



USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically
To Regulations.gov*

January 19, 2022

Douglas L. Parker
Administrator and Assistant Secretary of Labor for Occupational Safety and Health
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Re: Docket No. OSHA-2021-0007

Dear Assistant Secretary Parker,

On behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comment to the Occupational Safety and Health Administration (OSHA) regarding its *COVID-19 Vaccination and Testing: Emergency Temporary Standard* (ETS). Although enforcement of the ETS has been stayed by the Supreme Court, the ETS would require most employers with 100 or more employees to ensure their workers are fully vaccinated or tested for COVID-19 on a weekly basis. As we continue to contend with COVID-19, the mandate imposed by the ETS may be appropriate for non-Tribal entities. However, as an agency of the federal government, OSHA has an obligation to honor and uphold Tribal sovereignty and self-determination—an obligation which supersedes other interests. As such, any decisions to mandate vaccinations at Tribal Nation enterprises must rest solely with Tribal governments. Furthermore, OSHA has failed to properly consult with Tribal Nations on the ETS, including a failure to provide a comment period that aligns appropriately with Tribal consultation.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe—Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Enforcing the ETS in Indian Country Would Violate Tribal Sovereignty and Self-Determination

While we recognize that OSHA has yet to determine the ETS' application to Tribal Nation enterprises via Tribal consultation, we stress that enforcing it on Tribal homelands and within our enterprises would violate the central tenets of Tribal sovereignty, self-government, and self-determination. Above all, Tribal Nations have the sovereign right to make the best decisions for our citizens and communities. Imposing the ETS in Indian Country would run counter to all that this Administration espouses regarding its diplomatic relationship with Tribal Nations. In addition, it appears that there is some question regarding the applicability of OSHA's authority and enforcement mechanisms to Tribal Nations. Consistent with its determination that ETS does not apply to "traditionally governmental Tribal activities," OSHA should state unequivocally that the ETS also does not apply to Tribal enterprises. Although many Tribal Nations have and may impose similar mandates for employees, we must have the exclusive authority to determine such action.

No Distinction Between "Commercial" and Governmental Activities

We note and appreciate that OSHA has already determined the ETS does not apply to, "traditionally governmental Tribal activities." However, in its FAQs and initial conversations with Tribal Nations, it is clear that OSHA may take a different approach to activities that it deems to be "commercial" in nature. With this in mind, it is important that OSHA understands that "commercial" entities operated by Tribal Nations are inherently governmental because we rely on them to fund essential government services to our citizens. We have the inherent right to conduct these activities for the purpose of raising revenues for the benefit of our nations and citizens, in order to achieve the dual goals of self-determination and self-governance, as well as account for federal failures to fully fund trust and treaty obligations. The revenue generated by Tribally-owned entities is typically our sole source of non-federal funding, as many Tribal Nations do not tax economic activity occurring within our borders due to state and local dual taxation. For these reasons, it is inappropriate to make these types of distinctions between our entities and we strongly urge OSHA to confirm that the ETS does not apply to any entity operated by a Tribal Nation.

Lack of Tribal Consultation and Need for Tribal Comment Period

OSHA has not conducted meaningful consultation on the ETS and yet, on a briefing earlier today (that was initially reserved for Tribal consultation), it refused to extend the public comment deadline for Tribal Nations. While OSHA may not be accustomed to conducting Tribal consultation, USET SPF emphasizes the importance of a written comment period following a Tribal consultation session. Not only is this typical of other federal agencies (and referenced in the Department of Labor's Tribal Consultation Policy), but it allows Tribal Nations to respond directly to issues raised during a Tribal consultation session. Furthermore, during the briefing OSHA indicated that its leadership has yet to determine whether to press forward with litigation around the ETS, given the Supreme Court's recent opinion. Thus, any public comments submitted by today's deadline could ultimately be a waste of Tribal time and resources, should OSHA rescind the ETS. In the event that leadership does opt to continue forward, USET SPF calls upon OSHA to ensure its Tribal consultation includes a written comment period that ends at least two weeks after any Tribal consultation session.

Conclusion

USET SPF calls upon OSHA to confirm that the ETS does not apply to any Tribal enterprises (in addition to "traditionally governmental Tribal activities"), in recognition of Tribal sovereignty and its diplomatic relationship with Tribal Nations. Instead, OSHA should focus on supporting Tribal Nations in taking whatever steps we deem appropriate to fight COVID-19, including the sovereign choice to impose a vaccine mandate upon our employees. We further urge OSHA to work to improve its consultative

relationship with Tribal Nations, as well as prioritize the enactment of policies that uphold our status as sovereign governments, our right to self-determination and self-governance, and honor the federal trust obligation in full. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Francis', with a long horizontal flourish extending to the right.

Kirk Francis
President

A handwritten signature in black ink, appearing to read 'Kitcki A. Carroll', with a large, stylized flourish at the end.

Kitcki A. Carroll
Executive Director