

October 18, 2021

Memorandum

US Office of Management and Budget / Office of Information and Regulatory Affairs (OIRA)

Agency/Subagency: Department of Labor (DOL)/Occupational Safety and Health Administration

Cc: Filed electronically at EO 12866 Meeting Request ([reginfo.gov](https://www.reginfo.gov))

RE: COVID-19 Vaccination and Testing Emergency Temporary Standard Rulemaking

Summary

On September 9, 2021, President Biden announced an Executive Order to address the COVID-19 pandemic. Several of the policies announced directly affect our shared membership:

- All private-sector employers with 100 or more employees will be required to ensure that their workers are either vaccinated or are tested weekly for COVID-19.
- The U.S. Occupational Safety and Health Administration (OSHA) will issue an Emergency Temporary Standard (ETS) to implement this requirement.
- Companies covered by the ETS will face fines of \$14,000 per violation of the standard.

The likely costs of the ETS greatly outweigh the perceived benefit, and less intrusive alternatives exist to achieve the desired result. For this reason, we would recommend that OIRA return the ETS to the agency for reconsideration of a less intrusive approach.

Key areas of concern regarding the proposed Emergency Temporary Standard

Lack of formal language regarding the ETS has prompted several questions from the grain and agribusiness retailers in the state of Kansas. Please see our comments below:

Business continuity of the global food supply chain

- The COVID-19 pandemic has created, and accelerated, a host of industry challenges.
- The ETS would exacerbate current workforce shortages, specifically skilled labor, and commercial truck drivers, causing delays, shut-downs, inflation of costs, etc.
- Lack of workers impacts material availability and costs, and transportation costs.
- Lack of workers negatively impacts supply chains from factories and ports all through the end user.

Additional Costs and Administrative Burdens

- Organizations estimate up to 30% of the current workforce will quit their jobs or accept termination, rather than take the vaccine or submit to weekly testing.
- Employers will have additional costs associated with termination of non-compliant employees through increased unemployment insurance premiums.
- The ETS will increase the administrative burden on documentation, updating employee records, and OSHA record keeping and reports. These requirements will add additional administrative costs for employers.
- Covered employers will risk unreasonable civil penalties for failure to comply with the ETS.

Implementation

- There will be additional administrative burdens related to testing. Organizations have expressed concern with hiring additional labor to monitor testing and/or vaccine requirements along with reporting requirements and oversight.
- Adverse Reactions/Recordability: what are the requirements for recordability of adverse reactions to the COVID-19 vaccine when mandated by the employer/OSHA?
- Adverse Reactions/Liability: who bears the financial liability for an employee's adverse reaction to an employer-mandated vaccine? Will employers be liable for the cost of paid time off for those employees who will have adverse reactions to the mandated vaccinations? What about compensation for lost wages?
- Lawfully recognized exemptions: Current state and federal law on vaccines requires an employer to recognize certain lawful exemptions when mandating an employee to receive a vaccine as a condition of employment and provide for a reasonable accommodation for the exemption. How will the ETS allow for these recognized exemptions, and what civil liability would an employer be exposed to for failing to provide a reasonable accommodation to employees?
- Naturally Acquired Immunity: for those millions of workers who have naturally acquired immunity following exposure to COVID-19, how will the ETS recognize and account for these employees that, arguably, have greater levels of immunity to COVID-19, and variants, than the vaccine would provide? This is especially relevant for those employees who have received advice from a medical professional recommending for them not to receive the vaccine until they no longer have antibodies in their system. What will be the mandatory reporting requirements under the ETS for these employees?
- Civil Liability: What civil liability might employers be exposed to for receiving and storing their employees' sensitive medical information through compliance with the ETS? What protections will exist for employers concerning this exposure to potential liability?
- The initial Executive Order required employers over 100 employees be subject to the ETS, will this be total employee population, or per business location?

Recommendation

The likely costs of the ETS greatly outweigh the perceived benefit. The quantitative and qualitative benefits of the ETS do not justify the costs (direct and indirect) set forth above. In addition, the ETS does not allow for various possible less intrusive and less costly alternatives that would produce the desired result. A less burdensome alternative would be more productive in achieving the desired benefit. Because the desired benefit of the ETS does not justify the costs, OIRA should return the ETS to the agency for reconsideration of a less intrusive approach.

Kansas Grain and Feed Association (KGFA) is the state association of the grain receiving, storage, processing and shipping industry in Kansas. KGFA's membership includes over 950 Kansas business locations and represents 99% of the commercially licensed grain storage in the state.

Kansas Cooperative Council (KCC) represents cooperatively structured businesses including agriculture grain storage, marketing and supply, utility, financial and consumer cooperatives

Kansas Agribusiness Retailers Association (KARA) is a state-wide agribusiness industry trade association with over 700 members companies that supply agricultural inputs and services to Kansas farmers.