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Via www.regulations.gov
and U.S. First Class Mail

June 28, 2021

Hon. Martin J. Walsh, Secretary of Labor
c/o J. S. Frederick, Acting Assistant Secretary
for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Dear Mr. Secretary:

RE: OSHA Notice titled "Occupational Exposure to COVID-19; Emergency
Temporary Standard," OSHA-2020-0004, 86 *Fed. Reg.* 32376 (June 21, 2021)

This letter presents comments of the National Federation of Independent Business (NFIB)¹ on the Occupational Safety and Health Administration (OSHA) notice titled "Occupational Exposure to COVID-19; Emergency Temporary Standard" and published in the *Federal Register* of June 21, 2021. The notice prescribed as an interim final rule and proposed as a final rule a "Subpart U -- COVID-19 Emergency Temporary Standard" in part 1910 of title 29 of the Code of Federal Regulations, applicable in healthcare settings. NFIB urges OSHA to continue in the final rule to: (1) exempt first aid from the standard, and (2) commit to monitoring the extent to which a grave danger continues to exist and to modify the Emergency Temporary Standard (ETS) or final standard accordingly.

1. Exemption of First Aid

The new Emergency Temporary Standard applies generally to "all settings where any employee provides healthcare services or healthcare support services."² If the ETS said nothing further, the ETS might lend itself to the misconception that the mere rendering by one employee in a small business workplace to another employee of first

¹ NFIB is an incorporated nonprofit association representing small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty states hear the voice of small business as they formulate public policies.

² 29 CFR 1910.502(a)(1).

aid would make their workplace a "setting" subject to the ETS. The ETS eliminates the possibility of that misconception by stating explicitly that the ETS "does not apply" to "[t]he provision of first aid by an employee who is not a licensed health care provider."³ NFIB notes also that the rendering of first aid by any other individual in a small business workplace who is not a professional healthcare practitioner (such as the owner or a visiting customer) does not make the workplace a "setting" covered by the ETS because the definition of "healthcare services" applies only to rendering of services by professional healthcare practitioners and "healthcare support services" applies only to services that facilitate the provision of health care services, such as the administrative and cleaning activities in a hospital.⁴

OSHA wisely exempted first aid from the ETS, as regulations should not discourage people in a workplace from rendering first aid to each other. OSHA's exemption of first aid from the ETS also fits well with the policies of states that have laws (often called "Good Samaritan" laws) that protect from legal liability individuals who provide first aid to the injured.⁵ OSHA should carry forward from the ETS into the final rule the exemption for employee-provided first aid and the definitions that exempt employer-provided and customer-provided first aid, for employees, employers, and customers who are not health professionals.

2. Commitment to Monitoring for Continued Existence of Grave Danger

Subsection 6(c) of the Occupational Safety and Health Act requires the Secretary of Labor to "provide . . . for an emergency temporary standard . . . if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger."⁶ OSHA

³ 29 CFR 1910.502(a)(2)(i).

⁴ 29 CFR 1910.502(b). ("Healthcare services mean services that are provided to individuals by professional healthcare practitioners . . . for the purpose of promoting, maintaining, monitoring, or restoring health. . . .") ("Healthcare support services mean services that facilitate the provision of healthcare services. Healthcare support services include patient intake/admission, patient food services, equipment and facility maintenance, housekeeping services, healthcare laundry services, medical waste and handling services, and medical equipment cleaning/reprocessing services.") (emphasis added).

⁵ See, for example, New York Public Health Law § 3000-a (protecting against all but gross negligence any person who voluntarily and without expectation of monetary compensation renders emergency first aid); 42 Pennsylvania Consolidated Statutes Annotated §8332 (protecting against all but gross negligence any person who in good faith renders first aid at an emergency event); Indiana Statutes 34-30-12-1 (protecting from all but gross negligence or willful or wanton misconduct for gratuitous, good faith emergency care); 14 Maine Statutes § 164 (protecting any person who voluntarily, without the expectation of monetary or other compensation from the person aided or treated, renders first aid, except for willful, wanton, or reckless conduct or gross negligence); and Idaho Code 5-330 (protecting against all but gross negligence, person who, in good faith and without compensation, administers emergency first aid).

⁶ 29 U.S.C. 655(c).

has identified as a grave danger "workplace exposure to SARS-CoV-2, the virus that causes the development of COVID-19"⁷ and has concluded that "[t]his ETS is necessary to protect the healthcare workers with the highest risk of contracting COVID-19 at work."⁸

Whatever may be the case regarding the actual existence or not as of June 21, 2021, of the grave danger and necessity required by subsection 6(c) for the ETS covering the healthcare sector,⁹ OSHA appropriately made a commitment to monitor for the continued existence of a grave danger and to update the ETS as appropriate.¹⁰ OSHA should follow this precedent and incorporate into all future emergency temporary standards, and into final rules flowing from them, a requirement for OSHA to monitor for

⁷ 86 *Fed. Reg.* at 32381, col. 2, nt. 4.

⁸ 86 *Fed. Reg.* at 32412, col. 2.

⁹ With respect to OSHA's issuance of the Emergency Temporary Standard for Occupational Exposure to COVID-19 in settings where employees provide healthcare services or healthcare support services, NFIB doubts that OSHA has sufficiently demonstrated a rational basis for its determination that such employees are exposed to grave danger from COVID-19 and that the ETS is necessary to protect such employees from such danger, both of which subsection 6(c) of the OSH Act requires for issuance of an ETS. Section IV.A. of the preamble for the Emergency Temporary Standard, 86 *Fed. Reg.* at 32381 col. 2, states that "OSHA bases its grave danger determination on evidence demonstrating the lethality of the disease, the serious physical and psychiatric health effects of COVID-19 morbidity (in mild-to-moderate as well as in severe cases), and the transmissibility of the disease in healthcare settings where people with COVID-19 are reasonably expected to be present." Given those stated bases for the grave danger determination, OSHA has failed to take appropriate account of a crucial factor in the determination: the extent to which healthcare services employees and healthcare support services employees were, at the time of issuance of the ETS, immune from COVID-19 due to vaccination. Elsewhere in Section IV.A, 86 *Fed. Reg.* at 32377 col. 2, OSHA stated: "The development of safe and highly effective vaccines and the on-going nationwide distribution of these vaccines are encouraging milestones in the nation's response to COVID-19. OSHA recognizes the promise of vaccines to protect workers, but as of the time of the promulgation of the ETS, vaccination has not eliminated the grave danger presented by the SARS-CoV-2 virus to the entire healthcare workforce. Indeed, approximately a quarter of healthcare workers have not yet completed COVID-19 vaccination (King et al., April 24, 2021)." Thus, OSHA itself provides the evidence that three-quarters of U.S. healthcare workers had completed vaccination as of April 24, 2021. And April 24, 2021, was not the date of issuance of the ETS, which was June 21, 2021. In the 58 days between those two dates, vaccinations continued apace in the U.S., including no doubt for healthcare workers. At all events, with OSHA having clearly stated the basis for its grave danger determination, which took account of lethality, serious physical and psychiatric health effects of COVID-19 morbidity, and transmissibility of the disease in healthcare settings, but did not include the status of vaccination of health care workers, OSHA entirely failed to consider an important aspect of the grave danger determination. See *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

¹⁰ "Where OSHA finds a grave danger from the virus no longer exists for the covered workforce (or some portion thereof), or new information indicates a change in measures necessary to address the grave danger, OSHA will update the ETS, as appropriate." 86 *Fed. Reg.* at 32377, cols. 2-3.

the continued existence of the grave danger and, when the grave danger that required the standard ceases to exist, to eliminate the standard promptly. A standard mandated by the government, and the associated costs and burdens imposed on employers, should end when the circumstances justifying the issuance of the standard end.

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If and when OSHA promulgates a final rule to follow the interim final rule prescribing the Emergency Temporary Standard on Occupational Exposure to COVID-19, it should continue to exempt from coverage first aid rendered by individuals in workplaces who are not professional health care practitioners and should require continued monitoring of the grave danger by which OSHA justified the standard, so that the interim final rule and the final rule expire when the grave danger ceases. Thank you for considering our comments.

Sincerely,

A handwritten signature in blue ink that reads "David S. Addington". The signature is written in a cursive style with a large initial "D".

David S. Addington

Executive Vice President and General Counsel