



AMERICAN TRUCKING ASSOCIATIONS

950 N. Glebe Road ★ Suite 210 ★ Arlington, VA ★ 22203-4181
www.trucking.org



Chris Spear
President & Chief Executive Officer

October 21, 2021

Acting Administrator Sharon Block
Office of Information and Regulatory Affairs
1650 Pennsylvania Avenue, NW
Washington, DC 20503

RIN: 1218-AD42: COVID-19 Vaccination and Testing Emergency Temporary Standard Rulemaking

Dear Acting Administrator Block:

The American Trucking Associations, Inc. (ATA) strongly supports efforts to provide access to vaccination and COVID testing broadly throughout the country. We have worked with our members, governments, and other partners across the economy to transport resources, including the vaccine, throughout the country to combat COVID and keep the economy moving. The trucking industry has in fact been the glue of the country that transported all of life's necessities and made it possible to respond to the pandemic -- milk, eggs, bread, produce, toilet paper, holiday gifts, fuel, as well as personal protection equipment for medical professionals and workers outside health care, ventilators, test kits and the COVID vaccine itself.

Accordingly, as you review the draft COVID-19 Emergency Temporary Standard ("ETS") recently received from the Occupational Safety and Health Administration ("OSHA"), ATA respectfully requests that you ensure that the final version includes the following elements in order to avoid harming our nation's already stressed supply chain:

- (1) An exemption for truck drivers akin to that provided by Canada for its drivers or alternatively deferring coverage of truck drivers to the traditional regulating agency with transportation expertise rather than OSHA;
- (2) Federal contractors that implement the vaccine mandate required in Executive Order 14042 should not have to comply with a second set of OSHA rules -- those that implement the E.O. 14042 mandate should be deemed compliant with the OSHA ETS and ideally vice versa to avoid overlapping and contradictory requirements; and

(3) A reasonable implementation timeline for any ETS of not less than 90 days.

While much of the country was sequestered in their homes, the trucking industry served its essential function and did so successfully with safety standards developed by public health experts. Now placing vaccination mandates on employers, which in turn force employees to be vaccinated, will create a workforce crisis for our industry and the communities, families and businesses we serve. In fact, should OSHA and the leadership of the federal task force on COVID continue on the paths they are on, the nation's motor carriers – who exclusively supply 80% of the country and move 70% of all US freight tonnage – could lose up to **37%** of their drivers to retirements, attrition to smaller carriers and/or conversion to independent contractor owner-operators.

We support the Administration's goals of increased vaccination rates and clear health guidelines to enhance protections for all Americans. We have urged trucking industry employees to get vaccinated and will continue to do so. We will also continue to work with federal authorities to increase voluntary vaccination rates for our sector.

Unfortunately, however, the anticipated OSHA rule as outlined together with the federal contractor vaccination mandate will have vast unintended consequences. Because of its expected one-size-fits-all approach, the OSHA ETS will inherently fail to balance the risks of a single standard for all industries against the broad impact that such a rule will have in exacerbating challenges to the supply chain and economy. Even if the ultimate goal is something we all agree on – increasing vaccination protections and defeating the COVID-19 Pandemic – it is vital that public health measures first do no harm.

As noted, there are public health actions other than mandatory vaccination that achieved a high level of protection for the trucking industry workforce, and our companies and drivers have worked closely with federal, state and local governments to ensure compliance with safety guidelines for our drivers, employees, customers and communities. Were the OSHA ETS to remove that flexibility for our supply chain, our industry and economy would suffer additional major challenges to hauling freight for the nation. Indeed, given the Administration's acknowledgment of supply-chain problems and recent actions to try to alleviate those issues, the current direction of OSHA and OMB will exacerbate the supply-chain crisis.¹

Unfortunately, if the Administration does not specifically address the concerns expressed in this letter, ATA will be forced to take additional action against the OSHA ETS and possibly the government contractor mandate to protect our industry, our drivers' livelihoods and the consumers in 80% of the country who depend on trucks exclusively to obtain the necessities of daily life like food, medicine, and fuel, as well as access to the vaccine. We would much prefer to work with federal authorities to figure out how we can get more truck drivers voluntarily vaccinated, which would be good for public health and not cause additional harm to vital supply chains.

¹ See, e.g., <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/10/13/remarks-by-president-biden-on-supply-chain-bottlenecks/>.

Background

ATA is an 87-year-old federation and the largest national trade organization representing the trucking industry, with affiliates in all 50 states. ATA's membership encompasses over 34,000 motor carriers and suppliers directly and through affiliated organizations. Our association represents every sector of the industry, from Less-than-Truckload to Truckload, agriculture and livestock transporters to auto haulers and movers, and from the large motor carriers to the owner-operator and mom-and-pop one truck operations.

As evidenced by the COVID-19 pandemic, trucking is the dynamic linchpin of the United States' supply chain that keeps the wheels of our economy turning. This year, our industry will move more than 70% of the nation's freight tonnage. Over the next decade, trucks will be tasked with moving 2.4 billion more tons of freight than they do today, in addition to delivering the vast majority of goods to American communities.² Trucks will continue to be the dominant freight transportation mode for the foreseeable future.

More than 80% of U.S. communities rely exclusively on trucks for their freight transportation needs. In 2017, trucks moved \$10.4 trillion worth of goods, which is equal to more than half of U.S. gross domestic product.³ The trucking industry is also a major source of employment, with nearly eight million people employed in trucking-related occupations, including 3.6 million truck drivers.⁴ Indeed, trucking accounts for 1 in every 18 jobs in the U.S., and "truck driver" is the top job in 29 states.⁵ Without trucks, our cities, towns, and communities would fail to thrive, and would lack essential necessities such as food; there would be no clothes to purchase, nor parts to build automobiles or fuel to power them. The rail, air, and water intermodal sectors would not exist in their current form without the trucking industry to support them as the final link in the supply chain. Trucks are central to our nation's economy and our way of life, and every time the government makes a decision that affects the trucking industry, those impacts are also felt by everyday Americans and the millions of businesses that could not exist without trucks, including the referenced 80% of the country that depends on our services exclusively on a daily basis.

Even before the pandemic, the trucking industry needed an additional 60,000 truck drivers immediately and that shortage has grown by 30% to 80,000 drivers as of October 2021. That deficit could grow to more than 160,000 by 2030 under current trends. In fact, when anticipated driver retirement numbers are combined with the expected growth in capacity, the trucking industry will need to hire roughly 1 million new drivers over the next decade, or an average of nearly 100,000 per year. The COVID-19 pandemic further exacerbated the truck driver shortage, and the temporary closures of state licensing agencies and truck driver training schools disrupted the already-fragile pipeline of new drivers entering the trucking industry. As a result of the already-crippling driver shortage, companies in supply chains across the economy are facing higher transportation costs, leading to increased prices for consumers on everything from electronics to food as well as empty shelves in some parts of the country.

² Freight Transportation Forecast 2020 to 2031, American Trucking Associations, 2020.

³ U.S. Census Bureau Commodity Flow Survey, 2017.

⁴ American Trucking Associations, American Trucking Trends 2020.

⁵ American Trucking Trends 2018, American Trucking Associations.

At the outset, it is also clear that the timeframes for these mandates could not come at a more difficult time for the U.S. economy. As noted, the U.S. is already facing unprecedented supply chain disruptions and delays due to many factors, including significant labor shortages, production shut-downs, a shortage of raw materials, and pent-up consumer demand. Many businesses, including manufacturers, retailers, and transportation/logistics service providers have been planning for months to meet the logistics demands of the upcoming holiday season, while at the same time maintaining and updating programs consistent with current COVID-19 health and safety guidance to protect the safety of team members, customers, and communities they serve. This period historically is a significant driver for the U.S. economy, and much needed during this time of economic recovery.

The Administration Must Consider Industry Data to Guide Decision-Making

The trucking industry strives to avoid politicizing public health decisions and has sought constructive engagement with OMB and OSHA. Against this backdrop of an already strained yet essential supply chain, it is imperative that the Administration seriously consider the effects of its vaccine mandate on our industry. In fact, we do not come to you without well-informed discussions and data from our members. We have shared this data with the Administration and hold out hope that the compelling health and workforce data will shape your final decisions. Our data shows that a vaccine mandate may very well further cripple the supply chain throughout the country by forcing up to 13% of drivers to leave the industry entirely.

ATA Members representing small, medium and large carriers surveyed their drivers on a vaccine mandate. The average (mean) driver vaccination rate across responding carriers was only 50% -- meaning only half of responding drivers were vaccinated as of September 2021. Of those, 62% on average (again, a mean) of the unvaccinated also stated they would not get vaccinated under any circumstances, with a similar number saying there were no incentives the company could provide to change their mind. When asked what they would do if a vaccine mandate were to be implemented at their employer, 25% of the unvaccinated stated they would leave the trucking industry altogether and 49% stated they would move to smaller carrier not subject to the mandate. Assuming that is broadly representative and they actually follow through, a vaccine mandate would then result in all carriers subject to it **losing approximately 74% of those unvaccinated employees or 37% of their total workforce** of drivers to smaller carriers or retirements/resignations.

We agree with your administration's statements that a significant number of individuals who have refused vaccination will ultimately get the vaccine to maintain their employment and other benefits like air travel. Assuming only 50% of drivers actually follow through on their stated intention to avoid the mandate, however, 18.5% of truck drivers would leave their current employers during the holiday season, including 6.5% completely departing the industry.⁶ Given the well documented shortage of drivers and current stresses on the supply chain, that would critically damage the supply chain in

⁶ A 50% rate of refusal is within the bounds of experience of another transportation industry employer. See [United Fires 320 Employees Who Refuse Covid Shot. Will Other Companies Follow? | Barron's \(barrons.com\)](#).

vast swaths of this country, significantly impeding the economic recovery, employment, and the holiday season right when retailers and families desperately need a functioning supply chain. In fact, even assuming only 1% of the nation's drivers leave the industry and/or move to smaller carriers, the disruption will be massive and crippling to our supply chain and economy.⁷

This result is wholly unnecessary based on the actual industry experience regarding COVID. ATA also surveyed its membership for purposes of analyzing the potential impacts of your proposed mandate, including gathering data regarding the experiences of over 120,000 drivers during the pandemic. Based on the information we have collected, the OSHA ETS is a solution in search of a problem for our industry. First, our industry and partners did a good job protecting our drivers; the infection rate of our employee drivers was 8.7%. That compares to 13.2% for the US population as a whole as of August. While drivers are generally isolated during their workday, they also have extensive travel and periodic limited interactions with customers, hotels, restaurants, gas stations, etc. Despite this, we as an industry kept infection rates low for our drivers and we continue to do so.

Similarly, our survey data shows the mortality rate for employee drivers was 0.92% — meaning of those infected only that percent died from the virus or virus related causes. That compares to 1.6% mortality for the population as a whole. Given the older nature of the driver workforce as well as the often increased health risk for many due to the sedentary nature of the work, this is evidence that our drivers are at a significantly lower risk of mortality comparatively also.⁸

OSHA's Anticipated Rule Cannot Meet the Longstanding High Legal Requirements for an ETS

OSHA has long had the authority to protect workers from workplace pathogens and has done so through its normal regulatory process.⁹ We believe the anticipated ETS, however, is likely unlawful even if OSHA has the authority to issue such a regulation as a permanent standard. Because of the fundamental role notice and comment plays in ensuring the fairness, effectiveness, and transparency of agency action, Congress has carefully circumscribed the conditions under which OSHA may issue an ETS, which is the “most dramatic weapon in [OSHA's] enforcement arsenal.”¹⁰ OSHA's authority for an ETS “should be delicately exercised, and only in those emergency situations which require it.”¹¹ To meet those requirements, OSHA must first find that employees are

⁷ Some portion of drivers that leave covered carriers will also become independent owner-operators, leaving the comprehensive health coverage of their current employers and potentially increasing costs to themselves and society as a whole in obtaining individual insurance without risk pooling. Notably, the administration has opposed the use of independent contractors and promoted legislative and regulatory provisions designed to limit the use of independent contractors. The OSHA ETS and the federal contractor mandate will in the long term hypercharge the movement of drivers who do not want to be vaccinated into independent contractor status. We expect the same is true of the construction industry and others possibly.

⁸ ATA asked for data on morbidity rates as well but did not receive enough information to provide a representative sample for this letter. The reported morbidity rates for the limited data we received mirrored the low levels of infection and mortality unsurprisingly.

⁹ See, e.g., [Bloodborne Pathogens - Standards | Occupational Safety and Health Administration \(osha.gov\)](https://www.osha-slc.gov/bloodborne-pathogens-standards).

¹⁰ *Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 426 (5th Cir. 1984).

¹¹ *Florida Peach Growers Association, Inc. v. US Dep't of Labor*, 489 F.2d 120, 129 (5th Cir. 1974).

“exposed to *grave danger* from exposure to substances or agents determined to be toxic or physically harmful or from new hazards.”¹² Second, the emergency standard must be “*necessary* to protect employees from such danger.” *Id.* (emphasis added).

Neither requirement is met here. This regulation cannot, then, lawfully be imposed on employers without an opportunity for notice and comment. As the Third Circuit held in *Dry Color Manufacturers’ Association, Inc. v. Department of Labor*, “emergency temporary standards should be considered an unusual response to exceptional circumstances.”¹³ They are not “to be used as a technique for avoiding the procedural safeguards of public comment and hearings.” *Id.* OSHA “cannot use its ETS powers as a stop-gap measure” while it seeks notice-and-comment on a permanent standard.¹⁴ Without the necessity of remedying a grave danger, OSHA cannot “displace its clear obligations to promulgate rules after [notice and comment]” for the sake of offering “interim relief.” *Id.* In addition, OSHA must consider as part of implementing an ETS the “effects upon economic and market conditions in the industry.”¹⁵

Notably, the Administration has already determined earlier this year that COVID constituted a grave danger for workers in one sector only - health care. For the specific reasons stated below, which merely reflect broad concerns rather than the totality of potential legal infirmities, we do not believe OSHA can expand that prior determination to the rest of the economy.

OSHA Cannot Meet the Standard for a Grave Danger Determination

COVID-19 does not currently constitute the sort of “grave danger” that could justify an ETS. The current infection rate as of October 12, 2021 for the general population was 182 cases per 100,000, and the mortality rate has also declined precipitously thanks to various treatments to 2.68 per 100,000.¹⁶

Moreover, one of the alleged purposes of the forthcoming ETS -- “to protect vaccinated workers from unvaccinated co-workers” – is completely without merit. We are unaware of any evidence that the unvaccinated are a significant risk much less a grave danger to the vaccinated. The CDC has been very clear that the vaccine is highly effective, including against the Delta variant. Symptomatic infection of vaccinated individuals is rare, and extremely unlikely to require hospitalization. Accordingly, there is absolutely no basis to find that COVID-19 is a grave danger for vaccinated workers.

Nor can a grave danger finding be based on the risk to unvaccinated workers. Over 78% of the United States’ adult population has received at least one shot, and 68% are fortunately already fully vaccinated. These figures actually understate the level of protection in the United States population because they do not include individuals with natural immunity as the result of a previous infection. The naturally immune, then, are joined with the vaccinated in a bulwark against any “grave danger” that COVID-19 might

¹² 29 U.S.C. § 655(c)(1) (emphasis added).

¹³ 486 F.2d 98, 104 n.9a (3d Cir. 1973).

¹⁴ *Asbestos Info. Ass’n*, 727 F.2d at 422.

¹⁵ *Id.*

¹⁶ [CDC COVID Data Tracker](#).

otherwise represent for the workplace. The claim that grave danger exists throughout industry is prohibitively “speculative.”¹⁷

Widespread vaccination and natural immunity, however, are not the sole mitigating factors. Many receive substantial protection through the conditions under which they work. The CDC suggests that the risk of transmission is so low when outdoors and not in close contact with others that masking is generally not necessary, even for the unvaccinated.¹⁸ Millions of employees work in just such conditions where the baseline opportunity for viral spread is marginal at best. Therefore, even if a finding may be made that COVID 19 poses a grave danger in some workplaces, such as health care settings and prisons, it is not a grave danger in all industries. The rate of transmission within many industries, including trucking, is lower within the workplace than the community transmission rate.

It is accordingly doubtful that COVID-19 poses a significant risk within the meaning of the OSH Act in most workplaces, much less a grave danger. OSHA also cannot justify an ETS based on risk from off-the-clock activities. The agency may not “support [its] finding of danger with . . . deaths and injuries due to causes which the standard [it] promulgate[s] will not correct.”¹⁹

Even if COVID Were a Grave Danger, an ETS is Not Necessary

Immediate rulemaking through the anticipated ETS is also not “necessary” to protect employees from grave danger. Concerned for the health of their employees, employers across the country already have implemented engineering and administrative controls aimed at abating the spread of COVID-19 among their workforce. Among other things, many workplaces are outfitted with enhanced ventilation technology. Physical distancing and masks are required by many employers, as are daily COVID-19 screenings or wellness checks. Employers require their employees to stay home when they are sick with symptoms consistent with a COVID-19 infection. Especially compared to the beginning of the pandemic, when little was understood about the virus, these comprehensive workplace measures, grounded in science and experience, have afforded safe and stable working environments.

Further, as noted, the COVID-19 situation has changed significantly since the spike in cases that precipitated the September 9 announcement of an ETS. Earlier this month, it was noted that the number of COVID-19 cases has been steadily declining.²⁰ In late August, the Food and Drug Administration gave full approval to the Pfizer-BioNTech vaccine, which is certain to be reducing hesitancy among some of the unvaccinated. It also is anticipated that millions more children will get vaccinated once the Pfizer vaccine receives emergency use authorization for children ages of 5 to 11.²¹ The reduction in

¹⁷ *Asbestos Info. Ass’n*, 727 F.2d at 425.

¹⁸ CDC, *Transmission* (July 12, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/transmission/index.html>.

¹⁹ *Fla. Peach Growers Ass’n, Inc. v. U.S. Dep’t of Labor*, 489 F.2d 120, 132 (5th Cir. 1974).

²⁰ *Remarks by President Biden on the September Jobs Report* (Oct. 8, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/10/08/remarks-by-president-biden-on-the-september-jobs-report/>.

²¹ Food and Drug Administration, *FDA Approves First COVID-19 Vaccine* (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>; Minyvonne Burke & Elizabeth Chuck, *Pfizer asks FDA for emergency authorization for its Covid vaccine for kids ages 5-11*, NBC News

vaccine hesitancy and the availability of the vaccine for children ages 5 to 11 will further reduce spread, including to workers.

In fact, at these levels, there are actually more infectious and deadly public health crises, including influenza and pneumonia, which affects 3 to 11% of the population per year with an overall mortality rate of 12.3. It is also worth noting that OSHA would perhaps save more lives focusing its energy on unintentional injuries at workplaces which come in at 49.3 per 100,000 rather than COVID at 2.68 and are already generally covered by a myriad of standards promulgated without emergency authority by OSHA.

Furthermore, given that our survey data shows that truck drivers have had an even lower rate of infection and mortality than the general population as noted above, we fail to see how the current situation could possibly meet the requirement of “necessity” for an Emergency Temporary Standard nationally for trucking. Indeed, the fact that OSHA chose to apply its prior emergency authority only to the health care sector where workers saw COVID exposure on a daily basis and at a point where the infection, mortality and morbidity rates were much higher overall and vaccination rates were much lower suggests that the current situation nationally and certainly in trucking is not an emergency. Given that OSHA ETS standards have been stricken down 5 of 6 times they were challenged historically, we believe any reasonable court following precedent would agree that OSHA’s anticipated broad national mandate on all industries and certainly as to trucking is outside its authority.

Even if There Were a Grave Danger and an ETS Were Necessary, OSHA Cannot Reasonably or Legally Limit Coverage at 100 Employees

ATA believes any OSHA standard that sets an employee threshold of 100 for coverage will be even more likely be stricken down by a court. In fact, OSHA’s most recent ETS on health care perhaps provides the best evidence of that fact. Notably, there were no limitations on the size of the employer.²² ATA cannot fathom that assuming COVID constitutes a grave danger generally in the workplace for all health care workers regardless of size, that somehow that danger disappears the moment non-health care employers have less than 100 employees. That threshold level also runs logically counter to your Administration’s overall increased vaccination goal. Indeed, if your goal is to use all means possible to increase vaccination rates, leaving aside the legal propriety of coercing employers to in turn coerce their employees, then it is wholly without logical support to exclude employers under 100 employees. We cannot conceive of a reasonable explanation for how the lives of workers at 100 employee firms are somehow more important than those at a 99-person firm assuming there is a grave danger broadly posed by COVID in every industry across the entire country -- which is a necessary precursor to an OSHA ETS.

Moreover, this threshold will actually only cover a very small percentage of the trucking industry and is likely to similarly cover only large entities in other industries. If you include single truck for-hire fleets (many of which are owner operators), 99.2% of for-

(Oct. 7, 2021), <https://www.nbcnews.com/news/us-news/pfizer-asks-fda-emergency-authorization-its-covid-vaccine-kids-ages-n1280999>.

²² See [Occupational Exposure to COVID-19; Emergency Temporary Standard; Interim Final Rule | Occupational Safety and Health Administration \(osha.gov\)](#)

hire fleets are less than 100 employees. Excluding 1 truck operations, it is still 97.7% of for-hire fleets are less than 100 employees.²³ Accordingly, the contemplated mandate will miss between 97 and 99% of the employers in the industry but simultaneously hit the biggest and most efficient motor carriers that have national supply chain responsibilities and are already in comprehensive compliance with state, federal and local public health requirements that have safeguarded their drivers successfully as noted above.

Testing is Not a Viable Option Logistically or Economically for Truck Drivers

Furthermore, testing, including for those with religious or medical exemptions or as an alternative for mandatory vaccination under the OSHA ETS, is not viable for our industry. Even assuming tests are ubiquitously available and inexpensive – which they will not be even with the best efforts to expand the manufacturing capacities for them -- a motor carrier will have no reasonable ability to provide tests and/or collect compliant records for such a regimen given the high mobility of drivers. Indeed, logistically providing access to tests, processing those tests and awaiting results before allowing drivers to proceed with their weekly travel – often across multiple states—would be a virtual impossibility. Leaving the logistics aside, as you may know, drivers are also subject to limitations on their ability to drive under hours of service regulations to protect them and the public from the hazards of fatigue. How that issue would interplay with the requirement for time off for testing or while awaiting testing results is an issue of substantial concern to our members as is any state or federal wage and hour responsibility for the time testing. As such, we anticipate the costs of testing for most industries – and certainly for trucking – will so substantially outweigh the benefits – particularly given the current infection, mortality and morbidity rates – that any rational court will consider them unreasonable as an alternative.

Paid Leave Requirements Are Outside OSHA's Authority

OSHA does not have authority to require employers to provide paid leave to receive or recover from a vaccination. The paid leave requirement contemplated here is categorically different from the “medical removal” required in some existing standards which is the closest analogue under the Occupational Safety and Health Act. Medical removal provisions typically require employers to allow employees to choose to move to a different job (or, if one is not available, to take time off work) if they are exposed at work to a toxic substance above a certain level for a certain amount of time. During the removal period, employers typically must maintain the employee's compensation level and seniority. With respect to COVID-19, by contrast, it is expected that OSHA will require employers to pay employees for the time it takes to get vaccinated and to recuperate from any side-effects experienced. That paid time off is unrelated to workplace exposure to the hazard. Instead, employees would be paid for an activity that takes place off-the-clock outside of the workplace. What's more, COVID-19 vaccination is an activity that is free and so widely available that over 78% of adults have already received at least one shot and 68% are fully vaccinated, without any federal government mandate that employers pay them for the time. Requiring employers to provide paid time off for

²³ Based on FMCSA data and assuming approximately 55 trucks means 100 employees, which is derived from ATA member data, approximately 6,500 fleets overall have at least 100 employees.

vaccinations is a backdoor subsidization of the federal government's vaccination program, not a permissible exercise of OSHA's authority to regulate workplace hazards.

Moreover, Congress has specifically legislated with respect to COVID-related paid leave. In the Families First Coronavirus Response Act, Congress created a reticulated scheme under which companies with 500 or fewer employees were required to provide COVID-related paid leave in certain circumstances.²⁴ Congress then let that paid leave benefit expire at the end of 2020, but it renewed tax credits for companies that voluntarily continue the benefit.²⁵ That Congress considered, and limited, COVID-related paid leave in this manner is further evidence that the Labor Department may not use the OSH Act to introduce alternative COVID-related paid leave.

ATA has Suggested Options to Avoid Decimating the Supply-Chain

As noted, ATA understands and supports the goal of increasing vaccination and/or testing broadly to reduce infection and mortality and morbidity of the COVID pandemic. We have made a number of suggestions to officials at OMB, DOL and DOT to avoid harming our industry, while we continue to support your overall goals. The trucking industry continues to hope to work with the Administration, not against you, on this vital issue and find the best policies to support public health and economic goals to defeat the pandemic and further the recovery.

1. Truck Drivers Should Not be Subject to the OSHA ETS

As noted, the application of this standard to our drivers is legally dubious and logistically almost impossible. Moreover, truck drivers are more akin to isolated remote workers in that they may not interact in person with another motor carrier employee for days or weeks at a time. Other countries have grappled with this issue and made different decisions, including specifically exempting drivers. Our neighbors to the north in Canada, which has very similar COVID levels, omitted truck drivers from their vaccination mandate while requiring vaccination of all other transportation modalities.²⁶ If an ETS is issued despite the legal and policy issues identified above, we suggest the Administration consider implementing a similar decision given the essential nature of the trucking workforce and the low likelihood of harm to our drivers.

It is worth noting that this request has already been effectively granted in the mining industry. The Mine Safety and Health Administration (MSHA) recently announced that it would not duplicate OSHA's vaccine mandate for mining thus providing an exemption for the mining industry.²⁷

2. FMCSA Is the Longstanding Regulator for Standards Applicable to Truck Drivers

²⁴ Families First Coronavirus Response Act, Pub. L. 116-127, §§ 3102, 5102, 5109–10, 134 Stat. 178, 189–91, 195–96, 198–201 (2020).

²⁵ See *id.*, §§ 3102(a), 5109, 134 Stat. 178, 189, 198 (setting December 31, 2020 expiration for COVID-related paid leave provisions); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 286 (2020) (extending employer tax credits for COVID-related paid leave, but not extending requirement that employers provide paid leave).

²⁶ [Federally regulated trucking companies not required to mandate vaccinations - Truck News.](#)

²⁷ See, e.g., [Mine Safety Officials Announce No Vaccine Mandate on the Horizon | Fisher Phillips](#)

Assuming the Administration feels it must regulate truck driver vaccination and testing, a more knowledgeable regulator for trucking than OSHA is available and preferable. As noted, the trucking supply chain exclusively makes testing, vaccination and necessities like food available to over 80% of communities in the United States and should not be disrupted by an ill-thought out, one-size fits all plan for stationary workplace locations like offices and factories. The Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA), which regulates drivers and motor carriers already, would be better able to develop a regulatory system that makes sense and ensures the best protection for our most valuable resource – our drivers.

ATA in fact questions the legal jurisdiction of OSHA over our drivers who spend the vast majority of their workday alone in the cab of the truck and outside OSHA regulation while doing so. In fact, during that period, FMCSA has the federal safety and health authority over them. Leaving aside our objection to any vaccination mandate and the impossibility of testing effectively, FMCSA has been delegated authority over drivers by the US Congress, and, given its expertise, is better positioned to adapt any public health standard to our industry. Assuming you will not exempt the industry from the overall requirements, FMCSA should be allowed to make informed decisions on this issue and regulate according to its expertise through its normal process.

3. The Administration Should Exempt Federal Contractors from the OSHA Mandate or Alternatively Allow Compliance with Either Requirement to Meet the Other Requirement.

Implementation of both the federal contractor requirements and OSHA mandate for an employer of more than 100 employees will inevitably lead to significant supply chain disruptions. While senior officials from the Office of Management and Budget and Department of Labor have indicated these programs will be substantially similar, there are distinct differences between the programs, and requiring employers to comply with both standards will only serve to cause confusion, disparity of treatment amongst the workforce, and create unnecessary burdens and inefficiencies.

Thus, consistent with OMB's mandate to find that imposing vaccine requirements on federal contractors promotes economy and efficiency in federal contracting, we respectfully request that employers that meet the threshold requirements for compliance with both programs, and in particular transportation/logistic service providers providing essential services in support of critical infrastructure activity, be required to comply only with one of the requirements. Such treatment would: (1) be consistent with the treatment afforded to the U.S. Postal Service, (2) streamline compliance obligations, (3) obviate the need to renegotiate government contract pricing, and (4) minimize further disruption to the fragile U.S. and global supply chain during this critical period.

4. Any Mandates Need a Reasonable Implementation Timeline

Leaving aside the various legal arguments provided above, the timelines for the federal contractor mandate and the anticipated timeline for the OSHA ETS are unworkable for much of the country. Employers will have to develop the mechanisms needed to track and enforce compliance with the standards, communicate to and train employees on each of the new standards, and develop policies and procedures to maintain a

compliant workplace under each policy. These efforts will take time and require diversion of resources that have already been allocated to support continued operation of the global supply chain and the U.S. economic recovery. In short, the U.S. will likely experience major economic disruption during its most important time of year if these requirements are hastily applied without the benefit of industry input and careful consideration of key workplace safety protocols that have already proven effective in mitigating the risks of COVID-19 workplace exposure.

Immediate implementation – by December 8 for federal contractors and within weeks or 30 days of the ETS given the timelines in the health care version from earlier this year-- will immediately exacerbate hiring efforts and worsen supply chain disruption. Furthermore, many of the trucking industry's largest carriers are organized and will need time to collectively bargain implementation, and every company will need time to stand up the infrastructure necessary to process thousands of likely accommodation requests and set up testing (as that will be one of the necessary accommodations even for government contractors). At the very least, a 90 day first compliance deadline would be necessary for any hope of the industry implementing all the requirements contemplated in an organized and thoughtful manner.

Conclusion

While we are gravely concerned with the Administration's planned direction and will take all actions necessary to protect our vital industry and the 80% of the country that depends exclusively on us, we remain willing to work with the Administration on reducing COVID exposure through every reasonable and legal means. Please have your staff contact us if we can provide additional information to assist you in addressing the concerns outlined in this letter or in facilitating other means of expanding vaccination and testing availability without disrupting the nation's supply chain.

Sincerely,



Chris Spear
President and CEO
American Trucking Associations