



April 22, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Douglas L. Parker
Assistant Secretary of Labor
Occupational Safety and Health
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

RE: Occupational Exposure to COVID-19 in Healthcare Settings (OSHA-2020-0004)

Dear Mr. Parker:

On behalf of our members, Argentum appreciates this opportunity to provide comments regarding OSHA's proposed rulemaking.

Argentum is the leading national association exclusively dedicated to supporting companies operating professionally managed, resident-centered senior living communities and the older adults and families they serve. Along with its state partners, Argentum's membership represents approximately 75 percent of the professionally managed communities in the senior living industry. Nearly one million older adults live in an estimated 28,000 assisted living facilities across the United States.

On June 21, 2021, the Occupational Safety and Health Administration ("OSHA") published an interim final rule establishing an emergency temporary standard (ETS) "to protect healthcare and healthcare support service workers from occupational exposure to COVID-19 in settings where people with COVID-19 are reasonably expected to be present."¹ The ETS took effect immediately but also served as a proposed rule on which OSHA requested comment. The requirements were in effect for 6 months, after which the ETS expired.

On December 27, 2021, OSHA announced its intention to issue "a final standard that will protect healthcare workers from COVID-19 hazards" in line with its earlier Healthcare ETS. On March 23, 2022, OSHA issued a notice announcing that, as part of the process of developing a permanent standard, the agency would be "partially reopening the comment period for the ETS to allow for additional comment" on specific topics.²

In this letter, we reiterate our opposition to OSHA's consideration of ALFs as a "healthcare setting." ALFs provide only limited "healthcare services" (defined in part as services provided by "doctors and nurses"), and instead primarily assist residents with basic self-care or activities of daily living (ADLs) such as eating, dressing, bathing, and the management or administration of medication. Assisted living facilities are also a lower-risk environment than "hospital ambulatory care settings" and "non-hospital ambulatory care settings," which were exempt from this ETS in certain circumstances. As such, it is our position that our members should not be considered "healthcare settings" and thus

¹ 86 Fed. Reg. 32376 (June 21, 2021).

² Occupational Safety and Health Administration (OSHA), Labor, Notice of limited reopening of comment period; notice of informal hearing (87 Fed. Reg. 16426).

should not be subject to any further requirements imposed by OSHA’s rulemaking. We also reiterate other concerns expressed in our August 19, 2021 comments filed in response to the COVID-19 ETS.³

Below we provide additional comments in response to the specific potential modifications that would depart from the provisions of the ETS outlined by OSHA in its March 23, 2022 notice.

Extension of Comment Deadline

Argentum urges OSHA to extend the comment deadline by at least an additional 30 days. Argentum appreciates OSHA’s consideration of additional modifications to the standards laid out in the now expired ETS, and is working diligently with its members to assess the potential changes and approaches specified in the notice, as well as OSHA’s request for additional studies, information and data related to the delta and omicron variants since the close of OSHA’s initial comment period in August 2021. An additional 30 days will allow for adequate time to solicit comprehensive feedback on these issues from our members, and thus a more comprehensive record for the agency to review as it proceeds with these proposals.

A. Potential Changes From the ETS

A.1—Alignment with CDC Recommendations for Healthcare Infection Control Practices

In the notice, OSHA states that it “is considering whether it is appropriate to align its final rule with some or all of the CDC recommendations that have changed between the close of the original comment period for this rule and the close of this comment period.” Argentum opposes this proposed modification. As written, OSHA’s proposal would codify a permanent standard that aligns with *current* CDC recommendations. In practice, this will result in a static framework that does not account for future changes in CDC and other guidance and recommendations. Any future standard should remain flexible enough to account for changing circumstances and adapt with evolving COVID-19 recommendations.

A.2—Additional Flexibility for Employers

OSHA is also considering restating various provisions as broader requirements without the level of detail included in the Healthcare ETS and providing a “safe harbor” enforcement policy for employers who are in compliance with CDC guidance applicable during the period at issue.

Argentum supports OSHA’s proposed change to restate various provisions as broader requirements without the prescriptive level of detail included in the Healthcare ETS. An overly prescriptive approach disregards the significant differences among the diverse types of entities covered by the ETS, and prevents employers from developing and applying standards and best practices that are most effective and least burdensome for their particular setting.

Argentum also supports OSHA’s proposal to provide a safe harbor for entities in compliance with CDC guidance applicable during the relevant period at issue. This proposal creates a greater degree of uniformity and removes the burden associated with complying with multiple, and at times conflicting, standards. However, we urge OSHA to develop a safe harbor standard that limits the level of discretion given to compliance officers in determining whether an entity is in compliance with applicable CDC guidance, as an excessive level of discretion would contravene the proposal’s intended benefit of uniformity and certainty.

³ See <https://www.regulations.gov/comment/OSHA-2020-0004-1311>.

A.4—*Tailoring Controls to Address Interactions with People with Suspected or Confirmed COVID-19.*

OSHA is considering the need for COVID–19-specific infection control measures in areas where healthcare employees are not reasonably expected to encounter people with suspected or confirmed COVID–19. This could include eliminating certain requirements that were included in the Healthcare ETS and that applied to all areas of covered healthcare settings. Furthermore, OSHA notes that it is considering balancing the narrower scope of this proposal with a new “outbreak provision” to ensure that employers would still have a duty to address an outbreak quickly if an outbreak occurs among staff in the areas normally subject to fewer requirements.

Argentum supports OSHA’s proposal to tailor COVID-19 specific infection control measures to patient care areas where employees are reasonably expected to encounter people with suspected or confirmed COVID-19. This proposal would scale back the broad and overly burdensome scope of the ETS, and would acknowledge the “new normal” in which entities are now operating.

Furthermore, Argentum recommends that any conception of “outbreak” adopted by OSHA account for the variation in size and resources of entities potentially covered by this proposal. For example, a percentage-based approach can penalize smaller employers, where outbreak provisions could be triggered if just 1 or 2 employees test positive for COVID-19. Furthermore, an approach by which the outbreak provisions are triggered by a fixed number of positive cases for all covered entities can penalize larger employers, as any such a number could be a very small percentage of that employer’s employee population. Given the above, a viable middle ground may be a definition by which outbreak provisions are triggered where either a) 3 employees, or b) 5% of the workforce, *whichever is greater*, tests positive for COVID-19. This approach furthers the policy goal of the outbreak provisions and addresses the potential burden of a one-size-fits-all approach.

A.5—*Vaccination*

A.5.1—*Booster Doses*

OSHA is also considering how recent ACIP and CDC recommendations might impact the requirements in the ETS that take account of individuals’ vaccination status (e.g., fully vaccinated, up to date).

Argentum opposes any proposal that provides for a more restrictive definition of fully vaccinated or up-to-date and imposes additional burdens on the long-term care community that is already experiencing severe workforce shortages. Furthermore, Argentum also opposes any approach that dismisses the efficacy of prior infection. According to the CDC, individuals with previous COVID-19 infection have protection against reinfection as well as severe illness leading to hospitalization.⁴ As the pandemic has evolved, so has the science on this issue, and we urge OSHA to not narrowly focus on just one approach that provides protection from COVID-19 infection and severe illness, when it is clear that at this stage of the “new normal,” additional vaccinations is not the only means by which individuals gain protection. Argentum supports vaccination efforts, particularly among our members’ resident populations, but believes that it is time to move on from this limited and burdensome approach to conceptualizing protection from COVID-19.

⁴ I. D. Plumb et al., *Effectiveness of COVID-19 mRNA Vaccination in Preventing COVID-19–Associated Hospitalization Among Adults with Previous SARS-CoV-2 Infection — United States, June 2021–February 2022*, CDC Morbidity and Mortality Weekly Report (MMWR) (April 15, 2022), <https://www.cdc.gov/mmwr/volumes/71/wr/mm7115e2.htm>.

A.5.2—Employer Support of Employee Vaccination

OSHA is considering requiring employer support for employees who wish to stay up to date on vaccination and boosters in accordance with ACIP and CDC recommendations. Argentum opposes this proposal and believes that it is outside the scope of OSHA’s authority to require employers to provide employees with an additional paid time for the booster shot.

Argentum continues to believe that OSHA does not have the authority to require employers to provide employees “up to four hours of paid time at the employee’s regular rate of pay,” for employees who wish to take the COVID-19 booster or subsequent booster shots. Notably, OSHA does not require 4-hour paid time for Hepatitis B vaccinations in the agency’s Bloodborne Pathogens standard.⁵ Furthermore, given the strong evidence of widespread immunity to COVID-19, via either vaccination or prior infection, the status quo further weakens OSHA’s position for authority in this space. According to the CDC, the number of cases, hospitalizations, new admissions, and deaths are close to pandemic lows.⁶ There is also ample access to the vaccine through various venues, such as local pharmacies, allowing for employees to be vaccinated at times convenient to their schedule. As such, we urge OSHA to exclude this proposal from any final rulemaking.

Argentum supports COVID-19 vaccination efforts and assisted living providers have attained high rates of employee vaccination. However, at this stage of the “new normal,” strong protection from severe illness and hospitalization via either vaccination, prior immunity, or a combination of the two, renders unnecessary a revised and more restrictive definition of fully vaccinated or up-to-date, as well as federal standards that have the effect of increasing the burden on long-term care facilities that are already experiencing unprecedented financial and workforce issues that preceded, but were exacerbated by, the pandemic. Mandating paid time off for the COVID-19 vaccination worsens staffing challenges for an already compromised workforce.

A.5.3—Requirements for Vaccinated Workers

OSHA is considering suggestions that certain requirements be relaxed for vaccinated employees and workplaces with high vaccination rates. Such requirements include masking, barriers and physical distancing. Argentum reiterates its opposition to policies that, in utilizing a limited conception of protection against COVID-19, impose additional burdens on long-term care facilities already experiencing significant losses due to the pandemic. Argentum believes this approach is overly prescriptive and does not reflect current pandemic conditions. Given the strong evidence of widespread protection against significant illness and hospitalization from COVID-19, via either vaccination, prior infection, or both, Argentum opposes a proposal that would tie relaxation of certain requirements, which would alleviate the significant burden of some of this rule’s requirements, to a metric that only accounts for one method of protection from COVID-19.

A.6—Limited Coverage of Construction Activities in Healthcare Settings

OSHA is considering the same coverage for workers engaged in construction work inside a hospital (e.g., installing new ventilation or new equipment or adding a new wall) as for workers engaged in maintenance work or custodial tasks in the same facility. Argentum opposes this proposal, and any proposal, that adds to the burden already placed on long-term care facilities. Consistent with the

⁵ 29 CFR § 1910.1030.

⁶ Centers for Disease Control and Prevention, COVID Data Tracker, <https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions>.

spirit of these standards, any needed protection for individuals engaged in construction or similar activities should remain the responsibility of their own employers.

A.7—Recordkeeping and Reporting: New Cap for COVID-19 Log Retention Period

OSHA proposes to cap the record retention period for the COVID-19 log at one year from the date of the last entry in the log, rather than the current approach in which that retention period is tied to the duration of the standard. Argentum is supportive of policies tailored to minimize the burden on long-term care facilities that continue to face the economic and other repercussions associated with the COVID-19 pandemic. That said, Argentum recommends that OSHA consider including a provision by which the record retention requirements can expire upon a qualifying event, such as the end of the public health emergency or other such objective metric that reflects the beginning of the endemic stage of COVID-19.

A.8—Triggering Requirements Based on the Level of Community Transmission

OSHA is considering linking regulatory requirements to measures of local risk, such as CDC's community transmission used in CDC's guidance for healthcare settings or the CDC's COVID-19 Community Levels used in CDC's guidance for prevention measures in community settings.

Argentum is supportive of standardized measures that facilitate an approach that accurately reflects the risk posed by current conditions. However, Argentum also urges OSHA to modify its conception of risk, given the evidence of widespread protection from COVID-19, via either vaccination, prior infection, or both. Although Argentum supports measures intended to prevent infection from COVID-19, we believe that given the decoupling of case counts from outcomes such as severe illness and hospitalization, OSHA should prioritize the latter when determining the level of risk in a community.

A.9—Evolution of SARS-CoV-2 into a Second Novel Strain

OSHA is considering specifying that this final standard would apply not only to COVID-19, but also to subsequent related strains of the virus that are transmitted through aerosols and pose similar risks and health effects. Given the degree of burden and costs associated with this standard, Argentum opposes broadening its scope to also apply to different diseases. The OSHA permanent rulemaking process relies on a comprehensive record supported by the scientific and employer communities regarding the specific disease at issue. Any such standard applicable for a different disease must undergo a rulemaking process tailored to such disease, to ensure that the burdens associated with the standard reflect the circumstances of the particular disease at issue.

B. Additional Information/Data Requested

The standards set forth in the ETS were a comprehensive and complex set of requirements that necessitated a significant amount of time and resources to review and ensure compliance. It contained references to many external sources and expected employers to both analyze those sources and determine which provisions were applicable. Argentum is concerned that making these standards permanent will be overly burdensome for long term care providers and seniors and may ultimately divert time and resources away from resident care. These concerns are amplified by the workforce recruitment and retention issues plaguing the community. Overly prescriptive work rules place additional burdens on employees and restrict the pool of workers who are willing to endure these burdens. This further compromises the assisted living community's mission to care for the vulnerable senior population.

Argentum also reiterates that the measures laid out in the ETS that OSHA is considering in its permanent rulemaking are not just overly burdensome, but also unnecessary as applied to the

assisted living community. Since the beginning of the COVID-19 pandemic in the U.S., ALFs have implemented enhanced protocols in an effort to prevent COVID-19 from entering the community, and to mitigate the spread of, and otherwise limit the harm from COVID-19. Furthermore, ALFs are already subject to stringent infection control regulations issued by state and local health agencies that apply to employees. Properties have implemented staff workflow changes and visitor restrictions to reduce disease spread.⁷ Other steps have included enhanced infection control protocols; restrictions on or cessation of move-ins; conducting health screenings for visitors and staff and COVID-19 testing as available and appropriate for employees and residents; and vaccinations administration.⁸ Companies engaged in this business have already taken the steps necessary to protect the health, safety, and well-being of the residents they serve, and the health, safety, and well-being of the workers who serve them.

Argentum believes the protocols assisted living facilities have had in place for more than two years already fulfill the spirit of what the rule is trying to achieve. Adding an additional layer of regulatory complexity on a community that has experienced severe financial distress will be to the detriment of the elderly population we are committed to serving.

Thank you for your consideration of these comments. Please contact me with any questions or requests for additional information.

Sincerely,



James Balda
President & CEO
Argentum

⁷ A. C. Pearson et al., *The Impact of COVID-19 on Seniors Housing*, NORC at the University of Chicago (June 3, 2021), p. 18, https://info.nic.org/hubfs/Outreach/2021_NORC/20210601NICFinalReportand20ExecutiveSummary20FINAL.pdf. (hereinafter “the NORC Report”).

⁸ *Id.*