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Washington, D.C. 20004

September 14, 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:

On September 9, 2021, President Biden announced in a speech on COVID-19 that "the Department of Labor is developing an emergency rule to require all employers with 100 or more employees, that together employ over 80 million workers, to ensure their workforces are fully vaccinated or show a negative test at least once a week."¹ The accompanying White House plan specified that the Department's Occupational Safety and Health Administration (OSHA) would accomplish the President's stated objective by issuing under the Occupational Safety and Health (OSH) Act an "Emergency Temporary Standard (ETS)."² The National Federation of Independent Business (NFIB)³ objects strongly to the federal government's commandeering of America's small and independent businesses to serve as the government's instruments of coercion against their own employees.

The Biden Administration in essence threatens America's small and independent business owners with large fines, and even imprisonment for up to six months,⁴ unless the business gets its employees vaccinated, tested, or fired. If the Administration wants to command 80 million Americans, who do not wish to get vaccinated, to get vaccinated or tested weekly, the

¹ The White House, *Remarks by President Biden on Fighting the COVID-19 Pandemic* (September 9, 2021), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

² The White House, *Path Out of the Pandemic: President Biden's COVID-19 Action Plan* (September 2021), available at <https://www.whitehouse.gov/covidplan/>.

³ 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. The NFIB membership includes both small businesses with under 100 employees and small businesses with 100 or more employees.

⁴ Section 17 of the OSH Act (29 U.S.C. 666), with statutory adjustments of the civil monetary penalties. Notice of Final Rule, Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2021, 86 *Fed. Reg.* 2964 (January 14, 2021).

President should ask Congress to enact legislation issuing that command.⁵ Then the American people could hold the President, Senators, and Representatives accountable at the ballot box for how they voted on such legislation. That is the democratic way.

Given the President's vaccinate, test, or fire policy for millions of American workers, the Department of Labor no doubt will attempt to shoehorn that policy into the limited authority granted to OSHA by subsection 6(c) of the OSH Act to issue emergency temporary standards. Subsection 6(c) 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." OSHA would do well, in attempting to use subsection 6(c) to implement the President's policy, to recall that the OSH Act provides for judicial review of an ETS and that the Supreme Court recently reminded the Administration that the Court expects Congress "to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance." ' "⁶ The Department of Labor will have difficulty persuading the courts to stretch subsection 6(c) of the OSH Act to cover dragooning all of America's businesses with 100 or more employees into executing the government's vaccinate, test, or fire policy.

OSHA also faces other difficulties under subsection 6(c) with a proposed vaccinate-test-or-fire emergency temporary standard. First, OSHA must tailor the ETS to the limits of the constitutional power of Congress to regulate interstate, foreign, or tribal commerce, under which Congress enacted the OSH Act.⁷ Secondly, OSHA must tailor its ETS to the specific circumstances of various groups of employees. For example, in assessing whether the requisite statutory "grave danger" exists from which an ETS must protect an employee, OSHA must take account of the differing circumstances of groups of employees, ranging from

⁵ The authority of Congress to mandate vaccinations of employees may be subject to the outer limit of the combination of Congress's constitutional powers to legislate for interstate, foreign, and tribal commerce, the common defense, and the general welfare, and to enact any laws necessary and proper for carrying into execution those powers, but states have plenary authority to mandate vaccinations. See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). Preferably, small businesses would remain free to choose whether to require vaccinations of their employees or not, without government at any level ordering employers to require vaccinations or prohibiting employers from requiring vaccinations. Governments may, within the limits of their constitutional powers, seek to act directly on employed individuals, instructing them by law to vaccinate, and leaving their employers entirely out of the matter.

⁶ *Alabama Ass'n of Realtors et al. v. Dept. of Health and Human Services et al.*, No. 21A23, 2021 WL 3783142, at 3 (U.S. Supreme Ct., August 26, 2021) (on use of section 361(a) of the Public Health Service Act for a federal moratorium on residential foreclosures: "Even if the text were ambiguous, the sheer scope of the CDC's claimed authority under §361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance." ' "*Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 160 (2000)). That is exactly the kind of power that the CDC claims here.").

⁷ See section 2 of the OSH Act (29 U.S.C. 651). Among other things, OSHA will need to consider the decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 558 (2012) ("The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'") ("People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act. That is not the country the Framers of our Constitution envisioned." *Id.* at 554).

hundreds of employees of one business who work side-by-side in an office building with small, open cubicles to a hundred employees of another business each of whom teleworks from home, and must take account in all circumstances of the varying percentages of fully vaccinated people in a workplace. Thirdly, OSHA should provide for appropriate exceptions for a business from the vaccinate-test-or-fire policy with respect to any of its employees whose medical condition permits employment but neither vaccination nor testing⁸ or who has sincere religious beliefs that permit neither vaccination nor testing.⁹ Finally, OSHA lacks a basis to compel businesses to bear the cost of paying employees for non-work time, such as time spent obtaining a vaccination or weekly test.

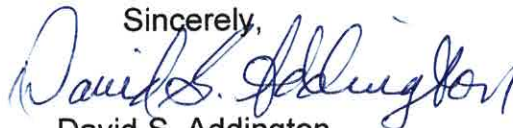
The Department of Labor should ask the President for permission to proceed through a notice-and-comment rulemaking process¹⁰ in issuing the contemplated OSHA rule, instead of the ETS process that allows no opportunity for small businesses or their employees to provide comments for OSHA to consider before it takes binding action. As the U.S. Court of Appeals for the Second Circuit has said:

Notice and comment are not mere formalities. They are basic to our system of administrative law. They serve the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decisionmaking.¹¹

Instead of the Administration's current plan to proceed without any public input and just dictate a binding ETS rule, please instead publish a proposed rule and then take and consider public comments on the proposed rule. Even a short period for commenting on a proposed rule would be better than no opportunity to comment at all. America's businesses and workers might well have something worthwhile to tell the Department of Labor that will save the Department from issuing a rule with unwise provisions.

Small businesses and their employees, like all Americans, look forward to the end of the COVID-19 pandemic and the government regulation associated with the pandemic. NFIB recognizes the duty of governments to help protect the safety and health of the people, but NFIB also recognizes the duty of governments to help preserve the liberties of the people, even in difficult situations. NFIB expects the government to do its best to help keep America both healthy and free.

Sincerely,



David S. Addington

Executive Vice President and General Counsel

⁸ See the Americans With Disabilities Act (42 U.S.C. 12111 et seq.).

⁹ See the Religious Freedom Restoration Act (42 U.S.C. 2000bb et seq.) (inapplicable to states, but applicable to the federal government, see *Kikumura v. Hurley*, 242 F. 3d 950, 959 (10th Cir. 2001)).

¹⁰ See 5 U.S.C. 553.

¹¹ *NRDC v. National Highway Traffic Safety Administration*, 894 F. 3d 95, 115 (2d Cir. 2018).