



January 13, 2022

*Submitted via Regulations.gov*

**Re: COVID-19 Vaccination and Testing Emergency Temporary Standard Rulemaking, Docket No. OSHA-2021-0007**

Centro de los Derechos del Migrante, Inc. (CDM) is the first binational workers' rights organization based in Mexico and the United States. Throughout our sixteen years of advocacy, CDM has published quantitative and qualitative research on migrant workers' experiences in the United States—research that has helped shape state and federal policies on labor migration and workers' rights.<sup>1</sup> CDM works to advance labor rights protections for workers, including raising health and safety standards. Currently, we are leading a multi-year cooperative agreement with the U.S. Centers for Disease Control and Prevention (CDC) to control the spread of infectious diseases among workers employed in U.S. protein processing industries and a short-term project focused on improving access to SARS-CoV-2 vaccinations among agricultural workers.

Our recommendations reflect our direct experiences with workers in the agriculture, seafood, meat, and poultry processing industries across the Delaware, Maryland, and Virginia region. While CDM submits this comment in support of the proposed COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS), **we urge the Occupational Safety and Health Administration (OSHA) to revise several key provisions of the proposed ETS because it also serves as a proposal under Section 6(b) of the Occupational Safety and Health Act (the OSH Act)<sup>2</sup> for a final standard.** To better protect workers and the communities where they work, the final standard should:

- **Cover all employers subject to the OSH Act and not just employers who employ 100 employees or more.** Exempting employers with fewer than 100 employees leaves essential workers in critical industries, like protein processing, unprotected and exposed to the hazard of SARS-CoV-2.

At present, OSHA has limited the ETS's coverage to employers with 100 or more employees because these employers "will have sufficient administrative systems in place to comply quickly with the ETS."<sup>3</sup> However, as the ETS goes through the rulemaking

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<sup>1</sup> Centro de los Derechos del Migrante, Inc., "Publications," <https://cdmigrante.org/publications/>.

<sup>2</sup> 29 U.S.C. § 655(b).

<sup>3</sup> U.S. Department of Labor, "COVID-19 Vaccination and Testing; Emergency Temporary Standard," at 7.

process and becomes a final standard, all employers will have ample time to implement administrative systems to bring them into compliance with the final standard.

This standard fails to protect workers like Norma Alicia Martínez and Ángela Hernández,<sup>4</sup> Maryland H-2B crab workers with 17 and 12 years of experience, respectively, who work at processing plants with fewer than 100 employees. Both work indoors in poorly ventilated spaces with twenty-five to fifty other women and live in crowded, congregate employer-owned housing. Their workplaces do not have more than 100 employees, and neither knows whether their employer employs more than 100 employees in total. In 2020, Ms. Hernández's Maryland workplace was forced to close for two weeks when she and her colleagues contracted SARS-CoV-2, and Ms. Hernández and a colleague were hospitalized with COVID-19. Though she is now vaccinated, she fears contracting SARS-CoV-2 again. Ms. Hernández explains:

[The rule] would be beneficial for everyone, but since I do not work in a place with more than 100 people, it would not apply to us. . . . That would impact me a lot, and we would fight to have it apply to us. We are all human. When we got sick, there were fewer than 50 of us [workers] and we all got infected, even the boss and even those who work outdoors. You don't need a big group in order to get sick—even in a small group, it's dangerous. The disease doesn't care whether it's a large group. . . . I hope this reaches the top so that the government knows that workers get sick not only where there are a lot of people, but also where there's not as many.

Despite the shocking rate of SARS-CoV-2 infections and deaths in the protein processing industry,<sup>5</sup> it appears unlikely that the ETS would cover Ms. Hernández's or Ms. Martínez's workplaces because, to their knowledge, their employers do not have more than 100 employees. Yet the size of their employers' payrolls does not mitigate their exposure to SARS-CoV-2 in the workplace. And regardless of their employers' sizes, Ms. Hernández and Martínez, due to the temporary nature of their work, must live in employer-facilitated housing and in close quarters with their colleagues, which makes it nearly impossible to socially distance outside of the work hours. While the ETS was drafted to bring larger employers into compliance quickly, OSHA must protect workers like Ms. Martínez and Ms. Hernández in any final standard by removing the exemption for smaller employers.

Moreover, OSHA's choice to structure this exemption in terms of the number of employees an employer employs is at odds with its position that SARS-CoV-2 is a grave hazard

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<sup>4</sup> Pseudonym.

<sup>5</sup> U.S. House Select Subcommittee on Coronavirus Crisis, "Coronavirus Infections and Deaths Among Meatpacking Workers at Top Five Companies Were Nearly Three Times Higher than Previous Estimates" (Oct. 27, 2021), <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021.10.27%20Meatpacking%20Report.Final.pdf>.

present in the workplace. As OSHA makes clear in the preamble to the ETS, its authority to issue emergency temporary standards does not contemplate employer size in the abstract, only whether an emergency standard is necessary to protect employees from grave danger or new hazards in their workplace.<sup>6</sup> The standard should apply to all employers regardless of size because workplaces are sites of exposure to the hazard of SARS-CoV-2, exposing employees at large and small workplaces alike.

- **At a minimum, revise the standard’s method of counting employees to reach the employer size threshold.** Even if OSHA maintains an employer size threshold in the final standard, then the standard’s method of counting employees to reach that threshold must be revised. The preamble of the ETS states:

In scenarios in which employees of a staffing agency are placed at a host employer location, only the staffing agency would count these jointly employed workers for purposes of the 100-employee threshold for coverage under this ETS. Although the staffing agency and the host employer would normally share responsibility for these workers under the OSH Act, this ETS raises unique concerns in that OSHA has set the threshold for coverage based primarily on administrative capacity for purposes of protecting workers as quickly as possible[.]<sup>7</sup>

First, for the reasons set forth above, any initial concerns regarding host employers’ abilities to “quickly” comply with the standard due to “administrative capacity” would not be present once a final standard is promulgated.<sup>8</sup> Second, this policy decision is inconsistent with OSHA’s long-standing multi-employer citation policy and the Temporary Worker Initiative, both of which can attach liability to employers under the Act based on employers’ control over employees—not employer size.

Third, this flawed counting method puts the burden on workers to determine what their employer’s size is and whether the ETS applies to them. For example, employers that are not subject to the ETS could nonetheless have employees in workplaces with more than 100 people working together, as in the staffing agency example above—making it difficult for employees to exercise or even know what their safety and health rights are under the standard. Conversely, the ETS’s counting method could give rise to situations where workers are covered but do not know it: for example, when an employee works at a worksite with fewer than 100 employees, yet the employer has multiple worksites and employs more than 100 employees in the aggregate. An employee at any one of the individual worksites would have no way of knowing how many employees her employer

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<sup>6</sup> ETS at 11–15; *see* 29 U.S.C. § 655(c)(1).

<sup>7</sup> ETS at 342.

<sup>8</sup> *Id.*

employs in total, and would be forced to rely on her employer's representations alone to determine whether she has rights under the ETS.

As noted above, Ms. Hernández and Ms. Martínez work in protein processing plants with fewer than 100 workers, so they have no reliable way of learning whether their employers employ more than 100 employees and will be subject to the ETS. **Workers, particularly the most vulnerable—such as im/migrant workers with limited English language proficiency, misclassified workers, and migrant workers with little to no internet access—have no clear path to determine how many employees their employer has and whether the ETS applies to them.**

With their substantive rights under the ETS thus obscured, workers' 11(c) rights to make complaints free from retaliation will also be diminished. This shortcoming must not carry over into the final standard. Given the grave danger posed by SARS-CoV-2, the final standard should cover all employees subject to the OSH Act so that workers know unequivocally that they are protected by the standard.

- **Protect employees who work exclusively outdoors from SARS-CoV-2 exposure and transmission in employer-furnished housing by including them within the scope of any final standard.** The ETS excludes “employees who work exclusively outdoors from the scope of [the] ETS[,]” leaving out thousands of workers in low-wage industries such as agriculture, forestry, construction, and landscaping.<sup>9</sup> While OSHA has clarified that excluded employees “must not routinely occupy vehicles with other employees as part of work duties (i.e., do not drive to worksites together in a company vehicle),”<sup>10</sup> many other migrant workers who work outdoors will be excluded despite serious potential SARS-CoV-2 exposure. Any final standard should protect employees who are exposed to SARS-CoV-2 in their outdoor work through employer-provided housing and shared bathroom and water stations.

In the text of the final standard, OSHA should make clear that employees who live in employer-furnished housing are covered by the regulation. Many people who work exclusively outdoors—particularly people with H-2A and H-2B temporary work visas—share crowded housing. During the pandemic, H-2A workers have reported sleeping in dormitory-style bunk beds separated by just three feet in employer-furnished housing.<sup>11</sup> OSHA recognizes the risks of SARS-CoV-2 transmission in shared and congregate

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<sup>9</sup> Federal Register vol. 86, no. 212, p. 61420.

<sup>10</sup> Occupational Safety and Health Administration, “Emergency Temporary Standard: Frequently Asked Questions,” <https://www.osha.gov/coronavirus/ets2/faqs>.

<sup>11</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, RIPE FOR REFORM: ABUSE OF AGRICULTURAL WORKERS IN THE H-2A VISA PROGRAM (2020) at 8, <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf>; CENTRO DE LOS DERECHOS DEL MIGRANTE, BREAKING THE SHELL: HOW MARYLAND'S MIGRANT CRAB WORKERS CONTINUE TO BE ‘PICKED APART’ (2020), at 18, <https://cdmigrante.org/wp-content/uploads/2020/09/Breaking-The-Shell.pdf>.

housing and has recommended that employers take steps to minimize these risks.<sup>12</sup> OSHA should ensure that the final standard covers these workers, even if they work exclusively outside, to fully protect them from the grave danger of exposure to SARS-CoV-2 in employer-furnished housing.

In agriculture, where workers labor shoulder-to-shoulder picking and processing fruits and vegetables, they often share bathroom and water stations with their colleagues. Even if these workers do not live or travel together, they are susceptible to contracting COVID-19 due to the close proximity of their work and shared use of bathrooms and water stations.<sup>13</sup> Any final rule must also cover these vulnerable workers to protect them from workplace SARS-CoV-2 exposure.

- **Protect employees who contract SARS-CoV-2 by requiring employers to provide paid sick leave and job protection.** Workers who contract SARS-CoV-2 should also receive paid sick leave and job protection to ensure that they can return to their jobs following leave. We commend OSHA for requiring employers to provide reasonable time and paid sick leave for workers experiencing vaccine side effects, however, a final standard should also include paid sick leave for medical removal.

But failing to provide paid sick leave and job protection subjects workers to an unfair burden if they contract SARS-CoV-2 on the job and incentivizes them to return to work even if they are still sick. Concretely, Ms. Hernández explains that in 2021, a coworker became ill with COVID-19 but returned to work after only three or four days because she could not afford unpaid time off. The prospect of weeks without pay and potential job loss could also undermine the ETS's purpose by disincentivizing vulnerable low-wage workers from reporting a positive diagnosis to their employer. As Ms. Martínez explains, "a sick person shouldn't go to work, but if they are not going to be paid [sick leave], they will want to work. It is worrying because that person could lie and pretend not to be ill." Further, the lack of job protection is particularly severe for H-2A and H-2B workers, whose visas permit them to work in the United States for limited periods and exclusively for a designated employer. Instead, OSHA should amend the ETS to require covered employers to provide paid sick leave and job protection during the mandatory quarantine period for workers with SARS-CoV-2 infections.

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<sup>12</sup> Occupational Safety and Health Administration, "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace," <https://www.osha.gov/coronavirus/safework>.

<sup>13</sup> See, e.g., CENTRO DE LOS DERECHOS DEL MIGRANTE, RIPE FOR REFORM: ABUSE OF AGRICULTURAL WORKERS IN THE H-2A VISA PROGRAM (2020) at 6, <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf>; see also Nadia Lopez, "Essential and Vulnerable: COVID-19 Takes Hard Toll on California's Migrant Farm Workers," USA Today (Sept. 3, 2020), <https://www.usatoday.com/story/opinion/2020/09/03/covid-19-hits-californias-migrant-farm-workers-hard-column/5689601002/>.

- **Require employers to pay for SARS-CoV-2 tests and masks.** Shifting the burden of paying for SARS-CoV-2 tests and masks to employees could, in some cases, give employees a greater incentive to get vaccinated. Nevertheless, imposing this burden on workers unfairly penalizes those who face significant barriers to vaccine access, including H-2A, H-2B, and other migrant workers. It is also a glaring departure from OSHA’s longstanding position that the costs of PPE and testing are the responsibilities of employers.

Migrant workers continue to face barriers to vaccination and other healthcare access. Many live in remote locations without access to transportation and rely on their employers to make vaccination available. Our research with protein processing workers in Delaware, Maryland, and Virginia has revealed that immigrant and migrant, limited English-language proficient, and women workers are disproportionately affected by COVID-19 and face greater hurdles in accessing healthcare.<sup>14</sup> Further, workers with limited English proficiency and immigrant and migrant workers were 10 times more likely to report facing barriers to PPE access or use at work.<sup>15</sup> Moreover, some workers simply cannot get vaccinated for medical or religious reasons.

It is these same workers who will be especially burdened if they must bear the cost for SARS-CoV-2 tests and masks. The low-wage realities of these industries already makes it difficult for workers to make ends meet: for example, workers in the H-2B seafood industry have expressed dire financial challenges being able to afford gloves when their employer refuses to cover the costs. Obtaining masks and tests is an unwarranted added burden, especially for migrant workers living in remote locations without transportation to access SARS-CoV-2 testing. To protect migrant workers facing barriers to vaccination and PPE access, OSHA should draft the final standard to leave no worker behind and require covered employers to pay for tests and masks.

- **Require employers to develop and implement comprehensive workplace controls against SARS-CoV-2 transmission recommended by OSHA and the CDC, including distancing, barriers, ventilation, and sanitation.** The ETS only requires employees to either be fully vaccinated against COVID-19 or be tested weekly and wear face coverings, based on the type of policy their employer adopts. It does not require the full suite of workplace controls against SARS-CoV-2 transmission recommended by OSHA and the CDC, including distancing, barriers, ventilation, and sanitation. The final standard must include comprehensive workplace controls against SARS-CoV-2. Employees need a comprehensive suite of protections due to the evolving and changing nature of SARS-CoV-

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<sup>14</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, UNPACKING THE FACTS: A RAPID ASSESSMENT OF PROTEIN PROCESSING WORKERS’ EXPERIENCES DURING THE COVID-19 PANDEMIC IN DELAWARE, MARYLAND, AND VIRGINIA (2021) at 3, <https://cdmigrante.org/wp-content/uploads/2021/12/Unpacking-the-Facts-Survey-Report-Final.pdf>.

<sup>15</sup> *Id.*

2. While vaccines are an effective and powerful tool to reduce the hazard of SARS-CoV-2 in the workplace, the continued emergence of variants of concern, including the Omicron variant, presents serious risks of breakthrough infections.

In a 2022 survey of migrant workers,<sup>16</sup> all agreed that a requirement for comprehensive safety measures beyond vaccination was needed to combat COVID in the workplace. As one anonymous migrant worker explained, “Companies must guarantee safe workplaces for their workers. We are talking about human lives, people who risk their lives to process food that reaches millions of American families. The least that companies must do is guarantee safe workplaces.”

In making these recommendations, we draw on our years of experience working closely with migrant workers in the U.S., including our leadership in a multiyear cooperative agreement with the CDC to prevent the spread of infectious diseases among workers employed in U.S. protein processing industries and a short-term project focused on improving access to SARS-CoV-2 vaccinations among agricultural workers. We recognize the ETS as an important victory for workers who have stood up for their right to health and safety throughout the pandemic. We stand by Ms. Martínez in supporting the ETS “so that no one contracts COVID-19. . . . That's why we need protections at work and the requirement for paid time off to go get vaccinated and to recover from side effects.” But in order to protect workers and their communities, the final standard must resolve the serious deficiencies that threaten to hinder the ETS’s effectiveness and endanger workers and their communities.

Sincerely,

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<sup>16</sup> On file with authors.