OSHA’s Notice purports to reopen the comment period to take input on potential changes OSHA is considering. This suggests that OSHA’s next action will be to issue a final standard that reflects input from this reopening of comments. At best, the Notice reads like an

³ See, <https://www.govinfo.gov/content/pkg/FR-2022-01-26/pdf/2022-01532.pdf>. OSHA withdrew this ETS in the wake of the Supreme Court’s decision to reinstate the stay blocking its implementation pending consideration of the merits in *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*. OSHA’s preservation of the “rulemaking” component raises many questions which remain unanswered.

⁴ 29 U.S.C. 655 (c)(3). (emphasis added)

⁵ OSHA Statement on the Status of the OSHA COVID-19 Healthcare ETS, December 27, 2021.

⁶ 29 U.S.C. 655 (c)(3).

Advanced Notice of Proposed Rulemaking—a list of open-ended topics on which OSHA wants input—rather than detailed descriptions of the changes that OSHA plans to implement that an actual Notice of Proposed Rulemaking would have, or even any way for interested parties to learn what a final standard would require or who would be covered.

Perhaps the most important element missing is any proposed regulatory text. Without the specific text OSHA wants to put in place, employers and other affected parties cannot know the impact of the changes OSHA is considering. This violates the foundational concept of rulemaking that interested parties have an opportunity to provide meaningful comments. This is also contrary to any concept of OSHA operating in a transparent manner.

Not only does OSHA not provide any regulatory text, but the agency does not even commit to the changes that are listed and allows for the possibility that it might add more changes than the ones discussed in the Notice based on the comments it receives: “OSHA has not made any decisions about these potential provisions or approaches, nor is this intended to list all of the potential changes from the ETS. Other changes may result after due consideration of all comments and hearing testimony.”⁷ How are employers supposed to know what the impact will be of the changes discussed if OSHA is not even committing to them, and allowing for other entirely unknown changes? Again, this violates any understanding of providing interested parties meaningful opportunities to comment.

The Notice is also lacking other key requirements for an OSHA rulemaking, even if OSHA was only modifying the ETS. These elements include a Regulatory Impact Analysis as required by Executive Order 12866, or any indication that this Notice was reviewed by the Office of Information and Regulatory Affairs under E.O. 12866. Similarly, OSHA gives no indication that the changes have been reviewed under the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act for their impact on small businesses. Whenever an agency determines that a regulation will have a significant economic impact on a substantial number of small entities, the agency is required to conduct an Initial Regulatory Flexibility Analysis prior to issuing the proposed regulation. In the case of OSHA, this also requires the convening of a review panel consisting of representatives from the agency, OIRA, and the SBA Office of Advocacy to take input from small businesses who would be impacted by the proposal. An agency can avoid conducting an IRFA (and a panel review in OSHA’s case) if it can certify that the proposal will not trigger the critical level of impact and provide a factual basis for the certification.⁸ Here, OSHA did none of that, not even provide some form of certification that the changes being considered would not create the level of impact that would trigger an IRFA and panel review. These omissions may in fact flow from the absence of regulatory text as that would be the prerequisite for conducting any type of impact analysis.

The Changes OSHA Claims to be Considering are Vague in the Absence of Regulatory Text.

⁷ 87 Fed. Reg. 16427.

⁸ See, 5 U.S.C. 603-605.

One of the changes OSHA claims to be considering would remove the exemption from coverage for facilities where patients are screened out if they are COVID positive and all the employees are fully vaccinated.⁹ However, because OSHA does not provide regulatory text, the full extent of the facilities that could be affected by this change is unclear. Would this apply to non-hospital ambulatory care centers, i.e., clinics embedded in manufacturing or other workplaces? If so, the potential scope of this change would be significant, and many workplaces not currently covered would have to prepare to implement the various requirements of the ETS. This is yet another example of the shortcomings of the Notice and the problems caused by OSHA not providing regulatory text.

Conclusion

OSHA's Notice fails on several different levels. It reopens a comment process for a standard that has been withdrawn and is no longer a viable regulatory vehicle for modifications. Even if the ETS was subject to modifications, OSHA's Notice does not include critical aspects of proposed regulatory changes, starting with the absence of regulatory text and including other rulemaking components such as E.O. 12866 review and analysis of impacts on small businesses as required by the RFA/SBREFA. Finally, the changes OSHA says it is considering are not clear, largely because there is no associated regulatory text. For all of these reasons, OSHA must cease any further activity toward issuing a finalized ETS. If OSHA believes a final standard reflecting the ETS is appropriate, the agency may only proceed by initiating a rulemaking under the provisions of 29 U.S.C. 655 (b) and the APA.

Sincerely,

A handwritten signature in blue ink that reads "Marc Freedman". The signature is fluid and cursive, with the first name "Marc" and last name "Freedman" clearly distinguishable.

Marc Freedman
Vice President, Workplace Policy
Employment Policy Division
U.S. Chamber of Commerce

⁹ 87 Fed. Reg. 16427, A.3--*Removal of Scope Exemptions (e.g., ambulatory care facilities where COVID-19 patients are screened out home healthcare)*.