

September 29, 2021

The Honorable Marty Walsh
Secretary
U.S. Department of Labor
Washington, DC 20210

The Honorable James Frederick
Acting Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
Washington, DC 20210

**RE: Nonprofit Questions Concerning the COVID-19 Vaccination & Testing
Emergency Temporary Standard**

Dear Secretary Walsh and Acting Assistant Secretary Frederick:

The charitable nonprofit community strongly supports policies to promote vaccinations against the coronavirus. Nonprofits have been working independently and as close partners with the White House, and state and local officials, in promoting vaccination outreach, education, and delivery.

Prior to the pandemic, charitable organizations employed more than 12 million people, making them the third largest industry in the country – employing more people than the construction, financial services, and manufacturing industries. But as of August, nonprofit employment has not yet recovered from the pandemic, with [nearly 565,000 jobs still lost](#) since February 2020. Nonetheless, throughout the health and economic crises, nonprofit employers and their employees have been on the frontlines helping people in local communities by providing essential relief and recovery services.

It is from this perspective that we write to inform the decision-making currently underway as OSHA drafts an Emergency Temporary Standard (ETS) requiring employers with more than 100 employees to be vaccinated against COVID-19 or to be tested on a weekly basis.

Many organizations have asked that OSHA and the Department answer the many questions arising from the vaccination and testing requirement ordered by President Biden. Here we focus on the questions related to the unique features and concerns of nonprofit operations:

- 1. *How will the number of “employees” be determined?*** *In calculating whether an employer employs 100 or more employees, will OSHA count only full-time equivalents, full- and part-time employees, or utilize some other method? Will the 100-employee threshold be determined based on the entire nonprofit workforce or on a per-location basis?*

Depending on their missions, nonprofits may employ a large number of part-time employees year-round, provide short-term seasonal employment, offer internships and volunteer opportunities, and/or engage with the broader community through independent contractors. We ask that OSHA provide a wide range of answers, a methodology for calculating the number of “employees,” and flexibility to ensure clarity and fairness for nonprofits.

- 2. How will remote work factor into calculating the number of employees and the application of the vaccination and testing requirements?** *Will employees who work remotely and have no contact with co-workers or the public be counted toward the 100-employee threshold? Will there be accommodations recognized for individuals who work from home and have no contact with co-workers or the public? What level of contact with co-workers or the public would trigger application of the ETS?*

We request that OSHA provide clear guidance that reflects the understanding that charitable organizations operate under myriad models, ranging from all-remote workforces to human service providers delivering home visitation services, and operating multiple small facilities throughout a region or even in several states tied to a centralized office, to name only a few examples. It is important that OSHA provide guidance that goes beyond the stereotypical “factory” workplace by offering examples that recognize the application of the ETS to arts and cultural facilities, houses of worship, childcare providers with multiple locations, summer camps, nature preserves, and other outdoor activities.

- 3. Will the ETS apply to guests, contractors, and/or volunteers who come on the worksite?** *Must employers follow CDC protocols for masking and social distancing, or will more or something different be required? Regardless of whether any of these individuals is counted as a covered employee at the outset, could the vaccination and testing requirements apply to them depending on how frequently they are on site? If so, what is the frequency of attendance that would trigger the requirements?*

The recently issued [COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#) (Safer Federal Workforce Task Force, Sept. 24, 2021) indicates that masking and social distance protocols must be required for guests and others at a federal contractor’s workplace. We ask that OSHA directly address questions related to volunteers, a category of individuals in the nonprofit setting that is not present in for-profit workplaces. Also, to the extent that the ETS will apply to “guests” and “volunteers,” please clarify whether there are instances in which parishioners attending a house of worship, students attending a nonprofit school, and similar situations when people at a nonprofit’s facilities will be considered within or outside the definitions.

- 4. What law applies in states that have prohibited vaccination, testing, and masking mandates?** *Does the same law apply if charitable nonprofits are operating in public facilities like schools and government buildings?*

Neither the board members nor the staff of charitable nonprofits serving the common good should be put in legal jeopardy based on whether they can correctly guess which set of laws apply. In the case of this global pandemic, we encourage OSHA, to the fullest extent permitted by law, to treat the ETS as a nationwide standard applicable to all employers – nonprofit and for-profit alike – in every state, regardless of state or local pro- or anti-mandate laws and regardless of whether a state is a state-plan state. Further, we seek express guidance on which rules apply when nonprofits operate on public school or governmental properties, such as by providing childcare and after-school enrichment programming.

- 5. Who will pay for the weekly employee testing called for in the President’s instructions?** *Will testing be required for unvaccinated remote employees who do not interact with co-workers*

of the public? What protocols must be observed in testing employees, and will there be reporting requirements for results? What, if any, reporting will be required of positive results among staff?

Charitable nonprofits generally do not have resources enabling them to absorb new testing expenses and administrative costs. Therefore, we urge OSHA to make it clear that nonprofit employers shall not be required to pay for regular testing of unvaccinated employees. OSHA needs to recognize that shifting the costs of testing onto charitable nonprofits would harm nonprofits' missions and in too many cases could result in even more nonprofit employees being laid off to cover those costs.

- 6. *What testing protocols must nonprofit employers follow? Will OSHA dictate which type(s) of testing is permissible, e.g., rapid self-test or PCR test by a third party? Must nonprofits submit a testing protocol in advance, or will OSHA provide clear instructions and/or a safe harbor for nonprofits to follow? Does an official or designated staffer have to observe the person taking the test? Will there be a level of proof of vaccination required or will self-attestation be sufficient?***
- 7. *What employee exemptions or accommodations will the ETS recognize? Presuming that the ETS follows provisions under similar guidance related to President Biden's vaccination requirements, what documentation will be required for individuals seeking an accommodation for a disability or a sincerely held religious belief, practice, or observance? Will exemptions or accommodations, if any, apply to vaccinations, to testing requirements, or both? What workforce rules, such as masking and social distancing, will be required for individuals qualifying for an exemption or accommodation?***

The recent [guidance for federal contractors](#) recognized accommodations for workers with a disability or a sincerely held religious belief, practice, or observance, and provides general instructions on what accommodations may be appropriate. More guidance, however, is needed. It should be noted that many nonprofits employ large numbers of people with disabilities, and virtually all faith-based organizations are charitable nonprofits. We ask that the ETS provide detailed examples of how nonprofit employers are to investigate and document accommodations and what protocols must be followed once a determination is made. We share for OSHA's consideration the [Employer Guidance for Religious Exemption Requests](#) from Washington State as an example of the level of instructions that is helpful for dealing with the real-world questions that many nonprofit and other employers are facing.

- 8. *How will OSHA alert covered employers when changes will be required? Once published, how quickly will OSHA update or modify the ETS to reflect changing instructions from the Centers for Disease Control and Prevention, the Department of Health and Human Services, and other federal agencies? Once an employer determines that an employee is properly vaccinated, what burden, if any, will the ETS impose on the employer to determine whether the employee should get or has gotten a booster shot?***

The science and law of coronavirus and vaccinations are changing rapidly, making OSHA standard-writing even more complicated than usual. We urge OSHA to establish a clearinghouse for workplace information and to include language in the ETS that alerts employers to the proper sources for information on which they can rely to maintain full

compliance with the ETS. Additionally, we ask that OSHA include in the ETS appropriate safe harbors and flexibility to enable employers to make good faith modifications to practices and protocols to reflect changing scientific guidance in advance of further OSHA guidance.

Thank you for considering these questions. The networks of the National Council of Nonprofits stand ready to answer questions and provide data and other information about charitable organizations to assist the Department in promulgating the most relevant and helpful Emergency Temporary Standard possible.

Regards,



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