Morgan Lewis

Jason S. Mills
Partner
+1.213.612.7387
jason.mills@morganlewis.com

December 17, 2021

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. 61,402 (Nov. 5, 2021)

Dear Mr. Parker:

The undersigned 51 organizations, which represent employers of all sizes around the country, respectfully submit these comments in response to the Occupational Safety and Health Administration's (OSHA's) COVID-19 Vaccination and Testing; Emergency Temporary Standard (ETS), 86 Fed. Reg. 61,402 (Nov. 5, 2021). We appreciate OSHA's consideration of these comments as it determines how to proceed with any permanent COVID-19 standard, amendments to the ETS, or future ETSs.

The undersigned and the employers they represent understand the significance of the COVID-19 pandemic and have made protecting workers against COVID-19 exposure a top priority. We believe that workplace safety is everyone's concern, and nonetheless we have significant concerns with the ETS in its current form.

To start, in publishing the ETS, OSHA did not go through proper procedures to consider the burden imposed on small businesses. If OSHA moves forward with developing a permanent rule on vaccination and testing, or with revisions to the ETS, OSHA should do so in accordance with the procedures required under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). This is necessary due to the significant impact that such a rule would have on a substantial number of small businesses. The Small Business Administration's (SBA's) definition of a "small business" varies by industry—it is defined based on the size of the employee population, with the maximum ranging from 100 employees to 1,500 employees. *See U.S. SBA Table of Small Business Size Standards*, effective August 19, 2019. Given that the ETS applies to all employers with 100 or more employees, the ETS will have a substantial impact on many small businesses. To the extent that a permanent rule may extend to organizations with fewer than 100 employees, the importance of following SBREFA procedures is even more pressing. And ETS compliance will be a significant hardship for large businesses with sophisticated human resources (HR) and administrative systems in place. Compliance issues will be compounded for small businesses, many

of which may already lack the resources to face the pandemic's challenges. In addition, employers with smaller workforces will be disparately impacted by the ETS because the loss of even a handful of employees who refuse to comply (including by not accepting a testing option) will disrupt operations (particularly in areas or industries with labor shortages).

Additionally, not all aspects of the ETS satisfy the "grave danger" standard set forth in the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 et seq. (the OSH Act). For instance, the ETS does not allow self-read and self-administered COVID-19 tests without observation—even though they would be the least expensive and least burdensome type of COVID-19 test for businesses. This prohibition is premised on unsubstantiated allegations of potential employee dishonesty; however, disallowing these tests due to the unproven assumption that employees may not be truthful about results (even when subject to criminal penalties) fails to meet the grave danger standard for an emergency rule. OSHA should be cognizant of this fact and aware of the potential for "as-applied" challenges to discrete portions of the ETS.

If the U.S. Court of Appeals for the Sixth Circuit or the U.S. Supreme Court lifts the present stay of the ETS, covered employers similarly will need additional time to comply. Accordingly, OSHA should confirm as soon as possible that it will not enforce the deadlines contained in the ETS if the stay is lifted and will instead give employers at least 60 days to comply with the weekly testing requirement and at least 30 days to comply with all other deadlines from the date when the stay is lifted (i.e., provide the same times that OSHA otherwise gave for compliance from the date of publication). This reassurance from OSHA will give businesses the certainty that they need to plan for all potential litigation outcomes and their complicated, cascading consequences. For example, many businesses are learning that the COVID-19 tests that they began to procure in September when the ETS was first announced have expiration dates. Businesses do not want to make a large investment in COVID-19 tests only to keep the tests in storage until they expire. In addition, businesses will need lead time to roll out any mandatory vaccination policies—to allow employees some time to digest the announcement (and speak with their healthcare providers, if they desire), and then adequate time to become fully vaccinated.

Beyond these initial points, we do not focus on the validity of OSHA's Vaccine ETS for several reasons. To start, many of us submitted comments on OSHA's June 2021 Healthcare ETS, which focused on OSHA's failure to establish a "grave danger," to justify emergency rule, and to show technological and economic feasibility. We have identical concerns with the present ETS, but will not repeat them and instead incorporate them by reference herein. Additionally, more than 30 lawsuits have been filed challenging the ETS on these grounds, and the ETS has been stayed by the U.S. Court of Appeals for the Fifth Circuit. Because the courts will be the ultimate decisionmakers on these issues, there is no need to dwell on them here. Instead, the following comments focus on two general categories.

First, we provide "big picture," overarching comments on OSHA's ETS, which, as OSHA knows, automatically serves as a proposed rule for a permanent standard per Section 6 of the OSH Act. Specifically, we urge OSHA to clarify in any future standard the following:

a) Any standard must be limited in time or tethered to actual risk. Any future, permanent standard must contain time limits not currently found in the ETS or be tied to actual risk of COVID-19

spread at a local level. OSHA must set parameters for when a permanent standard becomes ineffective (for example, after the national emergency declaration has been lifted).

b) The rulemaking should not circumvent the notice-and-comment rulemaking process. OSHA should not circumvent the notice-and-comment rulemaking process by including substantive requirements in its Frequently Asked Questions (FAQs). To meet its obligations under the OSH Act and ensure that it receives adequate input from stakeholders, these requirements should be plainly set forth in the text of the ETS itself.

c) Any standard should allow employee self-administered and self-read tests without employer observation. OSHA should allow employees to self-administer and self-read tests without employer observation or telehealth proctoring. This would significantly reduce cost for the regulated community and ease unnecessary administrative burdens, and would be consistent with the ETS's acceptance of employee attestations (subject to criminal penalties) for employee vaccination status.

d) Any standard should include options for good-faith effort, particularly where COVID-19 tests are unavailable. OSHA should add a section to the standard allowing employers to establish documented, good-faith efforts toward compliance to avoid citations and penalties. Particularly in situations where there are documented testing shortages in the local area, OSHA should not issue citations to first-time offenders where the employer can show substantial and concrete efforts to comply with the ETS, which may have been frustrated due to obstacles outside the employer's control.

Second, we will provide detailed comments on aspects of the ETS that are ambiguous and, as a result, require additional clarification from OSHA. Right now, businesses across the nation are attempting to draft policies that meet the ETS requirements (in the event that the ETS once again becomes effective). And businesses want to "get it right." However, the ETS in its current form contains several ambiguities that distract businesses from their compliance efforts. Employers who are attempting to comply with the ETS in good faith will continue to struggle with these issues until OSHA provides additional clarification. Specifically, we encourage OSHA to provide clarification with respect to the following issues:

a) Subsidiaries and related entities should not be "counted" together for coverage purposes. The ETS says that it applies to employers with 100 or more employees. Any future versions of this standard should clarify that employees of subsidiaries and related entities should *not* be included together in the same count.

b) Any standard should allow tele-observations for self-read tests. If OSHA keeps observation requirements for self-read tests (per the above, we encourage OSHA to drop this requirement), OSHA should clarify that such observations may be conducted remotely. This will decrease testing burdens for spread-out employees located in remote areas.

c) Any standard should define what constitutes a "record" for self-read tests. Right now, the ETS requires records for each required test result. However, many tests do not automatically generate records. OSHA should clarify that employers can create an ETS-compliant test record by simply recording the test date, result, employee and proctor.

d) Any standard should streamline available accommodation requests for mandatory vaccination policies. The ETS confusingly includes two categories of required accommodations beyond

those already required by federal civil rights law. These two superfluous categories should be eliminated from any future versions of the standard.

e) Any standard should streamline reporting-time requirements. The ETS requires that a work-related COVID-19 fatality be reported within eight hours of the employer learning of the fatality, and within 24 hours of an in-patient hospitalization. OSHA fails to establish that two different times are needed here—given that the underlying hazard, exposure to COVID-19, would be the same in either scenario. OSHA should revise this provision to institute a 24-hour window for reporting both fatalities and in-patient hospitalizations.

f) Any standard should only impute knowledge for reporting purposes through supervisors. Knowledge cannot and should not be imputed to an employer whenever any employee learns of a reportable event. Instead, the standards should specify that reporting is only triggered when a manager learns of such event.

g) The time period for reporting aggregate numbers to OSHA should be extended. The ETS unreasonably requires employers to report to OSHA aggregate numbers of vaccination by worksite within four hours. In order to produce a fully accurate roster within four hours of a request, employers would be required to constantly 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.

I. Overarching Comments on the OSHA ETS

a. Any Permanent Standard Must Be Time Limited or Tied to Actual Risk

Under Section 6 of the OSH Act, the ETS is effective for only six months from the date of publication. A "permanent" standard that is supposed to replace the ETS, however, would contain no such time limit. As a result, any permanent COVID-19 standard that requires vaccination or weekly testing regardless of the risk of COVID-19 spread would plainly fail to meet the requirement of needing to be based on a significant risk under the OSH Act.

As explained in the prior section, we already have concerns with the standard's feasibility and OSHA's failure to establish grave danger and the need for an emergency rule. At the conclusion of the ETS period, we will have similar concerns regarding OSHA's ability to establish even significant risk of harm as the spread of COVID-19 hopefully continues to decrease. Any permanent standard and, in particular, the onerous weekly testing requirements, must be tied to actual risk at a local level (for example, only in counties that the CDC has declared to be high-risk in its COVID Data Tracker). And any permanent standard should become ineffective after the national emergency declaration has been lifted.

b. The Rulemaking Should Not Circumvent the Notice-and-Comment Rulemaking Process.

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 FAQs. However, OSHA relies *heavily* on the FAQs to define the underlying requirements of the

ETS. Indeed, at the same time that OSHA published the ETS, it published nearly 100 FAQs detailing the standard's requirements. *See* OSHA ETS Frequently Asked Questions, https://www.osha.gov/coronavirus/ets2/faqs (last visited Nov. 24, 2021).

By publishing substantive requirements in its FAQs instead of in the ETS itself, OSHA circumvents the OSH Act's procedural requirements. This "backdoor" rulemaking is particularly concerning because OSHA seemingly establishes bright-line rules via FAQs that appear nowhere in the text of the standard.

We have significant legal and due process concerns, with OSHA creating, by all appearances, legal requirements through FAQs. Instead, any such provisions should be added to the text of the standard itself. In particular, OSHA is not required to establish economic or technical feasibility prior to publishing FAQs. And yet, covered employers are obligated to follow requirements set out in the FAQs or risk OSHA enforcement. And employers may be subject to shifting requirements to the extent that OSHA modifies and fine-tunes its FAQs, without any opportunity to comment and without any findings on feasibility. This only serves to further complicate employers' good-faith compliance.

i. Example: OSHA, Without Basis, Defines "Reasonable" Recovery Time as Two Days per Dose in the Vaccine ETS FAQs (Versus Eight Hours per Dose in the Healthcare ETS FAQs)

The ETS requires that employers provide "reasonable time and paid sick leave to recover from side effects," but does not address what constitutes "reasonable time." 29 C.F.R. § 1910.501(f)(2). FAQ 5D to the ETS states 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." This is a particularly egregious example of rulemaking through FAQs and in violation of due process and rulemaking requirements under the OSH Act. On this topic, OSHA does not cite to scientific studies or provide any additional justification in its FAQs for defining "reasonable" recovery as two days in its FAQs. Studies suggest that only one in four people experiences systemic side effects such as fatigue and headache (instead of just a sore arm). *See* Healthline.com, *Except for Sore Arm, 3 Out of 4 People Didn't Report COVID-19 Vaccine Side Effects*, https://www.healthline.com/health-news/except-for-sore-arm-3-out-of-4-people-didnt-report-covid-19-vaccine-side-effects (citing to UK community study published in *The Lancet*, Volume 21, Issue 7, 939-49 (July 1, 2021)). Based on studies on vaccine side effects, OSHA has not established that one day of recovery time would not be "reasonable" to satisfy Section 1910.501(f)(2). Defining "reasonable" as two days will trigger abuse of reasonable paid-time-off (PTO) policies because one day of recovery time typically is sufficient. And given that OSHA failed to define the term "reasonable" except in an FAQ, it remains ambiguous whether providing one day of recovery time satisfies or violates the standard.

Additionally, the interpretation of "reasonable" provided in the FAQs is inconsistent with the definition provided in the FAQs to the Healthcare ETS for a substantially similar PTO provision. *See* OSHA ETS Frequently Asked Questions, https://www.osha.gov/coronavirus/ets/faqs (last visited Nov. 24, 2021). According to FAQ 81 to the OSHA Healthcare ETS, "OSHA presumes that, if an employer makes available to its employees four hours of paid leave for each dose of the vaccine, as well as up to 16 additional hours of leave for any side effects of the dose(s) (or 8 hours per dose), the employer would be in compliance with this requirement." Notably, the Vaccine ETS FAQ (Section 501) and Healthcare ETS FAQ

(Section 502) are inconsistent in two ways. First, the Healthcare ETS FAQ defines "reasonable" time off for recovery as "8 hours per dose." By contrast, the Vaccine ETS FAQ defines "reasonable" time off for recovery as "two days of paid sick leave per primary vaccination dose." Did OSHA intend to define "reasonable" as twice as long for the general U.S. workforce as compared to healthcare workers? And is this based on any changes in studies on recovery time published between June 2021 and November 2021? Stakeholders have no answers to these questions because OSHA did not address "reasonableness" in the standard itself and provides no explanation for the definitions in its FAQs. Another difference between the FAQs is that "reasonable" time off is defined in terms of hours for the Healthcare FAQs and days for the Vaccine FAQs. There is no logical basis for these two standards to differ, and providing a day compared to eight hours matters for businesses that operate in shifts longer than eight hours. OSHA should clarify that eight (or 16) hours is sufficient.

ii. Example: Information That OSHA Is Requiring Employers to Collect from Employees

As another example, the ETS requires covered employers to "determine the vaccination status of each employee," including whether the employee is "fully or partially vaccinated." 29 C.F.R. § 1910.501(e)(1)-(2). Employers also must maintain an employee roster inclusive of each employee's vaccination status onsite and maintain a record of each employee's vaccination status, preserving acceptable proof of vaccination "for each employee who is fully or partially vaccinated." 29 C.F.R. § 1910.501(e)(3). Confusingly, FAQ 4C says that the same roster must clearly indicate for each employee "whether they are fully vaccinated, partially (not fully) vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated because they have not provided acceptable proof of their vaccination status." Through this FAQ, OSHA seemingly requires rosters to note the reasons that employees are not vaccinated (and not just the mere fact that they are unvaccinated). If required by the ETS, businesses can build rosters to include details on why employees are not vaccinated. However, many will likely not want to distinguish between employees who have received approved accommodations, as compared to those who have elected to remain unvaccinated because accommodation requests cover particularly sensitive topics. Additionally, employers likely will want to limit information on accommodations to as limited a group as possible to avoid any discrimination or retaliation claims. Again, if OSHA wants to put this requirement on businesses, it should do so in the ETS itself so that OSHA can receive comments from businesses that actually have to implement policies and balance their conflicting obligations under various civil rights and privacy laws.

iii. Example: 100-Employee Threshold

With respect to the 100-employee threshold, OSHA states in its FAQs that "[t]he count should be done at the employer level (firm- or corporatewide), not the individual location level." This level of detail, however, cannot be found in the text of the ETS itself, which merely states that the ETS "covers all employers with a total of 100 or more employees." 29 C.F.R. § 1910.501(b)(1). OSHA was aware of the ambiguity regarding whether the count would be on a location or companywide basis, and it could have addressed this issue in the ETS to subject it to more pointed notice-and-comment rulemaking.

iv. Example: Weekly Testing and Documentation

The ETS requires employers to ensure that unvaccinated employees are tested for COVID-19 at least once every seven days *and* that documentation of the weekly test is provided at least once every seven days. Because test results may not be "same-day," these two dates may differ. However, employers can only check that employees have completed their tests every seven days *after* they receive the results. Only at that point, when the employer has the test record, can the employer flag any deficiencies regarding when the test was administered. During the interim period, employees may be reporting to work in violation of the ETS (although there would be no practically feasible way to prevent this from occurring). For example, an employee submits a record on Friday, exactly seven days since submitting their last record, and the document reveals that the employee (who normally takes a test every Wednesday and submits results every Friday) took the last test on Thursday and therefore went eight days between COVID-19 tests. The employer would have no discernible way to detect this violation until it is too late.

OSHA's FAQ 6.0 provides that OSHA will recognize an employer's good-faith efforts in attempting to comply with the standard for testing delays beyond the employer's control: "[T]he agency recognizes that where the employee or employer uses an off-site laboratory for testing, there may be delays beyond the employee's or employer's control. In the event that there is a delay in the laboratory reporting results and the employer permits the employee to continue working, OSHA will look at the pattern and practice of the individual employee or the employer's testing verification process and consider refraining from enforcement where the facts show good faith in attempting to comply with the standard." However, this good-faith provision should be incorporated into the ETS itself—not only for testing delays but also for employee deficiencies.

c. OSHA Should Allow Employees to Self-Administer Tests

The OSHA ETS prohibits use of tests that are "self-administered and self-read unless observed by the employer or an authorized telehealth proctor." 29 C.F.R. § 1910.501(c); *id.* § 1910.501(g). Self-administered and self-read (i.e., "at-home") antigen tests, however, are significantly less costly and easier to administer than other types of tests. *See* Preamble to ETS, 86 Fed. Reg. 61,402, 61,451 (Nov. 5, 2021) ("While the NAAT test is a more reliable test, the antigen test is faster and less expensive."). With the ETS requiring unvaccinated employees to both take a test and return results within a week, along with paying the cost of weekly tests, self-administered and self-read tests are often the only feasible testing option.

In the Preamble to the ETS, OSHA cited to only one reason for requiring observation by the employer or an authorized telehealth proctor for these types of tests—the "potential for employee misconduct (e.g., falsified results)." 86 Fed. Reg. 61,402, 61,518 (Nov. 5, 2021). Throughout the ETS, however, OSHA relies on employee honesty in a number of ways. Notably, the ETS allows an employee to confirm vaccination status even if proof of vaccination is lost—if the employee signs an attestation with the following language: "I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties." 29 C.F.R. § 1910.501(e)(vi). Similar means can be used to confirm self-administered test results. There is no reason to think that an employee would be

honest when signing such a statement regarding vaccination status, but dishonest when signing such a statement to confirm weekly test results. A dishonest employee could just as easily avoid weekly testing obligations altogether by signing a statement saying that their vaccination card was lost.

Likewise, the ETS allows for an employee to self-administer a test if the specimens are processed by a laboratory. 29 C.F.R. § 1910.501(c). This system, which is acceptable under the ETS, requires trust in the employees who are self-administering the test. Employees could easily dip their testing swabs into a cup of water (instead of their noses) and send it to the lab or have a family member take the test. Still, OSHA allows employees to self-administer this type of test unsupervised. And, as explained above, the unsubstantiated potential for fraud is not a sufficient legal justification for rejecting the easiest, safest, and most cost-effective method for testing.

Removing the authorized telehealth proctor or employer observation requirements would make compliance substantially easier for the regulated community, and it would be critical to businesses' ability to meet the ETS's requirements. This is particularly true for employees in remote locations, employers with spread-out and isolated workforces, or employees with limited computer or internet access.

For example, retail stores may only have a small breakroom where social distancing cannot be maintained, and all other available spaces are customer-facing and nonprivate. Employer observations of an unvaccinated employee's antigen tests creates the opportunity for potential exposure in such close quarters; in many cases, a manager would have to be in a small room with an unmasked and unvaccinated employee to watch them utilize a nasal swab. This forces managers to be in close proximity to unmasked, unvaccinated employees. Continuing with this example, employer observations also can be logistically difficult, depending on the number of managers working in a single shift. If only one manager is working per shift, and someone tests positive, there may not be additional individuals who can administer tests and allow the store to remain open (given that the manager likely would be considered a close contact, depending on the manager's own vaccination status per current CDC guidance).

Due to safety and privacy concerns, among others, employees also may refuse to administer COVID-19 tests for colleagues. Throughout the pandemic, many company receptionists have been tasked with administering temperature checks as a barrier to entry. Many receptionists have refused to fill this role, explaining that it makes them uncomfortable and subjects them to too many close contacts in a day. We have heard similar feedback from those tasked with observing antigen tests. Such employees would be exposed to unmasked and unvaccinated colleagues, and by virtue of administering the test, they would know at the outset that a colleague is unvaccinated. Serving as test proctor is a step too far for many on-site employees.

Likewise, in mobile construction settings, work crews may consist of two or three nonmanagerial employees who themselves may not be comfortable proctoring a COVID-19 test. Indeed, many employees will feel uncomfortable administering a test in person, due to privacy concerns and potential exposure to unvaccinated colleagues who must be unmasked to take the test. Allowing employers and employees to use at-home antigen tests ensures that employers have a safe and cost-effective means of administering a weekly testing program.

d. OSHA Should Provide an Avenue for Establishing Good-Faith Compliance

OSHA should add a section to any future standard allowing employers to establish documented, good-faith efforts toward compliance, to avoid citations and penalties. For example, employers and employees can run into unforeseen obstacles while procuring weekly tests. In its Preamble to the ETS, OSHA dedicates a section to "Availability of COVID-19 Tests." *See* Preamble to ETS, 86 Fed. Reg. 61,402, 61,452 (Nov. 5, 2021). OSHA explains that "the increasing rate of production of COVID-19 tests is more than adequate to meet rising demand related to compliance with the ETS testing option." *Id.*

However, employers that we represent *already* have had issues with consistent employee access to tests—and, this is true *even with the ETS stayed while demand is presumably reduced.* In particular, in remote areas, employees have had issues obtaining tests that provide rapid results that satisfy the weekly requirement. For example, one employer reported that an employee took a two-hour bus ride to find a COVID-19 test after local drug stores were sold out. Additionally, the federal government reportedly has been stockpiling test kits. In situations where there are documented testing shortages in local areas, OSHA should not issue citations to first-time offenders where the employer can show substantial and concrete efforts to comply with the ETS, which have been frustrated due to documented and time-limited obstacles.

II. Several Provisions of the ETS Are Ambiguous and Require Clarification

As explained above, businesses want to "get it right" when it comes to ETS compliance. In fact, most businesses want to be "well over the line" when it comes to compliance because the stakes are so high. Employers face the threat of citations—which OSHA makes publicly available online regardless of whether an employer contests the underlying allegations—and ever-increasing penalties.[1] Unfortunately, the ETS in its current form contains several ambiguities that leave the regulated community left to wonder if they have, indeed, satisfied OSHA's standard. Employers who are attempting to comply with the ETS in good faith will continue to struggle with these issues until OSHA provides additional clarification. Below, we have listed several concerns about the ETS in its current form.

a. *OSHA Should Clarify That Employers Should Not "Count" Employees of Subsidiaries and Related Entities That Issue Separate W2s or Have Separate EINs to Determine Coverage.*

Thousands of employers across the country are struggling to determine whether the ETS applies to them. The ETS applies to "all employers with a total of 100 or more employees." FAQ 2(A)(2) clarifies that "[t]he count should be done at the employer level (firm- or corporate-wide), not the individual location level." To begin, as explained above, such detail should be included in the ETS itself. Even more, the ETS should specify that employees of subsidiaries or related entities are not included in this count.

The Preamble to the ETS fails to provide any support for the 100-employee threshold. This 100+ requirement is not tied to safety but purportedly to administrative ease in compliance. OSHA does not

[1] OSHA penalties would be dramatically increased under the Build Back Better budget reconciliation package passed by the House of Representatives.

cite to any studies for its conclusion that businesses with 100 employees can feasibly implement the ETS and its vaccination or testing requirements. Again, we will not dwell on this point here, as these issues are actively being raised in litigation. However, if OSHA is going to create a bright-line rule for coverage, OSHA should be crystal clear in the standard itself as to how employers should count employees.

Along these lines, OSHA should build into the ETS a provision clarifying that employers with separate Employer Identification Numbers (EINs), or whose Forms W2 reflect a different employer name, do not have to count employees of other entities. This additional provision would provide the clarity that employers need to determine coverage and take steps toward compliance. Without such a bright-line rule, a number of employers face uncertainty in determining whether they are required to abide by the provisions of the ETS. Ambiguity in the scope of the ETS creates unnecessary confusion, in addition to unnecessary expenditure of resources on the part of OSHA as it seeks to enforce the ETS.

b. *OSHA Should Clarify That Employers Can "Observe" Tests via Electronic Means.*

As a starting point, we support the deletion of employer or authorized telehealth proctor observations (see section above, "OSHA Should Allow Employees to Self-Administer Tests"). However, in the event that OSHA retains 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. Notably, the term "tele" only appears in relation to an authorized proctor (not employer), and the term "observed" is undefined. OSHA should explicitly clarify that employers can "observe" tests via electronic means such as a computer platform like Zoom. Otherwise, employers will have to use an authorized telehealth proctor for remote observations, which undermines any potential cost-savings. In-person, face-to-face employer observations trigger all of the problems discussed in the aforementioned section above, as well.

c. *OSHA Should Clarify What Constitutes a "Test Record" for At-Home Tests.*

The ETS requires that employers "maintain a record of each test result provided by each employee," but it does not clarify 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 proctor—or, alternatively, by taking a photo of the test result with the same information.

d. *OSHA Should Rely Solely on Federal Civil Rights Laws for Accommodation Requests.*

The ETS states that employers with 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." The ETS and its Preamble provide little context as to why the first two categories are included, or what they cover. The third category incorporates federal civil rights laws including the Americans with Disabilities Act (ADA), which requires reasonable accommodation for employees with qualifying disabilities or medical conditions, and Title VII of the Civil Rights Act of 1964. The first two

categories are entirely encompassed by the third; they add nothing new. The inclusion of the first two categories creates confusion as to whether there is a different standard that applies separate from those used to analyze accommodation requests under the ADA. For example, the ETS creates confusion surrounding whether the first two categories can be denied if granting these accommodations would subject the business to undue hardship (and, if so, which undue hardship standard applies). Given the confusion that the first two categories create, OSHA should delete them because they are already covered by the third.

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 incident (i.e., the exposure) should be the same regardless of the outcome, differentiating between eight hours and 24 hours for reporting requirements does not make sense. In both scenarios, the underlying event is exposure. As a result, although OSHA's ability to investigate work-related fatalities is important, there is no need to investigate one on a faster timeline than another. Such a distinction is unjustified. To streamline these requirements, OSHA should revise this provision to institute a 24-hour window for reporting fatalities as well as in-patient hospitalizations.

f. *OSHA Should Only Impute Knowledge for the Purposes of OSHA Reporting to Supervisors.*

The ETS requires employers to report the following to OSHA: "(i) Each work-related COVID-19 fatality within 8 hours of the employer learning about the fatality. (ii) Each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization." The phrase "learning about" is not defined in the ETS itself. However, the Preamble to the ETS specifies that employers must report "when any agent or employee of the employer becomes aware of the reportable event." Preamble to ETS, 86 Fed. Reg. 61,402, 61,546 (Nov. 5, 2021). Specifically, "an employer 'learns' of a COVID-19 fatality or in-patient hospitalization when a supervisor, receptionist, or other employee at the company receives information from a family member or medical professional about an employee fatality or in-patient hospitalization." *Id.* That definition of "learns" is overbroad and untenable.

Knowledge cannot and should not be imputed to an employer whenever *any* employee becomes aware of a reportable event. Indeed, most employees would not think of such tragic events in terms of OSHA reportability, even after they are trained on the ETS and its requirements. Such a broad, overreaching definition of "learning about" would sweep in situations such as when a nonmanagement employee happens to see a social media post from a deceased or hospitalized co-worker's family member. Based on the Preamble to the ETS, the clock would be ticking on the employer's obligation to report at this point, even if the employee who saw the post is nonmanagerial and has no direct reporting obligation to a member of the company's safety and health team. Any such requirement is unrealistic and unreasonable. Businesses nationwide are trying to "get this right." It would be unfair to penalize employers whose management is wholly unaware of such incidents. OSHA should redefine the term "learn" in the ETS to require reporting only when a manager learns of the fatality or hospitalization, not when any nonmanagement employee does so.

g. *OSHA Should Extend the Deadline for Production of a Roster.*

Employers are required by 29 C.F.R. § 1910.501(l)(3)(i) to produce their written policy and the aggregate numbers described in paragraph (l)(2) (i.e., the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace) "within 4 business hours of a request" from the Assistant Secretary. This time frame is unreasonable. In order to produce a fully accurate roster within four hours of a request, employers would be required to constantly check and update their rosters to account for transfers, new hires, and terminations. OSHA should change this deadline to the "end of the next business day after a request," aligning it with the deadline for all other records maintained under the ETS and providing employers with sufficient time to ensure accuracy. Alternatively, OSHA should permit employers to produce, within four hours of a request, a roster that has been updated with reasonable frequency.

III. Conclusion

The undersigned thank OSHA for its consideration of these comments.

Sincerely,

Outside Counsel
Jason S. Mills
Morgan, Lewis & Bockius LLP
300 South Grand Avenue
Twenty-Second Floor
Los Angeles, CA 90071-3132

Alana F. Genderson
Mathew J. McKenna
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541

On Behalf Of
American Apparel & Footwear Association
American Coke and Coal Chemicals Institute
American Foundry Society
American Home Furnishings Alliance
American Mold Builders Association
American Pipeline Contractors Association
American Pyrotechnics Association
Associated Equipment Distributors

Association for Manufacturing Technology
Association of Equipment Manufacturers
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Global Cold Chain Alliance
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Institute of Makers of Explosives
International Dairy Foods Association
International Foodservice Distributors Association
International Warehouse Logistics Association
Interstate Natural Gas Association of America
Manufactured Housing Institute
Manufacturer and Business Association
Motor and Equipment Manufacturers Association
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Club Association
National Cotton Ginners Association
National Lumber & Building Material Dealers Association
National Ready Mixed Concrete Association
National Tooling and Machining Association
National Utility Contractors Association
Non-Ferrous Founders' Society
North American Die Casting Association
Plastics Pipe Institute
Portland Cement Association
Power and Communication Contractors Association
Precision Machined Products Association
Precision Metalforming Association
Reusable Industrial Packaging Association
SNAC International
Texas Cotton Ginners' Association
Tree Care Industry Association
TRSA – The Linen, Uniform and Facility Services Association
Truck Renting and Leasing Association
United Motorcoach Association
U.S. Chamber of Commerce