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OF THE
UNITED STATES OF AMERICA

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Mr. James S. Frederick
Acting Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
Washington, DC 20210

Submitted electronically: www.regulations.gov

Re: *Interim Final Rule; request for Comments, 86 Fed. Reg. 32,376 (June 21, 2021), Dkt. No. OSHA-2020-0004*

Dear Acting Assistant Secretary Frederick:

The U.S. Chamber of Commerce ("Chamber") submits the following comments on the Occupational Health and Safety Administration's ("OSHA") Interim Final Rule and Request for Comments on an emergency temporary standard to protect healthcare and healthcare support service workers from occupational exposure to COVID-19. The interim final rule creates emergency temporary standards applicable to certain employers and employees in the health care industry under Section 6(c)(1) of the Occupational Safety and Health ("OSH") Act, 29 U.S.C. § 655(c)(1). OSHA intends for the rule to help protect covered health care workers from COVID-19. These comments identify flaws with the rule that compel the Chamber to urge OSHA to discontinue the rule after the statutory six-month period of being in effect.

As a key voice for the business community, the Chamber is sensitive to the unprecedented impact that the COVID-19 pandemic has had on the United States and the companies and employees that make our economy thrive. The Chamber and its members have taken an active role in helping to mitigate the spread of COVID-19. This has included hosting several virtual events and providing informational resources designed to spread awareness of effective measures to reduce the spread of COVID-19. Through these activities, we have helped amplify guidance from federal and state health agencies on the efficacy of masks, contact tracing, distancing, and, of course, vaccinations. The Chamber supports efforts to stop the spread of COVID-19, protect our communities, and keep our economy open for business.

The Chamber also has a keen interest in ensuring that federal agencies adhere to the authority granted to them by Congress. Even well-intentioned rules and regulations can have harmful consequences to the business community and general economic stability if they are not carefully tailored to the risks they seek to address. While we believe the Secretary's attempts to mitigate the risks to healthcare workers from exposure to COVID-19 are well intentioned, we submit that the emergency temporary standard fails to meet legal predicates for this type of

rulemaking. In addition, OSHA's ETS includes provisions which are in conflict with the OSH Act. In these comments we address the following points:

- **The Secretary's rationale does not meet the extraordinary requirements for an emergency temporary standard.** The OSH Act requires OSHA to base any emergency temporary standards on substantial evidence that workplace exposure to a hazard presents a "grave danger" to employees in covered sectors. It further requires OSHA to establish the standards are "necessary" to abate that danger. That is, OSHA must quantify the risk and the amount of reduction expected from the standard. But it has not done so here. Although healthcare workers may experience a higher exposure to COVID-19 infected individuals, effective vaccines and preventive measures have greatly helped reduce the risks associated with such exposures. The rule fails to account for these reduced risks or quantify the remaining risk to those covered by the rule. It similarly fails to quantify the degree to which the emergency temporary standard would reduce those risks beyond existing requirements and practices. As a result, OSHA has also not satisfied the requirement to show that the ETS is necessary.

- **The benefits employers would be required to provide to sick employees conflict with existing workers' compensation and sick leave requirements.** The OSH Act specifies that OSHA may not implement standards that would supersede or conflict with state workers' compensation laws and standards. Many states have updated and clarified the compensation that workers are entitled to in their state when they contract COVID-19 or are removed from work due to COVID-19 exposure. The emergency temporary standard unlawfully supersedes or conflicts with those state laws because it requires employers to provide compensation beyond what the state legislatures have established.

- **The anti-retaliation provisions in the emergency temporary standard are unlawful.** Congress specifically designed a program in the OSH Act to protect workers from retaliation for reporting injuries and illness. That process requires aggrieved employees to file a complaint, and for OSHA to investigate and bring enforcement actions in federal court where appropriate. Despite this clear instruction from Congress, OSHA contends that the emergency temporary standard gives OSHA authority to issue citations for alleged retaliation without going through the congressionally prescribed process or filing a complaint in the courts. This contention is contrary to law and must be retracted.

- **The non-work-related record-keeping requirements are unlawful.** Congress limited OSHA's rulemaking authority, including imposing record-keeping requirements, to work-related hazards, illnesses, and incidents. The emergency temporary standard requires employers to keep records of non-work-related COVID-19 cases contrary to the limits of its congressionally mandated authority.

- **Guidance is the better approach.** Best practices for preventing the spread of COVID-19 have changed as new information about the disease has come to light. Federal agencies, including OSHA and the Centers for Disease Control and Prevention, have been instrumental in providing continually updated guidance on the best practices (including incentivizing vaccination) to prevent the spread of COVID-19. Given changing

circumstances, including emerging variants of COVID-19, we believe continuing to provide guidance, rather than inflexible regulations, is the best approach to reducing the spread of COVID-19. Indeed, this was OSHA's position when it prevailed in a legal action intended to force the agency to issue an ETS, and OSHA relies on guidance to protect employees in all workplaces not covered by the ETS.

The Secretary's rationale does not meet the extraordinary requirements for an emergency temporary standard.

The OSH Act authorizes the Secretary of Labor to issue emergency temporary standards if he determines that (1) employees are exposed to **grave danger** from exposure to substances or agents determined to be toxic or physically harmful, and (2) emergency standards are **necessary** to protect employees from such danger.[1] Because emergency temporary standards are implemented without the notice and comment procedures normally required, the Secretary must provide extraordinary evidence of the "grave danger" for employees, and the significant reduction in that danger that the ETS will provide. The agency has failed to make the requisite findings of grave danger and necessity to justify an emergency temporary standard for health care workers or to support those findings with substantial evidence.

As OSHA acknowledges, the OSH Act does not define what constitutes a "grave danger." But a grave danger is indisputably higher than the risk necessary for the agency to promulgate traditional, permanent, standards under the Act. Before promulgating such standards, the agency must establish that there is a "significant" risk and that regulation "is reasonably necessary or appropriate" to address that risk.[2] The OSH Act and reviewing courts have made clear that OSHA must support any such standard with "substantial evidence" showing the significance of that risk and the efficacy of the regulations.[3] It follows that to promulgate an emergency temporary standard, which is intended to be triggered by a much higher risk threshold than permanent standards, OSHA also must support findings that employees face a "grave risk" with substantial evidence.[4]

Similarly, OSHA must provide substantial evidence establishing that emergency standards are "necessary" to protect employees from the "grave danger" that the standard is designed to address.[5] And the courts have made it clear that the substantial evidence standard requires OSHA to make concrete findings that new standards are necessary to reduce the risk of

[1] 29 U.S.C. § 655(c).

[2] *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.,* 448 U.S. 607, 641 n. 45 (1980)

[3] *See, e.g.*, 29 U.S.C. § 655(b); *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 607.*; Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin., 727 F.2d 415 (5th Cir. 1984) Fla. Peach Growers Ass'n, Inc. v. U. S. Dep't of Lab.*, 489 F.2d 120 (5th Cir. 1974).

[4] *See Indus. Union Dep't, AFL-CIO*, 448 U.S. at 641 n. 45; *Florida Peach Growers Association v. U.S. Department of Labor*, 489 F.2d at 132 (invalidating an emergency temporary standard for failing to support the agency's claims of "grave danger" with data).

[5] 29 U.S.C. § 655(c); *and see, e.g., Indus. Union Dep't, AFL-CIO*, 448 U.S. at 641 n. 45.

danger *relative to* the regulations that existed prior to the standard. For example, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute,* the Supreme Court invalidated an OSHA rule requiring the reduction of a carcinogen (benzene) from 10 parts per million to 1 part per million.[6] The Court noted that "OSHA's rationale for lowering the permissible exposure limit to 1 ppm was based, not on any finding that leukemia has ever been caused by exposure to 10 ppm of [the carcinogen] and that it will not be caused by exposure to 1 ppm, but rather on a series of assumptions indicating that some leukemias might result from exposure to 10 ppm and that the number of cases might be reduced by the exposure level to 1 ppm."[7] While that was in the context of a typically promulgated rule, the Court made clear there that the bar for an emergency temporary standard was even higher, requiring "specific findings" about the reduction in danger that the standard would generate.[8]

Simply put, OSHA must quantify and provide substantial evidence of the "grave danger" to the workers it seeks to protect in an emergency temporary standard, and it must provide substantial evidence of the degree to which that danger would be abated by the emergency temporary standard. It has not done so. To be sure, OSHA cites numerous studies indicating the health risks and consequences of COVID-19. [9] But it acknowledges that the studies show the risks are vanishingly low for vaccinated individuals.[10] Indeed, as OSHA acknowledges, studies of health care workers demonstrate that the vaccines are 90% effective and reduced the rate by which the small number of remaining infections required medical care by over 77%.[11] OSHA assumes that less than 100% of health care workers are vaccinated, but fails to quantify the vaccination rates among the workers covered by the rule. This is important because indications are that health care workers are vaccinated at a higher rate than the general population. In the case of physicians, for example, the vaccination rate is as high as 96%.[12] Data from the United States Department of Health and Human Services shows that nearly 70% of hospital workers have received at least one dose of the vaccine.[13] Nevertheless, OSHA concludes that the very low risks to vaccinated individuals are higher for health care workers because they are exposed to more COVID-19 patients by virtue of their work.[14] But it does so without ever quantifying that risk. Left unanswered is the specific degree of risk vaccinated workers in the various health care settings covered by the rule face and the specific degree of risk unvaccinated workers, but

[6] 448 U.S. at 662.

[7] *Id.* at 635.

[8] *Id.* at 641.

[9] 86 Fed. Reg. at 32,388-393.

[10] *Id.* at 32,396-32,397.

[11] *Id.* at 32,397.

[12] Study available at https://www.ama-assn.org/system/files/2021-06/physician-vaccination-study-topline-report.pdf

[13] Data available at https://healthdata.gov/Hospital/COVID-19-Reported-Patient-Impact-and-Hospital-Capa/anag-cw7u

[14] *Id.* at 32,411.

still protected by already in place workplace measures such as the use of personal protective equipment, in those settings face. Such unsubstantiated risk would not satisfy the standard for establishing a "significant risk" necessary to promulgate a traditional permanent rule and it cannot satisfy OSHA's higher burden to show a "grave risk" that would justify an ETS.

OSHA similarly fails to provide substantial evidence that the emergency temporary standard is necessary to abate the grave danger. Most significantly, OSHA fails to quantify the degree of risk that would be reduced by any individual measure in the emergency temporary standard or all of the measures together. OSHA does discuss the efficacy of various measures, including personal protective equipment and contact tracing,[15] but it never provides quantitative conclusions regarding how much the measures required by the emergency temporary standard would improve outcomes over the measures health care employers take under existing requirements and guidance.[16] Instead, OSHA essentially argues that the emergency standards are necessary because they would do more than existing standards by providing more direct and efficient enforcement opportunities than currently exist relying on the general duty clause coupled with guidance.[17] That is insufficient to present substantial evidence that the specific measures in the emergency temporary standard are *necessary* to prevent the specific grave risk to the workers covered by the standard. OSHA must demonstrate the degree to which the risks to health care workers are reduced by each of the measures required by the emergency temporary standard.

In short, OSHA has not provided substantial evidence that health care workers, particularly vaccinated healthcare workers, face a "grave risk." This is because it has not quantified the risk to these workers or properly accounted for their reduced risks from their high vaccination rate. Similarly, OSHA has failed to provide substantial evidence that the emergency standards are necessary to prevent the risks, because it has not quantified how the measures will improve outcomes over existing practices. Accordingly, OSHA has not met its burden of presenting substantial evidence justifying the ETS and it must be withdrawn.

The benefits that employers would be required to provide to sick employees conflict with existing workers' compensation and sick leave requirements.

The emergency temporary standard's requirement that employers compensate medically removed employees until they return to work conflicts with existing workers' compensation programs and exceeds OSHA's authority under the OSH Act. Section 1910.502(l) of the emergency temporary standard requires covered employers to remove employees who have tested positive for COVID-19 from the work place (referred to as "medical removal") until the employees meet specified return to work criteria.[18] The emergency temporary standard further requires that an employer must continue to provide "the benefits to which the employee is normally entitled" and must "pay the employee the same regular pay the employee would have

[15] 86 Fed. Reg. at 32,412-32,425

[16] *Id.*

[17] *Id.*

[18] *Id.* at 32,624.

received had the employee not been absent from work" (with certain adjustments over time for some workers).[19]

However, existing state workers' compensation and sick leave requirements already dictate paid and unpaid leave requirements related to COVID-19, and OSHA lacks authority to supersede or affect those requirements. More specifically, Section 653(b) of the OSH Act explicitly limits OSHA's authority, prohibiting the agency from promulgating regulations that would "supersede" or "affect" any workers' compensation laws or that would enlarge or diminish employers' responsibilities under those laws:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or during, employment.

29 U.S.C. § 653(b)(4). In other words, Section 653(b) preserves state primacy to set workers' compensation and sick leave standards.

Indeed, several states have acted swiftly and directly to address the COVID-19 related needs of employers and employees within their jurisdictions. For example, a recently enacted New York law requires larger employers to provide up to 56 hours of paid sick leave for COVID-19, while smaller employers may provide less paid leave and unpaid leave pursuant to certain formulas.[20] Similarly, Arizona and Oregon have both clarified that state laws requiring that most employers provide at least one hour of paid sick leave for every 30 hours of work also apply to COVID-19 related leave.[21] These state laws reflect the careful consideration of state lawmakers who have specified the duration and size of sick leave compensation related to COVID-19. Where longer term illness from work-related COVID-19 exposure occurs, workers' compensation would then come into play. By requiring fully paid leave until an employee meets specified return-to-work criteria, the emergency temporary standard conflicts with and attempts to supersede these state programs, which is directly prohibited by Section 653(b).[22]

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[19] *Id.* at 32,625.

[20] State of New York, New York Paid Sick Leave, https://www.ny.gov/programs/new-york-paid-sick-leave (last visited Aug. 9, 2021).

[21] Industrial Commission of Arizona, FREQUENTLY ASKED QUESTIONS (FAQS) ABOUT COVID-19 AND EARNED PAID SICK TIME (REV. APRIL 19, 2021), *available at* https://www.azica.gov/sites/default/files/media/04-19-21%20FREQUENTLY%20ASKED%20QUESTIONS%20RE%20COVID-19_MasterwTOC%20FINAL.pdf (last visited Aug. 9, 2021); Oregon Bureau of Labor and Industry, For Workers, Sick time, https://www.oregon.gov/boli/workers/Pages/sick-time.aspx (last visited Aug. 9, 2021).

[22] The Chamber recognizes that the emergency temporary standard specifies that the paid leave requirements under this new OSHA created compensation scheme will be reduced "by the amount of compensation that the employee received from any other source," including paid sick leave. 86 Fed. Reg.

The United States Court of Appeals for the D.C. Circuit has, in fact, allowed medical removal protection (*i.e.*, compensation) provisions of some prior OSHA rules to remain effective despite Section 653(b)'s restrictions. Most notably, in *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1237 (D.C. Cir. 1981) the court upheld compensation for workers exposed to lead in the medical removal protection provisions of OSHA's lead standard, despite a potential conflict with state workers' compensation schemes. The court reasoned that the lead rule left the "state schemes wholly intact as a legal matter."[23] The court further noted that the medical removal protection provision, which was conservatively protective, would mostly apply to workers before they had become disabled from lead exposure. It therefore would not be in direct conflict with workers' compensation laws, which would only apply to disabled workers. Furthermore, the court acknowledged that workers' compensation may apply indefinitely in many states, where the lead medical removal protection provision was limited to 18 months. But that is not the case here. As discussed above, the emergency temporary standard would directly conflict with state schemes that dictate the amount and duration of sick leave for COVID-19 exposure.

A direct application of Section 653(b)(4) applies here: Section 653(b)(4) says that OSHA may not "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers" 29 U.S.C. § 653(b)(4). In other words, it prohibits OSHA from promulgating a compensation scheme that would affect the amount of compensation that a state legislature determined was appropriate.

Even if OSHA did have authority to enlarge employers' duties and liabilities for sick time and workers' compensation, the emergency temporary standard fails to provide a sufficient basis for doing so. The courts have clarified that "OSHA must demonstrate substantial evidence to support any conclusions of determinable fact that underlie the [medical removal protection] program and, where the new provision cannot rely on factual certainty, must carefully explain the bases of its 'legislative' decision to create it."[24] As OSHA notes in the preamble, it has made concerted efforts to provide reasoned bases, with substantial evidence, for implementing medical removal protections when it created them for prior rules. For example, OSHA noted that the medical removal protections in the lead rule were necessary because the agency was presented with specific evidence in the record that employees were avoiding lead detection tests out of fear for uncompensated down time.[25] The agency similarly noted that "OSHA's standards for cotton dust and lead contain testimony from numerous employees indicating that workers would be reluctant to report symptoms and participate in medical surveillance if they fear economic

32,625. We further recognize that the compensation scheme reduces compensation for employees of companies with fewer than 500 employees. But those limits do not save the scheme from superseding or conflicting with existing state requirements. Any state policy decisions that require payment of less than an employee's full salary would be overridden by this standard.

[23] *United Steelworkers of America*, 647 F.2d at 1236.

[24] *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d at 1237.

[25] *See* 86 Fed. Reg. at 32,455.

consequence."[26] In contrast here, OSHA arbitrarily relies on its general "experience" that medical removal protections help maximize self-reporting of illness and injury.[27] However, it cites no specific information or evidence about health care workers' reluctance to report illness in general or COVID-19 exposure in particular. And all indications are that health care workers are more likely to report COVID-19 exposure.[28] OSHA simply jumped to the conclusion that health care workers are reluctant because workers in unrelated sectors have been reluctant to report unrelated conditions.

OSHA lacks authority to impose compensation requirements that supersede or conflict with state programs. Furthermore, it has failed to provide sufficient evidence or a reasonable explanation for why its judgment should supersede the judgment of state legislatures. OSHA should terminate the medical removal protection provisions in the emergency temporary standard and any further similar regulatory efforts.

The anti-retaliation provisions in the emergency temporary standard are inconsistent with the OSH Act.

The preamble to the emergency temporary standard states that new language OSHA added as 29 C.F.R. § 1910.502(o) allows OSHA to issue citations and penalties to employers for alleged retaliation against employees who report illness, and that OSHA need not follow the anti-retaliation procedures Congress specified in Section 11(c) of the OSH Act, 29 U.S.C. § 660(c). Section 660(c) specifically protects workers from retaliation and outlines the process for enforcement and the agency's authority. OSHA's contention that it has authority to bring enforcement actions outside of this process is contrary to the statute, exceeds the agency's authority and should be retracted.

Section 660(c) protects employees from retaliation on the basis of filing a complaint, testifying with respect to an enforcement proceeding, or exercising any right afforded by the Act on behalf of himself or others.[29] It applies to retaliation for reporting a work-related illness or injury.[30] Congress explicitly outlined the procedural process employees must take to report a violation if they believe they have been discriminated against, as well as the process OSHA must use to pursue an enforcement action.[31] Specifically, an employee must file a complaint with the

[26] *Id.*

[27] *Id.*

[28] *Id*. at 32,404 (noting health care workers are at least 3.4% more likely to self-report).

[29] "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." 29 U.S.C. § 660(c).

[30] *See* Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5,915, 6,050 (Jan. 19, 2001).

[31] 29 U.S.C. §§ 660(c)(2) and 660(c)(3).

Secretary within 30 days of the violation.[32] The Secretary must then 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.[33] Thus, Section 660(c) provides the exclusive process and enforcement authority that OSHA may employ to remedy retaliation for reporting illness.

Despite Congress' clear direction, OSHA asserts that it enjoys additional authority to issue citations and bring enforcement actions outside of the scheme laid out in Section 660(c). OSHA claims that once the agency establishes that an emergency temporary standard is necessary, the agency "has almost 'unlimited discretion' to devise the means to achieve that goal."[34] Indeed, OSHA goes so far as to claim that the Act is ambiguous on whether OSHA can promulgate this section, and that therefore OSHA's decision is deserving of "Chevron" deference—the most sweeping level of deference a court can confer on an agency action.[35] Such an interpretation of statutory authority would replace the traditional view that agencies can only do what Congress has permitted with a belief that unless Congress has specifically prohibited an act it is permitted.

As OSHA explained, the anti-retaliation scheme that Congress specified is not as advantageous to the agency as the one it developed for itself in the emergency temporary standard.[36] By avoiding Section 660(c), OSHA would not need to wait for an employee to lodge a complaint. Nor would it need to investigate a specific complaint. Instead, it could enforce against multiple perceived instances of retaliation in the same action without having to meet the burden of proof required by the federal courts in a judicial enforcement action.[37]

Because Congress explicitly addressed how OSHA should protect employees from retaliation, the *ultra vires* enforcement scheme outlined in the preamble exceeds the agency's authority.[38] It must be withdrawn.

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[32] *Id.* at § 660(c)(2).

[33] *Id.*

[34] 86 Fed. Reg. 32,603.

[35] *Id.* at 32,604. We note that courts must exhaust the traditional tools of statutory interpretation before concluding that a term is truly ambiguous, warranting deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019); *Chevron U.S.A. Inc.*, 467 U.S. at 843 n. 9. The plain language of the statute and the overall context of the emergency temporary standard provision and the anti-retaliation provision make relying on deference inappropriate here.

[36] *Id.*

[37] *Id.*

[38] We note, as OSHA has, that this is not the first time OSHA has tried to circumvent the specific anti-retaliation enforcement process that Congress laid out in Section 660(c). OSHA made similar claims in its electronic reporting rule. *See* "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016), *as revised at* 81 Fed. Reg. 31,854 (May 20, 2016). The Chamber has a pending court challenge to that rule that has not yet been resolved. *See National Association of Homebuilders of the United States, et al. v. Acosta*, NO. CIV-17-0009-PRW (W.D. Okla.)

The non-work-related record-keeping requirements are unlawful.

The emergency temporary standard improperly requires employers to keep records about their employees' COVID-19 exposure, regardless of whether the employees' exposure to COVID-19 is related to work.[39] Congress carefully crafted the OSH Act to give OSHA rulemaking authority to help prevent "occupational" or "work-related" accidents and illnesses.[40] Indeed, OSHA's authority to impose record-keeping requirements stems from Congress' determination that the agency may "prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, **work-related** deaths, injuries and illness."[41] OSHA cannot unilaterally expand this authority to illness that is not work-related, and thus it should eliminate the record-keeping requirements for non-work-related illness.

OSHA's reliance on Section 655(c)'s delegation of authority to promulgate emergency temporary standards that the Secretary deems "necessary to protect employees from" grave danger is too expansive.[42] While Section 655(c) gives the agency broad authority to abate emergencies, that language must be read in the context of the OSH Act as a whole, which focuses on work-related injury and illness. OSHA's position to the contrary fails to give meaning to the plain words of the statute and would leave the OSH Act's recordkeeping and emergency temporary standard provisions without any intelligible principle to limit the agency's discretion. Furthermore, by requiring employers to record non-work-related COVID-19 cases, OSHA underscores the point that the COVID-19 pandemic is fundamentally a public health issue instead of a workplace safety issue. Unlike other hazards OSHA regulates, or for which ETSs have been issued, exposure to coronavirus is not intrinsic to the workplace. OSHA should retract any assertion that it can require recordkeeping for non-work-related illness.

Guidance is the better approach.

Since, the beginning of the COVID-19 pandemic, health officials have adjusted guidance and instruction on how to help prevent the spread and treat COVID-19. This rapid adjustment to changing circumstances has been crucial to the fight against COVID-19, because our understanding of the virus and best practices to prevent it have evolved as we have learned more about it. It remains crucial as new variants of the virus emerge.

Indeed, in recognition of how our understanding of the virus and the best methods to halt transmission continues to change, the Centers for Disease Control and Prevention performs a regular COVID-19 guidance review.[43] As part of that review, the Centers strive to "routinely provide [a] clear summary of what has changed when updates to guidance are posted, allowing

[39] 86 Fed. Reg. at 32,626.

[40] *See* 29 U.S.C. §§ 655, 657(c), (g).

[41] 29 U.S.C. § 657(c)(2) (emphasis added).

[42] *See* 29 U.S.C. § 655(c).

[43] *See* Memorandum from Anne Schuchat, Principal Deputy Dir., CDC to Rochelle P. Walensky, Dir. CDC, Summary of Guidance Review (March 10, 2021) *available at https://www.cdc.gov/coronavirus/2019-ncov/downloads/communication/Guidance-Review.pdf.*

the public to differentiate major from minor changes and the rationale for changes."[44] OSHA similarly regularly updates its COVID-19 guidance and includes a clear summary of recent changes so that the public is aware of evolving practices.[45] For example, OSHA summarized June 10, 2021 updates to its guidance as clarifying that employers and employees should "[f]ocus protections on unvaccinated and otherwise at-risk workers," "[e]ncourage COVID-19 vaccination" and that the agency had "add[ed] links to guidance with the most up-to-date content."[46] The agencies' elasticity with guidance is commendable and plays an important role in helping employer's implement best practices.

In contrast, regulations, like the emergency temporary standard, are static and inflexible. They will leave employers and agencies unable to change practices or focus on emerging, effective measure and instead focus resources on compliance with the static requirements in the rule. As such, the rule will sacrifice potential better outcomes for less effective compliance with static regulations. As OSHA put it to the D.C. Circuit when it argued an emergency temporary standard for COVID-19 was unnecessary just a little over a year ago, "OSHA's time and resources are better spent issuing industry-specific guidance that adds real substance and permits flexibility as we learn more about this virus."[47] Further, "[g]iven that we learn more about COVID-19 every day, setting rules in stone through an ETS (and later a permanent rule) may undermine worker protection by permanently mandating precautions that later prove to be inefficacious."[48] In fact, for all other workplaces not covered by the ETS, OSHA is relying on guidance to provide the necessary tools for employers to protect their employees. Clearly, the agency believes the guidance model is a strong approach. We agree. A continued focus on guidance would be a better use of OSHA's resources and provide employers with much more usable information and assistance.

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[44] *Id.*

[45] OSHA, Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, *available at* https://www.osha.gov/coronavirus/safework

[46] *Id.*

[47] Department of Labor's Response to the Emergency Petition for a Writ of Mandamus, *In Re. AFL-CIO,* D.C. Cir. No. 20-1158 (Doc. No. 1844937 (May 29, 2020)).

[48] *Id.*

For the reasons stated above, the Chamber urges OSHA to withdraw the emergency temporary standard, or at least not move forward with a permanent standard, and focus its efforts on continuing guidance to stop the spread of COVID-19. We look forward to continuing to work with you to help spread awareness of best measures to address the pandemic and to help keep our economy open for business.

Sincerely,

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

Outside Counsel
Michael B. Schon
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