



Stephen E. Sandherr, Chief Executive Officer

September 18, 2021

The Honorable Martin J. Walsh  
Secretary of Labor  
U.S. Department of Labor  
200 Constitution Ave NW, C-2318  
Washington, DC 20210

The Honorable James Fredrick  
Acting Assistant Secretary of Labor  
U.S. Occupational Safety & Health Administration  
200 Constitution Avenue, Room: S2315  
Washington, DC 20210

**RE: Occupational Safety & Health Administration Emergency Temporary Standard for COVID-19 Vaccination or Weekly Testing Mandate for Employers with 100 or Fewer Employees**

Dear Secretary Walsh and Acting Assistant Secretary Fredrick:

As the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) works to promulgate an emergency temporary standard (ETS)—as directed under *Path Out of the Pandemic: President Biden's COVID-19 Action Plan* (Action Plan)—requiring all employers with 100 or more employees to ensure their workforce is either fully vaccinated against COVID-19 or mandate that any workers who remain unvaccinated produce a negative test result on at least a weekly basis, the Associated General Contractors of America (AGC) respectfully puts forth the construction industry's deep concerns with and sensible recommendations for this new mandate, assuming it is legally viable.

For background, AGC is the leading association in the construction industry representing more than 27,000 firms, including America's leading union and open-shop general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, levees, locks, dams, water conservation projects, defense facilities, multi-family housing projects, and more.

Since the onset of the pandemic, AGC and its members have strived to ensure the safety and health of the greatest construction industry asset: its more than seven million employees. As COVID-19 vaccines became available, AGC provided resources to its members about the vaccines, their safety, and their effectiveness. In addition, the association created an industry-specific public service message, tools to assist with employer vaccine policies, and more.<sup>1</sup> AGC members used those resources in their educational efforts to encourage voluntary employee vaccinations.

Again, assuming this mandate is legally viable, AGC puts forth the following for your review and consideration:

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<sup>1</sup> Associated General Contractors of America. *COVID-19 Vaccine Toolkit*. September 13, 2021, <https://www.agc.org/covid-19-vaccine-toolkit>

## OVERVIEW

- I. **Any OSHA ETS Should Exempt Construction Activities—Other than those Deemed “High Exposure Risk” or “Very High Exposure Risk”—from this ETS Based on the Agency’s own Exposure Assessments**
- II. **Broadly Applying the OSHA ETS to All Construction Activities Could Exacerbate the Industry’s Workforce Shortage, Significantly Increasing Construction Project Costs and Delays that will Serve to Undermine the Economic Recovery**
- III. **Broadly Applying the OSHA ETS to All Construction Activities Could Impede the Achievement of the Action Plan’s Goal to Increase Vaccination Rates & Could Lead to Significant Supply Chain Delays for Testing that Could Undermine Efforts Protect Those Who are Ineligible for Vaccines**
  - a. Do Not Underestimate the Willingness of Those Who Refuse the Vaccine or Testing to Find Work Elsewhere to Avoid this New Mandate Altogether, Impeding Efforts to Increase Vaccination Rates and Punishing Construction Businesses that Fall Under the Mandate
  - b. AGC Fears that if a Significant Number of Construction Workers—or other Unvaccinated Workers in the United States—Choose Testing Over the Vaccine, that there Could be Testing Supply Chain Issues that Threaten Both the Safety of those Ineligible for the Vaccine & the Ability of ETS Covered-Construction Employers to Operate Safely & Efficiently
- IV. **Any OSHA ETS Should Neither hold Prime/Controlling Contractors Liable for Subcontractors’ Compliance at any Tier nor Subcontractors Liable for their Subcontractors and Lower-Tier Subcontractors’ Compliance**
- V. **OSHA Must Coordinate with the U.S. Equal Employment Opportunity Commission (EEOC) on any Potential Sharing of Medical Information and Shield Employers from any Legal Liabilities they Could be Exposed to by the ETS & Similarly Coordinate with the EEOC on Accommodations**
- VI. **Any OSHAETS Requiring Vaccination or Testing Should Provide a Grace Period that is Equal to or Greater than the Grace Period Given to Federal Employees and also Consider Timelines for Becoming Fully Vaccinated**
- VII. **Any OSHA ETS Requiring Vaccination or Testing Should Provide Consideration for Collective Bargaining**
- VIII. **Conclusion**

## DISCUSSION

- I. **Any OSHA ETS Should Exempt Construction Activities—Other than those Deemed “High Exposure Risk” or “Very High Exposure Risk”—from this ETS Based on the Agency’s own Exposure Assessments**

The construction industry is the delivery tool for building and maintaining critical infrastructure and facilities used to deliver clean water and electricity, protect our national security, and transport essential goods and services like medical supplies, groceries and, most recently, COVID-19 vaccines. Equally important, the construction industry has a long history of working to ensure the safety and health of their employees, even before the COVID-19 pandemic. Given the many precautions already in place on construction jobsites, the

uniqueness of construction projects and their environment—which is completely different from an office workplace—AGC holds that applying the ETS mandate universally across all types of construction, especially those performed outdoors, does not make sense.

OSHA has previously 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.”<sup>2</sup>

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” (a risk category which OSHA does not believe is applicable for most anticipated construction work tasks).<sup>3</sup> AGC, in turn, recommends that OSHA follow its own assessments and exempt construction activities—other than those deemed “high exposure risk” or “very high exposure risk”—from this ETS.

## **II. Broadly Applying the OSHA ETS to All Construction Activities Could Exacerbate the Industry’s Workforce Shortage, Significantly Increasing Construction Project Costs and Delays that will Serve to Undermine the Economic Recovery**

The COVID-19 pandemic has taken its toll on the construction industry and its markets. The Delta variant of the virus has the vast majority of construction firms facing renewed economic uncertainty and hardship. An AGC survey<sup>4</sup> conducted in August 2021 found that 89 percent of construction contractors are having a hard time finding craft workers. Meanwhile, 88 percent of firms are experiencing project delays and 93 percent are affected by rising materials.

The survey results underscore how the pandemic has created constraints on the demand for work even as it limits the number of workers available to hire. Because of the pandemic, many construction firms are dealing with the impacts of delayed or canceled projects, suffering from construction materials shortages, delivery delays and lagging demand.

In other words, market conditions are nowhere near as robust as they were prior to the onset of the pandemic. Prior to the pandemic, contractors worried either about finding enough work to keep their workers busy or about finding enough workers to keep pace with busy demand.

But now, largely because of the pandemic, many contractors worry about finding enough work even as they struggle to find enough workers. Many of the challenges affecting contractors are being driven by the pandemic and policy responses to it, instead of typical market conditions.

Unfortunately, AGC and its members fear this ETS mandate could further exacerbate the industry’s workforce shortage and significantly increases project costs and delays to the detriment of any economic

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

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

<sup>4</sup> AGC of America. *Construction Workforce Shortages Reach Pre-pandemic Levels Even as Coronavirus Continues to Impact Projects & Disrupt Supply Chains*. (Available at <https://www.agc.org/news/2021/09/02/construction-workforce-shortages-reach-pre-pandemic-levels-even-coronavirus-0>)

recovery and meeting vast infrastructure and building needs. It must be added that this risk appears to be without any thought towards mitigating its impact in any reasonable way, placing all the risk on covered construction employers.

One of the primary goals cited in the Action Plan is to eliminate the risk to the economy that the current surge of the Delta variant poses. While increased vaccination rates will help address this concern, AGC has serious reservations about the extraordinary step of imposing the obligation vaccinating individuals on employers.

### **III. Broadly Applying the OSHA ETS to All Construction Activities Could Impede the Achievement of the Action Plan’s Goal to Increase Vaccination Rates & Could Lead to Significant Supply Chain Delays for Testing that Could Undermine Efforts Protect Those Who are Ineligible for Vaccines**

- a. Do Not Underestimate the Willingness of Those Who Refuse the Vaccine or Testing to Find Work Elsewhere to Avoid this New Mandate Altogether, Impeding Efforts to Increase Vaccination Rates and Punishing Construction Businesses that Fall Under the Mandate

Despite continued efforts to promote or incentivize voluntary vaccination of construction workers, AGC and its members have faced vaccine skepticism among too many. In April 2021, researchers from the University of Pittsburgh and Carnegie Mellon University found that 46 percent of construction workers did not plan to get vaccinated.<sup>5</sup>

As such, AGC members justifiably fear that many of those workers—when faced with the choice between the vaccine and their job with a covered employer—will quit and go to work for an employer not covered under the ETS mandate. Because the majority of the construction industry is comprised of small businesses of fewer than 100 employees, and, as detailed above, so many firms are looking for workers, those workers could very well go elsewhere and avoid the ETS vaccine or testing mandate altogether.

- b. AGC Fears that if a Significant Number of Construction Workers—or other Unvaccinated Workers in the United States—Choose Testing Over the Vaccine, that there Could be Testing Supply Chain Issues that Threaten Both the Safety of those Ineligible for the Vaccine & the Ability of ETS Covered-Construction Employers to Operate Safely & Efficiently

If a majority of construction employees—or other unvaccinated workers in the United States—opt to take the testing option versus getting vaccinated under such an ETS, there will undoubtedly be an increased demand for testing kits and, in turn, further strain laboratories to analyze these tests in a timely manner.

While the Action Plan pledges to increase the availability of testing kits, it is completely silent on how it intends to address the ability of laboratories to analyze the increased number of anticipated tests in a timely and efficient manner for all Americans—not just employees—needing them. As it stands, the nation’s most susceptible to contracting COVID remain those who are unvaccinated, many of whom remain so not by choice, but because they are ineligible to receive the vaccine. This unvaccinated population consists of children under the age of 12, of which many are tested on a weekly basis in order to attend school. The Administration must ensure—without exception and no room for error—that any increase in demand for testing kits and laboratory capacity can be met, lest it otherwise jeopardize the safety, health, and well-being of the nation’s most vulnerable: school children.

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<sup>5</sup> Lawrence, Robyn. Construction Dive. *It's complicated: Vaccine hesitancy continues among contractors*. Retrieve on September 16, 2021. Available at: <https://www.constructiondive.com/news/its-complicated-vaccine-hesitancy-continues-among-contractors/602300/>

Similarly, the Administration cannot require construction employers to meet a testing mandate where there are shortages of testing kits and laboratory capacity. If either fail to meet the increased demand, this will create uncertainty regarding a worker's availability on a consistent basis and pose the risk of delaying or cancelling construction projects across the country. If workers are unavailable due to delays in receiving test results, one could draw a parallel to the paid time off requirement for those choosing to get vaccinated and/or recover from adverse reaction to cover the lost wages. The economic fallout will be enormous and could result in construction firms shutting down their operations or even going bankrupt.

AGC must also caution that any ETS must put forth guidance on which types of tests would be acceptable under the mandate. Many reports indicate that not all COVID-19 tests are high quality and reliable in their results.

#### **IV. The OSHA ETS Should Neither hold Prime/Controlling Contractors Liable for Subcontractors' Compliance at any Tier nor Subcontractors Liable for their Subcontractors and Lower-Tier Subcontractors' Compliance**

AGC respectfully requests that you make clear the roles and responsibilities of prime/controlling contractors and subcontractors. Specifically, any reporting requirement should explicitly state that a prime/controlling contractor should not be held liable for subcontractors and lower-tier subcontractors' compliance with the vaccination or testing requirements. Similarly, subcontractors should not be liable for their subcontractors and lower tier subcontractors' compliance.

Unlike other reporting requirements, the uniqueness of a COVID-19 vaccination or testing mandate could have implications under Health Insurance Portability and Accountability Act (HIPPA), the Americans with Disabilities Act (ADA), and other federal, state and local medical and health privacy protections for employees if certain information is shared among different employers.

A simple and effective solution to such challenges would be allowing prime/controlling contractors and subcontractors to make, and be solely liable for, recordkeeping to one federal agency—such as OSHA or any other agency at the U.S. Department of Labor with jurisdiction.

#### **V. OSHA Must Coordinate with the U.S. Equal Employment Opportunity Commission (EEOC) on any Potential Sharing of Medical Information and Shield Employers from any Legal Liabilities they Could be Exposed to by the ETS & Similarly Coordinate with the EEOC on Accommodations**

OSHA must also coordinate with the U.S. Equal Employment Opportunity Commission (EEOC) on any potential sharing of medical information and shield employers from any legal liabilities they might be exposed to by the ETS.

Additionally, the existing guidelines governing the interactive process regarding accommodation requests governed by the U.S. Equal Employment Opportunity Commission (EEOC) are familiar and provide flexibility for employers to consider accommodations that fit the specific nature of their businesses.

The uniqueness of construction projects, the jobsites, and requirements of the actual jobs on the jobsites are completely different than those in an office workplace and so are the possible accommodations, or lack thereof. For example, unlike an office worker, a construction contractor cannot provide telework or alternative work (e.g., a project that isn't subject to a mandate) if no alternative work exists to its craft workforce (e.g., pipefitters, welders, heavy equipment operators, etc.).

While the EEOC does require an employer to participate in the interactive process to consider an accommodation request, it ultimately allows the employer to deny a request that imposes an undue hardship on the business. OSHA must coordinate with the EEOC to not conflict with, create any confusion to the already well-known accommodation process, or add any unreasonable accommodations that employers must grant.

**VI. Any OSHA ETS Requiring Vaccination or Testing Should Provide a Grace Period that is Equal to or Greater than the Grace Period Given to Federal Employees and also Consider Timelines for Becoming Fully Vaccinated**

On September 9, 2021, President Biden issued the *Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees* that put forth a COVID-19 vaccination mandate for federal employees. To implement that mandate, the Safer Federal Workforce Task Force established in its *COVID-19 Workplace Safety: Agency Model Safety Principles* that federal employees should be vaccinated by November 22, 2021. This period represents a 75-day grace period for federal employees to comply with the order. At a minimum, OSHA should provide such a grace period—of at least 75 days—for covered employees under its forthcoming ETS. It is only equitable for the Administration to provide the same grace period to covered employers and their employees as it has provided to its agencies and their employees.

AGC also must point out that it can be assumed that only a certain percentage—not all—ETS covered employees will make the decision to get vaccine. The President’s plan directs OSHA to require only *fully* vaccinated workers be permitted in the workplace, and that employers provide paid time off to get vaccinated as well as any time off to necessary recovery from any adverse reactions. Per the Centers for Disease Control and Prevention (CDC), an individual is fully vaccinated two weeks post final dose.

If the proposed ETS follows this language to the letter, it would prohibit covered employers from allowing these workers access to the workplace for a period of two to six weeks, depending on the particular vaccine administered. Given this potential scenario, OSHA should allow for a combination of approaches to comply after the first dose is administered. This hybrid approach would involve weekly testing until two weeks post final dose of whichever vaccine the worker receives, providing the covered employer with certainty that the employee is available and minimize risk of workplace spread of COVID-19.

**VII. Any OSHA ETS Requiring Vaccination or Testing Should Provide Consideration for Collective Bargaining**

AGC represents construction contractors that are signatory to collective bargaining agreements (CBAs) and those that are not. For those signatory contractors, this ETS mandate could have implications that would normally be subject to collective bargaining with their union partners.

Given that many likely have CBAs that do not expire for years, AGC recommends that OSHA takes similar action as has previously been taken regarding federal contractor labor mandates implemented under executive order. For example, Executive Order 13706, *Establishing Paid Sick Leave for Federal Contractors* considered the impact that extending paid sick leave could have on CBAs and could provide a pathway for consideration in this case.

AGC recommends that the vaccine mandate should not apply until a CBA expires and the collective bargaining process can occur.

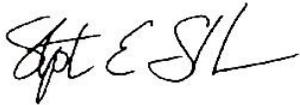
## VIII. Conclusion

To be clear, a proposed ETS could potentially have the unintended effect of causing further damage to the economy as well as unintended consequences on the health and safety of workers and other Americans. As the agency did with the health care ETS, OSHA must take the necessary time to carefully review and craft any such ETS required under the Action Plan. The agency should not expedite the regulatory process for the sake of fulfilling an obligation or avoiding public criticism. And it should focus its efforts on the industry sectors that present the highest exposure risks.

In addition to giving all aspects of such a standard due consideration, we strongly encourage the Administration to identify a “sunset” date to which the ETS will expire. Once the current surge is under control, as we all hope will be soon, a permanent standard covering all industry sectors, especially those with low exposure risk, will be unnecessary.

AGC remains committed to working with you to help ensure safe, healthy and efficient workplaces. Thank you for consideration of the association’s concerns and recommendations. We look forward to providing additional insight as the agency develops this ETS.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen E. Sandherr". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Stephen E. Sandherr

CC: U.S. Equal Employment Opportunity Commission