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February 25, 2021

Mr. Al Stewart
Acting Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Mr. Stewart:

On January 21, President Biden issued Executive Order (EO) 13999 on “Protecting Worker Safety and Health” directing the federal government to take swift action to reduce the risk of employee exposure to COVID-19 in the workplace. The EO specifically directs the Secretary of Labor, acting through the Assistant Secretary of Labor for Occupational Safety and Health, to consider whether an emergency temporary standard (ETS) on COVID-19 is necessary, directing the agency to issue an ETS by March 15 if necessary. We write to inquire about the status of this potential ETS and to learn more about the steps that the Occupational Safety and Health Administration (OSHA) is undertaking to determine whether an ETS specific to COVID-19 is necessary. This is especially important in light of decisions by previous administrations not to issue any pandemic-related ETS, substantial efforts and investments of business owners over the last year to keep workplaces safe, ever-changing scientific findings, and evolving Centers for Disease Control and Prevention (CDC) guidance.

Section 6(c) of the *Occupational Safety and Health Act* (OSH Act) authorizes OSHA to issue an ETS without following the customary standard-setting process if the Secretary of Labor can determine that two legal requirements are met: (1) workers are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or from new hazards; and (2) an ETS is necessary to protect workers from that danger. Once issued, an ETS must be replaced within six months by a permanent standard issued using the customary rulemaking process specified in section 6(b) of the OSH Act. Though OSHA has this authority,

the agency has only issued nine ETSs since it was established in 1971, and none since 1983, as the majority of ETSs have been either halted or invalidated by federal courts.¹

Recognizing the shortcomings of the ETS approach, OSHA has historically prioritized enforcement and compliance assistance efforts to respond more quickly to urgent and evolving workplace hazards. The Trump administration, modeling its response on the pandemic responses to H1N1 during the Obama administration² and Severe Acute Respiratory Syndrome during the Bush administration,³ utilized this proven method and denied emergency rulemaking petitions to issue an ETS addressing all infectious diseases during the COVID-19 pandemic.⁴ OSHA determined that enforcing existing OSH Act standards that address infectious disease hazards while also issuing detailed, industry-specific guidance that can quickly be adjusted based on changing scientific findings is “more effective than promulgating a rigid set of requirements for all employers in all industries based on limited information, and best utilizes OSHA resources.”⁵

We are concerned that nearly a year into the pandemic, and with the deployment of effective vaccines currently underway around the country, the Biden administration is considering implementing sweeping new employer mandates in the form of an ETS and permanent rule related to COVID-19 and other infectious diseases. This action would reverse the Trump administration’s effective policy and ignore the substantial efforts and investments employers and employees have successfully made, based on science-backed guidelines, to keep their workplaces safe. Since the very beginning of the COVID-19 pandemic last year, business owners, including those deemed essential by the federal government, have worked around the clock to operate under evolving state and local mandates, CDC and OSHA guidelines, and industry-recognized best practices to protect their workers. These efforts have included expanding cleaning and sanitization measures, investing in testing and personal protective equipment, and educating employees on new COVID-19 protocols.⁶

Before rushing to mandate a new, top-down federal regulation a full year into the pandemic, OSHA should diligently solicit feedback from business owners and their employees. Over the past 12 months, they have taken comprehensive and effective steps based on evolving science, changing government guidelines, and real-world experiences to prevent the spread of COVID-19 in their workplaces.

¹ GAO, WORKPLACE SAFETY AND HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA’S STANDARD SETTING (Apr. 2012).

² *Ensuring Preparedness against the Flu Virus at School and Work: Hearing Before the H. Comm. on Educ. & Lab.*, 111th Cong. 26-31 (2009) (statement of Jordan Barab, Acting Assistant Sec’y of Lab. for Occupational Safety & Health).

³ OSHA, INFORMATION REGARDING SEVERE ACUTE RESPIRATORY SYNDROME (SARS), <https://www.osha.gov/dep/sars/index.html>.

⁴ *See, e.g.*, Letter from Richard L. Trumka, President, AFL-CIO, to Eugene Scalia, Sec’y of Lab. (Mar. 6, 2020), <https://aflcio.org/statements/petition-secretary-scalia-osha-emergency-temporary-standard-infectious-disease>.

⁵ Letter from Loren Sweatt, Principal Deputy Assistant Sec’y of Lab. for Occupational Safety & Health, to Richard Trumka, President, AFL-CIO (May 29, 2020), https://drive.google.com/file/d/1rxlZnTDUwQxlnHJFCQy_bXEmufURd1AR/view.

⁶ Inti Pacheco, *How Much Covid-19 Cost Those Businesses That Stayed Open*, WALL ST. J., June 23, 2020.

To facilitate this input, we request that OSHA open a regulatory docket to receive more extensive and detailed comments from affected entities, as is customary during the proper OSHA rulemaking process. The agency should also consider the impact that this new regulation will have on small businesses who are already struggling to stay afloat amidst the pandemic, and convene a *Small Business Regulatory Enforcement Fairness Act* (SBREFA) panel to take vital input directly from small businesses.

Additionally, we are very concerned that new regulations being considered by OSHA, which would mandate actions based on a snapshot in time for a disease and public health guidance that is constantly evolving, will have an adverse impact on preventing the spread of COVID-19 in workplaces around the country. As OSHA explained in previously denying rulemaking petitions for an ETS, attempting to address worker exposure to COVID-19 permanently through rulemaking based on the constantly changing information that is being learned about the disease in real time could have “counterproductive consequences and deprive the agency of the flexibility that it needs to respond to new information during the current pandemic.”⁷

In fact, we do not have to imagine that such a scenario could play out with an ETS because we have a real-world example in a large state that implemented its own COVID-19 emergency regulations. On December 14, 2020, two weeks after California’s Division of Occupational Safety and Health (Cal/OSHA) enacted an ETS on COVID-19,⁸ Governor Gavin Newsom was forced to issue an executive order suspending the state’s regulations because they conflicted with changes in CDC and California Department of Public Health guidelines concerning the duration of quarantine periods for essential workers,⁹ causing massive confusion for employers during the busy holiday season. In a recent *Los Angeles Times* article, union leaders, business groups, and California workers all criticized the unworkable rule. An official from the activist group “Fight for \$15” said, “it’s hard to see how a federal standard based on California’s emergency rule could work considering the implementation and legal challenges Cal/OSHA faces.”¹⁰

We strongly urge OSHA to consider the real-world experiences of employers and their employees, experiences of OSHA State Plans, the evolving nature of the disease and associated public health guidance, and the promising deployment of new vaccines before rushing to enact sweeping new mandates that may create unsound policy with no improvement to workplace safety.

In addition, in order to understand OSHA’s process better, we request that you provide us with specific information about the steps that OSHA has taken to determine whether an ETS is necessary to protect workers from COVID-19, including answers to the following questions:

⁷ Letter from Loren Sweatt, *supra* note 5.

⁸ See CAL. CODE REGS. tit. 8 § 3205-3205.4.

⁹ See Cal. Exec. Order No. N-84-20 (Dec. 14, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/12/12.14.20-EO-N-84-20-COVID-19-text.pdf>.

¹⁰ Jie Jenny Zou, *Despite Cal/OSHA’s emergency COVID-19 safety rule, workers say little has changed*, L.A. TIMES, Jan. 28, 2021.

1. How does the agency meaningfully plan to solicit public feedback from employers, many of whom have been operating safely throughout the pandemic, to determine whether an ETS is necessary?
2. Has the agency determined whether an ETS on COVID-19 would have a substantial impact on small businesses, and if so, will the agency commit to convening a SBREFA panel to take input directly from small businesses?
3. Has the agency considered how a potential ETS could be quickly and frequently updated to keep workers safe as circumstances on the ground change and public health guidance evolves?
4. How does OSHA plan to address the differences in risk exposure across industries and different jobs within the same industry when it is considering whether COVID-19 presents a grave danger to workers, as required by the OSH Act?
5. How does OSHA plan to address workplaces where most employees have already been vaccinated and are therefore not exposed to grave danger from the COVID-19 hazard?
6. Has the agency considered whether it will be able to provide employers with robust guidance documents and compliance assistance expediently, especially if the rulemaking covers a broad range of industries not typically covered by OSHA regulations?
7. Has the agency considered how it will enact this sweeping and broad rule in a way that will give employers, who have already implemented workplace safety extensive programs, time to bring their workplaces into compliance with the specific measures outlined in the ETS?

We look forward to your response to these questions by March 11, 2021. If you have any questions regarding this request, please contact Kelly Tyroler with the Committee on Education and Labor at (202) 225-7101.

Thank you for your attention to this important matter.

Sincerely,



Rep. Virginia Foxx
Ranking Member



Rep. Fred Keller
Ranking Member
Subcommittee on Workforce Protections