

January 19, 2022

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

**RE: COVID-19 Vaccination and Testing Emergency Temporary Standard Rulemaking;
Docket # OSHA-2021-0007**

Dear Assistant Secretary Parker:

On behalf of the Agricultural Retailers Association (ARA), I am submitting comments in response to the agency's November 5, 2021 interim final rule to establish an emergency temporary standard (ETS) for unvaccinated employees of large employees of 100 or more from the risk of contracting COVID-19 by requiring employees either get vaccinated or undergo regular testing and wear a face covering at work in lieu of vaccination. While we have encouraged ARA members to get vaccinated, we strongly oppose the issuance of this OSHA federal mandate. This opposition is not because we question the vaccines or the need to receive them – rather, our opposition comes from the likely impacts the sweeping mandate will have on an already-tight employment situation for agricultural employers. We also believe the mandate is unlawful and arbitrary in scope.

Statement of Interest

ARA represents agricultural retailers who supply farmers and ranchers with products and services. These products include seed, nutrients, crop protection products, feed, equipment, and technology. Retailers also provide consultative services such as crop scouting, soil testing, field mapping, custom planting and application and development of nutrient management and conservation plans.

Agricultural retailers' range in size from small, family-held businesses to large companies and farmer-owned cooperatives with many outlet stores. Large and small retail facilities are scattered throughout all 50 states and provide critical goods and services, as well as jobs and economic opportunities in rural and suburban communities.

Comments

ARA member companies and the farmers they serve depend on innovation to continually improve production practices, and this innovation is rooted deeply in science. Our member companies were designated as "critical infrastructure" in the early days of the COVID 19 pandemic because they provide essential products and services to produce food, fuel, and fiber for American consumers.

ARA believes great care should be taken to not disrupt this supply chain by sending a shock through employee ranks with this ETS when it is already difficult to hire and retain quality employees.

OSHA was created by Congress to ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance. It was not created for the intention “to authorize a workplace safety administration in the deep recesses of federal bureaucracy to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest ways.”¹ As properly stated by the United States Court of Appeals for the Fifth Circuit in *Bst Holdings v. OSHA* on November 12, 2021, the agency’s COVID-19 vaccine and testing mandate is “both overinclusive (applying to employers and employees in virtually all industries and workplaces in America, with little attempt to account for the obvious differences between the risks facing, say, a security guard on a lonely night shift, and a meatpacker working shoulder to shoulder in a cramped warehouse) and underinclusive (purporting to save employees with 99 or more coworkers from a “grave danger” in the workplace, while making no attempt to shield employees with 98 or fewer coworkers facing the same threat).” This ETS also purports to be necessary under an emergency issuance to address a health threat the entire globe has endured for nearly two years.

On September 10, 2021, President Biden announced the COVID-19 vaccine and testing mandate under the guise of an “emergency”, yet OSHA spent nearly two months responding with the issuance of this ETS interim final rule. Federal courts have consistently ruled that OSHA’s ETS is an extraordinary power that is to be delicately exercised in only certain limited situations. However, OSHA’s COVID-19 ETS vaccine and testing mandate is “a one-size-fits-all sledgehammer that’s makes hardly any attempt to account for differences in workplaces (and workers) that have more than a little bearing on workers’ varying degrees of susceptibility to the supposedly grave danger the mandate purports to address.”²

ARA believes requiring employers of 100 or more employees to enforce OSHA’s COVID-19 vaccine and testing mandate is impractical and would cause irreparable harm of losing employees, incurring substantial and unrecoverable compliance costs, and worsening already-fragile supply chains and labor markets. OSHA does not have the federal authority under the Commerce Clause for this standard as it attempts to regulate noneconomic inactivity that falls fully within a State’s or local government’s long-recognized authorities. The U.S. Supreme Court previous rulings have indicated a State can mandate vaccines by implementing reasonable regulations to protect the public health, even if such regulations interfere with individuals’ rights.³ The U.S. Supreme Court case related to a smallpox outbreak and the state of Massachusetts ability to delegate local authorities the power to mandate smallpox vaccines. The federal courts have never ruled that the federal government or OSHA have similar broad powers to mandate vaccines as it is beyond the scope of the federal government’s and particularly OSHA’s constitutional authorities.

¹ Ala. Assoc. of Realtors v. HHS, 141 S. Ct. 2485, 2488-90 (2021)

² BST Holdings v. OSHA, 2021 U.S. App. 33698 (2021)

³ Jacobson v. Massachusetts, 197 U.S. 11 (1905)

ARA strongly agrees with the U.S. Supreme Court's Stay Order issued on January 13, 2022 by a 6 to 3 decision in the case of *NFIB v. OSHA*⁴. Some of the key highlights of the U.S. Supreme Court's Stay Order includes the following:

- Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate. Administrative agencies are creatures of statute.
- They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense. This is no “everyday exercise of federal power.”
- It is instead a significant encroachment into the lives—and health—of a vast number of employees. “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”
- The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set workplace safety standards, not broad public health measures.
- And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.
- Although COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. 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.
- But a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, “cannot be undone at the end of the workday.”
- Contrary to the dissent's contention, imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not “part of what the agency was built for.”
- That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID-19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID-19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID-19 that all face. OSHA's indiscriminate approach fails to account for this crucial distinction— between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an “occupational safety or health standard.”

⁴ National Federation of Independent Businesses, ET AL., Applicants v. Department of Labor, Occupational Safety and Health Administration, ET AL. and Ohio, ET AL, Applicants v. Department of Labor, Occupational Safety and Health Administration, ET AL.; 595 U.S. Nos. 21A244 and 21A247 (2022)

- In fact, the most noteworthy action concerning the vaccine mandate by either House of Congress has been a majority vote of the Senate disapproving the regulation on December 8, 2021. S. J. Res. 29, 117th Cong., 1st Sess. (2021).
- It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This “lack of historical precedent,” coupled with the breadth of authority that the Secretary now claims, is a “telling indication” that the mandate extends beyond the agency’s legitimate reach.
- The equities do not justify withholding interim relief. We are told by the States and the employers that OSHA’s mandate will force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs.
- Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.

ARA also strongly agrees with Justices Gorsuch, Thomas and Alito’s concurring opinion, which includes the following:

- The federal government’s powers...are not general but limited and divided.
- Congress has nowhere clearly assigned so much power to OSHA after approximately two years have passed since this pandemic began and vaccines have been available for more than one year.
- Over this two-year span, Congress has adopted several major pieces of legislation aimed at combating COVID-19 but it did not afford OSHA – or any federal agency – the authority to issue a vaccine mandate.
- Indeed, a majority of the Senate voted to disapprove OSHA’s regulation.
- It seems that the agency pursued its regulatory initiative only as a legislative “work-around”.
- The Court rightly applies the major questions doctrine and concluded that the lone statutory subsection OSHA claims to grant them this authority clearly does not authorize OSHA’s mandate.
- Historically, such matters have been regulated at the state level by authorities who enjoy broader and more general governmental powers.
- At the federal level, OSHA arguably is not even the agency most associated with public health regulation. An in the rare instances when Congress has sought to mandate vaccinations, it has done so expressly.
- The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, the power rests with the States and Congress, not OSHA.

On January 13, 2022, Secretary of Labor Walsh issued a statement on the U.S. Supreme Court ruling related to future OSHA actions that appear contrary with the law and the agency's existing authority provided by Congress as outlined by the court. ARA urges the agency to comply with the U.S. Supreme Court's Stay Order and not try to continue to illegally pursue this ETS under the General Duty Clause or the COVID-19 National Emphasis Program.

Agricultural retailers and the farmers they serve are in rural communities around the country. If ARA members are forced to apply a vaccine mandate to all of their employees in these rural locations, not only will it be impossible to enforce but it will also give rise to employee turnover that will destroy the abilities of these companies to conduct business. Some of our members are small family companies or cooperatives with fewer than 100 employees, and other members are much larger than the 100-employee threshold. These companies compete in the same trade areas. An arbitrary threshold would have one company's outlets subject to the vaccine mandate, and another in the same trade area – with similar numbers of people in its branch location - would be exempt. We've already heard from member companies who face a risk of losing their people because of the potential mandate. One-member company reported that they already have 10% of their positions open and applying this mandate to them could cause them to lose another 20% of their workforce.

America's agricultural industries and the nation's economy cannot afford to have fewer employees willing to work due to overreaching federal vaccine and monitoring mandates imposed on an estimated 84 million workers. Government agencies such as OSHA need to abide by federal laws that govern their existence and operations. If OSHA truly believes they have the legal authority to issue this mandate, this major policy change should undergo the proper notice and comments rulemaking process under the Administrative Procedures Act.

It is also being widely reported there is a severe shortage of COVID-19 tests due to a large increase in individuals seeking to get tested for COVID-19 whether they are experiencing any symptoms or not. This shortage of available testing is even before these new OSHA mandates have been put into effect. OSHA has stated it could start issuing citations to employers for noncompliance with the standard's testing requirements on or after February 9, 2022. It is highly unlikely that there will be enough testing kits available for every unvaccinated employee to conduct a weekly COVID-19 test, at either the employer or employees' expense. It is also widely reported that individuals who are fully vaccinated including with a potential booster shot can still test positive for COVID-19 and get infected. If that is the case, what is OSHA's rationale that only unvaccinated employers are required to get tested on a weekly basis? The reliability of the currently available COVID-19 tests remains an issue, especially related to the rapid and at-home tests that can provide false testing results. In addition, beginning on January 1, 2022, the Centers for Disease Control and Prevention (CDC) discontinued the use of certain PCR tests for COVID-19 following the Food and Drug Administration's (FDA) retirement of the test's emergency use authorization⁵.

⁵ https://www.cdc.gov/csels/dls/locs/2021/07-21-2021-lab-alert-Changes_CDC_RT-PCR_SARS-CoV-2_Testing_1.html

Conclusion

This ETS proposal is neither fair or workable and is harmful to our food supply chain and rural economies. ARA believes OSHA's actions will lead to removing workers from an already-tight workforce, severely impact services, impact sales, and cause irreparable economic injury. The Biden Administration still has an opportunity to create a voluntary, incentive-based approach that could lead to better vaccination rates and turning down the rhetorical heat on the issue of vaccinations. We are disappointed it has chosen to further deepen the philosophical divides with an impractical and harmful COVID 19 ETS vaccine and testing mandate destined to fail. ARA welcomes an opportunity to work with your Administration on a voluntary approach that can achieve everyone's goal to get us past the current pandemic. Let's promote positive measures to increase vaccination rates without causing further damage to our economy, society or nation.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard D. Gupton". The signature is written in a cursive style with a prominent initial "R".

Richard D. Gupton
Senior Vice President, Public Policy & Counsel