

**Testimony of
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**Before the U.S. House of Representatives
Committee on Education and Labor
Subcommittee on Workforce Protections
Subcommittee on Civil Rights and Human Services**

**Hearing on Protecting Lives and Livelihoods:
Vaccine Requirements and Employee Accommodations**

October 26, 2021

I. Introduction

Good morning, Chair Adams, Chair Bonamici, Ranking Member Keller, Ranking Member Fulcher, and honorable members of the Subcommittee on Workforce Protections and Subcommittee on Civil Rights and Human Services. I very much appreciate the opportunity to speak with you at today's hearing, "Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations."

My name is Scott Hecker, and I am a senior counsel in the Workplace Safety and Environmental Practice Group of Seyfarth Shaw LLP's Washington, DC office. I joined Seyfarth on March 23, 2020, the first day the DC office was fully remote due to the COVID-19 pandemic. Throughout my time at Seyfarth, I have counseled clients across the country on compliance issues surrounding COVID-19 laws, regulations, and orders. Those clients continue to protect their workforces by developing, implementing, and updating COVID-19 response plans to reflect the most current and effective risk mitigation protocols. My recent work has included navigating the requirements of Executive Order 14042, "Ensuring Adequate COVID Safety Protocols for Federal Contractors," and subsequent guidance from the Safer Federal Workforce Task Force, the Federal Acquisition Regulatory Council ("FAR Council"), and individual agencies regarding incorporation of the Federal Acquisition Regulation deviation clause into federal government contracts.

My work also includes counseling clients on the anticipated Occupational Safety and Health Administration ("OSHA") COVID-19 vaccine mandate emergency temporary standard ("ETS"), announced by President Biden in his September 9, 2021 COVID-19 Action Plan. I am no stranger to OSHA and its rulemakings, having joined Seyfarth after approximately 12 years in the Solicitor's Office ("SOL") at the U.S. Department of Labor. For about five of those years, from May 2015-March 2020, I sat in the Occupational Safety and Health Division of SOL, with OSHA as my client. Prior to my time in the Frances Perkins Building, I worked as a trial attorney in SOL's Region III offices located in Arlington, Virginia and Philadelphia, Pennsylvania. My experiences with both SOL and Seyfarth inform my testimony today.

II. DISCUSSION

I am vaccinated against COVID-19. My wife, Beth, is vaccinated. So are my mother and brothers. I plan to get my children, Lauren and Kate, vaccinated as soon as their age groups are approved. We know COVID-19 vaccines are effective against the virus, including its Delta variant.¹ From an occupational safety and health perspective, vaccination represents our best shot to beat the coronavirus. However, for OSHA to lawfully issue an emergency COVID-19 vaccine mandate, it must carry its statutory burden. The balance of my testimony will discuss the legal requirements OSHA must meet to issue an ETS and the practical impacts an ETS requiring vaccination would have on employers and employees.

A. Legal Requirements

Section 6(c) of the Occupational Safety and Health Act of 1970 grants OSHA the statutory authority to issue emergency temporary standards under certain delineated circumstances. The Secretary of Labor must determine that 1) employees are exposed to grave danger, and 2) an emergency standard is necessary to protect employees from that danger. 29 U.S.C. § 655(c). To reiterate, employees must be exposed to a **grave danger** and the standard must be **necessary** to protect them from such a danger. These standards issue outside the typical notice and comment rulemaking process, which justifies the strict legal threshold OSHA must meet to overcome legal challenges in the emergency standard context.

We can all agree that COVID-19 presents a serious danger to public health, as the disease has claimed the lives of over 728,000 Americans.² However, whether addressing that danger should fall to a federal workplace safety enforcement agency is questionable; COVID-19 is a public health concern, and tying exposure specifically to the workplace has significant evidentiary challenges when contact with the disease can occur anywhere. Beyond that tenuous relationship, OSHA must explain why only now COVID-19 has become a grave workplace danger, across all sectors and all businesses with more than 100 employees. A little over four months ago, OSHA published an ETS scoped narrowly to the healthcare sector. That is, OSHA determined an ETS requiring designated COVID safety protocols was necessary to combat the grave danger of exposure to coronavirus - only in the healthcare industry. Notably, the healthcare ETS did not include a vaccine mandate.

OSHA considered whether to have the ETS apply more broadly, but determined (presumably with the help of the White House's Office of Information and Regulatory Affairs) that it could not support such breadth. Now, OSHA must represent - to a U.S. Court of Appeals' satisfaction - what has changed to require a private employer vaccine mandate, particularly when President Biden and his Administration suggest their plans to defeat COVID are working. On October 14, 2021, President Biden stated that his plan is "working. We're making progress. Nationally, daily cases are down 47 percent; hospitalizations are down 38 percent over the past six weeks. Over the past two weeks, most of the country has improved as well. Case rates are declining in

¹ See, e.g., <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>, visited on October 21, 2021.

² See <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>, visited on October 21, 2021.

39 states and hospital rates are declining in 38 states.”³ This progress has occurred without OSHA’s ETS. Does that suggest necessity?

Under the prior presidential Administration, OSHA and its parent agency, the Department of Labor, strongly argued that an ETS was not necessary because the agency could pursue COVID enforcement under the General Duty Clause of the Occupational Safety and Health Act. OSHA’s website lists a number of regulations the agency can use to issue COVID citations, and OSHA has a COVID-19 National Emphasis Program in place to guide enforcement of COVID-related violations. By pursuing alternative enforcement avenues, and trumpeting the success of its pre-ETS efforts to beat back the disease, the Biden Administration undercuts its own arguments that an ETS is needed.

OSHA has not published many ETSs. Before June 21, 2021, OSHA last issued an ETS, concerning asbestos, on November 4, 1983. Congress set a high legal bar for ETS implementation because ETSs were meant to be used rarely and only under certain dire circumstances. Now, we expect to see two ETSs issue within about four months’ time. The importance of public input into regulatory action counsels toward OSHA’s continuing to exercise due caution when considering whether to proceed by ETS, rather than more traditional notice-and-comment rulemaking. ETSs are not a standard tool in OSHA’s regulatory kit, and should be used sparingly to avoid degrading the “necessary to protect against a grave danger” threshold. We *should not* politicize public health, and we *should* follow the science, but we *must* adhere to the **Occupational** Safety and Health Act’s statutory requirements.

In passing the OSH Act, Congress found “that personal injuries and illnesses **arising out of work situations** impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.” 29 U.S.C. § 651(a) (emphasis added). Further, Congress directed OSHA “to assure so far as possible every working man and woman in the Nation safe and healthful **working conditions**.” *Id.* at § 651(b) (emphasis added). If OSHA expands its jurisdiction to cover hazards not intrinsic to the workplace, then any public health hazard could qualify as a grave danger subject to an ETS.

OSHA decided not to meet with stakeholders concerning its anticipated COVID-19 vaccine mandate ETS, but as of October 22, 2021, OIRA had held around 70 stakeholder meetings with entities highly interested in the contours of OSHA’s standard.⁴ Unfortunately, commenters fly blind in these meetings, as the text of the regulation at issue is not released beforehand. Where President Biden and OSHA have taken unprecedented action to implement a national workplace vaccine mandate through an ETS, it would have been helpful to the Administration to do more to partner with employers, employees, and other interested stakeholders. Given the wide-ranging implications of the standard, OSHA would have benefitted from comprehensively considering interested stakeholders’ input. Instead, OSHA chose to pursue an expedited, emergency process that avoids typical notice-and-comment rulemaking under the Administrative Procedure Act.

³ <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/10/14/remarks-by-president-biden-on-the-covid-19-response-and-vaccination-program-2/>.

⁴ See <https://www.reginfo.gov/public/do/eom12866SearchResults?pubId=&rin=1218-AD42&viewRule=true>, visited on October 22, 2021.

Coupled with its decision not to engage with interested entities, OSHA missed the opportunity to obtain a more fulsome view of its ETS’s practical effects on affected entities.

Historically, OSHA has not had much success in meeting the “necessary to address a grave danger” statutory standard when it publishes an ETS. The Congressional Research Service Report, “Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19,”⁵ includes Table A-1, which provides a summary of the legal challenges to prior OSHA ETSs:

Table A-1. OSHA Emergency Temporary Standards (ETS)

Year	Subject of ETS	Federal Register Citation of ETS	Result of Judicial Review	Judicial Review Case Citation
1971	Asbestos	36 <i>Federal Register</i> 23207 (December 7, 1971)	Not challenged	—
1973	Organophosphorous pesticides	38 <i>Federal Register</i> 10715 (May 1, 1973); amended by 38 <i>Federal Register</i> 17214 (June 29, 1973)	Vacated	<i>Florida Peach Growers Ass’n v. United States Department of Labor</i> , 489 F.2d 120 (5 th Cir. 1974)
1973	Fourteen carcinogens	38 <i>Federal Register</i> 10929 (May 3, 1973)	Twelve upheld, two vacated	<i>Dry Color Mfrs. Ass’n v. Department of Labor</i> , 486 F.2d 98 (3d Cir. 1973)
1974	Vinyl chloride	39 <i>Federal Register</i> 12342 (April 5, 1974)	Not challenged	—
1976	Diving operations	41 <i>Federal Register</i> 24271 (June 15, 1976)	Stayed	<i>Taylor Diving & Salvage Co. v. Department of Labor</i> , 537 F.2d 819 (5 th Cir. 1976)
1977	Benzene	42 <i>Federal Register</i> 22515 (May 3, 1977)	Stayed	<i>Industrial Union Dep’t v. Bingham</i> , 570 F.2d 965 (D.C. Cir. 1977)
1977	1,2 Dibromo-3-chloropropane (DBCP)	42 <i>Federal Register</i> 45535 (September 9, 1977)	Not challenged	—
1978	Acrylonitrile (vinyl cyanide)	43 <i>Federal Register</i> 2585 (January 17, 1978)	Stay denied	<i>Vistron v. OSHA</i> , 6 OSHC 1483 (6 th Cir. 1978)
1983	Asbestos	48 <i>Federal Register</i> 51086 (November 4, 1983)	Stayed	<i>Asbestos Info. Ass’n v. OSHA</i> , 727 F.2d 415 (5 th Cir. 1984)
2021	COVID-19	86 <i>Federal Register</i> 32376 (June 21, 2021)	Petitions for review filed on June 24, 2021	<i>United Food and Commercial Workers and American Federation of Labor and Congress of Industrial Organizations v. OSHA, et al.</i> , Docket No. 21-1143 (D.C. Cir. June 24, 2021)

Source: CRS with data from Mark A. Rothstein, “Substantive and Procedural Obstacles to OSHA Rulemaking: Reproductive Hazards as an Example,” *Boston College Environmental Affairs Law Review*, vol. 12, no. 4 (August 1985), p. 673.

⁵ See <https://crsreports.congress.gov/product/pdf/R/R46288>, last revised on September 13, 2021.

Of the 10 ETSs OSHA has issued to date, seven were challenged, resulting in one being fully vacated, another partially vacated, and three stayed. The COVID-19 healthcare ETS was challenged by unions, but there does not appear to have been much activity in that case.

Legal challenges will likely be filed shortly after OSHA publishes its ETS; indeed, 24 state attorneys general previewed their arguments against the ETS in a September 16, 2021 letter to President Biden.⁶ On October 11, 2021, Texas Governor Greg Abbott issued Executive Order GA-40, prohibiting any entity in Texas from compelling COVID-19 vaccination, including of its employees, when the individual objects “for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.”⁷ Other states, like Montana and Florida, have implemented laws and orders that could conflict with OSHA’s ETS.

OSHA handles workplace safety and health enforcement in the majority of states, including Texas, Florida, and Montana.⁸ But 21 states administer their own OSHA programs, with federal OSHA’s approval.⁹ These state plan states have 30 days to either adopt the OSHA standard or develop their own that is at least as effective as OSHA’s, and they need to advise OSHA within 15 days of receiving notice of the ETS how they will proceed. Interestingly, on October 20, 2021, OSHA sent letters to Arizona, South Carolina, and Utah advising that it was reconsidering their state plan authorization because of the states’ “continued failure to adopt a COVID-19 Healthcare Emergency Temporary Standard.”¹⁰ These warnings seem timed to signal consequences for state inaction on the anticipated vaccine ETS. While President Biden’s COVID-19 Action Plan may have been designed for uniformity, the expected fractured jurisdictional response further complicates employers’ compliance efforts, as they continue to deal with a patchwork of rules and regulations to combat COVID.

⁶ See

[https://ago.wv.gov/Documents/AGs'%20letter%20to%20Pres.%20Biden%20on%20vaccine%20mandate%20\(FINAL\)%20\(02715056xD2C78\).PDF](https://ago.wv.gov/Documents/AGs'%20letter%20to%20Pres.%20Biden%20on%20vaccine%20mandate%20(FINAL)%20(02715056xD2C78).PDF).

⁷ https://gov.texas.gov/uploads/files/press/EO-GA-40_prohibiting_vaccine_mandates_legislative_action_IMAGE_10-11-2021.pdf.

⁸ Private Sector Employer Federal OSHA States include: Alabama, America Samoa, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Idaho, Illinois, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Virgin Islands, West Virginia, and Wisconsin. See <https://www.osha.gov/stateplans/>.

⁹ Private Sector Employer State OSHA Plan States include: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. See *id.*

¹⁰ <https://www.environmentalsafetyupdate.com/wp-content/uploads/sites/248/2021/10/ax-ITR.pdf>, <https://www.environmentalsafetyupdate.com/wp-content/uploads/sites/248/2021/10/SC-ltr.pdf>, and <https://www.environmentalsafetyupdate.com/wp-content/uploads/sites/248/2021/10/UTAH-LTR.pdf>.

In a similar vein, the FAR Council directed agencies to implement the federal contractor vaccine mandate through deviations developed by each individual agency, subjecting federal contractors to varying requirements when they hold contracts with multiple government entities. The September 24, 2021 Safer Federal Workforce Task Force Guidance directs that “[c]overed contractors must comply with the requirements set forth in this Guidance regardless of whether they are subject to other workplace safety standards,” such as OSHA ETSs.¹¹ The Guidance also makes clear the federal government’s position on what law governs, explaining that its “requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance. Additionally, nothing in this Guidance shall excuse noncompliance with any applicable State law or municipal ordinance establishing more protective workplace safety protocols than those established under this Guidance.”¹² OSHA’s ETS may include similar language. But courts will need to decide which legal vehicle wins out, and in the meantime, employers and their employees may rush to comply with an ETS that eventually does not pass legal muster.

Private employers who operate in more than one jurisdiction, especially those who are also government contractors, face numerous levels of compliance complexities and are left to reconcile complicated and conflicting standards issued by various levels and sectors of federal, state, and local government. Accordingly, we should expect challenges to the ETS from private employers as well. Open questions about the ETS continue to vex covered companies, pre-release, including how the costs of a testing option will be allocated, how long they will have to ensure their employees’ compliance, what paid time off requirements will look like, under what circumstances remote workers may be covered, and how the 100-employee threshold will be calculated.

Another question that OSHA must answer is how it will enforce its vaccine mandate covering 80-100 million workers. It seems likely that OSHA will target big fish to make examples of for the rest of the regulated community. On October 23, 2020, former Assistant Secretary for OSHA, David Michaels, tweeted that “[e]very OSHA press release achieves as much compliance as 210 inspections.”¹³ We can expect OSHA to publish detailed press releases when issuing citations under its ETS as a deterrence mechanism. What we will not see is OSHA’s retracting those press statements should it withdraw or modify its initial violations or should a court overturn them.

B. Practical Impacts

Employers working to comply with multiple vaccine mandates and COVID-19 protocols fear “the Great Resignation.” In a tight labor market, employees who employers cannot afford to lose may walk away from their jobs in droves to avoid being subjected to a vaccine mandate. Results from a recent survey conducted by the Society for Human Resource Management (SHRM) showed that “of organizations that meet the criteria for the Biden administration’s vaccine-or-

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https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.

¹² *Id.*

¹³ <https://twitter.com/drdavidmichaels/status/1319642847365259264>.

testing requirement, 85 percent said the anticipated requirement will make retaining employees more difficult. Eighty-nine percent said some of their employees will quit due to the new mandate.”¹⁴

My client calls, colleague conversations, and even my social media feeds reflect the difficulties employers face in connecting qualified individuals with open job opportunities. Such disruptions to individual employers will, of course, have ramifications for the larger economy, including negative impacts on already stressed supply chains. The SHRM survey mentioned above found that “[s]eventy-two percent [of the entities surveyed] said the vaccine-or-testing requirements will make maintaining regular business operations more difficult.”¹⁵

In addition to concerns about employee retention and economic turbulence, the costs to employers of ensuring compliance with the OSHA ETS will be significant. Companies at the lower end of the 100-employee threshold may not have robust legal, operations, or human resources departments in place to navigate the administrative and logistical challenges of implementing mandatory COVID-19 vaccine programs. Many employers, regardless of size, may face increased requests for medical and religious exemptions that they do not regularly handle. Employers take these requests seriously, and they take time and resources to evaluate.

OSHA indicated it will allow employees to choose to test at least weekly, rather than receiving the COVID-19 vaccine (an approach that the Biden Administration’s federal employee and federal contractor vaccine mandates do not permit). Employers anxiously await what the requirements of the ETS’s testing option, including how OSHA will allocate testing costs. The circumstances of the vaccine mandate suggest OSHA could decide to push costs to employees because 1) the government - not the employer - is instituting the mandate; 2) the employee - not the employer - is making a considered choice to pursue the costlier testing option; and 3) placing testing costs on the employee may encourage more individuals to choose vaccination. Despite legitimate reasons counseling toward placing testing costs on employees, some employers, expecting to bear the testing-cost burden, are already exploring options to offer onsite employee testing to minimize disruptions to company operations. While employers do not yet know for certain what type of COVID-19 tests OSHA’s standard will demand, those who have tried to secure tests have been frustrated by an inability to procure them in sufficient numbers.

Another costly provision of the vaccine mandate is President Biden’s directive that OSHA’s ETS require employers “to provide paid time off for the time it takes for workers to get vaccinated or to recover if they are under the weather post-vaccination.”¹⁶ OSHA may occasionally dabble in paid leave, but it tends to be the province of the Wage and Hour Division, and employers face uncertainties about what the OSHA ETS’s paid leave provisions will look like. For example:

¹⁴ <https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/coronavirus-survey-vaccine-testing-mandate-challenges.aspx>, visited on October 21, 2021.

¹⁵ *Id.*

¹⁶ <https://www.whitehouse.gov/covidplan>.

- Will employers be able to request that their employees use existing leave programs for vaccination and recovery?
- Will employees be incentivized to exhaust their banked leave so they can receive additional, vaccine-related time off?
- Might the vague term “under the weather” lead to increased absenteeism caused by longer-than-necessary recovery periods?

Along with testing and leave, employers also face potential costs around training or retraining employees, and recordkeeping.

III. CONCLUSION

Thank you again for the opportunity to present these remarks today. Vaccines work, and almost 190 million Americans are fully vaccinated against COVID-19.¹⁷ But the unprecedented nature of this national vaccine mandate, and the uncertainties, complexities, and impediments to implementing it through an OSHA ETS suggest this avenue lacks legal and practical viability.

¹⁷ See https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total, visited on October 21, 2021.