CONSTRUCTION INDUSTRY SAFETY COALITION

August 20, 2021

James "Jim" Frederick
Principal Deputy Assistant Secretary
U.S. Department of Labor
Occupational Safety and Health Administration
Room: S2315
200 Constitution Ave., NW
Washington, DC 20210

Re: Construction Industry Safety Coalition
Docket No. OSHA-2020-0004; RIN 1218-AD36
Comments on Occupational Exposure to COVID-19;
Emergency Temporary Standard

Dear Mr. Frederick:

The Construction Industry Safety Coalition ("CISC" or the "Coalition") respectfully submits these comments in response to the Occupational Safety and Health Administration's ("OSHA" or the "Agency") "Occupational Exposure to COVID-19; Emergency Temporary Standard," 86 Fed. Reg. 32376 (June 21, 2021). We appreciate OSHA's consideration of these comments as it determines how to proceed with the Emergency Temporary Standard ("ETS").

These comments support the Agency's determination *not* to include the construction industry within the scope of the rule. The construction industry has been consistently characterized as low risk for exposure to COVID-19 by OSHA and other regulatory agencies. Furthermore, the construction industry has been at the forefront of efforts to implement proactive mitigation measures specific to COVID-19. Any attempts by OSHA to expand the ETS to cover construction is not supported by the evidence and would be impermissible under the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act").

These comments are separated into several parts. In Part 1, we explain the proactive measures taken by the CISC and the construction industry to address COVID-19 in construction. Part 2 addresses the process that OSHA has undertaken to develop the ETS and how applying the ETS to the construction industry without engaging the Advisory Committee on Construction Safety and Health ("ACCSH") and specifically raising construction-specific issues in the ETS would be inappropriate and unlawful. Part 3 describes how and why the construction industry is low risk and thus applying the ETS to the construction industry would be impermissible. Part 4 describes how it would be inappropriate to apply the requirements of the ETS, the vast majority of which would be inapplicable to the construction work environment, in the construction industry. Finally, Part 5 discusses how OSHA' s anti-retaliation paragraph permitting OSHA to pursue Citations and

Notifications of Penalty for alleged retaliation is unlawful and impermissible under the OSH Act. OSHA must delete this provision from any final rule.

1. The Construction Industry's Proactive Efforts to Mitigate the Impact of COVID-19 on Construction Workers.

The CISC is comprised of trade associations representing virtually every aspect of the construction industry. The CISC was formed in 2013 to provide data and information to OSHA on regulatory, interpretive, and policy initiatives. The CISC speaks for small, medium, and large contractors, general contractors, subcontractors, and union contractors alike. The CISC represents all sectors of the construction industry, including commercial building, heavy industrial production, home building, road repair, specialty trade contractors, construction equipment manufacturers, and material suppliers.

Workplace safety and health is a priority for all members of the Coalition, and each is committed to helping create safer construction jobsites for workers. From the outset of the pandemic, the construction industry has been deemed essential critical infrastructure by the Department of Homeland Security.[1] Construction industry employers and employees have in large measure continued to work in states and localities across the country. As a result, the industry has been at the forefront of efforts to protect construction employees.

The CISC developed a "COVID-19 Exposure Prevention Preparedness and Response Plan" (the "Response Plan")[2] in March of 2020, which has been made available in both English and Spanish and provided at no cost to the construction industry. The CISC updated the plan four times to account for changes in guidance from the Centers for Disease Control and Prevention ("CDC").

The Response Plan provides a comprehensive approach for minimizing the risk of exposure to COVID-19 in the construction work environment. It sets responsibilities for managers and workers, provides key jobsite protective measures, and discusses personal protective equipment ("PPE"), work practice controls, use of face coverings, and how to handle employees who exhibit symptoms of COVID-19 or test positive. Sample forms and notifications are also included, along with a COVID-19 "Checklist" and "Toolbox Talk."

The Response Plan is tailored to the construction environment, which OSHA has generally classified as low hazard. Early in the pandemic, the CISC felt that most of the guidance for businesses was directed at general industry and stationary worksites. The Response Plan developed by the CISC was one of the first comprehensive guidance documents directed

[1] Advisory Memorandum on Ensuring Essential Critical Infrastructure Workers' Ability to Work During the COVID-19 Response, U.S. Dept. Homeland Security (Dec. 16, 2020) (available at https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce?).
[2] http://www.buildingsafely.org/covid-19-coronavirus/.

specifically at the construction industry. Indeed, several states and localities took note and referenced the Response Plan in their COVID-19 orders and guidance documents.

In addition to the Response Plan, the CISC organized two safety stand downs related to COVID-19, one in April 2020 and the other in January 2021. The most recent stand down was designed, in part, to reinforce that construction employers and employees must stay vigilant when complying with key COVID-19 prevention efforts.

In addition, from April 19, 2021, to April 23, 2021, CISC members partnered with the CDC to conduct a Vaccine Awareness Week in Construction campaign to raise awareness of the safety, effectiveness, and benefits of COVID-19 vaccination among construction workers. The CISC encouraged participation in Vaccine Awareness Week, distributed education materials and a new industry public service announcement, and encouraged participation in the CDC and NIOSH vaccination education webinars for the construction industry.

2. The Development of the ETS Does Not Permit Expansion of a Final Rule to Construction.

The CISC has expressed to the Agency its disappointment regarding the transparency with which OSHA developed the ETS. In the CISC's view, the Agency did not meaningfully engage with the public and provide an opportunity for public input regarding the best approaches to protect workers from occupational transmission of COVID-19. While OSHA conducted listening sessions allowing stakeholders to speak for three minutes, these listening sessions were not widely advertised and were available only to stakeholders that received a direct invitation from OSHA. This limited OSHA's insights to only those groups with which it had already established lines of communication and barred other stakeholders from having an opportunity to provide input and feedback on OSHA's regulatory process. Because the stakeholders invited to engage with OSHA through its listening sessions were limited to three-minute oral presentations, these stakeholders also lacked the opportunity to provide substantive or meaningful comment.

OSHA also declined individual meetings and did not accept written public comments prior to publication of the ETS. OSHA declined the CISC's January 27, 2021, request to discuss appropriate measures to keep construction workers safe from COVID-19 in the workplace, citing a high volume of interest in the topic and desire from a variety of groups and private stakeholders to meet.

By taking this position, OSHA deprived itself of useful information from stakeholders with experience in dealing with the pandemic. Employers, workers, state agencies, and subject matter experts each have developed unique perspectives over the course of the past year and a half of responding to the pandemic. This input would have helped OSHA craft an appropriate and targeted

standard to provide the most effective protection for workers. OSHA's failure to do that was very disappointing.[3]

Irrespective of the above, OSHA is prohibited from extending the ETS to construction in any final rule for two basic reasons:

- *First*, OSHA has not conferred with ACCSH on the ETS. ACCSH was established by the Construction Safety Act to serve an advisory function for the Secretary of Labor in formulating safety standards applicable to the construction industry. OSHA's own regulations *require* that the Assistant Secretary consult with ACCSH "whenever occupational safety or health standards are proposed." 29 C.F.R. § 1912.3(a). It is required that before OSHA implement an ETS applicable to construction that the Agency consult with ACCSH and receive any recommendations that ACCSH may have regarding application of the rule in the unique construction environment.

- *Second*, the ETS provides no discussion of how – nor does it request comment on whether – OSHA should expand the standard to include the construction industry. The CISC has expressed concerns in the past with OSHA's failure to provide notice before significantly expanding the scope of a proposed rule to include all of the construction industry in a final rule. In 2015, OSHA impermissibly failed to give notice to construction industry stakeholders in its proposed rule on Occupational Exposure to Beryllium and Beryllium Compounds that it would finalize a comprehensive health standard on beryllium applicable to all of construction. At that time, OSHA did not provide or request any meaningful assessment of the risk or feasibility of such expansion in its proposal. Because of this past experience, even though OSHA provides no notice that it would consider expanding the scope of the ETS, these comments provide information on why an ETS is inappropriate for the construction industry.

3. The Construction Industry is Low-Risk for COVID-19.

Most construction operations are low risk with respect to the transmission and spread of COVID-19. Early in the pandemic, OSHA explained that the level of risk of occupational exposure to COVID-19 "depends in part on the industry type, need for contact within 6 feet of people known to be, or suspected of being, infected with SARS-CoV-2, or requirement for repeated or extended contact with persons known to be, or suspected of being, infected with SARS-CoV-2."[4] Workers,

[3] Despite the Agency's refusal to engage stakeholders meaningfully in the development of the ETS, the CISC provided unsolicited information to the Agency regarding the construction industry and the low risk nature of it, including in a comprehensive letter on March 2, 2021. *See* http://www.buildingsafely.org/wp-content/uploads/2021/03/2021.03.02-CISC-Letter-to-Frederick.pdf.

[4] Guidance on Preparing Workplaces for COVID-19, OSHA (2020) (available at https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf).

such as construction workers, that have minimal occupational contact with the general public or other coworkers are generally considered to have a low exposure risk. OSHA established a webpage further analyzing when certain types of construction work fall into the various COVID-19 risk exposure categories. According to OSHA's own assessment, most construction work poses "low exposure risk"; construction work only crosses into "high exposure risk" when it takes place at indoor work sites occupied by people such as other workers, customers, or residents *suspected* of having or *known* to have COVID-19, including when an occupant of the site reports signs and symptoms consistent with COVID-19. Therefore construction work is unlikely ever to pose a "high exposure risk" or "very high exposure risk" (a risk category which OSHA does not believe is applicable for most anticipated construction work tasks).[5]

Throughout the preamble to the ETS, OSHA describes the high risk of COVID-19 transmission posed by indoor work environments with close human contact, particularly in healthcare settings. The preamble to the ETS acknowledges that "the primary way the SARS-CoV-2 virus spreads from an infected person to others is through the respiratory droplets" and that "most commonly this occurs when people are in close contact with one another in indoor spaces (within approximately six feet for at least fifteen minutes) (CDC, May, 2021)."[6] OSHA later references a study by the European Centre for Disease Prevention and Control, which found that "indoor settings contributed to 95% of reported clusters."[7] And the preamble further acknowledges that "a number of factors—often present in healthcare settings—that can increase the risk of transmission: Indoor settings, prolonged exposure to respiratory particles, and lack of proper ventilation (CDC, May 6, 2020)."[8] While these factors may be commonly present in healthcare settings, they *certainly are not common occurrences in construction environments*.

As OSHA has acknowledged in the past, construction work frequently occurs in outdoor settings. In its preamble to the final rule on Occupational Exposure to Respirable Crystalline Silica, OSHA acknowledges the unique nature of construction work and construction worksites when describing its decision not to require regulated areas for construction under the standard.[9] OSHA states that "conditions at construction worksites present challenges to establishing regulated areas for respirable crystalline silica exposure due to the varied and changing nature of construction work."[10] OSHA echoes commenters who expressed that "factors such as environmental variability normally present in construction differ substantially from those typically found in general industry," and that "construction tasks are often relatively short in duration; ***they are commonly performed outdoors***, sometimes under adverse environmental conditions; and they are normally

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[5] COVID-19 Control and Prevention: Construction Work, OSHA (*available at* https://www.osha.gov/coronavirus/control-prevention/construction) (last visited Feb. 23, 2021).
[6] 86 Fed. Reg. at 32392.
[7] *Id*. at 32402.
[8] *Id*. at 32393.
[9] *See* Occupational Exposure to Respirable Crystalline Silica, 81 Fed. Reg. 16286 (March 25, 2016).
[10] *Id*. at 16779.

performed at non-fixed workstations or worksites."[11] In other rulemakings and guidance, OSHA continues to acknowledge the outdoor nature of construction work.[12]

Given OSHA's understanding of the outdoor nature of construction worksites, it was and is appropriate for OSHA to acknowledge the relatively low risk of COVID-19 transmission posed by construction workplaces. In the preamble to the ETS, OSHA relies on studies that lend significant support to the wide-held belief that the risk of COVID-19 transmission outdoors is lower than the risk of indoor transmission. One review of available studies referenced by OSHA found that the odds of indoor transmission was about 18.7 times higher than the likelihood of outdoor transmission.[13] Because there is a substantially lower risk of transmitting COVID-19 in outdoor environments, it is not necessary to expand the scope of the ETS to cover construction worksites.

In addition, there is no indication in the significant body of literature and research that has developed around COVID-19 transmission to show any increased risk posed by COVID-19 within the construction sector. In fact, just one study found higher rates of hospitalization due to COVID-19 for construction workers compared to other occupations.[14] This finding, however, was limited to a comparison of COVID-19 hospitalizations between essential construction workers and other occupations during shelter-in-place orders that coincided with periods of high community spread. While construction work is used in this study as an example, the results are more meaningfully interpreted to show that while other occupations were shut down during periods of high community spread of COVID-19, those workers in essential occupations were more at risk for contracting COVID-19. This study does not support a broader finding that COVID-19 poses increased risk for those in the construction industry.

4. The ETS is Not Applicable or Even Relevant to the Construction Environment.

With very few exceptions, the ETS is not at all applicable or relevant to the construction industry. Instead, the ETS is specifically tailored to the healthcare environment. Section 29 U.S.C. 1910.502(a), addressing the scope and application of the ETS, specifically acknowledges that the standard applies where an employee "provides healthcare services or healthcare support services." The section then narrows this application, carving out the provision of first aid by a non-licensed healthcare provider and dispensing of prescriptions by pharmacists in retail settings, work

[11] *Id*. (emphasis added).
[12] *See* 86 Fed. Reg. 32479 (under the ETS provision regarding proper ventilation, warning health care employers not to "draw in [outdoor] air from potential pollution sources such as…active construction zones…").
[13] Bulfone, TC, et al., *Outdoor Transmission of SARS–CoV–2 and Other Respiratory Viruses: A Systematic Review*, The Journal of Infectious Diseases (Nov. 29, 2020) (*available at* https://doi.org/10.1093/infdis/jiaa742).
[14] Pasco, Remy F., et al., *Estimated Association of Construction Work With Risks of COVID-19 Infection and Hospitalization in Texas*, JAMA Network Open (Oct. 29, 2020) (*available at* https://doi.org/10.1001/jamanetworkopen.2020.26373).

performed in certain home health settings, healthcare support services performed in a non-healthcare setting, and other certain scenarios.[15] These carveouts are appropriate and recognize that these settings do not present the increased risk of exposure to COVID-19 that exists in other health care settings. Due to its scope, most of the requirements of the ETS are directly based and applicable to health care settings where indoor unrestricted direct patient care occurs. For example:

- At 1910.502(d), the ETS requires an employer to engage in certain patient screening and management protocols. This requirement applies to "settings where direct patient care is provided." It requires an employer to limit and monitor points of entry, and to screen and triage all non-employee persons entering the healthcare setting. This type of protocol is not necessary and would not be practical on a construction worksite.

- Section 1910.502(e) requires employers to develop and implement policies and procedures to adhere to Standard and Transmission-Based Precautions as espoused by the CDC in its 2007 Guideline for Isolation Precautions: Preventing Transmission of Infectious Agents in Healthcare Settings, last updated in July 2019.[16] This CDC Guideline identifies transmission risks associated with specific types of healthcare settings. It specifically identifies hospitals (including intensive care units, burn units, and pediatrics) and non-acute healthcare settings (including long-term care, ambulatory care, home care, and other sites of healthcare delivery).[17] In establishing the appropriate isolation precautions, this CDC Guideline specifically acknowledges these precautions are needed to prevent transmission in healthcare settings. Indeed, these precautions would not make sense outside of a healthcare setting. They include administrative measures that address nurse staffing and laboratory support; the surveying of healthcare-associated infections; educating healthcare workers and patients; PPE appropriate for healthcare personnel, including isolation gowns; guidelines regarding patient placement and transport of patients; handling of patient care equipment; as well as safe injection practices and infection control practices for specific medical procedures.[18] These clearly have no applicability in construction worksites.

- Section 1910.502(g) provides protocols applicable to the performance of aerosol-generating procedures on a person with suspected or confirmed COVID-19. This does not occur in construction settings. The employer is required to limit the number of employees present to only "those essential for patient care and procedure support." This will never be a construction employee. And as part of these protocols, the ETS provides that an employer should ensure such procedures are performed in an existing

[15] *See* 29 U.S.C. 1910.502(a)(2)(i)-(vii) and 1910.502(a)(3)(i)-(ii).
[16] *Available at* https://www.cdc.gov/infectioncontrol/pdf/guidelines/isolation-guidelines-H.pdf.
[17] *See* p. 32-39.
[18] *See* p. 43-75.

airborne infection isolation room (AIIR). There is clearly no plausible way these protocols for aerosol-generating procedures could be applied to construction work.

- Section 1910.502(i) provides that employers must install solid barriers to block face-to-face pathways between individuals who are not separated by at least 6 feet of distance, in fixed work locations outside of direct patient care areas. This is not practical in construction settings, where workers must frequently move throughout the worksite. Such physical barriers would likely introduce a new hazard to construction worksites, where open movement and communication are essential to worker safety. The provision envisions a setting in which there are designated spots "where each person would normally stand or sit." This does not exist in a construction worksite, where a worker's specific work location changes day to day, or even within the day.

- Section 1910.502(j) of the ETS sets out requirements for the cleaning and disinfection of patient care areas, resident rooms, and medical devices and equipment. Notably, the preamble to the ETS emphasizes the need for disinfection protocols "in indoor community settings where there has been a suspected or confirmed COVID-19 case in the previous 24 hours (CDC, April 5, 2021d)."[19] As most construction work occurs outdoors, this does not apply. The ETS also incorporates CDC guidelines. The incorporated COVID-19 Infection Prevention and Control Recommendations and Guidelines for Environmental Infection Control in Health-Care Facilities are clearly written with healthcare settings in mind, and could not be applied to construction worksites.[20] These include recommendations for air-handling systems and ventilation and recommendations for water distribution systems. Neither of these sets of recommendations make sense in an outdoor work environment, like construction worksites. They also include cleaning and disinfecting strategies for patient care areas, including spills of blood and body substances, which is not applicable to construction work. Finally, the recommendations address procedures for handling laundry and bedding, addressing animals in health-care facilities, and the handling and disposal of regulated medical waste. Each of these is clearly inapplicable to construction work.

- Section 1910.502(k) addresses ventilation requirements for existing buildings or structures with heating, ventilation, and air conditioning (HVAC) systems. The requirements address operation, maintenance, and upkeep of HVAC systems. Notably, the preamble to the ETS cites a CDC brief addressing "how ventilation can reduce the transmission of COVID-19 in indoor spaces."[21] The preamble further recommends that employers consider additional measures to improve airflow, such as "using natural

[19] 86 Fed. Reg. at 32448.
[20] *See* Guidelines, OSHA (Apr. 27, 2021) (*available at* https://www.osha.gov/sites/default/files/CDC's_COVID- 19_Infection_Prevention_and_Control_Recommendations.pdf).
[21] 86 Fed. Reg. at 32450.

ventilation…to increase outdoor air dilution of indoor air…"[22] As addressed above, construction worksites are almost always outdoor environments and so this requirement would not be applicable. Where construction work does occur indoors, it is almost always in a building or structure owned or controlled by someone other than the employer. As such, this provision would also not apply to indoor construction settings.

The above is not an exhaustive list of the ETS provisions that are not applicable or even relevant to the construction environment—especially indoor work environments in construction—but are provided as examples of why any expansion of the ETS to the construction industry would be inappropriate and unlawful. The Agency has provided no notice – either directly or indirectly – as to how the ETS could be extended to cover construction. OSHA may not do so in any final rule.

5. OSHA's Anti-retaliation Paragraph is Unlawful under the OSH Act.

OSHA lacks statutory authority to promulgate the anti-retaliation and discrimination provision at 29 U.S.C. § 1910.502(o). Congress provided clearly and unambiguously that discrimination complaints must proceed under Section 11(c) of the OSH Act, explicitly rejecting civil penalties and administrative review for discrimination claims.

Section 11(c) of the OSH Act protects an employee from retaliation on the basis of filing a complaint, testifying with respect to a Section 11(c) proceeding, or exercising any right afforded by the Act on behalf of himself or others.[23] The scope of rights protected implicitly and explicitly under the Act is broad. Sections 11(c)(2) and 11(c)(3) outline the procedural process Congress explicitly created for employees who believe they have been discriminated against.[24] Congress provided that an employee must file a complaint with the Secretary within 30 days of the violation occurring.[25] The Secretary then must investigate the complaint and, if the Secretary determines that a violation has occurred, pursue an action in a United States district court to seek appropriate relief, including rehiring or reinstatement of the employee to his or her former position with back pay.[26] Congress specifically gave the Secretary 90 days to complete the investigation and notify the complainant of his or her determination regarding the allegations in the complaint.[27]

Through these Section 11(c) provisions, Congress provided procedures to address all alleged discrimination by employers against an employee for exercising rights under the Statute. As such, Congress was not silent regarding how to handle retaliation in the workplace, the very issue addressed by the ETS at 1910.502(o). "Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those

[22] *Id*. at 32480.
[23] 29 U.S.C. § 660(c)(1).
[24] *See* 29 U.S.C. §§ 660(c)(2) and 660(c)(3).
[25] 29 U.S.C. § 660(c)(2).
[26] *Id*.
[27] 29 U.S.C. § 660(c)(3).

commands with others it may prefer."[28] There is no need to go beyond the plain language of Section 11(c) here, because Congress spoke directly to the Agency's authority to handle claims of retaliation. Furthermore, if Congress wished to provide separate discrimination penalties for employers solely with respect to COVID-19 safety requirements, it knew how to do so and could have included plain language to that effect in any of its COVID-19 response legislation enacted over the past 17 months.

As a practical matter, OSHA's approach would render Section 11(c) irrelevant with respect to rights exercised under the ETS, as the Agency would always choose its own administrative approach over going to court. Under the ETS, an employee would not have to file a complaint pursuant to Section 11(c) to obtain reinstatement or back pay. This would circumvent the due process for judicial review that Section 11(c) affords employers. And, in essence, it would extend the 30-day period required for filing a complaint under Section 11(c) to six months, the statute of limitations for issuance of citations.[29]

This is not the first time OSHA has exceeded its statutory authority to include an anti-retaliation provision in a rulemaking.[30] As OSHA notes in its preamble to the ETS, OSHA is undergoing a facial challenge to the validity of the 2016 Recordkeeping rule's anti-retaliation provision, which is pending in the U.S. District Court for the Western District of Oklahoma. The OSH Act legislative history clearly establishes that Congress never intended for OSHA to have the authority the Agency has now given itself – first in its 2016 Recordkeeping rule and now in Section 1910.502(o) – nor did it expressly or implicitly grant such authority to promulgate such a regulation. Indeed, Congress contemplated and rejected making discriminatory actions subject to a civil penalty through the issuance of a citation.[31]

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[28] *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018).

[29] *Compare* 29 U.S.C. § 660(c)(2) with 29 U.S.C. § 658(c) ("No citation may be issued under this section after the expiration of six months following the occurrence of any violation.").

[30] *See* Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 29624, 29627 (May 12, 2016).

[31] Congress considered a bill that would have given OSHA the authority it now attempts to give itself. The bill stated: "(g) Any person who discharges or in any other manner discriminates against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, shall be assessed a *civil penalty* by the *Commission* of up to $10,000. Such a person may also be subject to a fine of not more than $10,000 or imprisonment of a period of not to exceed ten years or both." H.R. Bill No. 19200 (September 15, 1970), 91st Cong., 2nd Session (1970), reprinted in H.R. Subcomm. on Labor and Public Welfare, 91st Cong. Legis. History of the Occupational Safety and Health Act, (Comm. Print 1971) at 763 (emphasis added). Similar language is found in other proposed bills, such as H.R. 16785. *See* H.R. Bill No. 16785 (July 9, 1970), 91st Cong., 2nd Session (1970), *reprinted* in H.R. Subcomm. on Labor and Public Welfare, 91st Cong. Legis. History of the Occupational Safety and Health Act, (Comm. Print 1971) at 961.

Although OSHA states Section 6(c) of the Act gives the Agency "almost 'unlimited discretion,'" in determining which provisions are "reasonably necessary" to protect employees under an emergency standard, the extensive consideration of this matter by Congress in the past should be a material consideration in OSHA's decision to promulgate an anti-retaliation provision under the ETS.[32] OSHA claims that the anti-retaliation provision is "reasonably necessary" because employee participation is critical to the success of the ETS.[33] However, it offers no evidence to show that employee participation is more important with respect to a COVID-19 safety standard than with respect to any other safety standard. In 1910.502(o), OSHA gives itself the very authority Congress rejected. At bottom, OSHA seeks to side-step what it believes to be a weak and cumbersome requirement for employees under Section 11(c). The Agency prefers an enforcement mechanism so that it can bypass the necessary element of an employee complaint and the statutory timeframes specifically established by Congress. OSHA would prefer to decide when employers are engaging in adverse action rather than waiting for an employee to allege such action in a complaint. Even under its emergency standard authority, OSHA cannot simply rewrite the Act more to its liking. Accordingly, OSHA must remove this provision from any final rule.

6. Conclusion.

The CISC appreciates OSHA's consideration of these comments. The CISC supports the Agency's determination not to issue an ETS applicable to the construction industry. Construction is generally low-risk for COVID-19 exposure and the industry has been proactive at protecting its employees throughout the pandemic.

Sincerely,

The Construction Industry Safety Coalition

American Road and Transportation Builders Association
American Society of Concrete Contractors
American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors
Association of Equipment Manufacturers
Association of the Wall and Ceiling Industry
Concrete Sawing & Drilling Association
Construction & Demolition Recycling Association
Distribution Contractors Association
Independent Electrical Contractors Association
Interlocking Concrete Pavement Institute
International Council of Employers of Bricklayers and Allied Craftworkers
Leading Builders of America

[32] 86 Fed. Reg. at 32603.
[33] *Id*. at 32604.

Mason Contractors Association of America
Mechanical Contractors Association of America
National Asphalt Pavement Association
National Association of Home Builders
National Association of the Remodeling Industry
National Demolition Association
National Electrical Contractors Association
National Framers Council
National Roofing Contractors Association
National Utility Contractors Association
Natural Stone Council
Natural Stone Institute
Specialized Carriers & Rigging Association
Tile Roofing Industry Alliance