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September 29, 2021

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretary Walsh:

On September 9, President Biden released a COVID-19 plan entitled “Path Out of the Pandemic,” which includes a directive for the Occupational Safety and Health Administration (OSHA) to quickly issue an emergency temporary standard (ETS). This standard would require all employers with 100 or more employees to ensure their workforce is fully vaccinated or produce a negative COVID-19 test result on at least a weekly basis before coming to work.¹ We write to express our very serious concerns about the administration’s inappropriate, unprecedented, and likely unlawful use of authority under the *Occupational Safety and Health Act* (OSH Act). Further, we are deeply concerned about the impact that this “emergency” rule will have on hundreds of thousands of business owners at a time when our economy continues to struggle, inflation is running rampant, job creators are facing a massive workforce shortage, and more than 8.4 million Americans are out of work.²

After failing to “shut down the virus,”³ President Biden is now weaponizing the federal bureaucracy to crush American businesses with this rushed and unprecedented OSHA mandate. This scheme not only passes the buck to workers and job creators, but it also creates massive uncertainty, costs, and liabilities for many employers. Small businesses will be particularly

¹ WHITE HOUSE, PATH OUT OF THE PANDEMIC, [HTTPS://WWW.WHITEHOUSE.GOV/COVIDPLAN/](https://www.whitehouse.gov/COVIDPLAN/).

² News Release, Bur. of Lab. Stat., The Employment Situation—August 2021 (Sept. 3, 2021), <https://www.bls.gov/news.release/pdf/empsit.pdf>.

³ *Joe Biden: I’m going to ‘shut down the virus,’ not the US – video*, THE GUARDIAN, Oct. 23, 2020, <https://www.theguardian.com/us-news/video/2020/oct/23/joe-biden-coronavirus-shut-down-video>.

harmful by being forced to police vaccines and testing on behalf of the federal government.⁴ Of particular concern, the Department of Labor (Department) does not plan to solicit any public input until after the ETS takes effect, despite the plethora of logistical, legal, and financial concerns we are hearing from businesses of all sizes in our Congressional Districts daily.

As job creators are facing an anemic economic recovery and struggling to find workers, it is unconscionable for the Biden administration to impose such a harmful mandate. The ETS will very likely cause many individuals to leave their jobs—exacerbating the national workforce shortage. These concerns are not just theoretical. Following the adoption of a similar state order in New York, a hospital was forced to pause maternity services because dozens of staff members quit due to the mandate.⁵ This reality is not an isolated incident. When applied to the broader private-sector workforce, the ETS will have a devastating impact on the ability of businesses to retain workers and on the economic recovery at large.

Moreover, the administration claims that this complex and convoluted ETS will impose punitive fines of up to \$14,000 per violation for noncompliance.⁶ However, Congressional Democrats plan to increase these fines to as high as \$700,000 per violation with the enactment of their \$3.5 trillion budget reconciliation boondoggle.⁷

Further, as Members of the Committee which has primary jurisdiction for overseeing the appropriate administration of our nation’s workplace laws, we are deeply troubled that the administration is abusing the authority delegated to it through the OSH Act. For example, on September 9, Ron Klain, President Biden’s chief of staff, retweeted a comment that “OSHA doing this vaxx mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations.”⁸ This tweet is a tacit admission that, rather than seeking Congressional authorization for a federal vaccine mandate, the administration is attempting to circumvent the rule of law by stretching its limited authority under the OSH Act⁹ to implement this sweeping and broad public health mandate under the guise of “workplace safety.”

Significantly, until the Biden administration took office, OSHA had issued only nine ETSs in the agency’s history—and none since 1983. OSHA has used this authority only sparingly because a majority of ETSs have been either stayed or invalidated by federal courts. In this instance, we

⁴ See Letter from David S. Addington, Exec. Vice Pres. & Gen’l Couns., NFIB, to Martin J. Walsh, Sec’y of Lab. (Sept. 14, 2021), <https://assets.nfib.com/nfibcom/NFIB-Letter-David-Addington-9.15.21.pdf>.

⁵ Jaclyn Diaz, *A N.Y. Hospital Will Stop Delivering Babies As Workers Quit Over A Vaccine Mandate*, NPR, Sept. 13, 2021, <https://www.npr.org/2021/09/13/1036521499/covid-workers-resign-new-york-hospital-stops-baby-delivery>.

⁶ See Ben Penn & Bruce Rolfsen, *Biden’s Employer Shot Mandate Tasks OSHA with New Rulemaking*, BLOOMBERG GOV’T, Sept. 9, 2021, <https://www.bgov.com/core/news/#!/articles/QZ6YHNT1UM63>.

⁷ See Comm. Print (S. Con. Res. 14 Reconciliation Directives, Amendment in the Nature of a Substitute, 117th Cong. (2021)), § 21004(a)(1)(A), <https://edlabor.house.gov/imo/media/doc/ANS%20to%20the%20Committee%20Print%20Offered%20by%20Mr.%20OScott.pdf>.

⁸ Edmund DeMarche, *White House’s Ron Klain panned for retweeting post on ‘ultimate work-around’ for federal vaccine mandate*, FOX NEWS, Sept. 10, 2021, <https://www.foxnews.com/politics/klain-vaccine-coronavirus-mandate>.

⁹ 29 U.S.C. § 655(c).

have serious doubts that courts will look favorably on such a rushed and hastily written ETS that circumvents the notice-and-comment rulemaking process, given the Department's abysmal track record of defending previous ETSs in court.¹⁰

Given significant concerns about the ETS's devastating impact on our nation's economy and the highly questionable legality of this mandate, OSHA should immediately suspend its work on the ETS. Job creators, workers, and our stumbling economic recovery will suffer from this unilateral effort to shift blame and responsibility for vaccines and testing to U.S. employers. If President Biden or the Department seeks to regulate America's workplaces, such an extreme, intrusive, disruptive, and likely unlawful mandate should either be proposed through formal notice-and-comment rulemaking to allow for review and scrutiny or be initiated through direct congressional authorization.

Sincerely,



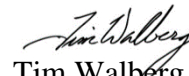
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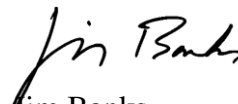
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¹⁰ CONG. RESEARCH SERV., OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): EMERGENCY TEMPORARY STANDARDS (ETS) AND COVID-19, Table A-1 (Sept. 13, 2021), <https://crsreports.congress.gov/product/pdf/R/R46288>.



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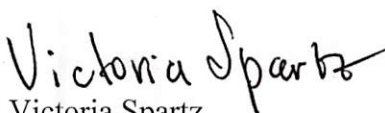
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