



Institute for  
**Policy Integrity**

NEW YORK UNIVERSITY SCHOOL OF LAW

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**To:** Occupational Safety and Health Administration

**Submitted by:** Institute for Policy Integrity at New York University School of Law

**Subject:** Comments on OSHA’s Proposed COVID-19 Vaccination and Testing Standard

The Institute for Policy Integrity at New York University School of Law (“Policy Integrity”) respectfully submits the following comments on the Occupation Safety and Health Administration’s (OSHA) Emergency Temporary Standard (ETS) and Proposed Rule regarding COVID-19 vaccination or testing at large employers.<sup>1</sup> Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

The Emergency Temporary Standard (ETS), which directs large employers to require certain eligible employees be vaccinated against COVID-19 or get regularly tested for the virus, represents an important step toward reducing the threat of COVID-19 in the workplace. While the agency offers numerous compelling justifications for the ETS and its proposed final rule, this comment highlights several additional rationales in support of OSHA’s COVID-safety measures regarding the legislative and regulatory history of the Occupational Safety and Health (OSH) Act. While that history supports the agency’s authority to finalize this proposal, it likewise provides support for OSHA to finalize a more targeted regulation focused on restricting the spread of COVID-19 in workplaces with particularly high risk of transmission.<sup>2</sup>

First, from its inception, OSHA was intended to protect workers from biological infectious hazards in the workplace. Second, the OSH Act itself grants the agency the authority to require vaccination. Third, OSHA’s other regulations, such as the bloodborne pathogens standard and noise standards indicate that OSHA may take protective measures against the risk of infectious disease in the workplace, and may regulate health hazards in the workplace even if they were initially contracted outside the workplace. OSHA can rely upon these decades of legal

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<sup>1</sup> 86 Fed. Reg. 61,402 (Nov. 5, 2021).

<sup>2</sup> On January 13, 2022, the U.S. Supreme Court stayed the ETS pending disposition of the petitions for review. While the Court’s opinion concluded that “[a]pplicants are likely to succeed on the merits of their claim that [OSHA] lacked authority to impose the mandate” at issue, it also recognized the agency’s “authority to regulate occupation-specific risks related to COVID-19” in cases “[w]here the virus poses a special danger because of the particular features of an employee’s job or workplace.” *Nat’l Fed’n of Ind. Bus. v. Dep’t of Labor*, No. 21A244 (U.S. Jan. 13, 2022).

and regulatory history in finalizing the Proposed Rule or issuing further regulations to combat the spread of COVID-19 in the workplace.

## **I. The Legislative History of the OSH Act Supports OSHA’s Authority to Require Vaccination and Testing**

The ETS and Proposed Rule briefly mentions statutory support for OSHA’s authority to mandate vaccination or testing, but it does not delve into the legislative history of the provision. That legislative history provides important evidence evincing Congress’s intent that OSHA have the authority to mandate vaccination or testing for infectious diseases.

From its inception, the OSH Act included the prevention of infectious disease in the workplace as an important part of OSHA’s responsibilities. During the 1969 Committee on Labor and Public Welfare hearings around the OSH Act, Dr. Roger O. Egeberg<sup>3</sup> explained that the Act was meant to create a federal agency that would set baseline federal safety standards due to state agencies’ failure to adequately protect employee health.<sup>4</sup> He also summarized a study cataloging the insufficiency of state regulations and the need for the OSH Act.<sup>5</sup> This study underscored the fact that before the OSH Act, “only 16 states specifically refer to biological or infectious hazards . . . None of these states have, either their own or national, statutory quantitative standards for biological factors.”<sup>6</sup>

Further, principles of statutory interpretation support the agency’s authority to encourage vaccination. As the ETS notes, “the OSH Act itself explicitly acknowledges that [vaccination] might be necessary, in some circumstances.”<sup>7</sup> The statute states that “[n]othing in this or any other provision of this Act shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others.”<sup>8</sup> Using the canon against surplusage, all statutory provisions should be read to have meaning.<sup>9</sup> Unless Congress intended the OSH Act to permit “medical examination, immunization, or treatment” requirements where necessary, this provision would be meaningless.

The legislative history of this provision supports such an interpretation. Earlier drafts of the OSH Act did not contain a religious exemption.<sup>10</sup> As the bill advanced through Congress, a representative of the Christian Science Church wrote a letter to Senator Harrison Williams, who

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<sup>3</sup> Assistant Secretary for Health and Scientific Affairs at the Department of Health, Education, and Welfare, which functioned as a precursor to OSHA

<sup>4</sup> *Occupational Health and Safety Act of 1970, S. 2193 and S. 2788 Before the Senate Committee on Labor and Public Welfare*, 91st Cong. 103 (1969) (statement of Dr. Roger O. Egeberg, Assistant Secretary for Health and Scientific Affairs at the Department of Health, Education, and Welfare).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 125.

<sup>7</sup> 86 Fed. Reg. 61,402, at 61,406.

<sup>8</sup> 29 U.S.C. § 669(a)(5).

<sup>9</sup> *See, e.g., Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 (1988) (“As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.”)

<sup>10</sup> *See, e.g., H.R. 16785*, 91st Cong. (1970).

was Chairman of the Subcommittee on Labor of the Committee on Labor and Public Works.<sup>11</sup> The Church’s letter expressed concern that the broad language of the proposed statute could lead workers, including Church members, to be subject to “involuntary medical services.”<sup>12</sup> The Church requested a provision to address the issue, proposing that it read: “The religious rights of individuals who maintain their health through spiritual means alone shall be taken into consideration in any regulations calling for medical examination, testing, or treatment.”<sup>13</sup>

Congress adapted the Church’s proposed language and expanded upon it to explicitly address vaccination. While the Christian Science Church’s proposal applied to “medical examination, testing, or treatment,” the final bill replaced “testing” with “immunization.”<sup>14</sup> This demonstrates that Congress specifically recognized that immunization requirements were within the scope of the Act.

The religious exemption provision was discussed in the Senate floor debate on the bill, indicating that Congress was aware of the provision and its implications. Senator Peter Dominick, a Republican from Colorado, noted in a floor statement that the bill “has no express provision requiring medical examinations, but such examinations are obviously contemplated under the bill because an exception is provided for those who object to ‘medical examination, immunization, or treatment on religious grounds.’”<sup>15</sup> Sen. Dominick’s observation that the bill “contemplate[s]” medical examination requirements applies equally to immunization requirements.

## **II. Prior OSHA Regulations Strongly Support the ETS and Proposed Rule**

OSHA can also rely on its regulatory history to support its legal authority to require COVID risk mitigation strategies in the workplace.

In 1991, OSHA adopted a standard requiring employers to take comprehensive safety precautions to prevent the transmission of human immunodeficiency virus (HIV), hepatitis B, and hepatitis C, including a requirement that employers give employees the opportunity to receive the hepatitis B vaccine and track potential exposures.<sup>16</sup> This standard, known as the “bloodborne pathogens standard,” epitomizes the broad regulatory power of OSHA to prevent infectious viruses from spreading in the workplace. Like the ETS, the bloodborne pathogens standard was not a vaccine mandate. The agency observed that “[w]hile the Agency may have the legal authority to require vaccinations as part of the standard, it recognizes that voluntary participation by employees enhances compliance while respecting individuals’ beliefs and rights to privacy.”<sup>17</sup>

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<sup>11</sup> Letter from C. Ross Cunningham, Manager, Washington, D.C., Off., Christian Science Comm. on Publication, to Sen. Harrison Williams, Jr., May 14, 1970, in *Occupational Safety and Health Act, 1970, Hearings Before the Subcomm. on Labor, S. Comm. on Labor and Public Welfare*, 91st Cong. 1167 (1970).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1168.

<sup>14</sup> *Id.*

<sup>15</sup> 91 Cong. Rec. 37,337 (1970) (statement of Sen. Peter Dominick).

<sup>16</sup> 29 C.F.R. § 1910.1030.

<sup>17</sup> Occupational Exposure to Bloodborne Pathogens, 56 Fed. Reg. 64,004, 64,155 (Dec. 6, 1991).

The bloodborne pathogens standard, like ETS, is tailored to apply wherever there is a threat of infection. The standard applies to any workplace with potential exposure to bloodborne pathogens. As OSHA explained shortly after promulgating the standard, “[t]he bloodborne pathogens standard addresses the broad issue of occupational exposure to blood and other potentially infectious materials and is not meant solely for employees in health care settings. Since there is no population that is risk free for human immunodeficiency virus and hepatitis B virus infectivity, any employee who has occupational exposure to blood or other potentially infectious materials is included within the scope of this standard.”<sup>18</sup> For example, a grocery store clerk who renders first aid as a part of his or her duties is covered by the standard.<sup>19</sup>

Also like the ETS, the bloodborne pathogens standard exemplifies OSHA’s authority to protect a wide range of workers with different degrees of exposure. For instance, home healthcare workers are covered by the bloodborne pathogens standard, even though they risk exposure outside of a traditional workplace. The American Dental Association and an organization of at-home healthcare providers challenged several aspects of the bloodborne pathogen standard, but the Seventh Circuit held that all non-site specific standards were still applicable to the home healthcare workers due to the risk of infection.<sup>20</sup> The agency has separately issued guidance that even hired home companions who do not provide healthcare services are covered by the bloodborne pathogens standard because of the possible risk of exposure to blood in urine or feces as a part of their home care work.<sup>21</sup> The American Dental Association, along with home healthcare workers and temporary medical personnel, also unsuccessfully argued that its workers were insufficiently exposed to fall under the standard.<sup>22</sup> Judge Richard Posner upheld the agency determination of infection risk and wrote that workplace protections against infectious hazards are particularly appropriate with regard to communicable diseases. He explained that “the infectious character of HIV and HBV warrant even on narrowly economic grounds more regulation than would be necessary in the case of a noncommunicable disease.”<sup>23</sup>

Critics of the ETS and Proposed Rule suggest that because COVID may not pose a critical threat of *severe* illness or death to the majority of healthy workers, OSHA may not regulate it.<sup>24</sup> Yet OSHA can act to prevent even a risk of transmission. The bloodborne pathogens standard prevents small risks of the transmission of HIV, hepatitis B, and hepatitis C, by requiring workers exposed to blood to always behave as if the blood could transmit a pathogen. As the Seventh Circuit noted, “OSHA’s rule reflects the public-health philosophy of ‘universal precautions,’ which means precautions against the blood of every patient, not just the blood of patients known or believed likely to be carriers of HBV or HIV.”<sup>25</sup> OSHA has the

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<sup>18</sup> Occupational Safety and Health Admin., Opinion Letter on Bloodborne Pathogens Standard's Relationship to Grocery Retailers and Wholesalers, Sept. 17, 1992, <https://www.osha.gov/laws-regs/standardinterpretations/1992-09-17-0>.

<sup>19</sup> *Id.*

<sup>20</sup> *Am. Dental Ass’n v. Martin*, 984 F.2d 823 (7th Cir. 1993).

<sup>21</sup> Occupational Safety and Health Admin., Opinion Letter on Applicability of the Bloodborne Pathogens Standard for Employees Who Work as Companion-Sitters in Private Homes, Apr. 17, 1997, <https://www.osha.gov/laws-regs/standardinterpretations/1997-04-17>.

<sup>22</sup> 984 F.2d at 826, 829.

<sup>23</sup> *Id.* at 826.

<sup>24</sup> *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at \*14 (5th Cir. Nov. 12, 2021).

<sup>25</sup> 984 F.2d at 825.

authority to regulate communicable diseases in the workplace wherever there is a risk of transmission—for instance, nurses are not permitted to drink coffee at their nurse’s station, on the slim chance that a patient’s blood may contain a bloodborne pathogen, reach the place the nurses keep their coffee, and contaminate the container.<sup>26</sup> Such a chain of transmission seems far less risky than the known, high-risk, infectious hazard of unvaccinated, untested employees in the workplace, yet the Seventh Circuit upheld OSHA’s authority to require stringent precautionary measures for bloodborne pathogens all the same.

Furthermore, OSHA standards may prevent workplace hazards that also exist outside the workplace. The bloodborne pathogens standard is a prime example: HIV, hepatitis B, and hepatitis C are diseases experienced by the public as a whole, not contracted solely through certain occupations, yet workers are protected from contracting or spreading bloodborne pathogens in the course of their work.<sup>27</sup> Accordingly, OSHA’s regulatory authority factors in the impact of health hazards outside the workplace on employee health within the workplace. For example, OSHA has the authority to require employers to test their employee’s hearing and prevent it from reaching a certain damage level in the workplace, even if employees might already be near the damage threshold due to their lifestyles outside of work.<sup>28</sup> In challenging the regulation, an industry group argued that “because hearing loss may be sustained as a result of activities which take place outside the workplace... OSHA acted beyond its statutory authority by regulating non-occupational conditions or causes.”<sup>29</sup> But the Fourth Circuit rejected this argument as having “no merit,” and held that OSHA was within its statutory authority to prevent subsequent hearing damage in the workplace.<sup>30</sup> As the court recognized, medical hazards in the workplace can also be found outside the workplace and exacerbated by non-workplace conduct, yet those hazards can still be regulated by OSHA: “Breathing automobile exhaust and general air pollution, for example, is damaging to lungs, whether healthy or not. The presence of unhealthy lungs in the workplace, however, hardly justifies failure to regulate noxious workplace fumes.”<sup>31</sup>

The ETS and Proposed Rule are in keeping with these precedents. Like the bloodborne pathogens standard, the rule applies to a diverse range of different work settings that pose a risk of exposure but are tailored to correspond with the level of risk.<sup>32</sup> Indeed, due to the high transmissibility of COVID through the air and its prevalence in the general population, compared to the lower transmissibility and occurrence of bloodborne pathogens, OSHA has an even stronger basis for regulation. As the Seventh Circuit explained, OSHA’s mandate requires it to protect workers from infectious disease, placing agency power at its highest ebb.<sup>33</sup> And the

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<sup>26</sup> Occupational Safety and Health Admin., Opinion Letter on Requirements for Covered Beverages at Nurses’ Stations, May 17, 2006, <https://www.osha.gov/laws-regs/standardinterpretations/2006-05-17-1>.

<sup>27</sup> 86 Fed. Reg. 61,402, at 61,407.

<sup>28</sup> *Forging Industry Ass’n v. Sec’ of Labor*, 773 F.2d 1437 (4th Cir. 1985).

<sup>29</sup> *Id.* at 1442.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1444.

<sup>32</sup> 86 Fed. Reg. 61,402, at 61411. The standard does not apply where COVID does not pose a grave workplace danger, such as teleworking set-ups, offices without other people, and outdoor workplaces. 86 Fed. Reg. 61,402, at 61419.

<sup>33</sup> 984 F.2d at 826.

Fourth Circuit in *Forging Industries Association* dismissed the argument that a workplace hazard cannot be the kind of harm that also occurs or is exacerbated outside of the workplace.<sup>34</sup>

### **CONCLUSION**

The OSH Act represents a strong commitment to workplace safety, including from infectious disease. The text of the statute itself specifically contemplates a vaccine requirement. And OSHA has previously regulated under the statute to prevent exposure to infectious disease in the workplace. In light of these precedents, OSHA is in strong footing to promulgate regulations that protect workers against the threat of COVID-19 in the workplace—either by finalizing the Proposed Rule or by promulgating a more targeted regulation focused on workplaces with elevated risk of transmission.

Sincerely,

Meredith Hankins  
Nina Henry  
Alex Jonlin  
Max Sarinsky

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<sup>34</sup> 773 F.2d at 1442.