

January 13, 2022

Mr. Douglas L. Parker
Assistant Secretary
United States Department of Labor
Occupational Safety and Health Administration
200 Constitutional Avenue NW
Washington, D.C. 20210

Re: Docket No. OSHA-2021-0007; RIN 1218-AD42; Comments of COVID-19 Vaccination and Testing; Emergency Temporary Standard; 86 Fed. Reg. 61,402 (Nov. 5, 2021)

Dear Mr. Parker:

The Flexible Packaging Association (FPA) respectfully submits the following comments in response to the Occupational Safety and Health Administration's (OSHA's) COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS). FPA is a national trade association that represents flexible packaging (such as rollstock, bags, pouches, labels, liners, wraps, and tamper-evident packaging for food and medicine) manufacturers and suppliers to the industry in the United States. Flexible packaging, a \$34.8 billion industry, is the second largest and fastest growing segment of the packaging industry and employs approximately 79,000 workers in the United States. FPA appreciates OSHA's consideration of these comments on the ETS as it currently stands, as well as on any future amendments or iterations.

FPA and its members have and continue to prioritize the protection of workers against COVID-19 exposure but would like to express significant concern with the current formulation of the ETS and with several ambiguities that the ETS has placed on the table. It is critical that these ambiguities be answered by OSHA for any successful, cohesive implementation of the standard across the nation.

To begin, it is important to address the significant burden that the ETS imposes on small businesses. This burden is not properly considered in OSHA's standard. Compliance with the ETS will require considerable energy and resources from businesses of all sizes, but it will be heightened for small businesses, many of which are already dealing with a lack of resources as a consequence of the pandemic. Additionally, small businesses will be disproportionately impacted by any loss of employees who refuse to comply with the ETS as

their labor forces are modest to begin with. Moving forward, it is important that OSHA make ETS decisions in accordance with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) so that small businesses are not unfairly burdened.

Additionally, it is important that OSHA provide a more detailed definition of “100 workers.” This definition of a small business does match that of the Small Business Administration, which classifies a small business as one with 500 or fewer employees, and it leaves businesses without a frame of reference for exactly who should be included as an employee and thus who is subject to testing under the standard. Specifically, OSHA should clarify the standard as it relates to remote and temporary workers. FPA recommends that OSHA consider using the OSHA Form 300 A employee count under OSHA Section 1904 as a basis for the ETS employee count and that temporary workers should thus be counted as employees. However, testing and vaccine records should be required by the agency supplying the temporary worker.

Should the present stay of the ETS be lifted, employers will need adequate time to comply. It is important to allow this time for compliance so that businesses can put plans in place that cannot be properly set up during the stay. For example, businesses cannot responsibly invest resources in COVID-19 tests when it is not clear that these tests will be necessary, and they may end up expiring before they can be used. It is important that should the stay be lifted, implementation of the ETS be phased in (such as over 90 days) so that businesses have time to educate employees on requirements, allow employees time to get vaccinated, obtain test kits (particularly given the potential for shortages of test kits at any given time), and develop a system to track employee information related to the standard.

OSHA needs to provide guidance to businesses regarding the handling of medical exemption, disability, and religious accommodations for those employees who are not obtaining the vaccine. The ETS states that employers who implement a “Mandatory Vaccination Policy” must require vaccination of all employees with three exceptions: (1) employees “for whom a vaccine is medically contraindicated;” (2) employees “for whom medical necessity requires a delay in vaccination;” or (3) employees “who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.” Further, the ETS requires included employers to “determine the vaccination status of each employee,” taking account of whether the employee is “fully or partially vaccinated.” 29 C.F.R. § 1910.501(e)(1)-(2). Should OSHA require employers to keep a record of the reason an employee is not vaccinated (as suggested in FAQ 4C of the ETS), this requirement needs to be put forth and detailed in the ETS itself. Employer obligations under civil rights and privacy laws, as well as general awareness and respect to sensitive situations, could easily conflict with such a roster. If OSHA would like businesses to keep these kinds of records, the requirement must be in the ETS explicitly to protect businesses from any claims of discrimination or retaliation.

OSHA needs to identify within the ETS when the standard will cease to be required. There is no communication within the ETS that provides information on the lifespan of the standard. Of course, it is difficult to give any particular timeline as the fluctuations of the pandemic continue, but OSHA should provide a better frame of reference on the termination of the ETS. Specifically, OSHA should base a termination of the requirement on herd immunity percentage –by local area or by business entity. This would allow employers a better understanding of the impacts of the ETS on their own businesses so that they can better implement strategies and long-term plans.

Lastly, because of the very real potential for a shortage of testing materials or kits, the ETS needs to contain a provision that details what an employer's obligations are when test kits are unavailable. Businesses should not be penalized for non-compliance when they cannot control the availability of test kits. This provision should consider the case of unvaccinated employees when tests are not available and should clarify associated employer and employee rights.

Thank you very much for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Abigail Trumpy', with a long, sweeping horizontal line extending from the end of the signature.

Abigail Trumpy,
Director, Regulatory Affairs
Flexible Packaging Association