



VIA ELECTRONIC SUBMISSION

Jan. 19, 2022

Douglas L. Parker  
Assistant Secretary  
U.S. Department of Labor  
Occupational Safety and Health Administration  
200 Constitution Ave. NW  
Washington, DC 20210

**Re: Docket No. OSHA–2021–0007, COVID–19 Vaccination and Testing;  
Emergency Temporary Standard [RIN 1218–AD42]**

Dear Assistant Secretary Parker:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Labor’s Occupational Safety and Health Administration in response to OSHA’s request for comments in the above-referenced docket published in the Federal Register on Nov. 5, 2021, at 86 Fed. Reg. 61402.

### **About Associated Builders and Contractors**

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC’s membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

As a steering committee member of the Construction Industry Safety Coalition, ABC supports CISC’s comments and hereby incorporates them by reference.<sup>1</sup>

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<sup>1</sup> The CISC is comprised of numerous trade associations representing virtually every aspect of the construction industry. Workplace safety and health is a priority for all members of the coalition, and each is committed to helping create safer construction jobsites for workers. <https://www.buildingsafely.org/>

ABC is writing separately as a litigant before the U.S. Supreme Court and the U.S. Court of Appeals for the 6th Circuit in order to stress the significance of the Supreme Court's ruling in *NFIB v. OSHA*.<sup>2</sup> As OSHA is aware, the Supreme Court has now ruled that the ETS is not authorized by the Occupational Safety and Health Act of 1970,<sup>3</sup> and the court has therefore stayed enforcement of the ETS in its entirety.

The Supreme Court's stated ground for its ruling was that the OSH Act only empowers "workplace safety standards, not broad public health measures."<sup>4</sup> The Supreme Court also required OSHA to target its standard to the particular features of an employee's job or workplace, and specifically found that "OSHA's indiscriminate approach fails to account for [the] crucial distinction—between occupational risk and risk more generally."<sup>5</sup>

It is clear to ABC, based upon the Supreme Court's decision, that the ETS cannot be enforced in its present form and should therefore be withdrawn. Any attempt by OSHA to proceed with the ETS or to develop a new standard following notice and comment that does not satisfy the Supreme Court's criteria will again be challenged in the courts.

In accordance with the Supreme Court's ruling, ABC's comments below highlight the unique features and lower risks of COVID-19 transmission in the construction industry workplace, which support withdrawal and/or much narrower focus of the ETS with regard to construction.

## **Background**

On Nov. 5, 2021, OSHA published the COVID-19 Vaccination and Testing; Emergency Temporary Standard, which applies to employers with 100 or more employees,<sup>6</sup> as required by President Biden's Path Out of the Pandemic COVID-19 Action Plan.<sup>7</sup>

A day after the OSHA ETS was issued, the U.S. Court of Appeals for the 5th Circuit granted a temporary stay on Nov. 6, citing that the ETS raises "grave" concerns.

Soon after, on Nov. 9, ABC and its Alabama chapter filed a petition for review with the U.S. Court of Appeals for the 11th Circuit against the OSHA ETS, arguing that the ETS exceeds the department's statutory authority and fails to comply with the standards for

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<sup>2</sup> *NFIB v. OSHA*, 595 U.S. \_\_ (2022)

<sup>3</sup> 84 Stat. 1590, 29 U. S. C. §651 et seq

<sup>4</sup> *NFIB v. OSHA*, Op. at p. 6

<sup>5</sup> *Id.* at 7

<sup>6</sup> 86 Fed. Reg. 61402

<sup>7</sup> See [www.whitehouse.gov/covidplan/](https://www.whitehouse.gov/covidplan/)

issuing an ETS, particularly with regard to the construction industry.<sup>8</sup> The ETS irreparably harms many construction industry employers who are members of and represented by ABC and its Alabama chapter.

On Nov. 12, the 5th Circuit reaffirmed its stay, which was then lifted by the 6th Circuit on Dec. 17. ABC filed an emergency appeal with the Supreme Court on Dec. 20, one of several filed by other groups.<sup>9</sup> The Supreme Court agreed to hold oral argument on the OSHA ETS on Jan. 7.

On Jan. 13, in a 6-3 decision, the Supreme Court reinstated the stay, holding that those challenging the ETS were likely to succeed on their argument that OSHA lacked the authority to promulgate the ETS.<sup>10</sup> The Supreme Court remanded the case to the 6th Circuit, which will consider the merits of the case.

### **ABC's Response to OSHA's Request for Comments**

#### **1. OSHA does not have the authority to promulgate the ETS in its current form.**

As noted above, the Supreme Court ruled that the ETS is not authorized by the OSH Act, and the Supreme Court has stayed enforcement of the ETS in its entirety. While litigation may continue on the merits of the ETS, the 6th Circuit cannot uphold the mandatory vaccination or testing aspects standard in the face of the Supreme Court's clear ruling to the contrary.

The Supreme Court has certainly made it clear that any aspect of the ETS that exceeds the boundaries of occupational standards and is viewed as a broad public health measure will be struck down.<sup>11</sup> To be consistent with the Supreme Court's opinion, OSHA must rewrite the standard to narrowly target the particular features of employees' jobs or workplaces. As the Supreme Court held with regard to the current standard: "OSHA's indiscriminate approach fails to account for [the] crucial distinction – between occupational risk and risk more generally."<sup>12</sup>

Therefore, ABC strongly recommends that the ETS be withdrawn. If OSHA tries to proceed with the ETS or develop a new standard following notice and comment that

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<sup>8</sup> See <https://abc.org/News-Media/News-Releases/entryid/19099/abc-seeks-to-overturn-osha-covid-vaccination-and-testing-ets>

<sup>9</sup> See <https://abc.org/News-Media/News-Releases/entryid/19166/abc-appeals-osha-covid-19-vaccination-and-testing-ets-argument-to-the-supreme-court>

<sup>10</sup> *NFIB v. OSHA*, 595 U.S. (2022)

<sup>11</sup> *Id.* at 6

<sup>12</sup> *NFIB v. OSHA*, Op. at p. 7

does not satisfy the Supreme Court’s criteria, it will lead to additional court challenges that will also likely succeed.

At most, OSHA should seek only comments on how best to refocus its COVID-19 standard on workplace safety and how to better target that standard to the particular risk features of different industries, recognizing the unique features and lower risks associated with the construction industry.

**2. The construction industry, or portions thereof, should be excluded if OSHA moves forward with a more targeted rule to regulate occupation-specific risks related to COVID-19.**

Although the Supreme Court held that OSHA does not have the authority to issue the ETS, it did indicate that the agency could issue a narrower rule.

The Supreme Court held that, “Where the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments.”<sup>13</sup>

If OSHA chooses to move forward with a targeted rule to regulate occupation-specific risks, the construction industry, or portions thereof, should be excluded for the following reasons:

- **The construction industry has been at the forefront of efforts to protect construction employees from the virus.**

Because healthy and safe work environments are a top priority for ABC and its members, ABC encourages its members and construction industry stakeholders to get vaccinated. In fact, according to an October 2021 survey of ABC member companies with 100 or more employees, roughly 61% of participants stated they encourage COVID-19 vaccinations.

A number of ABC chapters and member companies have organized and promoted educational campaigns and COVID-19 vaccination drives to accelerate the voluntary vaccination of industry stakeholders and employees. Since March 2020, ABC has created resources and toolkits for construction industry employers and employees to help reduce the risk of exposure to the virus.<sup>14</sup>

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<sup>13</sup> *NFIB v. OSHA*, Op. at p. 7

<sup>14</sup> ABC’s COVID-19 related resources and toolkits can be accessed at [www.abc.org/coronavirus](http://www.abc.org/coronavirus) and [www.abc.org/Coronavirus/Vaccine-Toolkit](http://www.abc.org/Coronavirus/Vaccine-Toolkit)

Further, the Construction Industry Safety Coalition, of which ABC is a steering committee member, developed a COVID-19 Exposure Prevention, Preparedness and Response Plan for Construction at the outset of the pandemic, which was tailored to the construction environment, available in English and Spanish and provided at no cost to the construction industry. It has since been updated four times.<sup>15</sup> In addition to the response plan, CISC organized two safety stand-downs related to COVID-19.<sup>16</sup>

ABC will continue to encourage common-sense safety precautions in accordance with the latest CDC guidelines. No ETS is needed to achieve that result.

- **The construction industry is relatively low risk for COVID-19 compared to other industries.**

Construction operations are low risk with respect to the transmission and spread of COVID-19. Construction workers that have minimal occupational contact with the general public or other co-workers are generally considered to have a low exposure risk.<sup>17</sup>

In fact, according to OSHA's own assessment of risk, as described in several agency guidance materials, most construction work poses very low risk and only crosses into "high-exposure risk" when it takes place at indoor work sites occupied by people such as other workers, customers or residents suspected of having or known to have COVID-19, including when an occupant of the site reports signs and symptoms consistent with COVID-19.<sup>18</sup>

Finally, in the June COVID-19 OSHA ETS, which applies to health care services and health care support services, OSHA describes the high risk of COVID-19 transmission posed by indoor work environments with close human contact. Such circumstances are rare in the construction industry.<sup>19</sup>

OSHA concedes in the preamble to the COVID-19 Vaccination and Testing ETS<sup>20</sup> that there is no national database establishing the extent of workplace COVID-19 exposures in many industries, including construction. A careful review

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<sup>15</sup> See [www.buildingsafely.org/covid-19-coronavirus/](http://www.buildingsafely.org/covid-19-coronavirus/)

<sup>16</sup> See [www.abc.org/News-Media/Newsline/entryid/18382/join-the-abc-construction-covid-19-safety-stand-down-on-jan-14](http://www.abc.org/News-Media/Newsline/entryid/18382/join-the-abc-construction-covid-19-safety-stand-down-on-jan-14)

<sup>17</sup> Guidance on Preparing Workplaces for COVID-19, OSHA (2020) (available at [www.osha.gov/sites/default/files/publications/OSHA3990.pdf](http://www.osha.gov/sites/default/files/publications/OSHA3990.pdf)).

<sup>18</sup> 5 COVID-19 Control and Prevention: Construction Work, OSHA (last visited Feb. 23, 2021) (available at [www.osha.gov/coronavirus/control-prevention/construction](http://www.osha.gov/coronavirus/control-prevention/construction))

<sup>19</sup> 86 Fed. Reg. 32376, 32392

<sup>20</sup> 86 Fed. Reg. at 61411-61413

of the “studies” cited in the preamble indicates that a majority of the studies do not identify any outbreaks in construction or do not even purport to study construction workplaces. Those studies that do refer to construction either fail to provide specific data on proven COVID-19 transmission in the workplace or find construction to be among the lowest percentages of the industries surveyed.

Only one study relied on by OSHA purports to focus on measuring outbreaks of COVID-19 in construction workplaces, in Austin, Texas. That study purported to measure outbreaks during a brief period in 2020 when construction work was restricted in the city, and attempted to estimate increases in outbreaks likely to occur when full-time construction resumed. There is no data showing whether the proposed model accurately predicted later outbreaks, but construction work in Texas and around the country has continued almost without interruption throughout the pandemic, arguing against the study’s claim that construction workplaces were likely to suffer significant workplace outbreaks of COVID-19 or reductions in productivity due to COVID-19 workplace exposures. Based on reports of ABC members in the Austin area, the study’s conclusions are contrary to the construction industry experience in that city and elsewhere.<sup>21</sup>

- **Construction work is predominately performed outdoors.**

OSHA has acknowledged that construction work is “predominately performed outdoors” and is otherwise “low risk.” However, the ETS allows an exception to the requirements for employees who “work exclusively outdoors.”<sup>22</sup> This inconsistency was highlighted by the Supreme Court:

*“There are narrow exemptions for employees who work remotely ‘100 percent of the time’ or who ‘work exclusively outdoors,’ but those exemptions are largely illusory. Id., at 61460. The Secretary has estimated, for example, that only nine percent of landscapers and groundskeepers qualify as working exclusively outside. Id., at 61461. The regulation otherwise operates as a blunt instrument. It draws no distinctions based on industry or risk of exposure to COVID–19. Thus, most lifeguards and linemen face the same regulations as do medics and meatpackers.”<sup>23</sup>*

Thus, “predominantly” should suffice.

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<sup>21</sup> <https://cbsaustin.com/news/local/escott-construction-sites-may-not-be-covid-19-hotspots-once-thought-to-be>

<sup>22</sup> 86 Fed. Reg. at 61460

<sup>23</sup> *NFIB v. OSHA*, Op. at p. 3-4

### **3. Additional topics OSHA is seeking information on:**

#### ***A. Employers with fewer than 100 employees.***

Since the current ETS cannot be lawfully implemented for employers with 100 or more employees, the ETS should obviously not be expanded to include smaller employers within its scope. Expanding the ETS to smaller businesses will only continue to exacerbate the current economic challenges facing the construction industry and cause negative ripple effects throughout the overall American economy.

#### ***B. Experience with COVID-19 vaccination policies.***

This inquiry is not mooted by the Supreme Court's decision. However, an October 2021 survey of ABC member companies with 100 or more employees provided the following results:

- 1.4% require COVID-19 vaccinations for workers.
- 61% encourage vaccinations but do not require it.
- 60% do not offer on-site vaccinations.
- 46% stated that employees cover the cost of vaccinations.
- 75% do not require employees to provide proof of vaccination. For those respondents that require proof of vaccination, their verification process includes a copy of employees' COVID-19 vaccination card.

#### ***C. COVID-19 testing***

This inquiry is likewise mooted by the Supreme Court's decision. However, an October 2021 survey of ABC member companies with 100 or more employees provided the following results:

- 58% do not mandate COVID-19 testing before employees enter the workplace.
- 86% stated that, if routine testing is required, the company does not administer it.

ABC member contractors have expressed serious concerns regarding the availability of testing kits for their employees who chose not to be vaccinated. For example, one member reported the potential for spending \$500,000 annually on \$6 kits and likely not being able to source enough tests to cover the expected increased volume of kits required under the ETS.

In addition, as a result of the requirement of extensive testing under California's COVID-19 ETS, testing requirements have proven almost impossible to comply with, as the demand for testing and testing kits has surpassed the supply.

Further, not only will contractors have to deal with inadequate testing capacity due to the increased demands under the ETS, but also potential lab delays.

Ultimately, the OSHA ETS will put further strains on test kit availability, making it infeasible for employers to comply with the rule.

#### ***D. Other controls***

Since the beginning of the pandemic, ABC has created successful resources and toolkits for construction industry employers and employees to help reduce the risk of exposure to COVID-19.

As previously mentioned, CISC developed a COVID-19 Prevention, Preparedness and Response Plan for Construction. Available in both English and Spanish, the response plan includes protective measures and guidance on keeping workers safe on jobsites, such as protective measures to take on the jobsite, personal protective equipment and work practice controls to be used, cleaning and disinfecting procedures, and what to do if a worker becomes sick. To account for changes in guidance from the Centers for Disease Control and Prevention, the response plan has been updated four times since April 2020.

In addition to the response plan, CISC organized two safety stand-downs related to COVID-19, in April 2020 and January 2021.

#### ***E. Educational materials***

ABC launched a COVID-19 Vaccine Toolkit as part of its Coronavirus Update webpage to help inform and educate members about the latest available resources and information on the COVID-19 vaccine.<sup>24</sup>

In addition, ABC encouraged members to participate in April's Vaccine Awareness Week in Construction. The purpose of the campaign was to raise awareness of the safety, effectiveness and benefits of COVID-19 vaccination among construction workers. ABC promoted resources member companies could visit to learn more about the COVID-19 vaccine, created social media text and graphics and outreach materials for ABC chapters and members, and developed toolbox talks.

According to an October 2021 survey of ABC member companies with 100 or more employees, 32% of respondents said that they would provide information to employees (e.g., on the benefits of vaccination, where to get vaccinated).

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<sup>24</sup> See <https://abc.org/Coronavirus/Vaccine-Toolkit>

***F. Burdens on the industry***

As further stated in ABC's filings with the Sixth Circuit and Supreme Court, hereby incorporated by reference, OSHA's estimates of jobsite disruptions (material shortages, mass resignations, etc.) are grossly understated. The ETS in its current form will greatly exacerbate the industry's workforce shortage and will impose crushing burdens on many contractors and subcontractors.

**Conclusion**

Based upon the Supreme Court's decision, the ETS cannot be enforced in its present form and should therefore be withdrawn. Any attempt by OSHA to proceed with the ETS or to develop a new standard following notice and comment that does not satisfy the Supreme Court's criteria will again be challenged in the courts.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is written in a cursive, flowing style.

Ben Brubeck  
Vice President of Regulatory, Labor and State Affairs