

U.S. Department of Labor

Office of the Assistant Secretary
For Occupational Safety and Health
Washington, D.C. 20210



May 29, 2020

Richard L. Trumka
President, AFL-CIO
815 16th St. NW
Washington, D.C. 20210

Dear President Trumka:

This letter is in response to your correspondence, dated March 6, 2020, in which the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), on behalf of several labor organizations, petitioned the Occupational Safety and Health Administration (OSHA) to promulgate an emergency temporary standard (ETS) to protect working people from occupational exposure to infectious diseases, including coronavirus disease 2019 (COVID-19).

As an initial matter, I appreciate you sharing your suggestions regarding OSHA's response to the COVID-19 pandemic. Ensuring worker safety and health during this unprecedented crisis remains the agency's top priority, and we value your feedback regarding OSHA's efforts to-date. I share your concern for the health and safety of America's workers during this challenging time, and mourn the workers we have lost to COVID-19.

That said, after thorough review and consideration of your petition, as well as your post-petition correspondence,¹ OSHA has decided to deny your petition for an ETS for infectious diseases. At this juncture, OSHA has determined that it lacks compelling evidence to find that an undefined category of infectious diseases generally pose a grave danger for which an ETS would be an appropriate remedy, and even if it did, it would not be necessary for OSHA to issue an ETS to protect workers from infectious diseases.

Although not specifically requested in your petition, OSHA also has also determined that it is not necessary to issue an ETS to specifically protect workers from COVID-19, which can result from exposure to the novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). OSHA has concluded that its provision of guidance and enforcement of employers' existing legal obligations under the Occupational Safety and Health Act (OSH

¹ This includes your post-petition letters to Secretary Scalia, dated April 28, 2020 ("April 28 Letter") and May 7, 2020 ("May 7 Letter").

Act), in combination with COVID-19-related requirements and guidelines by other entities, renders an ETS unnecessary.

Moreover, given that the SARS-CoV-2 virus is a novel infectious pathogen that poses danger inside and outside of the workplace, and is the subject of a constantly-evolving multi-agency response, it would be counter-productive for OSHA to attempt to fashion a SARS-CoV-2 exposure standard at this juncture. OSHA has determined that the best approach for responding to the pandemic is to enforce the existing OSH Act requirements that address infectious disease hazards, while also issuing detailed, industry-specific guidance that can be quickly amended and adjusted as its understanding of the virus grows. This approach is more effective than promulgating a rigid set of requirements for all employers in all industries based on limited information, and best utilizes OSHA resources.

Background

Section 6(c) of the OSH Act authorizes OSHA to issue an ETS only if the Secretary of Labor determines (1) that employees are exposed to a grave danger from exposure to substances or agents determined to be toxic or physically harmful, and (2) that issuance of an ETS is necessary to protect employees from that danger. An ETS is promulgated without the benefit of notice and comment, and becomes effective immediately upon publication in the Federal Register. As such, ETSs have been referred to as the “most dramatic weapon in [OSHA’s] arsenal.” *Asbestos Info. Ass’n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 426 (5th Cir. 1984). Once an ETS is published, section 6(c) requires OSHA to commence a rulemaking proceeding under its regular rulemaking procedures and issue a permanent standard to replace the ETS within six months of the ETS’ publication.

To find that a “grave danger” exists, OSHA must have compelling evidence of a serious health impairment involving incurable, permanent, or fatal consequences. *See Fla. Peach Growers Ass’n Inc. v. U.S. Dept. of Labor*, 489 F.2d 120, 132 (11th Cir. 1974). A “grave danger” poses a degree of risk that is higher than the “significant risk” that is required to promulgate a permanent safety and health standard under Section 6(b) of the OSH Act. *Compare Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 640 (1980) (permanent standard) to *Dry Color Mfrs. Ass’n. v. Dept. of Labor*, 486 F.2d 98, 104-105 (ETS). To find that an ETS is “necessary” to address a grave danger specific to the workplace, OSHA must be able to show that the ETS would substantially reduce the grave danger during the time the ETS would be in effect, and that such a reduction could not be obtained by enforcing existing OSH Act requirements or widespread voluntary efforts to address the hazard. *See Asbestos Info.*, 727 F.2d at 422, 426; *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983) (per curiam)

Accordingly, to issue the ETS that you request in your petition, OSHA would need compelling evidence that all infectious diseases collectively pose a grave danger to workers, and that enforcement of existing OSHA requirements and/or widespread voluntary efforts would not substantially reduce that danger. As discussed below, OSHA lacks sufficient evidence to find that infectious diseases generally pose a grave danger to

worker safety, and even if they did, an ETS would not be necessary because enforcement of existing OSH Act requirements can substantially reduce hazards related to infectious diseases.

Additionally, although such an ETS was not specifically requested in your petition, OSHA has also determined that it is not necessary to issue an ETS addressing the specific danger of COVID-19. Employers are already obligated under the OSH Act to protect workers from exposure to infectious disease agents, including the SARS-CoV-2 virus. Doubtless, all across the country, many employers are making good faith efforts to comply with the OSH Act's requirements, as well as with the myriad guidance on controlling exposure to the SARS-CoV-2 virus that has been issued by OSHA, other federal agencies including the Centers for Disease Control and Prevention (CDC), and industry associations, and with the requirements and guidance from State and local officials. OSHA's enforcement of its applicable mandatory standards, combined with the regulated community's compliance with existing requirements and non-mandatory guidelines for limiting exposure to the SARS-CoV-2 virus, renders an ETS unnecessary.

Furthermore, OSHA has determined that, as a policy matter, attempting to issue an ETS to regulate workplace exposure to COVID-19 would not just be inappropriate, but potentially damaging to the pandemic response effort: Rather than attempting to construct a standard based on today's evolving understanding of the virus and workplace exposure realities, OSHA's time and resources are better spent enforcing the OSH Act and issuing industry-specific guidance to help employers protect workers from COVID-19 based on the best information that is currently available.

An ETS is Not Necessary to Generally Protect Employees from Infectious Diseases.

Though much of your petition discusses the specific danger of COVID-19, the remedy that your petition requests is "an Emergency Temporary Standard to protect working people from occupational exposure to infectious diseases, including COVID-19." Petition ("Pet."), p. 1; *see also* Pet., p. 12. Your petition argues that "[w]hile COVID-19 is the most recent global health threat, infectious disease outbreaks and other biological threats will continue to occur," and therefore OSHA should issue an ETS that "comprehensively addresses an employer's responsibility to protect workers from infectious diseases," including "future infectious agents." *Id.* at 6. You state that the scope of the ETS should be "comprehensive," and that the ETS "should apply to all workers who perform essential functions and are at an elevated risk of occupational exposure to coronavirus," as well as to "workers with close contact to potential zoonotic sources of infection." *Id.* at 9.

OSHA lacks evidence to conclude that all infectious diseases to which employees may be exposed at a workplace constitute a "grave danger" for which an ETS is an appropriate remedy. Your petition does not explain how infectious diseases as a group pose a grave and urgent threat to workers, let alone provide compelling evidence that those diseases pose a grave danger to worker health. Section 6(c) does not authorize OSHA to issue broad-sweeping health standards to address entire classes of known and unknown substances and agents; rather, it provides extremely limited authority to immediately issue

a standard if it is necessary to address *specific* substances or agents that are proven to pose a grave danger to workers. *See Fla. Peach Growers*, 489 F.2d at 120, 129-30, 132 (11th Cir. 1974) (an ETS may be issued “only in those emergency situations which require it” to remedy a specific danger with “incurable, permanent, or fatal consequences”); *Dry Color Mfrs.*, 486 F.2d at 104-05 (evidence showing that a particular agent has the potential to cause harm is insufficient to support an ETS). Your petition does not support that such action is necessary.

Moreover, the OSH Act already requires employers to address hazards related to infectious disease exposure at the workplace. As you acknowledge in your petition, *see* Pet., p. 8, several existing OSHA standards play a role in protecting workers from infectious diseases at the workplace, including OSHA’s personal protective equipment standard (§ 1910.132), respiratory protection standard (§ 1910.134), sanitation standard (§ 1910.141), and bloodborne pathogens standard (§ 1910.1030). Additional protection is provided by the OSH Act’s general duty clause, which requires employers to furnish their employees with a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” To clarify how employers can fulfill their obligation to protect their employees from infectious diseases at the workplace, OSHA has published numerous guidance materials,² including (as discussed below) extensive specific guidance on how employers can protect employees from COVID-19.

You do not dispute in your petition that OSHA standards and the general duty clause currently protect against infectious disease hazards, but instead contend that those requirements are “not enough,” and that only a comprehensive infectious disease standard can effectively control workplace exposure to infectious diseases. *See* Pet. at 8-9. However, the Act does not authorize the issuance of an ETS merely to supplement an existing regulatory scheme. Rather, OSHA must be able to show that existing protections are wholly inadequate, leaving an ETS as the only means of substantially reducing the grave danger. The mandatory OSHA standards outlined above in conjunction with industry-specific guidance can substantially reduce the general threat that infectious diseases pose to worker health. Accordingly, OSHA cannot find that an ETS is necessary, even setting aside the lack of evidence indicating that infectious diseases categorically pose a grave danger to workers.

An ETS is Not Necessary to Protect Employees from the Specific Danger Posed By COVID-19.

As discussed above, your March 6, 2020 petition requests an ETS to comprehensively address the danger posed by *all* infectious diseases, both known and unknown. However, your post-petition correspondence suggests that you may also seek an ETS to specifically address the danger posed by COVID-19. *See* April 28 Letter, pp. 5-6; May 7 Letter, p. 2. OSHA has determined that issuing an ETS to specifically protect employees from COVID-19 is not necessary. Putting aside whether COVID-19 qualifies as a “grave danger” under section 6(c), issuing an ETS is not necessary. Enforcement of existing OSH Act

² *See, e.g.*, OSHA’s Hospital Respiratory Protection Program Tool Kit (May 2015), available at: <https://www.osha.gov/Publications/OSHA3767.pdf>.

requirements, paired with OSHA's publication of extensive COVID-19 guidance, can substantially reduce the hazard of COVID-19, and provides a superior method for responding to the challenges posed by a novel infectious agent than the issuance of an ETS. Moreover, attempting to permanently address workplace exposure to SARS-CoV-2 based on the evolving information that is currently available to the agency could have counterproductive consequences, and would deprive the agency of the flexibility that it needs to respond to new information during the current pandemic.

Within the workplace, the OSH Act requires employers to take action to protect employees from hazards associated with exposure to infectious disease agents. Several OSHA standards are particularly relevant to preventing exposure to the SARS-CoV-2 virus at the workplace:³

- *Respiratory Protection Standard* (§ 1910.134): OSHA's respiratory protection standard requires the use of respirators whenever it is necessary to protect the health of an employee. The standard requires employers to assess whether respiratory protection is necessary whenever there is potential for employees to be overexposed to atmospheric contamination, and if respiratory protection is necessary, the employer must implement a comprehensive respiratory protection program. Respiratory protection is required under this standard whenever airborne biological agents pose a hazard to employees. *See* Respiratory Protection Final Rule, 63 Fed. Reg. 1152, 1180 (Jan 8, 1998).
- *Personal Protective Equipment Standard* (§ 1910.132): OSHA's general PPE standard imposes a number of obligations on employers to ensure that workers have and use necessary protective equipment to keep them safe from workplace hazards, including infectious disease agents. The standard requires employers to: conduct an assessment of the hazards employees are likely to be exposed to; select appropriate PPE based on the assessment; provide the PPE at no cost to employees; train employees; and assure that employees have understood the training. Employers must consider the use of a wide variety of PPE, including "for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers." § 1910.132(a). Application of OSHA's PPE standard, 29 C.F.R. § 1910.132(a)-(h), to COVID-19 is consistent with how the agency has historically treated the standard.⁴

³ A more comprehensive listing of pertinent OSHA standards is available at: <https://www.osha.gov/SLTC/covid-19/standards.html>.

⁴ *See, e.g.*, Letter of Interpretation (LOI) to Vivian Erickson (Jan. 19, 2010), available at: <https://www.osha.gov/laws-regs/standardinterpretations/2010-01-19> (noting 1910.132 "would apply where [PPE] is deemed necessary to protect workers from infectious diseases" not covered elsewhere); LOI to Allen Cooper (Aug. 7, 2007), <https://www.osha.gov/laws-regs/standardinterpretations/2007-08-07> (noting 1910.132 requires employers to "provide adequate measures to protect employees who may be exposed to potentially hazardous agents, including infectious materials"); OSHA

- *Sanitation Standard* (§ 1910.141): OSHA’s sanitation standard provides hygiene requirements that, directly and indirectly, address the potential for infectious disease agents to spread at the workplace. Specifically, the sanitation standard requires that employers: keep workplaces clean to the extent possible; provide potable water of sufficient quality for personal washing and drinking; provide sufficient toilet and washing facilities, to include hot and cold or tepid running water, hand soap or a similar cleansing agent, and adequate means of hand-drying; provide showers where applicable, with adequate body soap, hot and cold water, and clean towels; and provide change rooms where necessary for removal of contaminated protective clothing. § 1910.141(a)–(e).

Additionally, OSHA’s general duty clause requires employers to furnish their employees with a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” There can be no dispute that COVID-19 is a recognized hazard. Indeed, the entire American public is acutely aware of the threat, and our day-to-day lives have been uprooted as the nation works together to reduce the disease’s spread.

To assist employers’ efforts to fulfill their duty of protecting workers from exposure to the SARS-CoV-2 virus, OSHA has published numerous guidance documents, often in conjunction with the CDC. Over the past few months, OSHA has developed—both independently and in conjunction with several federal partners⁵—a broad arsenal of

Instruction CPL 02-01-050, Enforcement Guidance for Personal Protective Equipment in General Industry (“PPE Directive”) at 30 (Feb. 10, 2011), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-050.pdf (listing as examples of PPE required to be provided by employer “[i]tems used in medical/laboratory settings to protect from exposure to infectious agents (aprons, lab coats, goggles, disposable gloves, shoe covers, etc.)”); *Peter Cooper Corp.*, 10 BNA OSHC 1203, 1204 n.4, 1211 (No. 76–596, 1981) (affirming 1910.132(a) citation for failure to provide necessary protective clothing and respirators to employees exposed to infectious disease anthrax); *Am. Dental Ctrs.*, 14 BNA OSHC 1710, 1990 WL 118162, at *1–3 (Nos. 89–1369 & –1857, 1990) (ALJ) (affirming application of 1910.132(a) to employer’s failure to provide safety goggles with masks or face shields against potential exposure to saliva containing infectious diseases).

⁵ At the federal level, OSHA has worked closely with a plethora of federal agencies, specifically: the Department of Health and Human Services (including CDC; NIOSH; the Centers for Medicare and Medicaid Services; and the Food and Drug Administration); the Department of Transportation (including the Federal Transit Administration; Federal Aviation Administration; and Pipeline and Hazardous Materials Safety Administration); the Department of Agriculture (including the Food Safety and Inspection Service); the Department of Homeland Security (including the Federal Emergency Management Agency); the Environmental Protection Agency; and the Departments of Justice,

guidance documents, alerts, enforcement memoranda, news releases, posters, and videos addressing COVID-19–related health and safety issues.⁶ For example:

- On March 9, 2020, OSHA issued initial and comprehensive “Guidance on Preparing Workplaces for COVID-19,” which advised employers in every industry on the importance of taking immediate action to prepare their workplace for the impact of COVID-19, including outlining steps that all employers should take to reduce workers’ exposure to the coronavirus. OSHA Publication No. 3990-03-2020 (available at: <https://www.osha.gov/Publications/OSHA3990.pdf>)
- More recently, OSHA issued comprehensive joint interim guidance with the CDC specifically tailored to the Meat and Poultry Processing Workers and Employers, issued on April 26, 2020; and Manufacturing Workers and Employers, issued on May 12, 2020. See <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>; <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-manufacturing-workers-employers.html>
- OSHA has also issued a series of industry-specific alerts that provide targeted guidance on practices and procedures that will help protect workers’ health and safety in numerous specific industries, including retail, package delivery, manufacturing, construction, restaurants, dentistry, rideshare and taxi service, retail pharmacies, and nursing home and long term care facilities. See https://www.osha.gov/SLTC/covid-19/news_updates.html.

Not only does this abundant, industry-specific guidance regarding COVID-19 guide employers’ efforts to comply with the OSH Act, but also—as you noted in your April 28 letter, p. 6—such guidance documents can support enforcement actions taken under the general duty clause.

Of course, SARS-CoV-2 is not uniquely a workplace hazard, and a vast range of federal, state, and local authorities have, simultaneous with OSHA’s efforts, been issuing an array of guidelines and directives to protect workers from coronavirus. Each of the fifty states has issued at least some orders and guidance on COVID, many of which speak—often in mandatory ways—on the issues which your petition suggests OSHA should address.⁷

Commerce, State, and Defense. OSHA has kept in near-constant contact with OSHA state plans in states that have established them.

⁶ All of OSHA’s guidance materials pertaining to COVID-19 can be found on the agency’s COVID-19 webpage, <https://www.osha.gov/SLTC/covid-19/index.html>.

⁷ The State of Georgia, for example, has promulgated detailed requirements specific to a wide variety of businesses, including restaurants; tattoo parlors, estheticians, massage therapists, tanning salons, and hair salons; movie theaters; bowling alleys; ambulatory surgical centers; childcare facilities; and summer camps. Ga. Exec. Order, Reviving a

Cities such as New York, Los Angeles, San Francisco, and Chicago have provided detailed requirements and recommendations for employers as well. Private industry has also taken efforts to protect workers, and have leveraged their expertise to offer industry-specific guidance.⁸ OSHA, and the Department as a whole, has closely monitored state and local government orders and guidance related to coronavirus, as well as guidance developed by private industry. When combined with OSHA's diligent enforcement of existing OSH Act requirements related to infectious disease exposure at the workplace, the regulated community's widespread compliance with COVID-19-related safety guidelines and directives further evinces that an ETS is unnecessary.

Furthermore, OSHA, within its discretion, has determined that this two-pronged approach—*i.e.*, enforcing existing OSH Act requirements related to infectious disease hazards, while also continuing to publish detailed and industry-specific guidance to employers on COVID-19—is the best method for ensuring that workers are protected from COVID-19. As you note in your petition, there are many “unknowns” regarding the novel SARS-CoV-2 virus, Pet., p. 10, and given that the world's understanding of the virus is evolving on a daily basis, OSHA's ability to quickly amend and supplement its guidance to employers and workers is paramount. For example, when your petition was first received, known symptoms of COVID-19 were limited to fever, cough, or shortness of breath, and the CDC was advising that general members of the public not wear masks; now, the list of symptoms has grown to encompass chills, muscle pain, sore throat, loss of taste or smell, and more, and the CDC recommends wearing cloth face coverings in all

Healthy Georgia (May 12, 2020), available at: <https://gov.georgia.gov/document/2020-executive-order/05122002/download>. The State of Texas has issued no fewer than sixty checklists containing a mixture of required and minimum recommended measures to mitigate coronavirus transmission and covering everything from manufacturers and retailers to museums, wedding venues, and rodeos. Governor's Strike Force to Open Texas, Office of the Texas Governor, available at: <https://gov.texas.gov/organization/opentexas> (last visited May 27, 2020). Other states have enacted similar protections on an emergency basis.

⁸ For example, the International Franchise Association has established uniform guidelines for fitness centers, restaurants, and hotels, among other industries. Int'l Franchise Ass'n, Franchise Reopening Blueprint, May 2020, available at: https://community.franchise.org/sites/default/files/2020-05/franchise-reopening-blueprint_05082020_0.pdf. Additionally, Target has published its approach to retail operations during the pandemic for others to consider using or adapting, suggesting policies and mitigation measures, checklists, and sample posters in English and Spanish. Target Corp., SAFE Retail, May 1, 2020, https://corporate.target.com/_media/TargetCorp/about/pdf/Target_SAFE_Retail_Considerations-for-Retail-Operations-Post-COVID-19.pdf. Similarly, Kroger has offered a “blueprint for businesses.” Kroger Co., Sharing What We've Learned: A Blueprint for Businesses, May 13, 2020, available at: <https://www.thekrogerco.com/wp-content/uploads/2020/04/Krogers-Blueprint-for-Businesses.pdf>.

public settings. See CDC Coronavirus Disease 2019 (COVID-19) Topic Page, Symptoms of Coronavirus, available at: <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>; Use of Cloth Face Coverings to Help Slow the Spread of COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>. See also Jacey Fortin, *Surfaces Are 'Not the Main Way' Coronavirus Spreads*, *C.D.C. Says*, New York Times (May 22, 2020), available at: <https://www.nytimes.com/2020/05/22/health/cdc-coronavirus-touching-surfaces.html> (reporting that “[e]xperts at the C.D.C. and elsewhere are still learning about the new coronavirus”). Unlike an ETS—which would necessarily be based on today’s limited understanding of the SARS-CoV-2 virus, and would be onerous to modify once promulgated⁹—OSHA’s two-pronged approach allows the agency to tailor guidance to specific industries and work settings, and gives the agency the flexibility to quickly adjust its guidance as necessary. Given that we learn more about COVID-19 every day, setting rules in stone through an ETS (and later a permanent rule) may undermine worker protection by permanently mandating precautions that later prove to be inefficacious.

Moreover, as a practical matter, an ETS is a poorly-suited approach for protecting workers against SARS-CoV-2 because no standard that covers all of the Nation’s workers would protect all of those workers equally. Hastily manufacturing an exposure standard that would cover all workers (as you request) would be ineffectual, as the appropriate protections for protecting workers from infectious diseases vary widely from industry-to-industry. See OSHA, Infectious Diseases SER Background Document (“SER Background”) 29-30, [osha.gov/dsg/id/OSHA-2010-0003-0239.pdf](https://www.osha.gov/dsg/id/OSHA-2010-0003-0239.pdf) (discussing how even within healthcare industry, while “best practices” may be similar, numerous factors affect assessment of most appropriate protections in a given workplace). Further complicating such an endeavor, adequate safeguards for workers could differ substantially based on their geographic location, as the pandemic has had dramatically different impacts on different parts of the country. Unlike an ETS, OSHA’s strategy for responding to the pandemic allows the agency to offer tailored guidance that takes into account the realities of specific industry settings and locations.

In your petition, you claim that OSHA’s guidelines regarding COVID-19 (including those jointly published with the CDC) are “largely voluntary,” and that absent a comprehensive ETS, employers have “the discretion to implement, ignore, or selectively follow the guidelines issued by the agencies.” Pet., p. 6; see also April 28 Letter, p. 3 (arguing that OSHA and the CDC’s joint meat and poultry processing guidelines are insufficient because they are “only voluntary guidelines, and according to the agencies, impose no obligations on employers to comply”). Your argument overlooks the existing legal authorities, discussed above, that require employers to take action to protect employees from infectious diseases, including COVID-19. Furthermore, you recognize that such guidelines can

⁹ An ETS once issued could very well become ineffective or counterproductive, as it may be informed by incomplete or ultimately inaccurate information. Even worse, under the statute the ETS would lead to a permanent final rule within six months of its promulgation, see 29 U.S.C. § 655(c)(3), an extraordinarily rapid pace for OSHA rulemaking. Faulty requirements ensconced in the final rule would be changeable only through additional, laborious notice-and-comment rulemaking, further sapping agency resources.

support an action under the OSH Act's general duty clause. *See* April 28 Letter, p. 6; May 7 Letter, p. 2. Enforcement of existing OSH Act requirements, paired with OSHA's publication of extensive COVID-19 guidance, can substantially reduce the hazard of COVID-19, and provides a superior method for responding to the challenges posed by a novel infectious agent than the issuance of an ETS.

Your post-petition correspondence also contests whether OSHA is, in fact enforcing the existing OSH Act requirements related to infectious disease exposure. April 28 Letter, p. 5; May 7 Letter, p. 2. Let me assure you that OSHA is taking appropriate enforcement action. The pandemic continues to receive OSHA's unflinching attention. Throughout the pandemic, OSHA has used its existing arsenal of enforcement tools to compel employers to protect their workers from COVID-19. To date, OSHA has initiated thousands of investigations of complaints related to COVID-19, opened hundreds of inspections, and repeatedly emphasized the rights of workers to report, without retaliation, unsafe and unhealthful working conditions. Many investigations have closed after OSHA received adequate assurances from employers that workers were being appropriately protected. In other cases, investigations and inspections are still open and could result in citations either under the general duty clause or under one of the mandatory standards discussed above. OSHA's investigatory process is resource-intensive and time consuming, sometimes taking six months to complete. Accordingly, OSHA's issuance of only one citation thus far for COVID-19 related violations resulting from OSHA's enforcement efforts to date is not surprising. It would be no different under an ETS.

Finally, your April 28 letter criticizes various OSHA policy actions taken in response to the pandemic, including OSHA's April 3, 2020 enforcement memorandum regarding "Enforcement Guidance for Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 (COVID-19) Pandemic," April 10, 2020 memorandum on Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), and April 13, 2020 Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19).¹⁰ *See* April 28 Letter, pp. 3-5. Your April 28 letter also provides various suggestions on policy actions that OSHA should take to better respond to the pandemic, including issuing "an interim final rule that requires all employers to maintain a COVID-19 log of all worker infections and deaths from COVID-19," *Id.* at p. 3, conducting "off-site investigations to fully enforce the law, including the issuance of citations for violations, as a supplement to onsite inspections," *Id.* p. 7, and "launch[ing] a major training and education initiative to protect workers from COVID-19." *Id.* at p. 10. While we appreciate your feedback and constructive suggestions, these matters of policy are within OSHA's discretion and do not affect the agency's determination that its existing legal authorities, buttressed by the extensive and specific guidance that OSHA has published regarding COVID-19, render it unnecessary to issue an ETS for COVID-19.

¹⁰ OSHA updated this guidance on May 19, 2020 by issuing an Updated Interim Enforcement Response Plan (Updated Enforcement Plan), which became effective on May 26, 2020. *See* <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

OSHA appreciates your interest in occupational safety and health, and the passion with which you seek to protect workers from the SARS-CoV-2 virus.

Sincerely,

A handwritten signature in cursive script that reads "Loren Sweatt". The signature is written in black ink and is positioned above the printed name.

Loren Sweatt

Principal Deputy Assistant Secretary