

September 10, 2021

VIA ELECTRONIC TRANSMISSION

The Honorable Marty Walsh
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Dear Secretary Walsh:

Congress, not the President, has the authority to make law. This is an elementary principle of American governance, but President Biden has flouted it with his unprecedented, arbitrary decision to mandate that certain employers—but not others—require workers to be vaccinated or undergo rigorous testing procedures. This is bad policy. It is an infringement of every citizen’s fundamental rights. But most of all, it is an unlawful bypassing of established regulatory procedures.

According to the White House, the Department of Labor’s Occupational Safety and Health Administration (OSHA) is “developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work.”¹ OSHA will “issue an Emergency Temporary Standard (ETS) to implement this requirement.”² It is projected to impact over 80 million workers in private sector businesses with 100+ employees.³

OSHA’s power to promulgate such policies by executive fiat is exceedingly limited. Under the Occupational Safety and Health Act,⁴ OSHA may issue an ETS without going through the normal rulemaking process only where (1) “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” and (2) “such emergency standard is necessary to protect employees from such danger.”⁵ Indeed, Congress was clear that it did not intend the ETS process to “be utilized to circumvent the regular standard-setting process.”⁶

¹ <https://www.whitehouse.gov/covidplan/>

² *Id.*

³ *Id.*

⁴ Pub. L. 91-596, 84 Stat. 1590 (April 28, 1971).

⁵ 29 U.S.C. § 655(c)(2).

⁶ U.S. Congress, Senate Labor and Public Welfare, Subcommittee on Labor, Legislative History of the Occupational Safety and Health Act of 1970 (S. 2193, P.P. 91-596), committee print (1971), p. 1218.

But that is precisely what has happened here. Rather than promulgating this substantive measure through ordinary notice-and-comment procedures—or seeking congressional authorization for such a policy—the Biden administration has decided to take an end run around public accountability in favor of heavy-handed authoritarianism. We know this because shortly after this rule was announced, President Biden’s Chief of Staff retweeted a comment that “OSHA doing this vaxx mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations.”⁷ Such a view of executive authority is positively grotesque. Ours is a government of enumerated powers—not “ultimate work-arounds.”

The federal courts have not looked favorably on such arrogations of authority in the past. Indeed, when OSHA attempted a similar shortcut decades ago, a federal circuit court struck down the ETS, holding that OSHA “by-passed normal notice-and comment rulemaking procedures” in issuing an ETS altering permissible exposure levels of asbestos. *Asbestos Info. Ass’n/N.A. v. Occupational Safety and Health Admin.*, 727 F.2d 415, 417 (5th Cir. 1984).

The Biden administration’s proposed ETS is especially problematic because it has no clear nexus to workplace safety: in the past, OSHA has exclusively used its rulemaking authority to address toxins and other specific workplace hazards—like asbestos—but it is unprecedented for OSHA to regulate large sectors of the economy in the name of public safety hazards that are not limited to the workplace. The Biden administration’s action seeks to transform the ETS process into a mechanism by which an administration can dictate any policy change it wishes in the name of “public health.”

Perhaps knowing this, President Biden consistently affirmed that he would not impose a vaccine mandate. When asked about this on December 4, 2020, he stated, “No, I don’t think it should be mandatory. I wouldn’t demand it be mandatory.”⁸ Similarly, this summer the Biden Administration’s Director of the Centers for Disease Control and Prevention (CDC) Dr. Rochelle Walensky stated “There will be no nationwide mandate.... There will be no federal mandate.”⁹

But now, in an attempt to distract from his botched Afghanistan withdrawal, President Biden has decided that the time has come to exact as much pain as possible on the perceived “holdouts” who don’t comprise his own political base. Indeed, as President Biden said himself, “We’ve been patient, but our patience is wearing thin.”¹⁰ His inability to competently lead—to persuade his fellow Americans of a specific course of action—is

⁷ <https://twitter.com/SRuhle/status/1436063357958823940?s=20>

⁸ *Joe Biden: Covid vaccination in US will not be mandatory*, BBC News (Dec. 5, 2020), <https://www.bbc.com/news/world-us-canada-55193939>.

⁹ *U.S. CDC chief says there will be no federal mandate on COVID-19 vaccine*, Reuters (July 31, 2021), https://www.reuters.com/world/us/biden-administration-weighing-federal-mandate-covid-19-vaccine-cdc-director-2021-07-30/?taid=6104c0397797f60001544761&utm_campaign=trueAnthem:+Trending+Content&utm_medium=trueAnthem&utm_source=twitter.

¹⁰ *Biden’s Speech on Vaccine Mandates and the Delta Variant: Full Transcript* (Sept. 9, 2021), <https://www.nytimes.com/2021/09/09/us/politics/biden-vaccine-mandates-transcript.html>.

no warrant for throwing aside the strictures of constitutional government in the name of dictatorial power.

I support vaccination, and I have encouraged individuals in my State to receive one, where it is consistent with their medical needs and religious faith. But vaccination should be an individual decision based on choice, not required by the federal government—or worse, required through midnight emergency regulations of the administrative state. OSHA’s Emergency Temporary Standard is patently unlawful and bad policy. The Department of Labor should immediately suspend all efforts to produce such an Emergency Temporary Standard.

Furthermore, in order for Congress to evaluate remedial legislation, please answer the following questions by September 24, 2021:

1. Under what specific legal authority does OSHA plan to issue this ETS?
2. Is there any precedent for treating a widespread disease, such as COVID-19, as a “toxic or physically harmful” agent or “new hazard” within the meaning of 29 U.S.C. § 655(c)(2)?
3. Has OSHA ever used its authority to promulgate ETS interim rules outside the contexts of healthcare and social services?
4. Did anyone at OSHA raise concerns about the lawfulness of the proposed ETS?
5. Why were certain constituencies, such as the U.S. Postal Service, explicitly excluded from the reach of the proposed ETS?
6. What considerations were made to respect individuals’ religious liberties?
7. Is OSHA currently in the process of pursuing notice-and-comment regulations to supplant the proposed ETS?

I look forward to prompt responses from the Department.

Sincerely,

A handwritten signature in black ink, appearing to read "Josh Hawley". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Josh Hawley
United States Senator