

B-333741

November 16, 2021

The Honorable Patty Murray
Chairwoman
The Honorable Richard Burr
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Robert C. "Bobby" Scott
Chairman
The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
House of Representatives

Subject: *Department of Labor, Occupational Safety and Health Administration: COVID-19 Vaccination and Testing; Emergency Temporary Standard*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor, Occupational Safety and Health Administration (OSHA) entitled "COVID-19 Vaccination and Testing; Emergency Temporary Standard (RIN: 1218-AD42). We received the rule on November 5, 2021. It was published in the *Federal Register* as an interim final rule with request for comments on November 5, 2021. 86 Fed. Reg. 61402. The effective date is November 5, 2021.

According to OSHA, the interim final rule, an emergency temporary standard (ETS), protects unvaccinated employees of large employers (100 or more employees) from the risk of contracting COVID-19 by strongly encouraging vaccination. OSHA stated that covered employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective date requirement can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. § 808(2). OSHA determined it had good cause to waive the 60-day delay because notice and public procedure with respect to this ETS are both impracticable and contrary to the public interest, given the expedited timeline on which this standard was developed and the grave danger threatening workers' lives and health.

Enclosed is our assessment of OSHA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink, appearing to read "Shirley A. Jones".

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Andrew Levinson
Acting Director
Directorate of Standards and Guidance

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
ENTITLED
“COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD”
(RIN: 1218-AD42)

(i) Cost-benefit analysis

The Department of Labor, Occupational Safety and Health Administration (OSHA) estimated the familiarization cost of the interim final rule would be \$149,369,213. OSHA further estimated other costs such as support for employee vaccination efforts to be \$1,910,862,252, reporting fatalities and hospitalizations to OSHA to be \$4,352,190, and recordkeeping costs to be \$313,198,683. OSHA estimated the total costs to be \$2,981,347,368.

OSHA stated the benefits of the interim final rule are to provide and incentivize vaccination because vaccination is the most efficient and effective workplace control against COVID-19. OSHA stated vaccination is highly effective in preventing hospitalization and death, and vaccinated individuals are more protected than unvaccinated individuals.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

OSHA certified the requirements of the RFA were impracticable under the circumstances.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

OSHA stated it analyzed the interim final rule's economic feasibility and health effects.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

OSHA waived notice and comment procedures for this interim final rule for good cause. OSHA determined it had good cause because of the critical importance of implementing the requirements in this interim final rule, including the recordkeeping and reporting provisions, as soon as possible to address the grave danger that COVID-19 presents to workers.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

OSHA determined the interim final rule contained information collection requirements (ICRs) subject to the PRA. The ICRs are entitled “COVID-19 Vaccination and Testing Emergency Temporary Standard” and are associated with Office of Management and Budget (OMB) Control Number 1218-0278. OSHA estimated the ICRs would create a burden of 79,720,444 hours at a cost of \$1,383,751,520.

Statutory authorization for the rule

OSHA promulgated the interim final rule pursuant to section 553 of title 5; sections 653, 655, and 657 of title 29; section 941 of title 33; section 3704 of title 40; section 4853 of title 42; sections 1801–1819 and 5101 *et seq.* of title 49, United States Code, as well as Public Laws 99-499 and 102-550.

Executive Order No. 12866 (Regulatory Planning and Review)

OSHA determined the interim final rule needed to be published more quickly than normal review procedures allow and stated OMB waived certain requirements of the Order for this economically significant rule.

Executive Order No. 13132 (Federalism)

OSHA determined the interim final rule complies with the Order. OSHA stated the problems addressed by this emergency temporary standard (ETS) for COVID-19 are national in scope. OSHA further stated the interim final rule establishes minimum requirements for employers in every state to protect employees from the risks of exposure to COVID-19. In states without OSHA-approved state plans, OSHA stated Congress provides for its standards to preempt state occupational safety and health standards for issues addressed by the federal standards.