

# American Staffing Association

277 South Washington Street, Suite 200 ■ Alexandria, VA 22314-3675



VIA ELECTRONIC MAIL TO: [levinson.andrew@dol.gov](mailto:levinson.andrew@dol.gov)

October 18, 2021

Andrew Levinson  
Deputy Director, Directorate of Standards and Guidance  
Department of Labor, Occupational Safety and Health Administration  
200 Constitution Avenue NW, FP Building, Room N-3718  
Washington, DC 20210

703.253.2020

703.253.2053 fax

[asa@americanstaffing.net](mailto:asa@americanstaffing.net)

[americanstaffing.net](http://americanstaffing.net)

Re: Application of Vaccine Mandate to Temporary and Contract Staffing Agencies under Occupational Safety and Health Administration Proposed Emergency Temporary Standard (ETS)

Dear Deputy Director Levinson:

On behalf of U.S. temporary and contract staffing agencies, the American Staffing Association requests clarification of the 100-employee test for applying the vaccine mandate under the proposed OSHA ETS currently under review by the Office of Information and Regulatory Affairs.

Staffing agencies recruit, hire, and assign employees to clients on an as-needed basis in a widely diverse range of businesses—often on short notice and for jobs that generally last only a few days or weeks. The vaccine mandate—which includes a testing option—for employers with 100 or more employees is part of the president’s Sept. 9 Covid-19 action plan. Although the plan does not explicitly say so, the exclusion for employers with fewer than 100 employees plainly is intended to mitigate the administrative burden and compliance costs of the mandate on small businesses.

Small businesses commonly enjoy exclusions from certain laws as well as special status under programs that provide economic relief like the Paycheck Protection Program. Most staffing agencies are small businesses as measured by financial metrics such as revenue and assets but may not satisfy traditional headcount tests due to the disproportionately large number of short-term temporary employees on their payroll at any given time relative to the employees who operate the business on a day-to-day basis.

Below we propose alternative size tests that would appropriately consider the unique operating characteristics of staffing agencies in determining their small business status under the ETS. Inclusion of such alternative tests would ensure that staffing agencies are treated on par with their small business counterparts in other sectors of the service economy.

## *Headcount Is Not a Fair Test for Determining Staffing Agency Size*

Unless adjusted for the unique nature of the staffing business, headcount is an unfair standard by which to measure a staffing agency’s size. For example, an agency consisting of an owner and a half dozen full-time staff employees typically could have on its payroll well over one hundred temporary employees assigned to clients in a week. If the latter are added to the agency’s

headcount as “full-time equivalent” employees, virtually all staffing agencies will exceed the 100-employee threshold notwithstanding their status as small businesses under any reasonable financial or economic measure.

To avoid such unfairness, we propose that the ETS adopt the headcount approach used for determining employer eligibility for the Employee Retention Tax Credit under the Taxpayer Certainty and Disaster Tax Relief Act of 2020. Headcount for ERTC purposes is determined by reference to Sec. 4980H(c)(4) of the Affordable Care Act—i.e., 130 hours per month, without regard to full-time equivalent employees. IRS Notice 2021-20, p. 56 and Notice 2021-23, p. 9 FN 3. Under that approach, application of the ETS 100-employee test to a staffing agency would be determined based on the agency’s average monthly headcount of employees working at least 130 hours in the month during the 12-month period immediately preceding the effective date of the ETS.

*The ETS Should Include Alternative Size Tests Based on Financial Metrics*

In addition to an adjusted headcount test as described above, the ETS should include alternative size tests for determining small business status based on financial measures like revenue and assets. For this purpose, we propose that the ETS adopt the tests used in the federal Paycheck Protection Program.

Under the PPP, a small business concern was an eligible borrower, notwithstanding its headcount, if it satisfied the definition of a “small business concern” under section 3 of the Small Business Act, 15 U.S.C. 632. Many service businesses qualify as small concerns under SBA revenue-based size standards. For [temporary staffing \(NAICS Code 561320\)](#), the current revenue-based standard is \$30 million or less in annual revenue.

The ETS also should include, as did the PPP, a size test similar to the [SBA’s “alternative size standard”](#) under which a borrower was considered a small concern if its maximum tangible net worth at the time of application was not more than \$15 million; and its average net income after federal income taxes (excluding any carry-over losses) for the prior two full fiscal years was not more than \$5 million.

*Conclusion*

Inclusion in the OSHA ETS of alternative size tests as described above would ensure that small temporary and contract staffing agencies are treated on par with their small business counterparts in other sectors of the service economy.

Respectfully submitted,



Stephen C. Dwyer  
Senior Vice President, Chief Legal and Operating Officer