

# THE INDUSTRIAL COMMISSION OF ARIZONA DIVISION OF OCCUPATIONAL SAFETY & HEALTH



DALE L. SCHULTZ, CHAIRMAN  
JOSEPH M. HENNELLY, JR., VICE CHAIR  
SCOTT P. LAMARR, MEMBER

P.O. Box 19070  
Phoenix, Arizona 85005-9070

JESSIE ATENCIO, ADOSH DIRECTOR  
PHONE: (602) 542-5795  
FAX: (602) 542-1614

JAMES ASHLEY, DIRECTOR

July 16, 2021

Via Email (wulff.james@dol.gov)

James D. Wulff  
Acting Regional Administrator  
Occupational Safety and Health Administration

## RE: COVID-19 ETS – 29 C.F.R. 1910, Subpart U

Mr. Wulff:

The Industrial Commission of Arizona (“ICA”) is currently reviewing the Emergency Temporary Standard (“ETS”) for COVID-19. At this time, the ICA intends to initiate the rulemaking process to adopt portions of the ETS. The ICA, however, respectfully requests that OSHA approve the deviations discussed below.

First, Arizona currently has extensive laws in effect pertaining to the payment of wages ([Arizona Revised Statutes, Title 23, Chapter 2, Article 7](#)) and Earned Paid Sick Time ([Arizona Revised Statutes, Title 23, Chapter 2, Article 8.1](#)). Specifically, earned paid sick time in Arizona can be used in the following circumstances: COVID-19 testing, vaccination, business closure, school closure, quarantine, or illness. See [ICA FAQs About COVID-19 and Earned Paid Sick Time](#). These laws are enforced through a robust program in the ICA’s Labor Department. See [Labor Department Website](#).

The ETS contains a number of provisions that are adequately addressed by existing Arizona law pertaining to wages and Earned Paid Sick Time and existing law in this regard is “at least as effective as” the following ETS provisions:

- 1910.502(I)(5)(ii)
- 1910.502(I)(5)(iii)
  - 1910.502(I)(5)(iii)(A)
  - 1910.502(I)(5)(iii)(B)
- 1910.502(I)(5)(iv)
- 1910.502(m)
- 1910.502(n)(1)(ix)

Second, Arizona currently has laws in effect to prohibit discrimination/retaliation pertaining to the exercise of both Earned Paid Sick Time rights ([A.R.S. § 23-374](#); [Arizona Administrative Code R20-5-1211, 1213](#)) and

safety-related protected activity ([A.R.S. § 23-425](#); [Arizona Administrative Code R20-5-680 through R20-5-682](#)). The Earned Paid Sick Time retaliation/discrimination laws are enforced through a robust retaliation program in the ICA's Labor Department. See [Labor Department Website](#). The safety-related retaliation/discrimination laws are enforced by ADOSH's whistleblower section.

The ETS contains a number of retaliation/discrimination provisions that are adequately addressed by the existing Arizona law described above and the existing law in this regard is "at least as effective as" the following provisions:

- 1910.502(o)(1)
- 1910.502(o)(1)(i)
- 1910.502(o)(2)

Because Arizona already has effective wage, earned paid sick time, and discrimination/retaliation laws that are "at least as effective as" above-referenced provisions in the ETS, the ICA respectfully requests that OSHA approve the ICA's intent to not adopt the specified ETS provisions. Moreover, proper enforcement of the above-referenced ETS provisions would require ADOSH to function as a quasi-wage and hour division responsible for enforcing complex legal standards. The ICA would be interested in understanding how OSHA trained its compliance officers to enforce the provisions of the ETS pertaining to wage, paid sick time, and retaliation – all of which can be extremely complicated subject matters that require a significant level of knowledge and training to effectively enforce.

If you should have any questions, please feel free to contact me at (602) 542-5726.

Sincerely,



Jessie Atencio  
ADOSH Director

cc: James Ashley, ICA Director  
Dale Schultz, ICA Chairman  
Phil Murphy, ADOSH Assistant Director  
Zachary Barnett, OSHA Area Director



September 16, 2021

Jessie Atencio, Director  
Arizona Division of Occupational Safety and Health  
800 West Washington Street, 2<sup>nd</sup> Floor  
Phoenix, AZ 85007-2922

Mr. Atencio:

This is in response to your letter dated July 16, 2021, where you requested the Occupational Safety and Health Administration's (OSHA) approval to not adopt portions of the COVID-19 Healthcare Emergency Temporary Standard (ETS) (29 CFR 1910, Subpart U). You provided examples of existing Arizona state laws as alternative language that you believed provided equivalent protections as the ETS. On August 24, 2021, OSHA sent you a side-by-side comparison of the OSHA Healthcare ETS to assist you in providing clarification about the specific provisions of the Arizona Revised Statutes, because OSHA did not have the information from your letter to determine if the alternative provisions were "At Least as Effective" (ALAE) as the provisions in the ETS. OSHA identified several areas of particular concern for which the Arizona Revised Statutes did not appear to be ALAE. After further review, you agreed on September 9, 2021, that the provisions of the Arizona Revised Statutes identified in your July 16 letter do not provide the same level of protection extended to workers in OSHA's COVID-19 Healthcare ETS. We agree with your assessment that the identified state laws are not ALAE as the corresponding provisions in OSHA's Healthcare ETS and are therefore not an adequate substitute to adoption of the ETS or an alternative ALAE standard.

As explained in the preamble to OSHA's Healthcare ETS, OSHA's Acting Assistant Secretary has determined that healthcare employees in the United States face a grave danger from the new hazard of workplace exposures to SARS-CoV-2 (the virus that causes COVID-19), except under a limited number of situations as described in the Healthcare ETS, and that the Healthcare ETS is necessary to protect the healthcare workers with the highest risk of contracting COVID-19 in the work place. Once OSHA makes the prerequisite findings of grave danger and necessity, the language of section 6(c)(1) is not discretionary: "the Secretary shall provide . . . for an [ETS]."

Section 18(c)(2) of the Occupational Safety and Health (OSH) Act, 29 USC 667(c)(2), requires State Plans to be at least as effective as Federal OSHA in their development and enforcement of occupational safety and health standards. OSHA's regulations at 29 CFR 1953.5(b) require State Plans to adopt an ETS promulgated by Federal OSHA within 30 days, or to demonstrate that promulgation is not necessary because the State's existing standard is already at least as effective as the Federal standard change. The deadline for State Plan intent was July 6, 2021, and the due date for State Plan adoption was July 21, 2021.

The Arizona Division of Occupational Safety and Health Administration (ADOSH) has not adopted the Healthcare ETS, and as discussed above, ADOSH and OSHA agree that the State does not already have an existing ALAE standard. Therefore, the Arizona State Plan is deemed not ALAE as OSHA with respect to COVID-19 enforcement for workers covered by the scope of the Healthcare ETS.

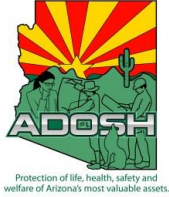
Please provide a written response to this correspondence by COB on Monday, September 20, 2021, confirming that ADOSH will immediately implement the OSHA COVID-19 Healthcare ETS. Please note that failure to do so may place Federal approval for the Arizona State Plan in jeopardy. If OSHA determines that the Arizona State Plan is no longer fulfilling its statutory responsibilities under the OSH Act by failing to meet Federal requirements under Section 18(e) for continued approval, Federal OSHA will be obligated to commence proceedings to assume responsibility for enforcement as necessary within Arizona.

If you have any questions, please feel free to contact me.

Sincerely,

JAMES D. WULFF  
Acting Regional Administrator

cc: James Ashley, ICA Director  
Dale Schultz, ICA Chairman  
Phil Murphy, ADOSH Assistant Director  
Zachary Barnett, OSHA Area Director



# THE INDUSTRIAL COMMISSION OF ARIZONA DIVISION OF OCCUPATIONAL SAFETY & HEALTH



DALE L. SCHULTZ, CHAIRMAN  
JOSEPH M. HENNELLY, JR., VICE CHAIR  
SCOTT P. LEMARR, MEMBER  
D. ALAN EVERETT, MEMBER

P.O. Box 19070  
Phoenix, Arizona 85005-9070

JESSIE ATENCIO, ADOSH DIRECTOR  
PHONE: (602) 542-5795  
FAX: (602) 542-1614

JAMES ASHLEY, DIRECTOR

September 21, 2021

Via Email (wulff.james@dol.gov)

James D. Wulff  
Acting Regional Administrator  
Occupational Safety and Health Administration

## RE: COVID-19 Healthcare ETS – 29 C.F.R. 1910, Subpart U

Mr. Wulff:

I am writing in response to your September 16 letter regarding the COVID-19 Healthcare Emergency Temporary Standard (ETS). It is disappointing that OSHA delayed responding to my July 16 letter for two months.

Although the Arizona Division of Occupational Safety and Health (ADOSH) has discerned that the determination in your September 16 letter is flawed, ADOSH intends to move forward with the ETS process pursuant to A.R.S. § 23-414 by presenting OSHA's findings on grave danger and necessity, as published in the Federal Register, to the Commission at the next Commission meeting.

The Commission has and will continue to ensure the safety and health of Arizona workers during the COVID-19 pandemic and is committed to ensuring Arizona's State Plan remains highly effective.

Sincerely,

Jessie Atencio  
ADOSH Director

cc: James Ashley, ICA Director  
Dale Schultz, ICA Chairman  
Phil Murphy, ADOSH Assistant Director  
Zachary Barnett, OSHA Area Director