

CONSTRUCTION INDUSTRY SAFETY COALITION

May 10, 2021

James “Jim” Frederick
Acting Assistant Secretary
U.S. Department of Labor
Occupational Safety & Health Administration
Room: S2315
200 Constitution Ave NW
Washington, DC 20210

Re: *Concerns with OSHA’s FAQs Regarding COVID-19 Vaccine Adverse Reactions*

Dear Acting Assistant Secretary Frederick:

On behalf of the Construction Industry Safety Coalition (“CISC”), we write this letter to request that the Occupational Safety and Health Administration (“OSHA”) review and revise OSHA’s recently issued Frequently Asked Questions (“FAQs”) on whether employers must record adverse reactions caused by COVID-19 vaccinations that are required and/or recommended by employers. The CISC does not object to OSHA’s position that an adverse reaction from a *required* COVID-19 vaccine would potentially be recordable (assuming all of the recordability criteria are met). However, we believe the analysis undertaken by OSHA related to the potential recordability of adverse reactions from *recommended* COVID-19 vaccines is confusing to employers and deviates from a straightforward application of the geographic presumption of OSHA’s recordkeeping rule. Given the public health importance of encouraging all eligible workers to get vaccinated, the CISC is concerned that the confusion created by OSHA’s FAQs may result in disincentives to vaccinations in the construction industry.

1. CISC’s Efforts to Encourage Vaccinations

From the outset of the COVID-19 pandemic, the CISC has been actively engaged in assisting members in protecting their employees from the hazards associated with COVID-19. These efforts have been well-documented and OSHA has been made aware of them on numerous occasions. Most recently, several members of the CISC organized a “COVID-19 Vaccine Awareness Week in Construction,” which took place from April 19-23, 2021. The effort was designed to support the Centers for Disease Control and Prevention (“CDC”) campaign to raise awareness of the safety, effectiveness, and benefits of workers receiving a COVID-19 vaccine. The CDC has recommended that all workers in the United States get vaccinated against COVID-19 as soon as they are eligible to end the pandemic and help Americans return to their normal lives. The Vaccine Awareness Week was designed to further this important message. It is with this background and the CDC’s stated desire to get all eligible workers vaccinated that OSHA issued the FAQs.

2. OSHA's FAQs

The CISC recognizes that individuals who get vaccinated against COVID-19 may experience adverse reactions. The CISC further recognizes that if an employer *requires* its employees to get vaccinated against COVID-19, any adverse reaction to the COVID-19 vaccine is recordable if it is a new case under 29 CFR 1904.6 and meets one or more of the general recording criteria in 29 C.F.R. 1904.7. This is a straightforward application of OSHA's recordkeeping rule and appropriate.

The CISC is concerned, however, with the third FAQ OSHA issued regarding the recordability of adverse reactions to a COVID-19 vaccine when the employer has *not* required the vaccination. The third FAQ asks:

I do not require my employees to get the COVID-19 vaccine. However, I do recommend that they receive the vaccine and may provide it to them or make arrangements for them to receive it offsite. If an employee has an adverse reaction to the vaccine, am I required to record it?

OSHA's answer to the FAQ states:

No. Although adverse reactions to *recommended* COVID-19 vaccines may be *recordable* under 29 CFR 1904.4(a) if the reaction is: (1) work-related, (2) a new case, and (3) meets one or more of the general recording criteria in 29 CFR 1904.7, OSHA is exercising its enforcement discretion to only require the recording of adverse effects to *required* vaccines at this time. Therefore, you do not need to record adverse effects from COVID-19 vaccines that you *recommend*, but do not require.

Note that for this discretion to apply, the vaccine must be truly voluntary. For example, an employee's choice to accept or reject the vaccine cannot suffer any repercussions from their choice. If employees are not free to choose whether or not to receive the vaccine without fearing adverse action, then the vaccine is not merely "recommended" and employers should consult the above FAQ regarding COVID-19 vaccines that are a condition of employment.

Note also that the exercise of this discretion is intended only to provide clarity to the public regarding OSHA's expectations as to the recording of adverse effects during the health emergency; it does not change any of the employer's other responsibilities under OSHA's recordkeeping regulations or any of OSHA's interpretations of those regulations.

Finally, note that this answer applies to the variety of scenarios where employers recommend, but do not require vaccines, including where the employer makes the COVID-19 vaccine available to employees at work, where the employer makes arrangements for employees to receive the vaccine at an offsite location (e.g., pharmacy, hospital, local health department, etc.), and where the employer offers the vaccine as part of a voluntary health and wellness program at my workplace. In

other words, the method by which employees might receive a recommended vaccine does not matter for the sake of this question.

This response, while well-intentioned, injects confusion into OSHA's recordkeeping requirements, the application of the geographic presumption for work-relatedness, and the exceptions to the geographic presumption.

As OSHA is aware, the recordkeeping regulation has adopted a geographic presumption for determining work-relatedness. The geographic presumption directs employers to consider an injury or illness to be work-related where it is determined that the injury or illness was the result of an event or exposure in the work environment, unless certain enumerated exceptions apply. One of the exceptions is the "voluntary participation in a wellness program or in a medical, fitness, or recreational activity such as blood donation, physical examination, *flu shot*, exercise class, racquetball, or baseball." 29 CFR 1904.5(b)(2) (emphasis added). This exception clearly incorporates receiving a non-mandatory vaccine. Put simply, receiving a non-mandatory vaccine is "voluntary participation" in a "medical ... activity."

In fact, the regulation itself specifically exempts from work-relatedness an injury or illness that occurs as a result of receiving the seasonal flu vaccine. In other words, if an employee voluntarily participates in a medical activity such as getting a flu shot, which is intended to vaccinate an individual against the seasonal influenza, any injury or illness resulting from such activity would not need to be recorded. Here, employers are faced with an identical scenario, but rather than clearly interpreting the regulation itself, OSHA has injected uncertainty by stating that a recommended COVID-19 vaccine *may* be recordable, but the Agency is simply choosing not to issue citations pursuant to its enforcement discretion. The third FAQ should simply state that adverse reactions to a COVID-19 vaccine that was not mandated by the employer should not be recorded on the employer's OSHA 300 Log because it is not considered a work-related injury or illness under the rule.

The notes to the third FAQ are also confusing. In particular, OSHA states that in order for the application of its enforcement discretion to apply, the vaccine must be "truly voluntary." Whether receiving a vaccine is "truly voluntary," however, is irrelevant to whether the exception actually applies in the first instance. If a vaccine is not "truly voluntary," then the exception to the geographic presumption does not apply and any adverse reactions would be work-related and potentially recordable (if the other criteria were met). Injecting such a requirement for application of OSHA's *enforcement discretion* only causes confusion for employers.

The CISC appreciates OSHA's efforts to provide guidance to employers regarding their recording obligations as they relate to COVID-19 and COVID-19 vaccines. However, for the reasons set forth above, the CISC has concerns with OSHA's response to the third FAQ recently issued by the Agency and urges OSHA to revise such response to provide an interpretation that is directly tied to the rule itself.

The CISC would be happy to meet with OSHA to discuss this letter and our views regarding any potential revisions to the FAQs.

Sincerely,



Robert Matuga, Assistant Vice President, Labor, Safety & Health
National Association of Home Builders



Karen Livingston, Senior Director of Policy, Government Affairs
Associated Builders and Contractors



Kevin Cannon, Senior Director, Safety & Health Services
Associated General Contractors of America



Ken Gear, Chief Executive Officer
Leading Builders of America



Jeff Buczkiewicz, President/Chief Executive Officer
Mason Contractors Association of America



Bradley Sant, Senior Vice President, Safety and Education
American Road & Transportation Builders Association



Howard Marks, Vice President, Environment, Health & Safety
National Asphalt Pavement Association



Thomas Shanahan, Vice President, Enterprise Risk Management
and Executive Education
National Roofing Contractors Association

cc: Amanda Edens, Deputy Assistant Secretary of Labor for Occupational Safety and Health
Lee Anne Jillings, Director of Technical Support and Emergency Management