



October 25, 2021

The Honorable Martin Walsh
Secretary
United States Department of Labor
200 Constitution Ave, NW
Washington DC 20210

The Honorable Tom Vilsack
Secretary
United States Department of Agriculture
1440 Independence Ave, SW
Washington DC 20250

Re: Comments on the Proposed OSHA Emergency Temporary Standards for COVID-19 vaccination

Dear Secretaries Walsh and Vilsack:

We write today to provide comments on the Department of Labor's Occupational Safety and Health Administration's (OSHA) forthcoming Emergency Temporary Standard (ETS) with respect to requirements that employers with more than 100 employees ensure that all employees are vaccinated or be tested weekly.

Western Growers members are small, medium and large-sized businesses that produce, pack and ship fruits, vegetables and tree nuts from our home states of California, Arizona, New Mexico and Colorado. Beyond our home states, Western Growers members produce in – and directly contribute to the economies of – more than 30 states as well as around 25 foreign countries. In total, Western Growers members account for roughly half of the annual fresh produce grown in the United States, providing American consumers with healthy, nutritious food. Indeed, Western Growers has long had the slogan: “We grow the best medicine®”.

Western Growers members and their workers were deemed essential employees from the onset of the pandemic. To keep our nation's food supply strong while doing everything possible to protect the people who bravely continued working in this industry during this time, our industry was one of the earliest adopters of protective measures even as they adapted to new guidance. We rapidly built up our personal protective equipment (PPE) supplies, starting in the early days of the pandemic, despite drastic price increases and extreme supply shortages. We enhanced existing hygiene, disinfection, and sanitation procedures, as well as installed infrastructure such as plexiglass and designated employee areas to ensure social distancing in our fields and packinghouses. We ramped up worker

training to ensure awareness of COVID guidance from local, state, and federal agencies. Away from the fields and packing houses, we made concerted efforts to secure additional housing and transportation to ensure continued social distancing and quarantine options. Indeed, many of our members navigated bureaucratic red tape to help our essential workers' gain voluntary access to COVID-19 vaccines at a time when logistics challenges and constrained supply made getting those workers vaccinated extremely challenging. Eventually, the majority of the farmworkers employed by our members did get vaccinated.

We strongly believe every individual has the right to choose whether and when to be vaccinated, with the benefit of their physician's advice, their own personal health considerations, and their religious beliefs. We also believe that private employers have the right to mandate that their employees be vaccinated, and where such a mandate is issued, employees can choose to be vaccinated or seek employment elsewhere. However, we strongly believe that it is beyond OSHA's purview to mandate that every employer with more than 100 employees require workers to be vaccinated or test weekly as a condition of continued employment. There is simply no justification for it other than to force employers, under threat of harsh penalties, to act as public health agents of the federal government.

An ETS must be carefully tailored to address an actual *emergency* in the workplace. COVID-19 was arguably an occupational health emergency in the early days of the pandemic, when much about the coronavirus that causes COVID-19 was still unknown, and before the extraordinary development and deployment of several effective vaccines. Thankfully, the nation and our economy have clearly moved beyond that difficult phase.

The government did not take this action when it could be plausibly asserted that a workplace emergency existed, yet now holds that the emergency condition in the workplace has not subsided and indeed must be addressed so quickly as to justify suspending notice and public participation. If we have learned anything during COVID-19, it is that having rigid one-size-fits all rules and regulations does not work; measures to counteract the virus in Boston are not necessarily appropriate in Bakersfield.

Concerns about the Rulemaking

Should this rulemaking nonetheless proceed, Western Growers notes several areas of concern:

- 1) The rule does not appear to contemplate seasonal/temporary employees, especially critical for the fresh produce industry which maintains a highly seasonal workforce. It is critical to differentiate rule application for year-round employees versus harvest employees that might be on payroll for a period of weeks. Many of our members employ workers solely for the harvest season which, depending on the crop and region, can last a matter of days and weeks. In many cases, these workers are shifting from one employer to another, from one

crop to another, or one region to another. A clear delineation of employer responsibility is critical in these situations.

- 2) This same concern is multiplied when farmers contract with farm labor contractors (FLC) for labor. The FLC is the employer responsible for OSHA requirements, not the farmer relying on the contractor for outside temporary labor. This needs to be defined in the rule.
- 3) We are very concerned that unvaccinated farmworkers will simply move to smaller employers or other industries. This could cause major disruptions in the nation's food supply. OSHA should create protections for food production employers facing employee flight due to vaccine hesitancy, including at minimum provisions to allow for fast-turnaround temporary suspensions of the rule.
- 4) OSHA should also recognize the nature of the work and the workforce when establishing these requirements. For example, an outdoor harvest crew working in open air to harvest our nation's fruits and vegetables face a much lesser risk of transmission than office workers. The risk profile of the workplace setting should be factored into specific requirements imposed by the rule.
- 5) The timeline placed upon employers is especially critical and should be reasonable given that federal law, as we understand it, will require some religious or medical exemption. Employers will need time to understand and implement these requirements and should be provided flexibility in doing so.
- 6) If the ETS insists upon a weekly testing requirement for those employees who are unwilling to get vaccinated, then OSHA must clarify who must bear the cost of those weekly tests. Employer health plans generally no longer cover the costs associated with routine COVID testing, which range between \$50 to more than \$500 per test in many cases. Weekly COVID testing for those unwilling or unable to be vaccinated should be an employee-borne cost unless the employer voluntarily chooses to bear that cost. We understand the Administration is actively working to help create an affordable, effective, at-home COVID test. We strongly agree with and encourage those efforts and suggest that its availability should be a precondition of the rule.

In conclusion, we believe that if employers should be mandated to have policies and plans in place to prevent the spread of COVID-19, adherence to those mandated policies and plans is all that should be asked of them. The proposed ETS would inappropriately coerce employers to act as enforcement agents of the federal government and in so doing, risk

losing valued employees even as they struggle to find enough employees to meet current demands.

Thank you for this opportunity to share our concerns.

Respectfully,

A handwritten signature in black ink, appearing to read "D. Puglia", written in a cursive style.

Dave Puglia
President and CEO
Western Growers