



January 19, 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

Re: Docket No. OSHA-2021-0007; RIN 1218-AD42; Comments on COVID-19 Vaccination and Testing; Emergency Temporary Standard; 86 Fed. Reg. 61402

Dear Assistant Secretary Parker:

The National Demolition Association (NDA) represents nearly 500 U.S. and Canadian companies that offer standard demolition services as well as a full range of demolition-related services and products. NDA educates members on the latest advances in equipment and services, provides educational programs and tools to stay abreast of regulatory and safety matters and keeps regulators informed about issues in our industry. NDA also increases public awareness of the economic and societal benefits of demolition.

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) published an Emergency Temporary Standard (ETS) which establishes a new COVID-19 vaccination or testing mandate for employers with 100 or more employees (86 Fed. Reg. 61402). The ETS requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.

NDA is committed to the safety and protection of workers at all times and takes that responsibility seriously. Demolition contractors have an excellent record of providing a safe environment and work with government officials regularly to mitigate hazards. NDA believes that OSHA and other federal agencies must fully consider the costs and benefits of proposed regulations to ensure that federal and private resources are utilized efficiently to improve safety.

To this end, NDA has significant concerns regarding OSHA's new vaccination mandate and its potential impact on the demolition industry. NDA opposes the promulgation of a permanent standard on COVID-19 vaccination and urges OSHA to make the temporary standard more workable for employers. Below you will find an outline of NDA's concerns with the ETS along with recommendations to improve the standard for the demolition industry.

Areas of Concern with ETS

A. Demolition Industry Has Been Proactive in COVID-19 Safety Efforts

Since the start of the pandemic, the construction industry has been at the forefront of efforts to protect construction employees from the virus. The Construction Industry Safety Coalition (CISC), of which NDA is a member, developed a "COVID-19 Exposure Prevention Preparedness and Response Plan" in March

of 2020, which has been made available in both English and Spanish and provided at no cost to the construction industry. The CISC has updated the plan four times to account for changes in guidance from the Centers for Disease Control and Prevention (CDC). The Response Plan is tailored to the construction environment, which OSHA has generally classified as low risk.

In addition to the Response Plan, the CISC organized two safety stand downs related to COVID-19, one in April 2020 and the other in January 2021. Of particular relevance to the Administration's efforts to encourage vaccinations, from April 19-23, 2021, CISC members partnered with the CDC to conduct a "Vaccine Awareness Week in Construction" campaign to raise awareness of the safety, effectiveness, and benefits of COVID-19 vaccination among construction workers. The CISC encouraged participation in Vaccine Awareness Week, distributed education materials and a new industry public service announcement, and encouraged participation in the CDC and National Institute for Occupational Safety and Health (NIOSH) vaccination education webinars for the industry.

NDA believes OSHA should consider the proactive safety measures taken by the construction industry to mitigate the transmission and spread of COVID-19 before applying the ETS's requirements broadly across all industries.

B. Construction Industry is Already Low-Risk for COVID-19 Transmission

As a general matter, construction operations are low risk with respect to the transmission of COVID-19. At the beginning of the pandemic, OSHA 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."¹ As such, workers in the demolition industry that have minimal occupational contact with the general public or other coworkers are generally considered to have a low exposure risk.

OSHA created a webpage further analyzing when certain types of construction work fall into the various COVID-19 risk exposure categories. According to OSHA's own assessment, most construction work poses "low exposure risk."² NDA calls on OSHA to reconsider whether the ETS should apply to industries, such as construction, in which the COVID-19 exposure and transmission risk is already low.

C. Failure to Establish "Grave Danger" Standard

According to federal law, an ETS is only allowed upon a showing that there is a "grave danger" from exposure to a hazard in the workplace and the ETS is immediately needed to address the hazard. NDA believes that not all aspects of the ETS meet the "grave danger" standard established in the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 et seq. (the OSH Act), especially as it pertains to demolition industry. As detailed above, construction environments are low risk with respect to the transmission of COVID-19 since much of the work is done outdoors and in areas where social distancing is easily attainable among workers.

Further, OSHA cannot provide sufficient evidence to justify COVID-19 as a uniquely "grave danger" to workplaces as transmission can routinely occur in non-occupational settings. Scientific studies

¹ <https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf>

² <https://www.osha.gov/coronavirus/control-prevention/construction>

conducted by federal agencies have shown that a majority of COVID-19 transmission occurs in households, nursing homes, and health care facilities, not in regular workplace settings.³

D. OSHA Did Not Follow Proper Rulemaking Procedures

In promulgating the ETS, OSHA failed to follow the proper rulemaking procedures and consider the economic impact of the requirements of ETS on small businesses. Section 6(c)(1) of the OSH Act states that publication of the ETS in the Federal Register begins notice and-comment proceedings under Section 6(b), with the ETS serving as a proposed rule on which comments may be submitted.

The OSH Act does not provide any statutory mechanism for comments on OSHA's frequently asked questions (FAQs) on the ETS. However, OSHA relies heavily on over 100 FAQs to define the underlying requirements of the ETS. By only publishing certain ETS requirements in the FAQs instead of the actual text of standard, OSHA is violating the OSH Act's procedural requirements. This is particularly concerning given that OSHA is not required to establish the economic or technical feasibility before issuing a set of FAQs.

Among many examples, the ETS requires that employers provide "reasonable time and paid sick leave to recover from side effects," but does not specify what constitutes "reasonable time." The FAQs state that "OSHA presumes that, if an employer makes available up to two days of paid sick leave per primary vaccination dose for side effects, the employer would be in compliance with this requirement." OSHA does not provide any scientific studies or any additional justification in its FAQs for defining "reasonable" recovery as two days. This level of rulemaking through FAQs is in violation of the due process and rulemaking requirements under the OSH Act.

E. Workforce Shortages

Like several U.S. industries, demolition contractors and the construction sector continue to suffer from a severe workforce shortage and lack of skilled labor to sufficiently carry out operations. According to the latest data from the Bureau of Labor Statistics, there are currently 345,000 unfilled job openings in the construction industry.⁴ These labor shortages are having a detrimental impact on America's supply chain, the cost of goods and services and overall health of the economy.

Further, the ETS threatens to exasperate the labor crisis by forcing employers to terminate workers who refuse to get vaccinated for COVID-19 or receive a weekly test. NDA has heard concerns from several of its members that vaccine-hesitant workers will leave the demolition industry if the ETS is allowed to go into effect.

F. Paperwork and Administrative Burdens

NDA has substantial concerns regarding the documentation requirements on small businesses as they seek to implement the ETS. Recording and maintaining proof of vaccinations, weekly test results, and other documentation requirements in the ETS place a significant burden on small businesses that lack the resources to keep up with the administrative paperwork. These requirements are even more burdensome in the construction industry, which tends to have high employee turnover and a transient workforce.

³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7327724/>

⁴ <https://www.bls.gov/news.release/jolts.t01.htm>

G. Availability of COVID-19 Testing

As demonstrated by the recent surge of the Omicron variant, the U.S. continues to struggle with the availability of timely and reliable COVID-19 tests for Americans who need them. Last month, problems with testing capacity caused individuals across the country to wait several hours in long lines to receive a COVID-19 test.⁵ President Biden has even acknowledged the need to expand the nation's testing capacity in recent public remarks.⁶

This ongoing test shortage raises serious concerns about how the U.S. will keep up with the demand for COVID-19 tests when millions of private sector workers are required by the ETS to provide a weekly negative test to employers. If reliable COVID-19 testing remains unavailable, employers could be forced to sideline unvaccinated workers for significant stretches of time and may lose these workers altogether due to the burden of obtaining a test. This threatens to further aggravate the workforce crisis plaguing small businesses and the U.S. economy.

The federal government must ensure there is adequate testing capacity across the country before implementing and enforcing any COVID-19 testing mandates for employers and employees.

Recommendations to Improve the ETS

A. Allow employees to self-administer and self-read test without employer observation

OSHA should allow employees to self-administer and self-read tests without employer observation or telehealth proctoring. The ETS currently requires unvaccinated employees to both take a test and return results within a week, along with paying for the costs of weekly tests. As a result, self-administered and self-read tests are often the only feasible testing option for employees. Allowing this change in the ETS would significantly reduce costs for employers and provide relief from unnecessary administrative burdens, and would be consistent with the ETS's allowance of employee attestations for employee vaccination status.

B. OSHA should clarify that employers can "observe" tests via electronic means

As noted above, NDA supports the removal of employer or authorized telehealth proctor observations from the ETS. However, if OSHA preserves the current language, it should clarify that employer observations can be accomplished via electronic means. In its current form, it is unclear whether employers can remotely proctor antigen tests without the involvement of an authorized health provider.

In the ETS, the "tele" only appears in relation to an authorized proctor and the term "observed" is undefined. OSHA should explicitly clarify that employers can observe tests via electronic means such as video conferencing platforms. Otherwise, employers will have to use an authorized telehealth provider for remote observations, which negates any potential cost-savings. This change to the ETS is even more critical given that employees may refuse to administer in-person COVID-19 tests for colleagues due to safety and privacy concerns.

⁵ <https://www.nytimes.com/2021/12/17/us/politics/us-covid-tests-omicron.html>

⁶ <https://www.cnbc.com/2021/12/23/biden-wishes-he-thought-about-ordering-500-million-at-home-covid-tests-2-months-ago.html>

C. Include employer protections for good-faith compliance efforts

OSHA should include a section to the ETS permitting employers to establish documented, good-faith efforts toward compliance to avoid citations and penalties. As mentioned above, COVID-19 testing challenges continue to affect communities across the country and threaten employers' ability to comply with the ETS. In situations where there are documented testing shortages in the local community or other compliance challenges beyond the employer's control, OSHA should not issue citations to first-time offenders when the employer can show substantial and good-faith efforts to comply with the ETS.

D. OSHA should define what constitutes a "record" for self-read tests

The ETS requires that employers "maintain a record of each test result provided by each employee," but it does not specify how employers can satisfy this requirement for at-home tests that do not generate a record. OSHA should define a "record" such that employers can create an ETS-compliant record of a test result by simply recording the date, result of the test, test taker, and test observer- or, alternatively, by taking a photo of the test result with the same information.

E. OSHA should revise reporting-time requirements

The ETS requires employers to report any work-related COVID-19 fatality within eight hours of the employer learning of the fatality, and each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization. However, given that the work-related exposure would be the same regardless of the outcome, differentiating between eight hours and 24 hours for reporting requirements is illogical. In both situations, the primary event is exposure. While OSHA's ability to investigate work-related fatalities is important, it is unnecessary to investigate both events on two different timelines. OSHA should adjust the ETS to institute a 24-hour window for both reporting in-patient hospitalizations and fatalities in order to streamline these reporting requirements.

F. The time period for reporting aggregate numbers to OSHA should be extended

The ETS unreasonably requires employers to report aggregate numbers of employee vaccinations to OSHA by worksite within four hours. In order to produce a fully accurate roster within four hours of a request, employers would be required to frequently check and update the list to account for transfers, new hires, and terminations. OSHA should change this time period to the "end of the next business day after a request," aligning it with the deadline for all other records maintained under the ETS.

G. Any permanent standard should be time limited and tied to risk

While NDA opposes the promulgation of a permanent standard by OSHA on COVID-19 vaccination, any potential permanent standard should contain time restrictions not currently found in the ETS or be tied to actual risk of COVID-19 spread at a local level. Unlike the existing ETS, there would be no mandatory time constraints for a permanent standard. OSHA should set concrete parameters for when a permanent standard becomes ineffective.

Conclusion

While employee safety continues to be the foremost priority for demolition contractors, NDA has significant concerns regarding several provisions detailed in OSHA's ETS on COVID-19 vaccination and

testing. Construction is generally low-risk for COVID-19 exposure and the demolition industry has been proactive at protecting its employees throughout the pandemic. OSHA must ensure that it fully studies the impact of the ETS on employers and workers before moving forward with a permanent standard.

Given the ever-changing nature of the virus and ongoing difficulties with implementation, OSHA should strongly consider the recommendations presented in these comments and forgo a permanent standard later this year.

Thank you for the opportunity to provide comment on this important issue. Please contact NDA's Director of Government Affairs Kevin McKenney at kmckenney@demolitionassociation.com with any further questions.

A handwritten signature in black ink, appearing to read "J. Lambert". The signature is fluid and cursive, with the first letter "J" being particularly large and stylized.

Jeff Lambert
Executive Director
National Demolition Association