



September 27, 2021

Mr. Jim Frederick
Acting Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room S2315
Washington, DC 20210

Dear Assistant Secretary Frederick:

The undersigned associations,¹ representing America's fuel retailing and marketing industry, would like to share some of the questions and concerns our members have raised in response to President Biden's executive order (EO) directing businesses with more than 100 employees to either require workers to be vaccinated against COVID-19 or produce a negative COVID-19 test weekly. The Emergency Temporary Standard (ETS) will have far-reaching consequences beyond the laudable objective of moving past the COVID-19 pandemic. It may complicate already fragile labor markets and create challenges for many businesses that are currently struggling to remain open. We urge you to consider these realities as you draft the ETS, and request that the ETS or forthcoming guidance address the specific questions we raise below.

While we support efforts to increase vaccinations in the United States, many of our members have expressed concern about the impact such a vaccine or testing mandate will have on the labor market. Many of our members have been forced to reduce operating hours or shutter stores completely due to labor shortages over the last several months. What's more, the driver shortage confronting the commercial trucking industry is getting worse. It is a daily struggle to ensure our locations are supplied with sufficient quantities of food, fuel and other items that the public expects us to offer. A rigid vaccine or testing mandate could exacerbate this problem.

¹ The National Association of Convenience Stores (NACS) is an international trade association representing the convenience store industry with more than 2,200 retail and 1,600 supplier companies as members, the majority of whom are based in the United States. The Energy Marketers of America (EMA) member associations represent wholesalers and retailers of gasoline, diesel, heating oil, lubricants and renewable fuels. Additionally, these companies supply motor fuels to 40,000 independently owned retail outlets. The National Association of Truckstop Operators (NATSO) currently represents more than 4,000 travel plazas and truck stops nationwide, comprised of both national chains and small, independent locations. SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel. Collectively, our associations represent over 2.3 million employees.

Much of our industry has initiated programs designed to incentivize their workforces to get vaccinated, including meaningful bonus payments and extra paid time off. These have been modestly successful, but there remains reluctance from certain employees. A vaccine and testing mandate may trigger employee retention challenges that do not ultimately lead to more shots in arms but instead a migration of workers to employers with fewer than 100 employees or the unemployment rolls.

The cost of labor is already on average the highest operating cost for most retailers. A vaccine or testing mandate will increase those costs, causing further financial strain on businesses while our economy continues a precarious recovery.

Beyond those significant concerns, many of our members have outstanding questions that we urge you to clearly address in the forthcoming ETS.

- 1) What is the timetable for the ETS? Will it only be applicable during the current state of emergency or will it be a permanent requirement?
- 2) Will employers be required to pay for the regular testing for employees?
- 3) Will employers be required to provide paid time off for regular testing of employees?
- 4) How will employers be expected to collect and safeguard testing results for their employees?
- 5) What type of information will OSHA request from employers, or will employers be required to collect from employees, to verify vaccination and testing status?
- 6) Will businesses be required to track lot numbers, which vaccines were received, and the dates employees received vaccines?
- 7) Considering there now exist various different types of COVID-19 tests, will the ETS specify what type of test(s) must be taken by employees?
- 8) What measures will employers be required to implement to enforce vaccine or testing mandates?
- 9) Will employers be required to dismiss employees due to refusal to get vaccinated or tested?
- 10) Will employees who lose their jobs because they refuse to be tested or vaccinated be eligible for unemployment payments?
- 11) Will employees who refuse to be tested or vaccinated and leave their employment to work for an employer with fewer than 100 employees be able to evade a requirement that they be tested or vaccinated?
- 12) For businesses with high turnover rates, what can businesses do to provide a reasonable amount of time for new employees to get vaccinated?
- 13) Will the COVID-19 vaccine requirement mean that eligible employees need to receive booster shots?
- 14) OSHA requires record retention for 30 years after employment. Will this be required for all the testing and vaccine records compiled based upon the ETS?
- 15) What HIPAA restrictions and requirements will apply to testing and vaccine information? Will businesses need management personnel to undertake regular training on HIPAA?
- 16) How will the ETS define “under the weather” for the purposes of time off post-vaccination, and do we have to pay for a set period of time?
- 17) Does a family member feeling “under the weather” trigger a requirement?

- 18) Will employees with a religious or medical exemption be required to test weekly? If so, who pays for those tests? If an employer objects to those religious beliefs, will the employer still be forced to pay for testing to support those beliefs when other employees are required to be vaccinated?
- 19) What proof do employees have to provide for negative tests? Will an attestation of vaccination or negative test be sufficient?
- 20) Will joint employers be treated as one company or will each company be treated separately? How will any costs be split among joint employers?
- 21) Can we legally ask, “Are you vaccinated” during the hiring process?
- 22) Can we refuse to hire any new employees who are not already vaccinated?
- 23) What happens when an employee tests positive for COVID-19?
- 24) Do employees who have received one dose of a two-dose sequence have to test weekly? Will employees who have received a second dose but are not yet two weeks past that second dose need to test weekly?

We urge you to carefully consider all of these questions and provide clear and complete guidance to employers, so they know what OSHA expects. The potential economic impacts a new mandate on America’s employers will have are significant and we hope that you will fully consider those issues as you work to develop this ETS.

Sincerely,

National Association of Convenience Stores
Energy Marketers of America
National Association of Truckstop Operators
SIGMA: America’s Leading Fuel Marketers