



October 13, 2021

Sharon Block
Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
The White House
715 17th Street, NW
Washington, DC 20503

Dear Ms. Block:

It is our understanding that the U.S. Department of Labor (DOL) Occupational Health and Safety Administration's (OSHA) Emergency Temporary Standard ("ETS" or "Rule") relating to COVID-19 testing and vaccination mandate in the workplace is before your office for final review. As such, on behalf of the National Restaurant Association and its members, I write today to offer the perspective of the restaurant and food service industry on the impending rule. We appreciate the opportunity to present these comments on behalf of our membership, who have been and continue to be resolute in their efforts to combat the COVID-19 pandemic, and ensure a safe environment for their workers, customers, and community.

At the outset of President Biden's announcement regarding the vaccination mandate on the private sector, the Association has done extensive engagement with our diverse national membership, which includes chains, franchisees and independent restaurants. Given the scope and magnitude of the impending ETS, we remain in constant coordination with our membership as we position ourselves to help them navigate guidance and ETS compliance. As such, we share with you the following implementation issues of concern and insights that are unique to our industry.

The Restaurant and Food Service Industry Faces Unprecedented Peril. Restaurants have without question been one of the sectors most dramatically impacted by the ongoing COVID-19 pandemic. While we saw the start of a gradual recovery earlier in the year, the emergence of the COVID-19 delta variant has seen what little progress was made slip away. Restaurant sales stalled in August as consumers changed their behavior due to the delta variant. Since the beginning of the pandemic, restaurant and foodservice sales are down close to \$300 billion from expected levels. Some key points:

- Data from August of this year confirms that 6 in 10 adults have changed their restaurant use due to the rise in the delta variant. Nineteen percent of customers have stopped going out to restaurants, and almost nine percent have cancelled existing plans to go out to a restaurant in recent weeks. In August, eating and drinking places cut 41,500 jobs, the first decline since December 2020, indicating that restaurants are feeling the strain of waning consumer confidence.

- Restaurants are still nearly 1 million jobs, or about 8% below pre-pandemic levels, which is double national employment levels. Restaurant jobs remain below June 2019 levels in 46 states and D.C., and by the end of June, the restaurants and accommodations sector had 1.4 million job openings according to Job Openings and Labor Turnover data from the Bureau of Labor Statistics.
- 90,000 restaurants are closed permanently or long-term. As of the end of June 2021, 11 states and Puerto Rico are open at varying capacities ranging from 50% to 80%. The vast majority of permanently closed restaurants were well-established businesses, and fixtures in their communities. On average, these restaurants had been in business for 16 years, and 16% had been open for at least 30 years. Moreover, according to a recent survey 45 percent of small business restaurant owners said they could not cover their August rent.

The Restaurant Industry Has Gone Above and Beyond to Ensure Safe Operations During the Pandemic. The industry has been at the forefront of efforts to protect employees throughout the pandemic. Faced with these very challenging times, restaurants and hospitality companies have been doing their level best to respond reasonably and appropriately to executive orders and the most-up-to-date scientific evidence. Throughout, the paramount focus of the industry has been the safety of their employees, along with customers and communities. When executive shutdown orders were initially issued in mid-March of last year, restaurants adapted as best they could in the face of unprecedented circumstances and suffered millions in lost revenue as a result of the physical loss and damage the orders caused. Some restaurants created carry-out and delivery businesses where they did not have them before, even though takeout, delivery, and curbside pickup equate to only a small fraction of normal revenue for a typical restaurant. Some restaurants drastically expanded that service, installing extra windows or rearranging indoor spaces and furniture to create pick-up areas for customers and delivery personnel, also mounting physical barriers, partitions, and signage to direct traffic flow and keep people properly socially distanced. Still, other restaurants opted to remain closed, reasonably concluding that they could not operate under such circumstances.

Our industry appreciates your keen focus on the impact that the pandemic has had on the labor market, including the need for flexibility for employers to continue operating in a safe and healthful manner. It is against this backdrop that we offer the following comments on any ETS that OSHA issues regarding vaccination and testing for COVID-19. How OSHA implements the President's directive and crafts the specifics of the regulatory approach is critically important to the Industry.

The Emergency Temporary Standard. The makeup of the restaurant industry is incredibly diverse, ranging from small eateries with fewer than ten employees to franchised restaurants collectively employing thousands of workers. As you can imagine, virtually every job in a restaurant cannot be done remotely. At this stage in the pandemic, restaurants have had to comply with a myriad of federal, state and local regulatory requirements related to COVID, and thus have significant experience in attempting to manage difficult issues of vaccinations, testing, contact tracing, and the like. Given these experiences, we welcome the opportunity to put forth the following for OSHA's consideration, and hope that these observations are helpful to OSHA as it prepares the ETS.

- **Complex Regulatory Burdens.** Given that many restaurants are still struggling to emerge from the ongoing pandemic, the Association is deeply concerned about the compliance and recordkeeping requirements of the ETS. Several issues should be addressed. Importantly, the ETS should provide clear instruction to employers on how to differentiate between vaccinated and unvaccinated employees and how to document vaccination and testing status. The Association recommends that employers be permitted the ability to rely on simple employee attestation as the California standard allows and/or utilization of a vaccination/testing credentialing service. Regardless, employers should not be required the onerous task of collecting and preserving individual employee vaccination and testing credentials. The ETS should also clarify for the employer when the vaccination mandate is satisfied, i.e., after one dose, two, and booster. The rule should clarify whether fully vaccinated means 14 days after completing two doses of the Pfizer or Moderna vaccine, or one dose of the Johnson & Johnson vaccine and booster shot. Additionally, the ETS should clarify whether employers or employees will bear the burden of the cost of testing and whether time spent testing should be considered compensable time. In regard to at home rapid test, specific guidance should be provided to employers if they will be required to train employees to properly administer the test in order to return accurate results. The ETS should also clarify if there are requirements for customers and third parties regarding occupancy, physical distancing, or masking requirements.
- **Legal Liability.** With respect to resulting employee disciplinary actions regarding those employees who are dishonest about their vaccination or weekly testing status, the ETS should clearly state that employers, acting in good faith to implement the mandate, will be shielded from legal liability. Thus far, OSHA has not addressed this issue.
- **The Industry Workforce.** Vaccine hesitancy is real and complex within the restaurant workforce. The ETS should reflect the enormous recruitment and retention challenges associated with implementation. To the extent the primary purpose of the rule is to increase vaccinations, OSHA must be sure to consider the incentives and costs built into any rule. A rule that provides for widespread opt-outs by employees will not accomplish the goals of increased vaccinations.
- **Testing.** Our membership knows from experience that managing widespread testing has been shown to be particularly difficult. We have concerns regarding widespread availability of tests. In that light, we urge that the rule make explicit that a “test out” option will not be required except in narrow, prescribed circumstances. Put more simply, neither restaurants nor the public health will be well served by a rule that allows employees to broadly opt out of vaccination and requires employers to provide a “test out” alternative, particularly where employers are required to manage and pay for the tests.

Ms. Sharon Block
October 13, 2021
Page Four

- ***Accommodation and Administration.*** Our members have likewise also seen a significant number of accommodation requests that are proving to be overwhelming for many employers, particularly where requests for religious accommodation are concerned. OSHA has indicated in public statements that accommodation for medical conditions and religious beliefs that prevent employees from being vaccinated will be “in narrow instances.” Frankly, that is not the case on the ground for most employers, and we urge that an ETS be consistent with this fact. Similarly, employers are facing challenges daily documenting and verifying employee vaccination status, with no shortage of resources available for those who may wish to avoid a vaccination requirement. We urge that OSHA recognize this reality in whatever direction it gives to employers regarding verification of vaccination status and the collection and maintenance of vaccine records.

Thank you again for the opportunity to provide the insights and concerns of our members on this critical issue. We stand ready to work with the Administration in combatting this continued public health crisis.

Sincerely,



Shannon L. Meade
Vice President, Public Policy and Legal Advocacy

cc: The Honorable Martin J. Walsh
Secretary of Labor