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January 17, 2022

The Honorable Joseph R. Biden
President of the United States
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Mr. President and Secretary Walsh:

We write to object to the Administration's announced intention to withdraw the June 2021 Emergency Temporary Standard (ETS) protecting health care workers from COVID-19.¹ The risks these workers face are so severe that we call on you to reconsider that decision and, following the reinstatement of the protections under the ETS, move with maximum urgency to a final standard that will secure the protections of the ETS for some of the nation's most essential workers.

The U.S. Department of Labor (Department) issued the ETS because it was clear that health care workers were exposed to grave danger from the SARS-CoV-2 virus and that an emergency standard was necessary to protect them from that danger.² As the Department explained in the ETS, the finding of grave danger was based on "the severe health consequences of COVID-19, the high risk to employees of developing the disease as a result of transmission of SARS-CoV-2 in the workplace, and that these workplace settings provide direct care to known or suspected COVID-19 cases."³ Even "mild" cases posed grave risks to health care workers, in part because of the risk of long-term disabling effects collectively known as "long COVID."⁴ The Department noted that vaccination was not in itself sufficient to eliminate the danger to health care workers.⁵

¹ Occ. Safety & Health Admin., *Statement on the Status of the OSHA COVID-19 Healthcare ETS*, Dec. 27, 2021, <https://www.osha.gov/coronavirus/ets> [hereinafter "Notice of Plan to Withdraw"].

² Occupational Exposure to COVID-19, 86 Fed. Reg. 32,376 (June 21, 2021).

³ *Id.* at 32,382.

⁴ *Id.* at 32,385–32,386 (discussing risk from mild cases), 32,386–32,388 (discussing risk of long-term health effects).

⁵ *Id.* at 32,382 ("While vaccination greatly reduces adverse health outcomes to healthcare workers, it does not eliminate the grave danger faced by vaccinated healthcare workers in settings where patients with suspected or confirmed COVID-19 receive treatment . . ."). See also *id.* at 32,423–32,424.

The Department concluded that an ETS was necessary to protect health care workers from this grave danger because existing policy and enforcement tools were simply insufficient.⁶ The experience of the many months before the ETS taught the Department that non-mandatory guidance triggered, at best, “uneven compliance.”⁷ Instead, “OSHA has found that neither reliance on voluntary action by employers nor OSHA non-mandatory guidance is an adequate substitute for *specific, mandatory* workplace standards at the federal level.”⁸

Additionally, that kind of specific and mandatory standard also had no adequate replacement in the General Duty Clause, the fallback for enforcement of widely-recognized hazards in situations when there is no mandatory standard on the books.⁹ The Department explained that the General Duty Clause is “ill-suited to requiring employers to adopt a comprehensive set of abatement measures, like those required by the ETS,”¹⁰ in part because “even in cases where OSHA prevails, the employer need not necessarily implement the specific abatement measure(s) OSHA established would materially reduce the hazard.”¹¹ Moreover, the Department explained that the General Duty Clause is not geared for enforcement in multi-employer worksites such as hospitals¹² and is impracticable for use in the pandemic because of the “heavy litigation burden” it imposes on the Department.¹³

We are alarmed by the decision to allow the ETS to lapse, because it forces a return to heavy reliance on the General Duty Clause, existing respiratory standards, and voluntary guidance—the very policies the Department previously explained are inadequate to protect health care workers.

Further, the Department’s call for voluntary compliance with the terms of the ETS¹⁴ assumes that voluntary compliance will be more effective now than it was prior to the ETS. Additionally, the Department’s vow to use the General Duty Clause for enforcement in the period before a promised final standard¹⁵ is not reassuring, as it is not clear how the Department will now be able to provide robust enforcement for health care workers given the deficiencies in that approach, which the Department itself so thoroughly documented in the ETS. It is difficult to believe that the Occupational Safety and Health Review Commission or the courts will countenance enforcement under the General Duty Clause for failure to comply with the mitigation measures in the ETS when an actual final standard is within the Department’s grasp.

⁶ *Id.* at 32,412–32,425.

⁷ *Id.* at 32,421–32,422.

⁸ *Id.* at 32,421.

⁹ *Id.* at 32,414–32,422.

¹⁰ *Id.* at 32,419.

¹¹ *Id.* at 32,420.

¹² *Id.* at 32,420–32,421.

¹³ *Id.* at 32,418.

¹⁴ *See* Notice of Plan to Withdraw, *supra* note 1 (“Given these facts, and given OSHA’s anticipated finalization of this rule, OSHA strongly encourages all healthcare employers to continue to implement the ETS’s requirements....”).

¹⁵ *See id.* (“As OSHA works towards a permanent regulatory solution, OSHA will vigorously enforce the general duty clause and its general standards.... OSHA believes the terms of the Healthcare ETS remain relevant in general duty cases....”).

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Congress never contemplated, and the legislative history does not show, that grave dangers would be allowed to remain unmitigated while an emergency persists. The grave danger of COVID-19 has not disappeared, and there is still an urgent need for enforceable standards to protect health care workers. The Department has an obligation to revisit its announced intention to withdraw the ETS, restore the ETS immediately, and move expeditiously to publish a final standard protective of workers.

It is imperative that the Administration remove all unnecessary obstacles to a final standard. When the Department first drafted the ETS, it was held up for the better part of two months in the Office of Information and Regulatory Affairs in the White House's Office of Management and Budget.¹⁶ The White House uniquely has the power to streamline the pothole-strewn path of the regulatory process into an expressway. We call on the Administration to use this authority to press on with the final standard and not turn our backs on the health care workers who save lives at the risk of their own during this pandemic.

The Administration has repeatedly espoused the importance of our healthcare workers. Therefore, consistent with that recognition, the Administration ought to reinstate this ETS and do everything in its power to keep these workers safe.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chairman



ALMA S. ADAMS Ph.D.
Chair
Subcommittee on Workforce Protections

¹⁶ The draft ETS was submitted to OIRA on April 26, 2021, and OIRA did not conclude its review until June 8, 44 days later. See RegInfo.gov, <https://www.reginfo.gov/public/do/eoDetails?rid=166261>.