24-3252

United States Court of Appeals for the Second Circuit

REMO DELLO IOIO, SUZANNE DEEGAN, MARITZA ROMERO, JULIA HARDING, CHRISTINE O'REILLY, SARA COOMBS-MORENO, JESUS COOMBS, ANGELA VELEZ, SANCHA BROWNE, ZENA WOUADJOU, CHARISSE RIDULFO, TRACY ANN FRANCIS MARTIN, KAREEM CAMPBELL, MICHELLE HEMMINGS HARRINGTON, CARLA GRANT, OPHELA INNISS, CASSANDRA CHANDLER, AURA MOODY, EVELYN ZAPATA, SEAN MILAN, SONIA HERNANDEZ, BRUCE REID, JOSEPH RULLO, CURTIS BOYCE, RASHEEN ODOM, JESSICA CSEPKU, JOSEPH SAVIANO, EDWARD WEBER, ROSEANNE MUSTACCHIA, NATALYA HOGAN, FRANKIE TROTMAN, MARIA FIGARO, PAULA SMITH, LYNDSAY WANSER, SARAH WIESEL, CHRISTIAN MURILLO, DIANNE BAKER-PACIUS, DAWNS CHOL, SUZANNE SCHROETER, ALTHEA BRISSETT, TRACEY HOWARD, MARC ROSIELLO, AUDREY DENNIS, MARIE JOSEPH, PATRICIA CATOIRE, SALLY MUSSAFI, COLETTE CAESAR, BERTRAM SCOTT, DIANE PAGEN, STELLA M PRESTON, RACHELLE GARCIA, JULIE LAWLEY, SUSANNE PHILLIP, MARIA ESTRADA, JENNETTE FRAZER,

Plaintiffs-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' CORRECTED BRIEF AND SPECIAL APPENDIX

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Plaintiffs,

v.

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, ASHWIN VASAN, COMMISSIONER OF THE DEPARTMENT OF HEALTH AND MENTAL, NEW YORK CITY DEPARTMENT OF EDUCATION, DOES 1-20, ERIC L. ADAMS,

Defendants-Appellees.

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I. INTRODUCTION

This is a case of first impression substantively and procedurally requiring de novo review of the district court's dismissal of Plaintiff-appellants' Fourth Amended Complaint that procedurally presented federal preemption and purely undisputed issues of Constitutional and federal law for which this Court has a right and a duty to resolve - without remand – to preserve the integrity of the judicial system due to the district court's judicial bias evidenced in the final order that give rise to this appeal.

Substantively this case involves one of the most egregious violations of personal fundamental liberties in the history of America since the enforcement of the hateful Jim Crow laws. Never in the history of America has the entire American work force been mandated by public and private employers to take a vaccine medical treatment to stop the transmission in the workplace of a communicable airborne hazardous virus declared a global pandemic or face termination for refusal. (See Appendix "A"-544 & A-1149) In 2009, the World Health Organization declared the airborne H1N1 hazardous virus a "global pandemic" that caused deaths around the world and still causes deaths today, and yet there was no national vaccine medical treatment mandate placed on American employees for which the refusal would cost employees their jobs. (A-509) Yet, in 2021, after the World Health Organization declared the Covid-19 virus a "global pandemic" and after the Moderna and Johnson

and Johnson Covid-19 vaccines were granted Emergency Use Authorization by the Secretary of the U.S. Department of Health and Human Services (A-1444), the City of New York (Appellees') through its Department of Health and Mental Hygiene issued Orders stating its several objective and mandates as follows:

> "pursuant to Section 556 of the Charter and Section 3.01(c) of the Health Code, the Department is authorized to supervise the control of communicable diseases and conditions hazardous to life and health and take such actions as may be necessary to assure the maintenance of the protection of public health;"
>
> WHEREAS, Section 17-104 of the Administrative Code of the City of New York directs the Department to adopt prompt and **effective measures to prevent the communication of infectious diseases such as COVID-**19, and in accordance with Section 17-109(b), the Department **may adopt vaccination measures to effectively prevent the spread of communicable diseases**;
>
> NOW THEREFORE I, Dave A. Chokshi, MD, MSc, Commissioner of Health and Mental Hygiene, finding that a public health emergency within New York City continues, and that **it is necessary for the health and safety of the City an**d its residents, do hereby **exercise the power of the Board of Health to prevent, mitigate, control and abate the** current emergency, and hereby order that:
>
> No later than 5pm on October 29, 2021, all City employees, except those employees described in Paragraph 5, **must provide proof to the agency or office where they work that: a. they have been fully vaccinated against COVID-19**; or
>
> Any City employee **who has not provided the proof described in Paragraph 2 must be excluded from the premises at which they work**…..
>
> (See several Orders at A-359-A396- above language at A-376 (collectively hereinafter the "NYC Vaccine Mandate")

It was over 100 years ago that one of few states – Massachusetts - mandated adult vaccination under its police power as a criminal law measure to address the public health crisis, as recorded in the U.S. Supreme Court decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)

While the U.S. Supreme Court in *Jacobson* upheld the Massachusetts criminal law that made it a crime to refuse the smallpox vaccine at a time in American history when there was no state or federal health department to deal with statewide public health issues, since that time refusal to take a vaccine medical treatment for public health reasons has never been a national federal crime nor state law crime. (A-791, 795, 841) Why? Because *Jacobson* was overruled by subsequent preemptive federal laws, specifically the OSH Act, and most state laws ban adult vaccine mandates, including in New York State.[1]

The NYC Vaccine Mandate, unlike the 1905 *Jacobson* mandate however, did not criminalize employee refusal to take the Covid-19 vaccine medical treatment under any governmental police power.[2] (A-359-396) Any city employee's refusal to

[1] Tex Health & Safety Code §81.082 ("The commissioner may not require vaccination of an adult … unless otherwise provided by law." (see also § 161.001) Florida Stat. §381.00315 ("The Department may not adopt any rule … requiring any adult … to receive an immunization." Indiana Ind. Code §16-19-3-4 (""The State Health Commissioner has no power to require vaccination of any person … except as provided by law.") Ohio Rev. Code §3701.13 ("Nothing in this chapter authorizes the director to prescribe medical treatment for any person.")

[2] Jacobson, (held that states under the 11th Amendment have power to criminalize any activity not regulated by the federal government so long as the criminal law was "reasonable") At that time, states had no other powers to address public health issues.

take a Covid-19 vaccine resulted in an automatic "lock-out"/removal from their workplace, effectively discharging any employee objectors from their jobs. (A-376) Appellants refused to comply with the mandate on religious grounds and were discharged from their jobs as explained in their affidavits attached to the complaint and incorporated by reference. (See all A-178-A-353)

Unlike many other cases filed against the NYC Vaccine Mandate, Appellants filed their complaint under the Federal Declaratory Judgement Act 28 U.S.C. §2201 to obtain a judicial declaration that the Occupational Safety and Health Act of 1970 (OSH Act) preempted the NYC Vaccine Mandate along with a declaration that the OSH Act also provided Appellants the right to object to the NYC Vaccine Mandate and obtain compensatory damages related to employee discharge. The complaint[3] explicitly alleged federal preemption as a jurisdictional threshold question that required a judicial ruling before the merits of any other claims for which Appellants provided relevant federal and state statutory materials and cited binding Supreme Court authority supporting federal preemption. (See generally 4th Amend. Complaint A-1316)

The complaint also makes claims for monetary and punitive damages under the OSH Act at 29 U.S.C. Sec. 11(c)(2), and under the "and laws" provision of 42

[3] The Complaint was amended three times the Fourth Amended Complaint was dismissed. (Appen. 1316)

U.S.C. §1983 Civil Rights Act with constitutional claims for deprivation of Appellants' historically recognized fundamental right to refuse unwanted medical treatment under the First Amendment Free Exercise and 14th Amendment substantive Due Process clauses for damages also available under §1983. The complaint also included alternative claims under Title VII 42 U.S.C. §2000 et. seq., the New York City Human Rights Act and common law fraud. (A-1316) Attached and incorporated by reference to the complaint was approximately 15 sworn affidavits of Appellants with evidence of their sincerely held religious beliefs for objecting to the NYC Vaccine Mandate along sworn expert affidavits and many pages of supporting statutory evidence in support of the preemption claim. The case was assigned to the Honorable Eric Komitee.

Unbeknownst to Appellants, prior to the start of Covid-19 Pandemic, however, and shortly before his appointment to the federal bench, Judge Komitee served from 2008 to 2019 as General Counsel for Viking Global Investors, LP (Viking) a $30 Billion dollar hedge fund that in February 2018 invested $500 Million in the commercialization of the Moderna mRNA vaccine that Judge Komitee directly managed and was involved in obtaining Emergency Use Authorization from the Food and Drug Administration for the Moderna Covid-19 vaccine. (A-1679-1730) Judge Komittee also currently owns stock in Moderna through his Viking investments. Id.

Shortly after Appellants filed their complaint, they filed a motion for temporary and preliminary injunction under the Declaratory Relief Act to stay the enforcement of the NYC Vaccine Mandate based primarily on preemption that Judge Komitee denied. (A-58-88) Appellees quickly moved to dismiss under Rule 12(b)(6), never disputing the factual predicates for preemption with any evidence, nor disputing whether Appellants had sincerely held religious beliefs for their refusal of the Covid-19 vaccine.

Appellants filed a flurry of motions including a Motion For Summary Judgment (A-709-777), Motion to Vacate the order denying the injunction (A-1141-1157) and a Motino for Sanctions (A-933-965) all stressing that the OSH Act preempted the NYC Vaccine Mandate and that Appellee's claim that no private right of action was legal false and unsupported by any case law.

Without ruling on preemption or any of the pending above listed motions, Judge Komitee dismissed the entire case having made the finding of fact that Appellants did not have sincerely held religious beliefs nor recognized Constitutional fundamental rights or federal rights under the OSH Act for which relief could be granted. (SPA-2, P. 2,3, 12) Judge Komitee refused to consider any of the attached and incorporated by reference affidavits of the Appellants regarding their religious beliefs. Neither did Judge Komitee evaluate the expert affidavits that

were specifically pointed to in the complaint that established OSH Act preemption. (A-1324, ¶94 & A-1346, ¶116)

Judge Komitee did, however, recognize as a sincere religious practice one of the Appellants belief in Biblical Plant-based Lifestyle Medicine that required her to choose whole plant food as her natural medicine of choice rather than take any man made vaccine medicine for the treatment of any disease, including the Covid-19 infection. (SPA-2, P.4)

At no time during the course of the litigation did Judge Komitee disclose to Appellants his prior direct involvement in the approvals and investment management of the Moderna Covid-19 Vaccine, which was one of the vaccines Appellants refused to take. Neither did Judge Komitee disclose to the Senate Judiciary Committee responsible for judicial confirmations in his Public Questionnaire in Section 18 under "significant legal activity" that he provided direct legal oversight of the $500 Million Moderna investment, which he was required by law to disclose. Even now, Judge Komittee owns stock in Moderna through Vicking that is not disclosed in his judicial financial disclosures. (A-1679-1728 – Motion to Recuse)

It wasn't until after Judge Komitee dismissed Appellants case that Appellants learned of his "Extrajudicial Disqualifying conduct," his failure to comply with federal public disclosure requirements before taking the bench and his financial ownership in the subject matter of Appellants case. Id. The same day Appellants

filed their Notice of Appeal, Appellants filed a Motion for Recusal under 28 U.S.C. §455(a) and (b)(1) and (4) for Judge Komitee's egregious failure to recuse when he knew his existing financial interest plus extrajudicial work in the commercialization of the Moderna Covid-19 vaccine that Appellants objected to taking created an actual bias that impugned the integrity of the judicial system. (A-1700-1728) Appellants also filed a formal Judicial Complaint with the Chief Justice of this Second Circuit that is still pending.

These facts necessitate reversal of the dismissal and entry of judgment in Appellants favor on all of their claims to avoid any further injustice to Appellants and to restore the integrity of the judicial system now in serious question by these unprecedented acts.

II. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291. This district court entered final judgment on September 25, 2024 (Special Appendix hereinafter "SPA" -2). Appellant timely filed notice of appeal on October 25, 2024. (A-1803)

III. ISSUES PRESENTED

1. Whether the district court's refusal to recuse under FRCP § 455(a) (appearance of partiality), (b)(1) (bias), and (b)(4) (financial interest) tainted its dismissal and requires reversal to decide preemption and the merits to preserve judicial integrity.
2. Whether the court erred in dismissing Appellants' Declaratory Relief Act claim of federal preemption—an issue of law this Court should resolve de novo, where no facts are disputed and all supporting documents are in the record.
3. Whether § 20(a)(5) of the OSH Act—which protects the First Amendment right to refuse unwanted medical treatment—creates an express or implied private right of action under § 11(c)(2).
4. Whether Appellants' OSH Act rights (§ 20(a)(5) & § 11(c)(1)) are independently enforceable via 42 U.S.C. § 1983.
5. Whether the court erred when it applied "rational basis" review to Appellants' Free Exercise and substantive Due Process claims, instead of the OSH Act's "necessary" standard under § 1983.
6. Whether the court should have sanctioned Appellees for misrepresenting that holdings in *Armstrong v. Exceptional Child Ctr., Quirk v. DiFiore*, and

Donovan v. OSHRC conclusively foreclosed a private cause of action under §§ 11(c)(2) & 20(a)(5), when those cases differ materially in fact and law.

7. Whether the court abused its discretion by denying early class certification of Appellants' preemption defense, private-action claims (§ 20(a)(5), § 11(c))—and related § 1983 claims—to avoid inconsistent rulings on identical legal and factual issues.

If federal relief is granted, Appellants' alternative Title VII, NYCHRA, and common-law fraud claims need not be addressed; otherwise, those claims remain available only if no federal claims prevail.

IV. STANDARDS OF REVIEW

A. Recusal

Pursuant to 28 U.S.C. § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Also, a judge shall recuse himself under 28 U.S.C. § 455(b)(1) & (4):

> (1) Where he has …….personal knowledge of disputed evidentiary facts concerning the proceeding; and/or
> (4) He knows that he, individually ……has a financial interest in the subject matter in controversy or……., or any other interest that could be substantially affected by the outcome of the proceeding;

This Second Circuit Court of Appeals has interpreted 28 U.S.C. §455(a) as asking whether "an objective, disinterested observer fully informed of the underlying facts, [would] entertain significant doubt that justice would be done absent recusal," or alternatively, whether "a reasonable person, knowing all the facts," would question the judge's impartiality. *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir.1992) This Court evaluates “partiality” under § 455(a) on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance." (citing *Liteky v. United States*, 510 U.S. 540, 548 (1994) ("The goal of section 455(a) is to avoid even the appearance of partiality.") In making that objective analysis, the Court considers "whether a reasonable person, knowing all the facts, would conclude that the trial judge's impartiality could reasonably be questioned." *United States v. Thompson*, 76 F.3d 442, 451 (2d Cir. 1996); see also Code of Conduct for United States Judges, Canon 2(A) ("An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired."). "'[I]f the question of whether 455(a) requires disqualification is a close one, the balance tips in favor of recusal.” Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995..." In Re Boston's Children, 244 F.3d 164 (1st Cir. 2001)

Essentially, under Section 455(a) a judge has no discretion to not disqualify himself especially when it is obvious that a judges extrajudicial activity creates a real “appearance” of bias. In other words, if it looks bad, then it is bad and disqualification is mandatory.

Section 455(b), however, operates slightly differently, requiring "actual knowledge . . . regarding disqualifying circumstances and provid[ing] a bright line as to disqualification based on a known financial interest……" See *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 127 (2d Cir. 2003). A "known financial interest in a party, no matter how small, is a disqualifying conflict of interest and one that cannot even be waived by the parties." Id. at 128, which includes for purposes of Section 455(b)(4) a financial interest in the “subject matter in controversy”…… that could be substantially affected by the outcome of the proceeding.”

In the *Chase c*ase, this Second Circuit specifically held that:

> “recusal was required under § 455 because a reasonable person could find a violation of § 455(b), despite the judgment for Chase Manhattan Bank being so small relative to the firm's size that it would not cause a "discernable" increase in the share values owned by the district judge, which were themselves not even 1% of the judge's personal assets

B. De Novo Review For Failure To Decide A Preemption Question

The Supremacy Clause establishes that federal law is the supreme law of the land, and state laws that conflict with federal law are preempted, U.S.C.A. Const. Art. VI cl. 2 The Supreme Court has consistently emphasized that preemption analysis under the Supremacy Clause is a necessary first step when determining the validity of state laws that may conflict with federal law. *In Livadas v. Bradshaw*, 512 U.S. 107 (1994), the Court clarified that its role in preemption cases is not to evaluate the reasonableness of state policy but to determine whether the state law conflicts with or obstructs the objectives of federal law. Specifically, the Court stated, "Our office is not to pass judgment on reasonableness of state policy, but rather, is to decide if state rule conflicts with or otherwise stands as obstacle to accomplishment and execution of full purposes and objectives of federal law" This principle underscores the need to resolve preemption issues before considering other aspects of state law, such as neutrality.

Similarly, in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), the Court held that state laws are preempted if they interfere with the **methods** by which federal statutes achieve their goals, even if the state law shares the same ultimate objective as the federal law. The Court explained that "it is not enough to say that the ultimate goal of both federal and state law is the same." This reinforces the idea that preemption analysis must precede any evaluation of the

substantive content or neutrality of state laws. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79–80 (1990) ("Before turning to the specific aspects of §210 on which the lower courts based their decisions, we address the field pre-emption question.)

While a district courts denial of declaratory relief -as in this case- is generally reviewed for an abuse of discretion, this Second Circuit has consistently held that failure to address federal preemption is reviewed de novo. *English v. General Electric Co.*, 496 U.S. 72, 79–80 (1990) *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 103 (2d Cir. 2010) *Drake v. Lab'y Corp. of Am. Holdings,* 458 F.3d 48, 56 (2d Cir. 2006) The Supreme Court emphasized that the resolution of preemption issues depends on congressional intent and the scope of federal authority, which are legal questions reviewed de novo, including in the context of a declaratory judgment action. *Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta,* 458 U.S. 141, (1982) Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983)opens a new window)

C. Motion To Dismiss

On a motion to dismiss, the allegations in the complaint are accepted as true. See Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir.1998). The court's function is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir.1985). "While a complaint attacked by a Rule 12(b)(6)

motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, —— U.S. ——, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007) (internal quotation marks, citations, and alterations omitted).

This "plausibility standard" is a flexible one, "oblig[ing] a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir.2007). Recently, the Supreme Court reiterated that, at the motion-to-dismiss stage, well-pleaded factual allegations and reasonable inferences therefrom, particularly undisputed facts must be assumed true. *National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024)

D. Standard For Statutory Interpretation

Plaintiff- appellants' claim under the Declaratory Relief Act, specifically asked the district court to analyze the specific terms of OSH Act to determine the rights between Plaintiff-appellants and Defendants-appellees, specifically the right of Plaintiff-appellants to refuse Defendant-appellees Vaccine Mandate without penalty of employment discharge and whether Plaintiff has the right to maintain a private right of action for damages against Defendant-appellee under Sec. 11(c)(1) and (2). The claim for declaratory relief required careful statutory analysis to

perform the most rigorous statutory interpretation to seek the intent of Congress to protect employee rights when it enacted the OSH Act.

Therefore, the task of this court "is limited solely to determining whether Congress intended to create the private right of action" which "must begin with the language of the statute itself…" *Touche Ross Co v. Redington*, 442 U.S. 560, 568, (1979). "Absent a clearly expressed legislative intention to the contrary, statutory language must ordinarily be regarded as conclusive." *Bread Political Action Committee v. FEC*, 455 U.S. 577, 580 (1982) (citations omitted). "In approaching a statute, moreover, a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation..." *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 635(1982) "[T]he legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)

The U.S. Supreme Court, however, has summarized the above rules and provided a three-step process for statutory interpretation in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, (1997), which this court must follow as set forth below:

> "statutory interpretation **focuses on the language itself**, the **specific context** in which that language is used, and the **broader context** of the statute as a whole." (Emphasis added)

The Supreme Court also declared as part of the rule of statutory interpretation in *Rubin v. United States*, 449 U.S. 424, 430 (1981) that Courts are not to look to the

legislative history for Congressional intent of a statute, unless the ordinary meanings of the words in a statute are ambiguous, otherwise, the examination ends as stated below:

> "When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." —Id. at 430

Finally, the "rule of ejusdem generis cannot be employed to obscure and defeat the intent and purpose of Congress or render general words meaningless." *United States v. Alpers*, 338 U.S. 680, 682, (1950)

E. Standard of Review For Infringements of Fundamental Rights

It is well established that where a law burdens a right rooted in the Due Process Clause of the Fourteenth Amendment and is considered a fundamental right, courts apply strict scrutiny, even if the law is facially neutral. See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). The right to refuse unwanted medical treatment on religious or non-religious grounds is one of the most important fundamental rights of all people that must be protected with the strictest standards. In *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), the Court recognized the broader right to personal autonomy and bodily integrity as fundamental. See also

Jacobson v. Massachusetts, 197 U.S. 11 (1905)[4] and re-iterated in *Cruzan v. Director, Missouri Dep't of Health,* 497 U.S. 261, 279 (1990) (holding – "we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." – based on substantive Due Process)

However, when Congress provides by statute more protection than the Constitution requires, courts must apply the terms and standard of review of the Congressionally enacted federal statute, and not the constitutional floor. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) see also *Franklin v. Gwinnett County Public Schools et al*., 503 U.S. 60 (1992).[5] For example, it was held that "[i]t is the obligation of the courts to consider the test set forth by Congress" in the Religious Freedom Restoration Act ("RFRA") to determine if a law impermissibly burdens religion pursuant to the express terms of that statute. *United States v. Lepp*, 2008 WL 3843283, at *2 (N.D. Cal. Aug. 14, 2008), aff'd, 446 F. App'x 44 (9th Cir. 2011) This maximum applies in this case.

Similar to RFRA, when Congress enacted the OSH Act, it provided more protection than the Constitution, specifically for the Free Exercise right to refuse

[4] *Jacobson* at 26. (held that "the inherent right of every freeman to care for his own body and health in such way as to him seems best……

[5] "Congress broadened the coverage of these antidiscrimination provisions in this legislation."

unwanted medical treatment on religious grounds. At 29 USC §669 Sec. 20(a)(5) of the OSH Act, Congress listed the specific protected religious practices and set forth the test courts must follow to determine if a burden on the protected religious practices listed is permissible. Sec. 20(a)(5) states as follows:

> Nothing in this or any other provision of this Act shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, **except where such is necessary for the protection** of the health or safety of others.

Under the OSH Act, employee's right to object to unwanted medical treatment can only be burdened if the burden is "necessary" for the protection of the health or safety of others. This court must only apply this statutory test to determine if Defendants violated Plaintiffs most precious fundamental right made inalienable by this standard.

V. STATEMENT OF UNDISPUTED FACTS OF THE CASE

1. The OSH Act created the federal Occupation Safety and Health Administration (OSHA) and provided exclusive authority to OSHA's Secretary through 29 U.S.C. §655 Section 6(b)(6)(iii) to promulgate "minimum" health and safety standards and to determine the "practices, means, methods, operations, and processes" to meet the minimum standards. (A-1316, See A-1332, ¶46- A-1333 ¶46-¶125)

2. In 1970, Congress (through its Constitutional power under Article 1, Section 8 of the Commerce Clause) enacted the Occupational Safety and Health Act (OSH Act) described by in the “All About OSHA” publication by the Occupational Safety and Health Administration as a law that “makes it clear that the right to a safe workplace is a basic human right” and that employers are responsible for providing a safe and healthful workplace. (A-436)
3. Congress reserved to the OSHA Secretary the exclusive power to set “a nationwide floor of minimally necessary safeguards” that federal, state and private employers and places of public accommodation are mandated to meet for public health and safety. 29 U.S.C. § 651(b) (A-1333, ¶49-50)
4. The OSH Act was enacted "to address the problem of uneven and inadequate state protection of employee health and safety" and to "establish a nationwide ‘floor’ of minimally necessary safeguards." (A-1333, ¶51-54)
5. Appellee as a municipality has a duty to comply with OSH Act standards and regulations through the New York OSHA State Plan and specifically comply with standards and regulations not under the jurisdiction of the New York State Department of Labor. (A-1335, ¶63)
6. Under the OSH Act General Duty Clause at 29 USC 654 Sec 5(a)(1), Defendants shall provide a workplace that is free from recognized hazards that

are causing or are likely to cause death or serious physical harm to employees. (A-1332, ¶ 47)

7. According to the CDC, people are infected chiefly by respiratory fluids carrying virus in three ways: (1) inhaling fine airborne droplets and aerosols of various sizes; (2) direct splashes or sprays depositing droplets/particles onto the mouth, nose, or eye; and (3) touching those mucous membranes with virus-soiled hands. (A-1336, ¶65)

8. The list of "minimum safety methods" approved by OSHA that employers can use to meet its duty to provide employees with a safe workplace when a respiratory communicable disease is present in the workplace atmosphere, exclusively includes the General Respiratory Standard at 29 CFR §1910.132, the Personal Protective Equipment standard at 29 CFR §1910.132, the Respiratory Protection standard at 29 CFR §1910.134 and the General duty Clause of the OSH Act 29 U.S.C. §654 (collectively hereinafter "Respiratory Standards"). (A-1344, ¶55-58)

9. Pursuant to the General Duty Clause and Respiratory Standards contained in 29 CFR §1910.132 and 29 CFR §1910.134, Defendants have a duty to prevent exposure to airborne hazardous infectious diseases "recognized" in the atmosphere of the workplace, including but not limited to the infectious

diseases of SARS, MRSA, Zika, Pandemic Influenza, Measles, Ebola and Covid-19. (A-1335, ¶ 60-73)

10. The primary objective of the OSHA Respiratory Standards is to implement **methods** that, at minimum, either: 1) remove hazardous airborne contaminations from the atmosphere of a workplace and/or 2.) prevent employee exposure to known airborne contaminates in the workplace atmosphere. Id.

11. According to the CDC and the OSHA ETS June 21, 20212, the Covid-19 airborne viral hazard is a "grave danger" that can cause serious physical injury and/or death. (A-1336, ¶ 66& A-1339, ¶79-83)

12. All Appellees are mandated to comply with the OSHA minimum Respiratory standards by using only the authorized methods approved by OSHA to keep employees safe during an outbreak of the airborne virus that can cause a Covid-19 infection in the workplace. (A-1335, ¶60-73 (A-1650, A-1659-1664)

13. Pursuant to the OSHA Respiratory regulations at CFR 1910.132 and the OSHA General Duty Clause, the City and all employers have a non-delegable duty to take "immediate action to eliminate employee exposure to an imminent danger identified" in the workplace atmosphere, when dealing with airborne contaminants. (A-1341, ¶ 91)

14. No vaccine or immunization is capable of meeting the OSHA Respiratory regulation standard as an approved safety method because neither vaccines nor immunization can remove airborne hazards from the workplace atmosphere and neither can they shield employees from exposure to any airborne hazard, including the Covid-19 airborne hazard or any other airborne infectious disease. (A-1342, ¶ 93)

15. According to Dr. Baxter Montgomery, MD, a cardiologist responsible for OSHA workplace safety in his medical facility, vaccines/immunizations are "medical treatments" that affects the human immune system and are incapable of removing airborne infectious diseases from the air or shielding employees from exposure to any airborne infectious disease, like Covid-19 that can cause serious injury or death. (A-1342, ¶94)

16. The OSH Act does not authorize the OSHA Secretary nor employers regulated by the OSH Act and regulations to prescribe FDA "medical treatments" to eliminate airborne workplace hazards like Covid-19 that can cause serious injury or death. (A-1343, ¶99)

17. Vaccines/immunizations are not OSHA authorized or approved workplace safety methods that any employers is permitted to use to comply with the OSHA mandate that employers protect employees from exposure to airborne hazards. (A-1342, ¶ 101)

18. Nothing in Section 20(a)(5) of the OSHA Act requires employees to explain their religious beliefs or provide a clergy letter as a condition precedent to an employee refusing or objecting to submitting to any immunization, medical treatment or examination. (A-1345, ¶113 - ¶ 117)

19. Between September 2021 and December 2201, the New York City Health Commissioner issued nine-emergency orders requiring city workers and non-city workers to submit to providing proof of vaccination against Covid-19 or be "excluded from the workplace." (A-399)

20. Appellants were required to submit a request for religious exemption from the requirement to provide proof of Covid-19 vaccination and Appellants were denied their right to object to taking the Covid-19 vaccine on religious grounds and were removed from their workplaces without pay. (See Affidavits various Appellants with evidence of submission and rejection - submission of Religious Exemptions in electronic portal) (R. Del Ioio – AP 178-182,185,) (E. Loiacono A. 199-219), (J. Harding A. 222-227), (A. Ustares A. 228-231) (S. Coombs A. 232-243) (S. Browne A. 244- 256) (A. Brayan A. 257 – 267) (Zena Wouadjou A. 268 – 274) (T. Martin A -294 – 300, 327, 332) (M. Harrington A. 343 -345) (B. Reid A. 346 - 349) (J. Rullo A. 350-352) (J. Coombs A. 353-358)

21. Appellee has a "religious exemption evaluation" process that directly conflicts with the OSH Act rights in Sec. 20(a)5) that does not require any elongated religious beliefs evaluation. (A. 319 – 326, 330-331)

22. Appellee's corporate counsel provided a memorandum instructing entities when to deprive employees of their right to object to the NYC Vaccine Mandate. A-444-446

VI. JUDGE KOMITEE'S RECUSAL WAS MANDATORY REQUIRING REVERSAL OF DISMISSAL WITH A RULING ON THE MERTIS BY THIS COURT

It is imperative that this Court reverse Judge Komittee's dismissal in full and decide the merits of Appellants' claims without remand, because his failure to recuse taints the order. The undisputed facts are:

1. Timely Motion to Recuse: Appellants filed their Notice of Appeal and Motion to Recuse on the same day (A - 1679).
2. Undisclosed Financial Bias (§ 455(a)): Judge Komittee omitted from his Senate Questionnaire that, as in-house counsel at Viking, he managed their investment in Moderna's mRNA vaccine (A - 1700–1727, esp. A-1724, A-1745).
3. Personal Knowledge (§ 455(b)(1)): As Moderna's former General Counsel, he knew the COVID-19 vaccine could not prevent workplace aerosol

transmission and thus could not satisfy OSHA's "necessary" standard—but he ruled on a mandate predicated on that necessity.

4. Financial Interest (§ 455(b)(4)): He admits owning Moderna stock via a "diversified investment fund" but provides no evidence that this meets the statutory exception for mutual or common funds. He also fails to dispute his $60 million direct Moderna holding before his appointment (A - 1745).

Under the "reasonable person, knowing all the facts" test, these conflicts demand recusal. Judge Komittee's dismissal must therefore be reversed and the merits of all constitutional and federal claims addressed. *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir.1992) There was no way that he could have reasonably believed that Appellants would not object to him remaining as their judge had Appellants knew he was responsible for the $500 Million investment in the commercialization of the vaccine they refused to take. Moreover, Judge Komittee's failure to disclose to the Senate Judiciary his management of the FDA approvals of the Moderna Covid-19 vaccine is evidence of his deliberate intent to hide his extrajudicial knowledge regarding the fact that the Moderna vaccine did not meet OSHA standards was a fraudulent concealment on the Senate that made automatic recusal mandatory to protect the public trust.

VII. DISTRICT COURT ERRED IN ABSTAINING TO DECIDE OSH ACT PREEMPTION

Article VI, cl. 2, of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Consistent with that command, the Supreme Court has long recognized that state laws that conflict with federal law are "without affect." *Maryland* v. *Louisiana,* 451 U. S. 725, 746 (1981).

The scope of a statute's pre-emptive effect is guided by the rule that " '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996) In general, three types of preemption exist: (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, "where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law"; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives. Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 313 (2d Cir. 2005); see English v. Gen. Elec. Co., 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

Appellants consistently plead and fiercely argued in every motion to the district court that the OSH Act preempted the NYC Vaccine Mandate under both field preemption and conflict preemption, which the district court ignored and

refused to address under Appellants claim for declaratory relief. This abdication of this district court's primary responsibility to address direct federal questions, is evidence of judicial bias that requires this Court to provide de novo review and a ruling on the merits. *Freightliner Corp. v. Myrick*, 514 U. S. 280, 287 (1995).

Notwithstanding his failure to rule on the preemption claim, Judge Komitee expressed during the only pre-trial hearing during the case that he understood fully that Appellants were seeking a declaration of preemption and requested an injunction against Appellees regarding that issue. (SPA -1) Yet, he refused to do his job.

A. Field Preemption

The Supreme Court, further explained that field preemption in the context of workplace health and safety in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), also occurs when federal law occupies "**methods** by which federal statutes achieve their goals, even if the state law shares the same ultimate objective as the federal law."

When Congress enacted the Occupational Safety and Health Act (OSH Act) it abrogated state police power to regulate in the area of health and safety specifically in places of business and workplaces affecting interstate commerce by providing exclusive authority to OSHA's Secretary through 29 U.S.C. §655 Section 6(b)(6)(iii) to promulgate "minimum" health and safety standards and to

determine the “practices, means, **methods,** operations, and processes” to meet the minimum standards. See 29 U.S.C. 651 Section 2(b)(5). (SPA – 3)

Specifically, Congress reserved to the OSHA Secretary power to set “a nationwide floor of minimally necessary safeguards” that federal, state and private employers and places of business are mandated to meet for public health and safety, which established field preemption of state law to set minimum standards. 29 U.S.C. § 651(b) see *Solus Indus. Innovations, LLC v. Superior Court of Orange Cnty*., 228 Cal. Rptr. 3d 406 (Cal. 2018). The OSH Act was enacted "to address the problem of uneven and inadequate state protection of employee health and safety" and to "establish a nationwide ‘floor’ of minimally necessary safeguards″. *United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd*., 32 Cal.3d 762, 772, 654 P.2d 157 (1982) (SPA -3)

An occupational safety and health standard is one that "requires conditions, or the adoption or use of one or more practices, means, **methods**, operations, or processes, reasonably **necessary** or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §652 Section 3(8) (Emphasis added). (SPA-3) The field preemption language in the OSH Act is set forth in the General Duty clause at Sec. 5(a) and (b), that mandates that employers and employees are required to exclusively comply with the OSHA “methods” as follows:

> (a) Each employer …….(2) shall comply with occupational safety and health standards promulgated under this Act.
>
> (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

While Sec. 18(a) states that "[n]othing" in the OSH Act "shall prevent any State agency or court from asserting jurisdiction to establish safety issues" and health ordinances or rules, because the OSH Act preempts the field in setting "minimum standards" a states or municipal's safety standards or ordinances must meet and not conflict with the minimum safety and health standards set by OSHA. Appellees as a city is bound by the State of New York OSHA Plan that requires all municipalities in the state to also comply with OSHA standards. (SPA-3) (A-530 – State Plan)

When there is no specific health or safety standard that details a specific requirement for a specific hazard, the OSHA General Duty Clause 29 U.S.C. §654 Section 5 is the fall back minimum compliance requirement that all employers must meet, which requires all employers to "to eliminate any known hazard in the workplace through engineer and administrative methods…" (SPA-5, A-124-A-139) The General Duty standard applies to any hazard "recognized" in the workplace regardless of how the hazard appears, arrives, or manifests in the workplace; once an employer "recognizes" the existence of a hazard in the workplace, the employer has a non-delegable duty to eliminate the hazard. (SP-5, A-124-A-139)

Federal courts have repeatedly held that, once OSHA has defined a hazard category in a standard, a rule reaches all newly-recognized or unanticipated forms of the hazard "within the scope" of the language—even if the agency did not envision those specific manifestations at promulgation. *Association v. Secretary of Labor*, 727 F.2d 415 (5th Cir. 1984) (the Fifth Circuit explained that "nothing in the statutory scheme or in the regulatory text limits a standard to particular work processes or to known forms of the hazard." Rather, asbestos standards are "drawn broadly to embrace all harmful exposures to the listed substance—regardless of how they occur.")

While the OSH Act standards do not have a specific detailed safety standard specific to the Covid-19 airborne hazard, the OSHA Secretary has promulgated minimum standards to specifically address all airborne hazards recognized in the workplace atmosphere, including infectious communicable diseases hazards of any severity, including Covid-19, TB, SARS or Ebola. A- The OSHA Secretary has promulgated the "Respiratory Standards" that cover broadly all airborne hazards, which methods include the OSHA Personal Protective Equipment standard 29 CFR §1910.132 (which covers body protect equipment), and the Respiratory Protection standard 29 CFR §1910.134 which mandates employer to provide employee respirators, like the Powered Air Purifying Respirators (PAPR). (collectively the "Respiratory Standard") (SPA-4,5,6, & 7)

These approved safety methods have not changed despite the number of global pandemics involving hazardous respiratory agents, including the 2009 H1N1 Global Pandemic,[6] and other infectious diseases for which OSHA has established directives, including SARS, MRSA, Zika, Pandemic Influenza, Measles, and Ebola. Id.

The primary objective of the OSHA Respiratory Standards is to implement "practices, means, **methods**, operations, or processes" that, at minimum, either: 1) remove hazardous airborne contaminations from the atmosphere of a workplace and/or 2.) prevent employee exposure to known airborne contaminates in the workplace atmosphere based on a plain reading of the Respiratory regulation in 29 CFR 1910.132 and the OSHA General Duty Clause. (A-1335, ¶60-73)

Employers have a non-delegable duty to take "immediate action to eliminate employee exposure to an imminent danger identified" in the workplace atmosphere, when dealing with airborne contaminants. See 29 USC 670 §21(d)(3), Pub.. L 105-97, §2 See *Doca v. Marina Mercante Nicaraguense, S.A*., 634 F.2d 30, 33 (2d Cir. 1980) (held that OSHA regulatory standards created a non-delegable duty to remove a known hazard.)

In summary, if a safety method does not meet the two objectives listed above,

[6] In 2009 the World Health Organization declared H1N1 a global pandemic- see Youtube.com

then the method cannot meet the OSHA minimum safety method standard. It is obvious that it is impossible for any vaccine to remove infectious diseases from the atmosphere, and neither can a vaccine shield a person from exposure to any airborne infectious hazard. As addressed in the affidavit of Dr. Montgomery, and the FDA, vaccines are a "medical treatment" and cannot meet this minimum authorized standard and are therefore illegal. (A-97-118)

While all vaccines obtain federal approval from the Food & Drug Administration (FDA), the 1938 Federal Food, Drug, and Cosmetic Act ("FDCA") 21 U.S.C. § 301 et seq., only grants the FDA authority to regulate all "drugs" and "devices," which include any "articles (other than food) intended to affect the structure or any function of the body," as well as any components of such articles. Id. § 321(g)(1)(C)- (D), (h)(3) (Emphasis added). The FDA does not have authority to regulate methods to be used to provide health and safety in physical places of business and workplaces. Neither does FDA approval of any vaccine, nor does CDC recommendation that the Covid-19 vaccine is "safe and effective," automatically make any vaccine an OSHA approved "safety method." The OSH Act provides minimum standards that regulate the "environments" of public and private workplaces and public accommodations (as they touch and concern the outside of a human person). The FDA regulates medical treatments or products that are ingested inside a human person that every competent person has the

fundamental right to refuse. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 262 (1990)

Appellees, therefore, were banned by the OSH Act standards from utilizing the Covid-19 vaccine as a "safety measure" for its stated purpose in their mandated which is "to effectively prevent the spread of communicable diseases;" which the Covid-19 vaccine medical treatment is incapable of doing.

This district court's refusal to address Appellants preemption claim has effectively denied Appellants their right to remain on their jobs and has also violated their other OSH Act and Constitutional rights explained below.

B. Conflict Preemption

It is axiomatic that "[a] state law is preempted where it 'stands as an obstacle to the accomplishment and execution of the **full purposes and objectives of Congress**." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) When a statute conflicts with an express preemption provision in a federal statute and violates the constitution, the state law is void as preempted by federal law despite how compelling the government interests. *Arizona v. United States*, 567 U.S. 387, 399 (2012)

It is important to understand that the basic safety principle undergirding the OSHA standards is the duty of employers to remove "hazards" from the workplace

and not "people" under the General Duty clause. The express language of the NYC Vaccine Mandate, however, directly conflicts with this principal when it states that "[a] City employee who has not provided the proof of [vaccination] must be excluded from the premises at which they work…" It is the duty of the employer to utilize only authorized methods to shield employees from hazards and not place the duty on the employee to inject a drug intervention into their body to minimize the symptoms or infection when they are exposed to any airborne hazard. The NYC Vaccine Mandate impermissibly shifts the burden of workplace safety onto the employee which directly conflicts with the entire scheme of the statute. (SPA-3_)

Finally, the NYC Vaccine Mandate expressly conflicts with various express rights conferred by the OSH Act on all employee, including 1.) the right under the General Duty Clause Sec. 5(b) that mandates employees to only comply with standards promulgated under the OSH Act and not FDA vaccine measures; 2) the right to object to immunizations, medical treatments and exams on religious grounds provided under Sec. 20(a)(5) (hereinafter "Medical Freedom Rights"; and 3.) the right to be free from discharge and discrimination under Sec. 11(c)(1), which expressly states that employers:

> "shall not discharge or in any manner discriminate against any employee because such employee…..because of the exercise …. of any right afforded by this Act."
>
> (SPA-3)

While NYC Vaccine Mandate order contained a provision for religious

exemptions, that provision also conflicted with language in Sec. 20(a)(5) mandates exemptions without pre or post conditions for exercising the right. Sec. 20(a)(5) does not afford employer discretion to deny an exemption nor require a lengthy exemption process as required by Appellees. (A-444)

Based on the foregoing, the district court's dismissal must be reversed and the NYC Vaccine mandate orders declared void and enter a prospective national injunction declaring employees rights as follows:

1. Employees need only comply with OSHA-approved safety measures, which do not include vaccines (Sec. 5(b)).
2. Employees may object to any mandated immunization, medical treatment, or exam on religious grounds without pre- or post-conditions.
3. Employees cannot be discharged or discriminated against for exercising their OSH Act rights.
4. All waiver agreements tied to the NYC Vaccine Mandate are void as of their execution dates.

VIII. AN EXPRESS PRIVATE RIGHT OF ACTION EXISTS UNDER OSH ACT SEC 11(C)(2) WITHOUT MANDATORY EXHAUSTION

Once the district court found the City's Vaccine Mandate preempted, it should have applied the three-step test to § 11(c)(1) to determine if it creates an express or implied private right of action. Instead, it erred by ignoring that analysis

and incorrectly relied solely on Second Circuit and district-court decisions that never considered § 20(a)(5)'s medical-freedom claims.

A. Statutory Language Supports Direct Access To Federal Court

Defendants claim that Sec. 11(c)(2) of the OSH Act bars Plaintiff's private right of action because the statute provides an exclusive "administrative remedy" through the OSHA Secretary is incorrect based on a careful analysis of unambiguous language of that provision following the first two steps of the rule of statutory interpretation. Starting with the text itself and its context, Sec. 11(c)(1) and (2) of the OSH Act, commonly known as the "Whistleblower Anti-retaliation" clause states as follows:

Sec. 11(c)(1) provides:

> **No person shall discharge any employee……because of the exercise by such employee ……..of any right afforded by this Act**. Section 11(c)(1) (Emphasis added)

Section 11(c)(2), the enforcement provision, states as follows:

> **Any employee** who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection **may**, within thirty days after such violation occurs, **file a complaint with the Secretary alleging such discrimination.** Upon receipt of such complaint, the Secretary shall cause **such investigation to be made as he deems appropriate**. If upon such investigation, **the Secretary determines that the provisions of this subsection have been violated**, he shall bring an action in any appropriate United States district court against such person. **In any such action** the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all

> appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.(Emphasis added) (SPA-3)

The plain language in 11(c)(2) indicates that employees are not required to file a complaint with the Secretary. The Supreme Court has made clear that "[a]bsent a clearly expressed legislative intention to the contrary, statutory language must ordinarily be regarded as conclusive." *Bread Political Action Committee v. FEC*, 455 U.S. 577, 580 (1982) (citations omitted) and "….a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation..." *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 635(1982)

It is axiomatic that the ordinary meaning of the word "may" in Sec. 11(c)(2) expresses Congresses intent to give discretion to employees to file a complaint with the Secretary. The Supreme Court in *United States v. Rogers*, 461 U.S. 677, 706 (1983) explained the ordinary meaning of the word "may" as follows:

> "The word "may," when used in a statute, usually implies some degree of discretion. This common-sense principle of statutory construction is by no means invariable, however, (internal quotes omitted) and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute."

The *Rogers* court further explains that the use of the term "may" in a statute relating to judicial action confirms Congressional intent to confer judicial discretion to a Court of equity as follows:

> "reading "may" as either conferring or confirming a degree of equitable discretion conforms to the even more important principle of statutory construction that Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion." Id. at 708

The Supreme Court defined the ordinary meaning of the word "shall" as follows:

> "When a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command." *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) "The statute's use of the permissive "may" contrasts with Congress' use of a mandatory "shall" elsewhere in §3621 to impose discretionless obligations, e. g., *Lopez v. Davis*, 531 U.S. 230, 241 (2001):

With this interpretative instruction regarding the ordinary meanings of the words "may" and "shall" used in Sec. 11(c)(2), it is clear that Congresses use of the word "may" in Sec. 11(a)(2) conveys Congresses intent not to require any employee, including Plaintiff, to have to file a complaint with the Secretary of OSHA in order to obtain a remedy for violations of their Medical Freedom Right.

This interpretation is also consistent with the text that follows the employee permissive language that also gives the Secretary discretion to file any complaint he receives in federal court. The corresponding discretionary language regarding the Secretary is as follows:

> "Upon receipt of such complaint, the Secretary shall cause **such investigation to be made as he deems appropriate**. If upon such investigation, **the Secretary determines that the provisions of this subsection have been violated**, he shall bring an action in any appropriate United States district court against such person. (Emphasis added) (SPA-3)

The two phrases "he deems appropriate" and "the Secretary determines" in Sec. 11(c)(2) confers on the Secretary two discretionary rights – the right to investigate as he deems appropriate and the right to bring an action in federal court as "the Secretary determines". While the mandatory word "shall" as used indicates that investigations are required, the phrase following the shall "as he deems appropriate" limits the shall to the discretion of the Secretary. The discretionary terms in the description of the OSHA Secretary's enforcement duties is evidence that both the Secretary and employees have discretionary rights to bring a claim in federal court.

B. Federal Court Jurisdiction is Mandatory Once Action is Filed

While Sec. 11(c)(2) confers discretionary rights on both Plaintiff and the Secretary, the Courts jurisdiction is mandatory. The phrase "In any such action … district courts **shall** have jurisdiction" confers unequivocal mandatory/exclusive jurisdiction and original jurisdiction to federal courts to adjudicate claims under the OSH Act. Specifically, the "shall" precludes state courts from adjudicating OSH Act claims. *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990), *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990)

The phrase "any such action," however, indicates from the use of the word "such" that the intent of the phrase is to allow two types of claims to be brought to

federal court, either by "any such action" by an employee or by the Secretary. The ordinary meaning of the word "such" defined by the Merriam-Webster Dictionary and as used in the context of an "action" is used as an adjective to delineate the "kind" of actions that can be brought – the kind by an employee or the kind by the Secretary. The discretionary language used in the sentences preceding, coupled with the "any such action" in the following sentence is clear evidence of Congresses intent to give both harmed employees and the Secretary the discretion to file complaints in federal court.

C. Employee Claims Filed In Federal Court Limited – Sec. 20(a)(5) Claims Permitted

While the express statutory language of Sec. 11(c)(2) and its context permits employees and the Secretary to file complaints directly in federal court, that permission is not without limitations. The third step in statutory interpretation is to evaluate a provision "in the broader context of the statute as a whole." *Robinson as*

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To ascertain the limits on both "kind" of potential litigants, the examination must begin with an identification of the statutory authorities granted by Congress to the Secretary in the statute. When the OSH Act was passed in 1970, Congress gave the OSHA Secretary exclusive authority through 29 U.S.C. §655 Section 6(a) & (b) to promulgate "minimum" health and safety standards and to determine the "practices, means, methods, operations, and processes" to meet the minimum

standards" Sec.8 of 29 U.S.C. §652 gives the Secretary exclusive authority to inspect and investigate violations of any "standards, rule or order promulgated" under the Secretaries exclusive authority under Sec. 6.[7] Section 9 of 29 USC §658 gives the Secretary power to issue citations employer for violations, after investigation and Sec. 10 of 29 USC 659 gives the Secretary power to assess monetary fines against employers for standards, rule or orders violations. (SPA-3)

Furthermore, in Sec. 12 of 29 USC §661 of the OSH Act the OSH Review Commission has "nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context. Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness…." *Martin v. OSH Rev. Commission*, 499 U.S. 144, 155 (1919) In the *Martin* case, the Supreme Court defined the responsibility of federal district courts who "shall" hear all actions filed by the Secretary as limited to "review" of "the Secretary's interpretation" of an employer's violation of a standard, rule or regulation for "reasonableness." Id. at 145-146.

Nowhere in the above OSHA comprehensive administrative enforcement scheme does Congress give the Secretary power to investigate, sanction, or fine

[7] Martin v. OSH Rev. Commission, 499 U.S. 144 (1991)(held: "authoritative interpretations of OSH Act regulations is a "necessary adjunct" of the Secretary's powers to promulgate and to enforce national health and safety standards.")

employers for violations of Sec. 20(a)(5). Even when the Secretary brings a complaint in federal court according to the holding in *Martin*, federal courts only have authority to review the citations and/or monetary sanctions levied by the Secretary. Since federal courts are limited in their review regarding Complaints brought through the OSHA administrative process, then the Secretary is limited to only filing complaints pursuant to his Congressional authority. Neither the Secretary, the Commission nor the federal courts have enforcement authority to provide a remedy for violations of Plaintiff's Medical Freedom rights under Sec. 20(a)(5).

Based on the foregoing conclusion regarding the Secretary's limited authority to file complaints in federal court under its regulatory power, it is reasonable to conclude that employees' discretionary right to file directly in federal court under Sec. 11(c)(2) is correspondingly limited to OSHA statutory rights not under the authority of the Secretary. The Secretary has no authority to investigate or fine employers for any violation under Sec. 20(a)(5) because it is not a regulation promulgated by the Secretary. Sec. 20(a)(5) provides employees with a statutory right enacted by Congress, that can only be remedied through the permissive authority given by Congress in Sec. 11(c)(2) to employees to file a complaint directly in federal court.

D. Other Court Decisions Do Not Apply

Defendants point to a Second Circuit decision and some lower court opinions that held that employees do not have a private right of action under the OSH Act.[8] Since the OSH Act was enacted in 1970 until the present, there has been approximately 200 cases related to Sec. 11(c)(2) and all of those courts have held explicitly or implicitly that there is no private right of action under the OSH Act.[9] (A-997) Those cases, however, are not authoritative and should be ignored because those decisions are inconsistent with the rules of statutory construction. All of those cases involved either a whistleblower claim under Sec. 11(c)(2) by an employee whose claim was for retaliatory termination after reporting an employer to the Secretary for violations of OSHA safety regulation, rule or some standard. Other cases involved employee claims for personal injuries caused by an employers violation of OSHA safety regulation or standard. Those cases involving employer violations of safety regulations under Sec. 11(c)(2) are the "kind" of employee claims that exclusively must be filed with the Secretary within the 30-day period.

[8] *Donovan v. Occupational Safety & Health Rev. Comm'n*, 713 F.2d 918, 926 (2d Cir. 1983), *Vasquez v. City of New York*, No. 22-CV-05068, 2024, WL 1348702, *11 (E.D.N.Y. Mar. 30, 2024), *Quirk v. DiFiore*, 582 F. Supp. 3d 109, 115-16 (S.D.N.Y. 2022), *Blessing v. Freestone,* 520 U.S. 329, 340–41 (1997)

[9] See Exhibit 3 attached – with list of the approximately 200 cases with a brief summary to show they all involved either a regulatory violation or a personal injury that resulted from a violation.

Complaints that do not involve regulatory violations or violations over which the Secretary has exclusive authority, cannot be filed with the Secretary because the Secretary has absolutely no authority to investigate nor discretion to file in federal court.

E. 30-Day Limit Does Not Apply

Employee complaints alleging statutory (non-regulatory) violations of the OSH Act are not bound by the 30-day filing deadline because of the following:

1. No Secretary's Enforcement Power.

   Non-regulatory violations fall outside the Secretary's remedial authority, so complaints need not be filed with—and therefore need not meet any deadline for—the Secretary.

2. Purpose of the 30-Day Limit.

   The 30-day window serves only to ensure swift investigation of regulatory violations, which may be cured by employers under 29 U.S.C. § 670. Because safety hazards can be transient and employers can remedy regulatory violations at any time, a strict deadline helps the Secretary gather timely evidence and witness testimony.

3. Private-Action Rights**.**

Allowing a 30-day cutoff for non-regulatory claims would undermine employees' private right of action by imposing an impracticable rush to secure legal counsel and file suit.

F. Other Statutes with Mandatory Exhaustion Use 'Shall' Consistently

Finally, other similar federal statutes use mandatory language to limit the rights of employees, which is further evidence of the permissive right to seek judicial review in Sec. 11(c)(2). This is obvious by comparison of other civil rights statutes as outlined below.

The Enforcement Provision under Title VII at 42 US §2000e-5 states as follows:

> "A charge under this section **shall be filed within** one hundred and eighty days after the alleged unlawful employment practice occurred...".

The National Labor Rations Act NLRA 29 U.S.C. §160 Sec 10(b) also contains mandatory administrative exhaustion language a follows:

> That no **complaint shall issue based upon any unfair labor practice** occurring **more than six months prior to the filing** of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

The New York State Human Rights statute at Executive Law Chapter 8, Article 1, §297 also contains a mandatory administrative remedies process in its statute as follows:

> "Any person claiming to be aggrieved by an unlawful discriminatory practice **shall have a cause of action** in any court of appropriate jurisdiction for damages, including, in cases of employment discrimination related to private employers and housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, **unless such person had filed a complaint hereunder."**

Here, by contrast, the OSH Act does **not** require employees to file a complaint in federal court within a fixed period. Nor does it prohibit employees from bypassing the Secretary entirely. It is clear that Congress expressly intended that Plaintiff have the right to pursue an action for damages against Defendants in federal court to vindicate the deprivation of their Sec. 20(a)(5) Medical Freedom Right. The "Cardinal principal" applies that "Congress must have intended to create—not deny—a remedy." *Cort v. Ash*, 422 U.S. 66, 78 (1975)

IX. VIABLE IMPLIED PRIVATE RIGHT OF ACTION UNDER SECTION 20(a)(5) OF THE OSH ACT

A. Long History of Judicial Precedent Supports A Finding of Implied Private Right of Action

If this Court is unable to find an express private right of action within the ordinary language of Sec. 11(c)(2) of the OSH Act, Appellants contend that an

examination of case law and the broader scheme of the administrative remedies afforded in the OSH Act will provide the necessary ingredients for this court to exercise its judicial authority to fashion an implied remedy. It "is not uncommon for federal courts to fashion federal law where federal rights are concerned." *J.I. Case Co. v. Borak*, 377 U.S. 426, (1964) (citing *Textile Workers v. Lincoln Mills,* 353 U. S. 448, 353 U. S. 457 (1957).

The general rule… is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute. *Franklin v. Gwinnett County Public Schools et al*., 503 US 60, 71 (1992) For over 160 years, federal courts engaged in providing judicial remedies to enforce the expressed intention of Congress in federal laws that did not contain express statutory remedies. Starting with *Marbury v. Madison*, 5 U.S. 137, 177 (1803) the Supreme Court stated that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Implied rights of action were liberally provided.

A cursory review of Supreme Court cases from 1916 until around 1950, reveals that the Supreme Court diligently provided implied remedies when federal statutes expressly supplied a right without statutory a remedy. See *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) ("A disregard of the command of the statute is a wrongful act, and where it results in damage to a class for which the

statute was enacted, the right to recover the damages … is implied.") *Paine Lumber Co. v. Neal*, 244 U.S. 459 (1917) (citing Rigsby) ("A right of action for damages by a party specially aggrieved would have followed by implication.); *Texas & N.O.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 567 (1930) ("The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties."); *J.I. Case Co. v. Borak,* 377 U.S. 426, 434 (1964) ("It is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."); *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co*., 341 U.S. 246 (1951) ("The aim of Congress would be needlessly aborted if this 'definite statutory prohibition of conduct' did not impose civil liability in a situation not covered by administrative remedies merely because no judicial relief was explicitly authorized. … Hence, it is necessary to bring the case into court … to enforce the Power Act.") Id.

While in recent years, the Supreme Court has practiced greater judicial restraint in fashioning judicial remedies, suggesting that "courts must refrain from implying a cause of action unless doing so is consistent with the statutory scheme"[10] none of those decisions, summarized below, involved federal statutes, as in this case,

[10] *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) (Shareholder under Investors Advisers Act 1940 does not provide a private right of action for damages against third-parties for which the Act provided specific criminal penalties to redress violations of the act)

that provided enhanced protections for a fundamental inalienable Constitutional right.

As spelled out previously, Section 11(c)(2) implicates both Due Process and Free Exercise Constitutional rights, for which controlling Supreme Court precedent continues to instruct that when a Constitutional right is violated, it is consistent with the letter of the Constitution to imply a right of action, which is consistent with the long history of jurisprudence of this nation. *Davis v. Passman*, 442 U.S. 228, 233 (1979), *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394–395 (1971), *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 230, (2023)

It is, therefore, necessary for this court to use its judicial muscle to fashion a remedy for the most egregious violation of fundamental constitutional rights made inalienable by federal statute. It was the goal of the framers of the OSH Act, who while looking into the future, desired to prevent tyrannical employers from using employees as "guinea pigs" of experimentation through employer mandated "safety" measures not authorized by federal OSHA law. When a federal statute does not provide any criminal penalties for a particularized violation,[11] the door is open for a slippery slope of greater abuse of fundamental rights if a judicial remedy is not supplied.

[11] *Wyandotte Transp. Co. v. United States,* 389 U.S. 191, 208 (1967)("It would be surprising if Congress intended that, by limiting the statutory remedies to criminal penalties and abandonment provisions, it meant to bar civil remedies necessary to effectuate the statute's purpose.")

It was this context that Congress probably saw into the future employers mandating medical treatment as a condition of employment and turning the workforce into corporate experimentation. Section 20(a)(5) effectively removed criminal sanctions, while providing the strongest rights to workers, but left off civil remedies. Without criminal penalties and civil liability, employers would be immune from damages caused by forcing medical treatments on workers as a condition of employment, which was not the intention of Congress based on the totality of the text of the Act.

Several cases that are still good law, held that when a constitutional right is violated and there is no criminal nor civil penalties, a remedy must be judicially implied. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, (1971), *Davis v. Passman*, 442 U.S. 228, 233 (1979) (rejecting the test in *Cort v. Ash*, 422 U.S. 66 (1975), and most recently in the case *Health & Hosp. Corp. of Marion Cnty. v. Talevski,* 599 U.S. 166, (2023) (“Supreme Court implements Congress's choices rather than remakes them.)

B. Implied Right For Unambiguous Constitutional Rights

While this case does not involve the federal government, the principal of judicially created implied remedies for Constitutional violations was spelled out in in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, (1971) which held that "it is . . . well settled that where legal rights have

been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts **may use any available remedy to make good the wrong done**." citing *Bell v. Hood*, 327 U. S., 678, (1946) (private right to monetary damages for violations of the 4th Amendment right to be free from unreasonable search and seizures in the criminal law context) (Emphasis added)

Shortly after the *Bivens* decision, the Supreme Court in *Davis v. Passman*, 442 U.S. 228, 233 (1979) held that "[a] cause of action and damages remedy can be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated…. and a federal statute may be implicit in a statute not expressly providing one, … the question of whether a statute implicitly creates a cause of action is a matter of statutory interpretation." Id. at 241 (quoting Cort v. Ash, 422 U.S. 66, 78 (1975). The *Davis* court held that the Fifth Amendment's Due Process Clause conferred on the petitioner a federal constitutional right to be free from gender discrimination in higher education, a liberty right already enumerated as fundamental by the Supreme Court.

The *Davis* court further held that the "Constitution ….. does not "partake of the prolixity of a legal code…….It speaks instead with a majestic simplicity. One of "its important objects…..is the designation of rights. And in "its great outlines,…. the judiciary is clearly discernible as the primary means through which these rights may be enforced. Simply, put if the statutory language demonstrates an intent to

protect a Constitutional right, and there is no remedy to vindicate the violation within the "legal code" of administrative remedies, then it is for the judiciary to protect that right by implication." Id. 241

Most, recently, the Supreme Court in *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 230, (2023) again addressed the power of the judicial power to "use any available remedy to make good a wrong," which is directly on point and is authoritative for this case because it addressed the intersection between a federal statute and implicit Constitutional rights. The *Talevski* Supreme Court answered the question of when a court can fashion an implied private remedy through the enforcement power of Section 1983 under the "and laws provision." The federal statute involved was the Federal Nursing Home Reform Act (FNHRA) that provides rights to patients but fails to provide an express remedy for the violation of personal rights by a nursing home based on a provision in FNHRA.

Appellants in this case have made a separate Section 1983 claim based on the *Taleski* decision as a possible remedy in the event an express or implied remedy is not found. In that case the remedy supplied was the remedy afforded under Sec. 1983 under the "laws" provision, which is also applicable to Appellants' OSH Act Medical Freedom Rights.

Like the FNRAH, Section 20(a)(5) confers unambiguous rights to employees to refuse medical treatment and medical examinations on religious grounds (a

fundamental right under two Constitutional rights the Free Exercise and Due Process). Section 11(c)(1) & (2) expressly confers a remedy, but at issue is whether Section 11(c)(2) expressly or impliedly provides a private right for damages. *Talevski* stands for the proposition that this court can and should interpret the OSH Act with either an express or implied right, or that §1983 can provide the remedy for the Medical Freedom Rights.

C. Cases Denying Implied Rights of Action Do Not Apply

While there is a progeny of Supreme Court cases decided in the same year or after the *Davis* decision suggesting that "courts must refrain from implying a cause of action unless doing so is consistent with the statutory scheme." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) [12] Those cases do not apply to this case because none of them involved a federal statute that expressly provides enhanced protection of a fundamental Constitutional right, specifically the right to refuse unwanted medical treatment either under the Due Process Clause of the 14th Amendment and the Free Exercise clause.

[12] Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (ERISA case);Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989)(Sec. 1981 no implied right under respondeat superior); Cent. Bank of Denver, N.A. v. First Interstate Bank, 511 U.S. 164 (1994)(SEC case no implied right for third parties)Alexander v. Sandoval, 532 U.S. 275 (2001)(Title VI regulation not a statutory claim); Stoneridge Investment Partners v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008)(SEC case); Egbert v. Boule, 596 U.S. 482 (2022)(no private right of action regarding U.S. Boarder Petrol)

X. IN THE ALTERNATIVE, PLAINTIFFS STATE A VIABLE CLAIM UNDER 42 U.S.C. § 1983

A. Preempted Laws Are Never Neutral & Constitutional

As discussed, previously 42 U.S.C. Section 1983 applies to Appellants case particularly because their Medical Freedoms Right arise from their Constitutional First Amendment Free Exercise and 14th Amendment substantive Due Process clause rights that receive heightened protection and made inalienable applicable to all employers, including private sector employer under Sec. 20(a)(5) and Sec. 11(c)(1) of the OSH Act. Appellants do not dispute and therefore admit, despite the district court's diatribe, that Plaintiffs properly alleged unambiguous rights under the Constitution and the OSH Act. Appellees urged that the NYC Vaccine Mandates were nevertheless "constitutional" because the ordinances were neutral and generally applicable. This conclusion is wrong for a few reasons.

First, the holding in *Employment Division v. Smith, 494 U*.S. 872, 878 (1990) "neutral laws of general applicability do not violate the Free Exercise Clause of the First Amendment" does not apply in cases that do not involve generally applicable criminal laws, as in this case. Also, when a neutral or generally applicable law is preempted by a federal statute that renders a free exercise right inalienable as in this case -the right to refuse and choose medical treatment on religious grounds cannot be burdened under any circumstances because vaccines are "never"

necessary to prevent the transmission of any airborne hazard. The Smith standard does not apply.

Also, *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) makes clear that preempted state laws can never be neutral and generally applicable because the preempted laws are never enacted within the power or authority of a state or municipality." (*Brown* held: "Where the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.")

B. Vaccines Are Never Necessary To Prevent Transmission

As previously discussed, vaccines in general in are incapable of preventing the transmission of any communicable disease because vaccines cannot remove any airborne hazard from the atmosphere where the hazardous droplets and spray transmit and vaccines cannot shield any person from exposure to any airborne hazardous disease. Vaccines, including the Covd-19, never could and never will be able to meet any government interest in preventing transmission in workplaces or public places. Vaccines violate OSHA safety "methods" standards. Therefore, there is no compelling or rational basis for utilizing it as an unapproved method.

Since the CDC and medical experts all agree that the Covid-19 disease primarily affected those who suffered chronic disease, according the Dr. Montgomery and Appellant Amoura Bryant. (A-97, A-103-A105) Consequently, Appellee should have allowed Appellant Bryant to work remote because her religious practice of using only whole plant food as medicine based on her fundamental beliefs was supported by medical journals and based on her religious beliefs. According to Dr. Montgomery who cited several medical journal articles the practice of Plant Based Lifestyle Medicine, which includes the consumption of whole plant foods from the earth was more effective than the vaccine at eliminating or substantially reducing serious illness and death if a person is infected by the Covid-19 disease. (A-97, A-103- A-106, A-117-A- 123) Just as it takes faith to believe that vaccines can reduce serious illness, the same faith is required for the use of whole plant food, accept that the medical evidence establishes it as more effective at supporting the natural immune system. Therefore, pursuant to *Jacobson* and *Cruzan*, Appellants have the right to refuse unwanted vaccine medical treatments and have the right to choose legal medically supported plant based medical treatments on religious grounds.

XI. Federal Standards For Discrimination Under Federal Statute Qualify As Discrimination Under New York City Human Rights Act

Under the New York City Human Rights Law (Admin. Code § 8-107(10)(a)), a "discriminatory practice" explicitly includes "any practice forbidden under . . . the

laws of the United States," so a violation of a federal civil rights statute is per se a violation of the NYCHRL. Two leading New York State decisions confirm this in *Zuckerman v. City of New York*, 60 A.D.3d 62, 67–68 (1st Dep't 2009): *Brown v. City of New York*, 15 Misc.3d 833, 840 (Sup. Ct. N.Y. Cnty. 2007), aff'd, 58 A.D.3d 291 (1st Dep't 2009).

XII. SANCTIONS

It is well settled law that the "making of a false statement of law or fact is …. reprehensible"[13] and should be sanctioned by federal courts under Rule 11 of the Federal Rules of Civil Procedure (Fed.R.Civ.Pro Rule 11). False statements of law in pleadings to the court that are "utterly unsupportable" or frivolous to the extent that all the law on the subject goes against a claimed statement of law also warrants imposition sanctions. See *Collie v. Kendall*, Civ. 3:98-CV-1678-G, 1999 U.S. Dist. LEXIS 10435, at 8-10 (N.D. Tex. July 6, 1999) Also, groundless statements of law are also sanctionable. *Associated Indem. Corp. v. Fairchild Indus., Inc*., 961 F.2d 32, 36 (2d Cir. 1992). The Federal Rule of Civil Procedure Rule 11 was created to deter flat out lying to the court by lawyers in the pleadings.

[13] See *In re Air Crash Disaster at Washington, DC*, 559 F. Supp. 333 (D. D.C. 1983)

On May 30, 2023, Appellants served Appellees with a notice of Rule 11 Sanctions and July 10, 2023 filed their motion arguing that Appellee's committed fraud on the Court in two of their motion pleadings in Appellee's Response Motion for Preliminary Injunction and Motion to Dismiss, specifically pointing out that Appellee's legal claims stated below where gross material misrepresentations of the law and unsupported by any case ever ruled upon since the OSH Act was enacted in 1970. (A-933-965)

> **False statement of law**: "as an initial matter, **it is well established that there is no private right of action** under the Occupational Safety Heath Act ("OSH Act"). See 29 U.S.C. § 653(b)(4); Quirk v. DiFiore, 2022 U.S. Dist. LEXIS 16063, at *12 (S.D.N.Y. Jan. 28, 2022) (citing Donovan v. Occupational Safety & Rev. Comm'n, 713 F.2d 918, 926 (2d Cir. 1983)). For this reason alone, the Court must reject Plaintiffs' preemption argument." See ECF #25, Page 13, and restated in ECF #39

Appellee also made the following additional false statement of law:

> **It is well established** that the **Vaccine Mandates are lawful and enforceable**. The Second Circuit declared that "[t]he Vaccine Mandate, in all its iterations, is neutral and generally applicable." *Kane v. De Blasio*, 19 F.4th 152, 166 (2d Cir. 2021).

In all the litigation around the NYC Vaccine Mandate, Appellee knew that none of the other cases made a preemption claim supported by expert testimony as was done in this case. Therefore, Appellee knew that the factual holdings in those other cases did not and could not apply to substantially different legal issue of preemption raised in this case. Appellees also know that there was no case law since 1970 that ever held that no private right of action exists for claims under OSH Act Sec. 20(a)(5).

Therefore, the district court should have granted Rule 11 sanctions as there was no basis in law or fact for Appellee's fraud on the court. I*n re Prudential Lines, Inc. S'holder Litig.,* 738 F. Supp. 260, 266–67 (S.D.N.Y. 1990) This court has in the past sanctioned defendants under its inherent power for filing a "frivolous" motion to dismiss that "served no purpose other than to harass and delay" the litigation. *Lau v. Napolitano*, No. 09 Civ. 7661, 2010 WL 3522501, at *11 (S.D.N.Y. Sept. 9, 2010), aff'd, 633 F. App'x 18 (2d Cir. 2015) The Supreme Court in *Chambers v. NASCO, Inc*., 501 U.S. 32, 46 (1991) upheld a sanction under the court's inherent authority for "abusive litigation practices," including motions filed in bad faith to harass or delay.

XIII. CLASS CERTIFICATION

The Supreme Court has made clear that courts may engage in early class certification in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982) which held:

> "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."
> Id. at 160.

The central determinate for class certification under FRCP Rule §23(b)(3), while the other factors are necessary, is whether:

> "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Moreover, the Supreme Court made clear that the risk of inconsistent adjudications and incompatible standards of conduct is dispositive in granting an early class certification, especially when inalienable Constitutional rights of all people are involved.

In the *County of Suffolk v. Long Island Lighting Co*., 907 F.2d 1295, 1304 (2d Cir. 1990) it was held that "Subdivision (b)(1)(A) embraces situations in which *separate actions by individual class members would create a risk of inconsistent adjudications*, and *incompatible standards of conduct* for the party opposing the class."

Finally, in one of the first Supreme Court cases explaining equitable class action remedy before Rule 23 was enacted in *Hansberry v. Lee,* 311 U.S. 32, 42 -44 (1940), held that "[t]he consistent view of this Court has been that in *a proper case* a class action may be maintained in order to prevent *inconsistent adjudications* as to the same question of law or fact."

These two cases together make clear that when the very same undisputed facts (e.g. identical discharge for refusing vaccination) and purely legal defenses (e.g. OSHA preemption) would otherwise be litigated over and over with potentially

conflicting outcomes, the court may and should grant an early (b)(1)(A) class certification to lock in a single, uniform ruling.

Appellees do not dispute they terminated Appellants after they were on notice that they objected on religious grounds. With those undisputed facts and the well plead law in the complaint, a class certification is appropriate.

XIV. CONCLUSION

The district court's decision should be reversed and a declaratory judgment entered in favor of Appellants without remand.

July 18, 2025

Respectfully Submitted,

/s/ Jo Saint-George

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CERTIFICATE OF COMPLIANCE

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Dated: July 18, 2025

/s/ Jo Saint-George
Jo Saint-George

CERTIFICATE OF SERVICE

I, Jo St. George, hereby certify that on the 17th day of July, 2025 a copy of BRIEF FOR PLAINTIFFS-APPELLANTS in *Remo Dello Ioio, et al. v. City of New York, et al.* (Docket# 24-3252) was served by ECF upon the party as listed below:

New York City Law Department
Appeals Division
100 Church Street
New York, New York 10007

Dated: July 18, 2025

/s/ Jo Saint-George
Jo Saint-George

24-3252

United States Court of Appeals for the Second Circuit

REMO DELLO IOIO, SUZANNE DEEGAN, MARITZA ROMERO, JULIA HARDING, CHRISTINE O'REILLY, SARA COOMBS-MORENO, JESUS COOMBS, ANGELA VELEZ, SANCHA BROWNE, ZENA WOUADJOU, CHARISSE RIDULFO, TRACY ANN FRANCIS MARTIN, KAREEM CAMPBELL, MICHELLE HEMMINGS HARRINGTON, CARLA GRANT, OPHELA INNISS, CASSANDRA CHANDLER, AURA MOODY, EVELYN ZAPATA, SEAN MILAN, SONIA HERNANDEZ, BRUCE REID, JOSEPH RULLO, CURTIS BOYCE, RASHEEN ODOM, JESSICA CSEPKU, JOSEPH SAVIANO, EDWARD WEBER, ROSEANNE MUSTACCHIA, NATALYA HOGAN, FRANKIE TROTMAN, MARIA FIGARO, PAULA SMITH, LYNDSAY WANSER, SARAH WIESEL, CHRISTIAN MURILLO, DIANNE BAKER-PACIUS, DAWNS CHOL, SUZANNE SCHROETER, ALTHEA BRISSETT, TRACEY HOWARD, MARC ROSIELLO, AUDREY DENNIS, MARIE JOSEPH, PATRICIA CATOIRE, SALLY MUSSAFI, COLETTE CAESAR, BERTRAM SCOTT, DIANE PAGEN, STELLA M PRESTON, RACHELLE GARCIA, JULIE LAWLEY, SUSANNE PHILLIP, MARIA ESTRADA, JENNETTE FRAZER,

Plaintiffs-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

SPECIAL APPENDIX

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Plaintiffs,

v.

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, ASHWIN VASAN, COMMISSIONER OF THE DEPARTMENT OF HEALTH AND MENTAL, NEW YORK CITY DEPARTMENT OF EDUCATION, DOES 1-20, ERIC L. ADAMS,

Defendants-Appellees.

SPECIAL APPENDIX – TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WOMAN OF COLOR FOR EQUAL JUSTICE, ET AL.,	**Docket#** 22-cv-2234(ERK)
Plaintiffs,	
- versus -	U.S. Courthouse Brooklyn, New York
THE CITY OF NEW YORK,	
Defendants	September 13, 2022 12:01 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR PRE-MOTION CONFERENCE
BEFORE THE HONORABLE ERIC R. KOMITEE
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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THE CLERK: Civil Cause for a Pre-Motion Conference, *Women of Color For Equal Justice, et al v. The City of New York*, docket number 22-cv-2234.

Would you all please state your appearances for the record starting with the plaintiffs?

MS. SAINT-GEORGE: Attorney Jo Saint-George for the Women of Color for Equal Justice.

MS. GREEN: Attorney Donna Green, co-counsel.

THE COURT: Good morning. Or afternoon as of one minute ago.

MS. ROSEN: Good afternoon, your Honor. Felicia Rosen for the defendants City of New York and Department of Health and Mental Hygiene and the Commissioner.

THE COURT: Good afternoon to you as well.

Okay. I hold pre-motion conferences sometimes, not always. One reason for which I do is when there a bevy of motions suggested simultaneously and it makes sense to figure out the order in which to proceed. That's the reason we're here this morning. Thank you all, by the way, for your patience. That prior conference ran substantially longer than I would have guessed.

We have a motion for a preliminary injunction which I've not ruled on and which we may or may not want

to schedule a hearing in connection with that. It would depend on whether it looks like there are factual questions that need to be resolved.

We have a putative motion from the defendants to dismiss the case under Rule 12 and we have a putative motion for summary judgment from the plaintiffs which I take to be a statement that in your view there are no material facts in dispute and that this case is really a question of law. Is that correct?

MS. SAINT-GEORGE: Correct. And it is a partial motion for summary judgment on the preemption issues with regards to OSHA and the invalidation of the vaccine orders. The second half of the causes of action are the personal injury or First Amendment damages claims under religious harassment. So the partial motion for summary judgment definitely no issues of fact in dispute. And that is the same for the preliminary injunction.

But I do want to add that we also asked for a request to amend the complaint to add the Department of Education because half of the plaintiffs are Department of Education and they had to be separately served and notified, which we have done, and we've submitted with our letter motion a request to amend the complaint to add them also. But they have been included in the preliminary injunction as if they were a plaintiff or a

defendant for the TRO and preliminary injunction, so they have been properly served with that too.

THE COURT: Okay. And remind me, has the city responded to the motion to amend?

MS. ROSEN: Your Honor, my understanding is that plaintiffs already amended. There's a second amended complaint on the docket that already includes the Department of Education even though the Department of Education has not been served.

THE COURT: Yes, this may be an amendment as of right and not actually require leave from me given that there's been no answer or motion yet.

MS. SAINT-GEORGE: And you're correct, I had did one amendment as of right and as a courtesy I just wasn't clear on how your local rules were, whether or not I needed to get permission. So then we can take that issue off the table and we can just effectuate the service. But I did request from Ms. Rosen if she would just consent or stipulate to accepting on behalf of the Department of Education or at least the city, although they're separate entities, everything still goes through the city's service system.

THE COURT: Right.

MS. SAINT-GEORGE: So I did ask that. I've never gotten a response. And it would just streamline us

moving forward on the real substantive issues.

THE COURT: Okay.

MS. ROSEN: Your Honor, just on that point, I don't --

THE COURT: Let me just put down some markers along the way here. As to the amendment, it may be that leave of court is required, it may be that it's not. If leave is required, I grant that leave now and do order that the amended complaint shall serve as the operative complaint on this service issue. What is the city's --

MS. ROSEN: I don't have authority to accept service for a city entity that has not been served.

THE COURT: Ever?

MS. ROSEN: My understanding is that it has to go through the proper channels of the city service whether it's a suable entity through the entity or through the Law Department service window.

THE COURT: Fast forward the movie for us a little bit. Is the Department of Education a suable entity or is --

MS. ROSEN: Yes.

THE COURT: It is. Okay.

MS. SAINT-GEORGE: Well part of the -- there was a little confusion on the city's website about the service process but everything has been served through

the city's centralized service.

THE COURT: Okay. I'm going to leave this issue with the parties for now.

MS. SAINT-GEORGE: Okay. Thank you.

THE COURT: If it turns out we have a dispute over whether service was probably effectuated, we'll take that up at the appropriate time, although that may have implications for the preliminary injunction.

MS. SAINT-GEORGE: Yes, it would. But the preliminary injunction TRO was separately served, or it was served on the city and named the Department of Education. So if we did not have a complaint and we just asked for a TRO and a preliminary injunction, that would be proper service because --

THE COURT: Okay.

MS. SAINT-GEORGE: -- they're technically separate requests. You can have a TRO without having a complaint. So they have been served the TRO, the preliminary injunction which is really critical for all of the plaintiffs who have been on leave without pay for almost a year now to have them have whatever ruling come out be directed to the Department of Education.

THE COURT: Yes. I think we should have, and let's put this to the side for a moment, a bit of argument from both sides about the preliminary injunction

and the question of (A), whether it should be granted or denied, and (B), whether we do need a fact hearing in connection with the preliminary injunction or not. I suppose in that context the city might argue, or maybe nobody would argue because there's nobody here to argue, that if a party receives valid service of a preliminary injunction motion but did not receive valid service of the complaint in the first place, I don't know exactly what that means from the perspective of whether they can be bound by a preliminary injunction order. Again, let's table that question for a second while we just figure out what to do first.

It does sound to me like this preemption question is a key question for all three motions, preliminary injunction, motion to dismiss, summary judgment. And that whether we do it today or next week, we should just put this case on for -- well maybe we should do it today, for oral argument at least on that question. And then I can resolve the request for a preliminary injunction in relatively short order.

What is the city's perspective on the order of operations question here? (A), do we need a hearing on the preliminary injunction motion? (B), in what order should we be proceeding here?

MS. ROSEN: Your Honor, the city's position is

that all the issues in the preliminary injunction overlap with motion to dismiss issues. And so if they can be resolved together, that would save judicial resources and the time of both parties.

I would also like to add that the preliminary injunction's attempting to prevent the vaccine mandates against DOE employees and city employees have been litigated over a dozen times in the federal southern and eastern district. The Second Circuit has already ruled the vaccine mandates on their face are enforceable. So I --

THE COURT: But on this, against these objections?

MS. ROSEN: On the grounds of First Amendment, on the grounds of whether or not state law preempts have been ruled on already and --

THE COURT: All right. But so you're not necessarily able, correct me if I'm wrong, to point to decided cases in the Eastern or Southern Districts of New York or the Second Circuit that reached the question of whether OSHA preempts this mandate? I understand that maybe you think it's an easy question to resolve, but has any court decided that question?

MS. ROSEN: No court to my knowledge has addressed specifically the issue of OSHA and the vaccine

mandates, your Honor.

THE COURT: Okay. So I'm going to need briefing at least on the OSHA preemption question unless --

MS. ROSEN: However, my pre-motion letter does discuss that there is no private right of action under OSHA. So therefore, that would make, I feel, a preliminary injunction on the basis of OSHA moot because the individual plaintiffs cannot sue under OSHA as well as OSHA is not the relevant law --

THE COURT: Then you'd be suing under the Declaratory Judgment Act, right? Assume arguendo that there's some area in which federal law truly preempts, completely preempts any efforts by states or municipalities to regulate in that area. I understand you don't think that we're sitting in that situation here, but assume that there is. And then the state comes in and says hey, you need to do something or else you lose your job, your city job. You don't need a private right of action under the statute that gives rise to preemption, do you? Why does the private right of action matter if the -- I don't know if you've dealt with the Declaratory Judgment Act.

MS. SAINT-GEORGE: Actually, you don't need to. This is an issue of does the city have authority to

regulate in workplace safety that they --

THE COURT: Right. So the city's probably right. I didn't look to OSHA. But they may be right that there's no private right of action --

MS. SAINT-GEORGE: Right. But --

THE COURT: -- in the OSHA statute and so you'd still need to point to some --

MS. SAINT-GEORGE: Correct.

THE COURT: -- vehicle to give rise to the cause of action.

MS. SAINT-GEORGE: And the cause of action is of course the New York City Human Rights Act with regards to the issue of harassment on religious, for the religious exemption. So let's take this step by step. Private right of action has to do with whether or not someone can receive damages and a remedy under that statute. And we're not looking --

THE COURT: But also whether someone gets into court. Right? Let's say you decided you're going to sue somebody for violating the federal wire fraud statute and that person said look, I may or may not have defrauded them but this is a criminal statute and you can't bring civil actions -- private parties are not empowered to invoke the statute to bring a lawsuit. I think that's what they're saying about OSHA is that OSHA sets up a

regulatory scheme by which a government agency, whether it's workplace safety, and there just is no vehicle in that statute for you to --

MS. SAINT-GEORGE: But as I said, we're not --

THE COURT: Let me just look at the complaint.

MS. SAINT-GEORGE: -- bringing a case. We're addressing two separate issues. The issue is the First Amendment right to object to a vaccine and --

THE COURT: Right. But that has nothing to do with OSHA, right?

MS. SAINT-GEORGE: Well yes it does because in OSHA in Section 655(b) it expressly states that this section or any part of this act shall require or preclude any person from objecting from immunization. So it gives the individual worker --

THE COURT: On religious grounds you're saying?

MS. SAINT-GEORGE: -- worker, it gives the worker the right, and it's an automatic right to object to immunization in workplace safety. So when the statute was written and passed bipartisanly, it was understood that employers could require employees to engage in workplace safety acts that could violate their religious practices. So in the statute it provides --

THE COURT: Can you just point me to the page in your complaint where the individual causes of action

start? I'm looking at the second amended complaint.

MS. SAINT-GEORGE: I apologize, I don't have it up on my computer so bear with me.

THE COURT: Yes, take your time.

(Pause in proceedings)

THE COURT: Count 1, violation of OSHA.

MS. SAINT-GEORGE: Page 9.

THE COURT: Yes. Oh I'm on page 17.

MS. SAINT-GEORGE: The causes of action or the introduction?

THE COURT: The causes of action.

MS. SAINT-GEORGE: Causes of action. Sorry.

THE COURT: That's okay. Do you mind me asking though the relevance of the causes of action? Because we're not seeking damages, we're not seeking --

THE COURT: Because the standard for preliminary injunctions asks whether you have a certain likelihood of success on the merits.

MS. SAINT-GEORGE: Right.

THE COURT: And the question was on the merits of what claim?

MS. SAINT-GEORGE: The First Amendment claim which is clearly the --

THE COURT: What count is that?

MS. SAINT-GEORGE: We did preemption. We said

this is preempted and then -- wait, hold on. Let me get there.

THE COURT: That's Count 2? Count 2 invokes the supremacy clause.

MS. SAINT-GEORGE: Right.

THE COURT: And 42 USC Section 1983. Oh and Count 3 is the First Amendment and Section 1983.

MS. SAINT-GEORGE: Right, and section 1983 applies to states and it protects First Amendment rights.

THE COURT: Okay.

MS. SAINT-GEORGE: So what I think -- is the confusion over whether or not the preemption claim can be made or --

THE COURT: How to make it.

MS. SAINT-GEORGE: -- is the issue whether or not First Amendment claims can be made but are protected as strict scrutiny by the federal statute? Because that's --

THE COURT: So I'm understanding your arguments to fall into two separate baskets. And I understand there may be some interplay between the two. But let me just tell you how I understand the baskets to work and you'll tell me if I have this right or wrong.

Basket one is look, the United States Constitution confers a right to religious liberty and

Section 1983 confers a private right of action for violations of people's constitutional rights. And we are asserting, pursuant to Section 1983, that religious liberties have been violated. That's question one.

Question two, or cause of action broadly speaking two, you're saying whether this is a violation of religious liberty or not, this is an area in which the city does not have the right to regulate because the federal government through the OSHA statute has completely preempted states and municipalities from regulating.

MS. SAINT-GEORGE: Correct.

THE COURT: And that's good for us because we like the federal statute anyway because it has this exception. The question in my mind is okay what is the vehicle, or legal vehicle, pursuant to which you are asserting that preemption claim? The legal vehicle I think cannot be OSHA because as the city has pointed out, OSHA contains no private right of action. I would have intuited, and I could be wrong about this, that the vehicle I would have thought would have been the declaratory judgment act that you were looking for a statement, a declaration --

MS. SAINT-GEORGE: Correct.

THE COURT: -- from the Court that the city is

preempted by OSHA. But the vehicle for bringing that claim, again I would have intuited, would have been the Declaratory Judgment Act.

MS. SAINT-GEORGE: And that's correct. And that's in our conclusions in the complaint that says we request the declaration -- you don't -- and in pleadings, we try to streamline it, right?

THE COURT: Yes.

MS. SAINT-GEORGE: We didn't want to do separate -- we could have done a separate motion. We streamlined everything, the preemption, First Amendment, and here are prayer for relief. Prayer for relief is what controls and, as you say, is the vehicle through which we seek this Court --

THE COURT: Okay. But you don't have a count or cause of action that invokes the Declaratory Judgment Act if I'm --

MS. SAINT-GEORGE: Well embedded in the preemption is a declaratory request because a preemption is just that, a declaration that -- the authority is in the federal statute and not in the state statute or state law. So we were just trying to streamline these issues that --

THE COURT: Oh, I see you do --

MS. SAINT-GEORGE: -- have never been presented

I think in any court in the United States at this point, but --

THE COURT: Okay. So I think I need briefing from the parties on this preemption question. Right? The city has not had a chance adequately to brief the OSHA preemption issue.

MS. SAINT-GEORGE: Well they've had the notice of preemption since May.

THE COURT: No, I know they have notice but I haven't set a briefing schedule.

MS. ROSEN: Your Honor --

MS. SAINT-GEORGE: Your Honor, I'd like to make this one point.

THE COURT: Yes.

MS. SAINT-GEORGE: The issue of preemption though squarely focuses on --

THE COURT: Oh and I should say, by the way, if you're confident that everybody is sitting within six feet of you is okay with you taking off a mask when you're speaking at length, you should feel free to do that. If not, you can continue to wear it. That's completely up to you

MS. SAINT-GEORGE: Okay. Yes. What I'd like to point out though is squarely at the heart of this issue of preemption has all to do with whether or not the

law is a law of general applicability. General applicability which was decided by the state courts in the smallpox case, and I can't remember the case name at this point, but it was just 2019, smallpox outbreak here. The city ordered a mandated vaccine for measles for anyone six months and over, and if they didn't want to get vaccinated, they pay a fine. The court in that decision, it was a general applicable law because it applied to everybody. The landmark Supreme Court decision, which is the *Smith* case, or the *Payote* case everyone knows, that case applied to every person in the country being prohibited from using a controlled substance.

This statute does not regulate every resident of the City of New York. It only applies to people in the workplace, employees of the city and/or employees of private --

THE COURT: Yes, I'm --

MS. SAINT-GEORGE: So that's not everybody. So it cannot --

THE COURT: I understand. I don't want to get into the merits right now.

MS. SAINT-GEORGE: So once you decide, right, but once you decide that it's not generally applicable, it automatically puts you in OSHA. So there is nothing

to brief once they concede that the statute on its face is not generally applicable. If it's not generally applicable, it only applies to employees in the workplace setting, what is there to brief with regards to OSHA? OSHA applies. That is the federal standard and statute. And it's the agreement that this city and this state has with the state because the city did not take control over respiratory diseases, they don't have -- they didn't get a variance, and they don't have a state plan for managing communicable diseases, respiratory diseases.

THE COURT: Sorry, what is in OSHA that gives rise to the relevance of whether this is applicable to all citizens or just the city employees? The

MS. SAINT-GEORGE: So it actually is the *Gade* U.S. Supreme Court case and all of the --

THE COURT: Can you spell the name for me?

MS. SAINT-GEORGE: G-A-D-E. And all OSHA cases involving any state or city regulator that wants to regulate workplace safety. So in New York in particular it's mainly in construction where you have -- the city says we want to set a standard higher than the federal standard. So federal standards always set the floor. Cities can always regulate above that. Right? And there's often this clash where the industry will say no, you don't have the right to regulate in that space. So

this context is usually, or these types of cases are usually found in heavily regulated industry cases. And all of those line of cases have made it very painfully clear, and the Supreme Court has made it painfully clear, that in order for a city, state, or employer to change workplace safety standards, they have to one, get a variance, or the city or the state has to have a state plan with the federal government that the federal government approves. So at the end of the day, the agreement is the feds have the control. States and employers have to get permission which hasn't been obtained in this situation.

THE COURT: Okay.

MS. SAINT-GEORGE: The issue -- and so the general applicability --

THE COURT: Tell me what the briefing schedule should look like here. Have you said anything to say on these preemption standards in legal briefs?

MS. SAINT-GEORGE: You have my binders with all the exhibits. I made it all nice for you.

THE COURT: Yes.

MS. SAINT-GEORGE: I would ask that the city respond by this Monday and I'll respond three days later. They know these issues. These issues -- they argued these very issues themselves just a year ago as it

relates to the fire department and whether or not there was --

THE COURT: Oh I know the Second Circuit opinion you're talking about.

MS. SAINT-GEORGE: Right. Exactly. These --

THE COURT: I'm going to give the city a little bit more time than that because these preemption questions can be complicated and this is a unique context in which we're having that argument.

MS. SAINT-GEORGE:

MS. ROSEN: Your Honor, if I may?

THE COURT: Yes.

MS. ROSEN: OSHA doesn't apply to the City of New York the City of New York's relevant statute is the Public Employee Safety and Health Act, or PESHA, which is New York Labor Law --

THE COURT: No, but the question is --

MS. ROSEN: -- 27(a). OSHA has no relevance. Also, it's not a workplace safety. The vaccine mandates are conditions of employment as the Second Circuit has already held. So workplace safety is getting --

THE COURT: I don't want to hear argument on the merits.

Here's where I understand us to be. I think I understand the plaintiffs to be arguing that it's not

about whether OSHA binds the city to do anything or not do anything in terms of workplace safety regulation other than to say that -- and you may think this argument is frivolous and if so, you'll say so in the briefs. But I understand the argument to be OSHA preempts the city's ability to regulate in this space. And have you answered that question? Is that not the right question? I'm not sure why you --

MS. ROSEN: Your Honor, I feel like that's the wrong question.

THE COURT: Why?

MS. ROSEN: Because OSHA is irrelevant. It doesn't apply to the City of New York. The City of New York has other standards. There is a 100 plus year history in the U.S. Supreme Court and the Second Circuit that permits vaccination mandates.

THE COURT: But this one, if it's justified on the grounds of -- just put in a brief. You can decide what you want to say in response to the request for a permanent injunction and not say. I would like to hear a response, even if it's one paragraph and even if the answer is utterly obvious to you, I would like to see a citation for the proposition that OSHA does not preempt states and municipalities from regulating in the area of workplace safety. And if there's 100 years of regulation

on that subject, it should be as obvious, it should be easy for you to find the case law that I'm asking for.

MS. ROSEN: But your Honor, this isn't an issue of workplace safety, it's an issue of a condition of employment.

MS. SAINT-GEORGE: Your Honor, I --

THE COURT: What is the difference?

MS. SAINT-GEORGE: Can I just --

THE COURT: It's a condition of employment but why? If OSHA says --

MS. ROSEN: Because the City of New York has decided it's a condition of employment.

THE COURT: Then you can get around -- let's assume for a minute that OSHA really preempted all state and municipality regulation on the subject of workplace safety. Right? And the city didn't like that and thought it should have its own ability to regulate workplace safety. And so the city passed a bunch of new regulations that say that everybody who wants to be employed in the construction industry or work on a city job or whatever has to follow the following 52 safety regulations. You would think that the plaintiffs could come in and say look Judge, we all agree, assume counterfactually, we all agree that OSHA preempts state and municipal regulation of workplace safety. But these

52 safety regulations, that's not regulation of workplace safety. That's just a condition of employment. That sounds preposterous to me and like you may be missing the point.

If the argument is that -- and I understand you may think this argument is crazy but there's no exception to the briefing rules that says that if you think an argument is crazy you don't have to respond to it. The argument that's being made is that OSHA completely preempts state and municipal regulation in this area. And that's going to be true if indeed these regulations can be characterized as workplace safety regulations or emerging from workplace safety imperatives or defensible on bases associated with workplace safety. It's not going to be an answer that oh, it's just a condition of employment so you don't have to worry about it because if that was the case, that would be the exception that swallowed the entire preemption rule, right? Because you just call everything a condition of employment instead of a workplace safety regulation or whatever kind of preemptive regulatory area you were talking about. Does that make sense?

MS. ROSEN: I hear what you're saying, your Honor.

THE COURT: Pick an area in which we agree

there is preemption. Right? The City of New York is not allowed to regulate what prescription drugs pharmacies can sell and not sell. Right? There really is federal preemption on that issue. Let's say the City of New York wanted to come in and say nobody's allowed to take Lipitor. We think this cholesterol thing is a complete myth and that these drugs are bad for you and shouldn't be allowed. If the New York City Council passed a law that said anybody who takes Lipitor is not eligible for employment in the City of New York, we would agree that that would be preempted by the Food and Drug Act and we would agree that even if the city came in and said Judge, it's just a condition of employment, it's not a food or drug issue, it's a condition of employment. What am I missing?

MS. ROSEN: I guess, your Honor, my confusion is if there's no private right of action under OSHA, why are they --

THE COURT: There's no private right of action --

MS. ROSEN: -- why are plaintiffs pursuing a cause of action under OSHA? And this is all tied into individual plaintiffs --

THE COURT: I agree with you. You're going to make this point in your brief. You're going to make this

point in your brief. I agree with you that it's odd that the complaint is structured in such a way that the vehicle, let me just get to the count --

MS. SAINT-GEORGE: May we have permission then to just file a separate -- or in our amendment file a separate declaratory relief under the Federal Declaratory Relief Act?

THE COURT: Yes.

MS. SAINT-GEORGE: If we really need to do that, I mean I'm again --

THE COURT: So I --

MS. SAINT-GEORGE: But I want to make one --

THE COURT: -- I was going to ask the same question. Let me just respond. I do agree that it's odd to me, to my eye, that Count 1 is framed as some sort of freestanding OSHA preemption argument without reference to the Declaratory Judgment Act. But it is true, as the plaintiffs have said today, that the prayer for relief specifically names the Declaratory Judgment Act. And I would, if asked, allow the plaintiffs to amend their complaint to just add the Declaratory Judgment Act to the heading for Count 1. Right? And so to me, and I'm sort of puzzled that there seems to be such ferocious resistance from the city on this point, to me understood that way, the plaintiff's argument seems to call for a

response from the city on the question of whether it's true or not true as a matter of law that OSHA preempts all workplace safety regulations including vaccine mandates that may be justified on the basis of workplace safety.

MS. SAINT-GEORGE: Well your Honor, I want to --

THE COURT: I'm telling you what I think is relevant. You can write a brief on any subject you want and it'll just impact the likelihood that this litigation continues or doesn't continue, goes your way sooner or goes your way later or not at all. But I'm telling you that question is -- I think it's incumbent on you to answer that question and to do it in a brief that I will call for two weeks from tomorrow.

MS. SAINT-GEORGE: Your Honor, may I make a point though? It's not -- I want to make it clear, the preemption is not a straight preemption. The Supreme Court has said, and Justice Day O'Connor completely stated that --

THE COURT: But I don't want to have argument on this. I'm saying what's --

MS. SAINT-GEORGE: I just wanted -- well, I guess I'm being a stickler about clarity around preemption.

THE COURT: Yes, and I may have misstated your arguments.

MS. SAINT-GEORGE: Preemption in this situation, it doesn't mean that they can't regulate. It means that when they don't have a state plan that specifically regulates on a particular safety subject, respiratory safety, they have to have permission to either control it or get a variance. So it's not just straight preemption, oh it's automatic preemption. No. The statute gives states the right --

THE COURT: Right.

MS. SAINT-GEORGE: -- to do certain things, but they have to follow the rules.

THE COURT: But that argument's in your briefs already?

MS. SAINT-GEORGE: I have made it crystal clear. And so I'm really --

THE COURT: Yeah. So I may be dropping an intermediate step in the argument, and I apologize if that's the case. There can be complete preemption or like the Voting Rights act, it can be that states are only allowed to do certain things with federal permission. Right? And maybe they're seeking a declaratory judgment that okay fine, the city could theoretically do some of these things if they got

expressed written permission from the federal government through some articulated process.

MS. SAINT-GEORGE: Called a variance which --

THE COURT: Called a variance.

MS. SAINT-GEORGE: -- which they have not gotten.

THE COURT: And they haven't done that. And therefore, the city law is unenforceable. And I want a declaratory judgment to that effect. The plaintiffs can put in an amended complaint by close of business on Thursday if there's something you want to change in here to that effect.

MS. SAINT-GEORGE: Is there any way that we can like make that two weeks sooner? People have lost their homes, people have -- I mean we're in -- and the other issue is I filed the preliminary injunction because of the harassment to do -- if you don't have authority to do something and then to dangle someone's job after you can't make money, you can't get hired anywhere in the state and out of the state, you've run out of money --

THE COURT: Right.

MS. SAINT-GEORGE: We are not talking --

THE COURT: All right. Let me --

MS. SAINT-GEORGE: They've known this issue. This is not new to them nor --

THE COURT: Let me --

MS. SAINT-GEORGE: Amazon was sued on the same issue and the court said --

THE COURT: Well that's --

MS. SAINT-GEORGE: Yeah. So I'm --

THE COURT: So I'm going to call for the city's brief a week from Friday. Can you do that?

MS. ROSEN: Well, your Honor, I just have two questions. One, the third amended complaint that plaintiffs can file is going to be due Thursday?

MS. SAINT-GEORGE: I'll give it to you --

THE COURT: The day after tomorrow.

MS. ROSEN: Okay, day after tomorrow. And then my second question is is this additional briefing separate, the motion to dismiss separate from my response to preliminary injunction on top of --

THE COURT: If you already said everything you feel like you need to say on this subject, then you don't have to submit any more briefing. But I'm understanding the arguments here today a bit differently than it sounds like you understood them before today. And I'm giving you the opportunity if you want it to respond to the arguments that I'm saying. And it sounds like there's, you know, the plaintiffs have had to step in and modify certain things that I've said about how their preemption

argument works but I think we've gotten to a place now where --

MS. SAINT-GEORGE: Crystal clear.

THE COURT: -- I am certain I understand the plaintiff's argument in a way that dovetails with the plaintiff's understanding of the argument. And that on the one hand does not match up with the arguments you have responded to in your briefing on the other hand. And so that's my question to you is have you heard what I've said with input from the plaintiffs about how I understand their argument to work? Do you want an opportunity to respond --

MS. ROSEN: Yes, your Honor.

THE COURT: -- to those arguments? Okay. How soon can you get me that response? Is a week from Friday too soon? I don't think so.

MS. ROSEN: I will do a week from Friday.

THE COURT: Thank you.

MS. ROSEN: And your Honor, do you also want me to brief a response to the preliminary injunction which I have not done yet or should I -- because the preliminary injunction request is 610 pages.

MS. SAINT-GEORGE: We can streamline it. The motion for summary judgment preliminary injunction, all the same thing. They can answer --

THE COURT: And let's take the preliminary injunction first, and I think that will inform where we go from here. And I may choose to decide the motion to dismiss at the same time that I decide the preliminary injunction motion. You can call out -- you should respond to the motion for a preliminary injunction. You can do that by cross referencing to arguments you've already made. You don't need to submit the same briefs twice. If you think there is -- I mean the standard for a preliminary injunction is a little different, right? You've got to talk about whether -- not only whether there's a likelihood of success on the merits, but you may want to say something or not about the balance of harms or possibility of irreparable harm. I mean maybe you think that the likelihood of success on the merits is all that matters for purposes of the preliminary injunction or maybe you don't. I defer to you on that question.

MS. ROSEN: So do you want me to respond to the preliminary injunction at the same time as I address the issue of whether OSHA preempts vaccine mandates?

THE COURT: Yes.

MS. SAINT-GEORGE: That is the --

THE COURT: Yes. I'm calling for that briefing on the preemption question because --

MS. SAINT-GEORGE: That is the motion.

THE COURT: -- as I understand the plaintiff's argument, I think that preemption question goes very specifically to their likelihood of success on the merits of their OSHA claim. I understand there's also a First Amendment claim. I think that's a little different. But I see this all as tied up in the likelihood of success on the merits for the preliminary injunction purpose. Does that make sense?

MS. ROSEN: Yes, your Honor. Would this be the same 25 page limit that's in your -- I was working on a fuller briefing of the motion to dismiss before today.

THE COURT: I bet you can use a lot of that stuff in your statement of whether they're likely to succeed on the merits.

MS. ROSEN: Yes, your Honor. And I was going to ask today for the motion to dismiss if I can have additional pages since there are a lot of issues addressed here. And if I'm going to be combining preliminary injunction standards --

THE COURT: You can have 30 pages. It's a little --

MS. SAINT-GEORGE: Your Honor?

THE COURT: I want to wrap this up pretty quickly. There's a little bit of attention between say

on the one hand all of these issues have already been decided and you can just look at, you know, eastern and southern district and Second Circuit case law and that's the end on the one hand, and then saying I need 600 pages to respond to the preliminary injunction motion.

MS. ROSEN: Oh, I don't need 600 pages.

THE COURT: I'm kidding.

MS. ROSEN: 30 would be great.

THE COURT: 30. And we'll leave it at that. And do you want a reply to what I'm going to file a week from Friday?

MS. SAINT-GEORGE: I'll take the 30 but I think I can do it in two.

THE COURT: The page number for the reply should be 15 --

MS. SAINT-GEORGE: Okay.

THE COURT: -- because you've already had the first bite at the apple. Your reply should be due, should we say a week or as soon as you can get it but no later than a week after the defense submission.

MS. SAINT-GEORGE: So can I have the same number of additional pages that you've given to defense?

THE COURT: Yes. So if they get 30 and you want 20, that's fine.

MS. SAINT-GEORGE: Correct. Just in the event

they raise issues that are outside the box of the focus so I can address them. So yes, thank you.

THE COURT: Okay. And I will endeavor to get a response out as quickly as possible. And as I say, I may just grant or deny the preliminary injunction. If the preliminary injunction is denied, it may be based on legal analysis that applies with equal force to the motion to dismiss and I'll take up both of those questions at the same time. I don't know until I read the briefs. But whatever ruling I issue, I'll try to say in the last paragraph here's what I think this means in terms of next steps.

MS. SAINT-GEORGE: So let me make sure I'm hearing you correctly. Are you saying that there's the potential that in your post hearing ruling that you may even decide the preliminary injunction? Or are you --

THE COURT: Decide the motion to dismiss you mean?

MS. SAINT-GEORGE: No. And I might have heard you incorrectly I thought I heard you say that you may even -- you may decide the preliminary -- to grant or deny a preliminary injunction in your ruling after this hearing or after the briefing?

THE COURT: No, after this briefing.

MS. SAINT-GEORGE: Okay.

THE COURT: Yeah. But I was saying just imagine -- I don't know what the case law is going to say. I haven't looked into any of this yet. But imagine hypothetically that the government cites case law that says there just absolutely is no extent to which states and municipalities are preempted by OSHA in regulating workplace safety or even required to give variances or anything else. You know, if that's a basis for finding an absence of likelihood on the merits for preliminary injunction purposes, it may also be a sufficient legal basis on which to decide a Rule 12 motion. And if so, I would possibly do those two things simultaneously.

MS. SAINT-GEORGE: So a Rule 12 only gets to the legal issue --

THE COURT: Sufficiency of the complaint.

MS. SAINT-GEORGE: -- on the sufficiency of the complaint. The complaint on its face is sufficient and it provides enough information that you can convert it to a motion for summary judgment.

THE COURT: Yes. I'll have --

MS. SAINT-GEORGE: The First Amendment is in the brief. So to say well there isn't a basis upon which --

THE COURT: Let me just ask you this --

MS. SAINT-GEORGE: -- there is no First

Amendment claim, which we know there is, the only issue in all of these cases have been what standard should be applied, strict scrutiny or rational basis. We're saying OSHA expressly states strict scrutiny should apply for --

THE COURT: Can I ask you --

MS. SAINT-GEORGE: Yes.

THE COURT: -- what facts -- are there any facts in dispute here?

MS. SAINT-GEORGE: Absolutely none.

THE COURT: Okay. So there's no need for you to call witnesses at a hearing.

MS. SAINT-GEORGE: Only to prove damages. So as to the damage claim, that's it. As to the legal arguments and issues, absolutely not. We do have expert testimony on one issue and that is whether or not a vaccine is a safety method or a medical treatment. Medical treatments do not effectuate safety standards for what OSHA's control is and that is over the environment. Vaccines don't take airborne hazards out of the air and they do not shield anyone from being exposed to airborne hazards. That's the authority of OSHA and that's why the Supreme Court in January said OSHA, you can't make people test.

THE COURT: Okay.

MS. SAINT-GEORGE: So that's the only --

THE COURT: All right. I understand the arguments.

MS. SAINT-GEORGE: That's the only piece that we have as far as expert testimony on that specific issue.

THE COURT: All right. Thank you. All right. So do you want to just reiterate the briefing schedule here just to make sure we're all on the same page?

THE CLERK: Yes, sir. The city will respond by 9/23 and the plaintiff will reply by 9/30.

THE COURT: Thank you all.

THE CLERK: The plaintiff, if they are to amend their complaint further, are to do that by 9/15.

THE COURT: Yes. All right? Thank you all very much.

MS. ROSEN: Thank you, your Honor.

MS. SAINT-GEORGE: Thank you.

THE COURT: Stay safe and we'll be in touch.

MS. SAINT-GEORGE: Thank you.

(Matter concluded)

-oOo-

C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this **14th** day of **September**, 2022.

Mary Greco

Transcriptions Plus II, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

Sara Coombs-Moreno, et al.,

Plaintiffs,

MEMORANDUM & ORDER
22-CV-02234(EK)(LB)

-against-

The City of New York, et al.,

Defendants.[1]

----------x

ERIC KOMITEE, United States District Judge:

The plaintiffs in this case are current and former employees of several New York City agencies. During the COVID-19 pandemic, they refused (for religious, medical, or philosophical reasons) to be vaccinated. Many (but not all) of them suffered employment-related consequences as a result. They brought this action in response, arguing that the City's vaccine mandate violated various federal constitutional and statutory provisions.

The defendants have moved to dismiss plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6).[2] For the following reasons, that motion is granted, except with

[1] The Clerk of the Court is respectfully directed to amend the caption as set out here.

[2] Defendants are the City of New York, Mayor Eric Adams, the New York City Department of Health and Mental Hygiene, Dr. Ashwin Vasan in his capacity as Commissioner of the Department of Health and Mental Hygiene, the New York City Department of Education, and Does 1-20.

respect to plaintiff Amoura Bryan's Title VII and New York City Human Rights Law claims against New York City and the Department of Education.[3]

I. Background

The following facts are taken from the Fourth Amended Complaint and certain court documents of which the Court may take judicial notice. ECF No. 88; *see Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991). Plaintiffs cite over 1300 pages of exhibits attached to the FAC, including a number of affidavits from plaintiffs and putative experts and reams of OSHA regulations. At the motion to dismiss stage, the Court need not wade through materials that are not "written instruments" under Federal Rule of Civil Procedure 10(c). *See Smith v. Hogan,* 794 F.3d 249, 254-55 (2d Cir 2015);[4] *see also Jackson v. Nassau Cnty.*, 552 F. Supp. 3d 350, 367 (E.D.N.Y.

[3] The municipal defendants are the City of New York, the New York City Department of Health and Mental Hygiene, and the New York City Department of Education. The Department of Health and Mental Hygiene is suable. *See* N.Y. Educ. Law § 2551; N.Y.C. Charter Ch. 22, § 564 ("The department may sue and be sued in and by the proper name of 'Department of Health and Mental Hygiene of the City of New York.'"). The Second Circuit has noted that whether the DOE is a non-suable agency of the City is "unclear." *Broecker v. New York City Dep't of Educ.*, No. 23-655, 2023 WL 8888588, at *1 n.2 (2d Cir. Dec. 26, 2023). However, for the reasons set out in *Brainbuilders LLC v. EmblemHealth, Inc.*, No. 21-CV-4627, 2022 WL 3156179, at *13 (S.D.N.Y. Aug. 8, 2022), the Court concludes that the Department of Education is a suable entity.

[4] In *Smith,* the Second Circuit held that the plaintiff's affidavit was not a written instrument "or otherwise properly considered to be part of the complaint," per Rule 10(c). *Id.* The panel reasoned that "treating the affidavit as part of the complaint would do considerable damage to Rule 8(a)'s notice requirement" – indeed, the "requirement of a short and plain statement of a claim for which relief could be granted would be eviscerated." *Id.*

2021) (declining to consider 56 exhibits attached to plaintiff's Second Amended Complaint when deciding a motion to dismiss).

Between August and December 2021, in response to the COVID-19 pandemic, the New York City Commissioner of Health and Mental Hygiene issued nine orders requiring certain individuals to be vaccinated against COVID-19. ECF Nos. 17-19 to 17-27. These included employees and contractors of the City Department of Education, along with certain other City employees and contractors, childcare workers, nonpublic school staff, and employees of private businesses. *Id.* All vaccine orders have since been lifted.[5]

Not all plaintiffs complain of the same harms. Some allege that after they refused to be vaccinated, they were placed on leave without pay and have been "locked out of their jobs" since September 2021.[6] Fourth Am. Compl. (FAC) ¶ 11, ECF No. 88. Other plaintiffs remain gainfully employed; they allege that they originally refused the COVID-19 vaccine but were "coerced" into vaccination by the threat of leave without pay. *See, e.g.*, *id.* ¶¶ 11, 19, 37-38, 88. Plaintiffs also allege that some (unnamed) individuals were harmed by the City's

[5] *See* Order of the Board of Health to Amend the Requirement for COVID-19 Vaccination for City Employees and Employees of Certain City Contractors (Feb. 9, 2023); Order of the Board of Health Amending COVID-19 Vaccination Requirements for Department of Education Employees, Contractors, Visitors and Others (Feb. 9, 2023).

[6] Based on plaintiffs' allegations, the continued lock-out appears to be involuntary. *See* FAC ¶ 11.

alleged misrepresentations regarding the effectiveness of the vaccines. *Id.* ¶ 11(c). No individual plaintiff expressly alleges membership in this latter group.

The complaint invokes the "biblical practice of plant-based lifestyle medicine" and other unspecified religious, medical, and philosophical beliefs as the root of Plaintiffs' objection to receiving the COVID-19 vaccination. *See, e.g.*, *id.* ¶¶ 16-18, 20-36, 138-42. Only one plaintiff alleges a more specific description of her religious beliefs. Amoura Bryan

> exercised her right to refuse the Covid-19 vaccine so that she could practice her religious Biblical medical practice of Plant-Based Lifestyle Medicine, which includes consuming a 100% plant-based diet according to the Bible instruction in Genesis 1:29 along with practicing the nine (9) lifestyle interventions also prescribed by the Bible, namely exercise, water, outdoor fresh air, cleanliness or hygiene to name a few.

Id. ¶ 138. The complaint provides no specifics concerning other plaintiffs' religious or philosophical objections.

Plaintiffs allege that the vaccine mandate violated their federal constitutional and statutory rights, as well as New York state law. FAC ¶ 1. They bring claims under (1) the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(11)(c); (2) the First Amendment's Free Exercise Clause and the Fourteenth Amendment's guaranty of substantive due process; (3) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.; (4) the New York City Human Rights Law,

Administrative code § 8-107(3), § 8-109(a)(f)(i); and (5) New York's common law of fraud. They seek declaratory and injunctive relief, as well as monetary damages. FAC ¶ 1.

On September 6, 2022, I denied plaintiffs' motion for a temporary restraining order because they had not established a sufficient likelihood of success on the merits. *See* Mot. for TRO & PI, ECF No. 17; Dkt. Order, Sept. 6, 2022. I denied a related application for injunctive relief on September 14, 2022. *See* Mot. for Reconsideration of TRO, ECF No. 20; Dkt. Order, Sept. 14, 2022. Following this denial, plaintiffs filed a Third Amended Complaint on September 15, 2022. *See* Third Am. Compl., ECF No. 22. Based on that new complaint, plaintiffs again filed for emergency relief on October 26, 2022, and moved to supplement their request for relief on November 16, 2022. Mot. for TRO, PI, & Conditional Class Certification, ECF No. 33; Mot. to Amend/Correct/Supplement, ECF No. 38. Again, I found that plaintiffs were unlikely to succeed on the merits of their claims. *See e.g.*, Mem. & Order, ECF No. 37; Mem. & Order, ECF No. 39.

Defendants initiated the instant Motion to Dismiss in 2023. *See* Mot. to Dismiss, ECF No. 47. Plaintiffs' several submissions thereafter, together with the failure to follow the Court's rules, elongated the briefing process. *See e.g.*, Mot. for Summary Judgment, ECF No. 57; Mot. to

Amend/Correct/Supplement Fourth Am. Compl., ECF No. 63; Mot. for Sanctions, ECF No. 64; Dkt. Order, Apr. 4, 2023.

On January 10, 2024, I granted plaintiffs leave to amend their complaint once again. Dkt. Order, Jan. 10, 2024. Plaintiffs filed their Fourth Amended Complaint on January 22, 2024 – the operative complaint here. *See* FAC. Consistent with my January 10, 2024 Order, defendants renewed their Motion to Dismiss on February 1, 2024. *See* Renewed Mot. to Dismiss, ECF No. 90; *see also* Opp'n to Renewed Mot. to Dismiss, ECF No. 91; Reply Supp. Renewed Mot. to Dismiss, ECF No. 95.

The Court acknowledges the following deficiencies in the Fourth Amended Complaint, as well as the inability of certain plaintiffs to bring suit. However, the Court need not wade into these deficiencies in greater detail due to the complete dismissal of the action, save for two claims brought by one plaintiff.

First, this case was initially brought by an association called "Women of Color for Equal Justice." That organization was dropped from the Fourth Amended Complaint after questions of standing emerged. Of the plaintiffs who remain, thirty-five assert no specific facts in support of their claims. Renewed Mot. to Dismiss at 2-3. Several plaintiffs are listed on ECF in the caption but not referenced in the body of the Fourth Amended Complaint at all, or vice-versa. *Id* at 2.

Second, the plaintiffs bring claims against the "Department of Children's Services," though no City agency bears that name. *Id.* This is presumably a reference to the Administration for Children's Services; that entity is not, however, subject to suit under the New York City charter. *E.g.*, *Thomas v. Admin. for Children's Servs.*, No. 21-CV-0047, 2021 WL 493425, at *2 (E.D.N.Y. Feb. 10, 2021).

Third, at least some plaintiffs in this case are or were also plaintiffs in other actions regarding the vaccine mandate, giving rise to the specter of claim-splitting. *See Am. Stock Exch., LLC v. Mopex, Inc.*, 215 F.R.D. 87, 91 (S.D.N.Y. 2002) ("It is well established, under the doctrine of 'claim splitting,' that a party cannot avoid the effects of *res judicata* by splitting her cause of action into separate grounds of recovery and then raising the separate grounds in successive lawsuits."); Mem. in Supp. Mot. to Dismiss at 6-7, ECF No. 48.

Lastly, three plaintiffs – Curtis Boyce, Ayse Ustares, and Sarah Wiesel – waived their claims against the Department of Education in exchange for health benefits through September 6, 2022. *See* Renewed Mot. to Dismiss, Ex. A; Ex. B; Ex. C, ECF Nos. 90-1, 90-2, 90-3. The New York County Supreme Court recently upheld and enforced an identical waiver to those executed by these plaintiffs. *See Sullivan v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 2023 N.Y. Misc. LEXIS

2468 (N.Y. Sup. Ct. 2023). Plaintiff Carla Grant executed a similar waiver with the Department of Transportation in exchange for health benefits through June 30, 2022. *See* Renewed Mot. to Dismiss, Ex. D; ECF No. 90-4. These plaintiffs' claims are thus also barred by *res judicata*.

These issues notwithstanding, the case is dismissed in its entirety, with the exception of two claims brought by Amoura Bryan, for the reasons that follow.

II. Standard of Review

To overcome a motion to dismiss under Rule 12(b)(6), a complaint must plead facts sufficient "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).[7] A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

On a motion to dismiss, the district court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiffs' favor. *See Lundy v. Catholic Health Sys. Of Long Island Inc.*, 711 F.3d 106, 113 (2d Cir. 2013). However, the Court need not construe legal

[7] Unless otherwise noted, when quoting judicial decisions this order accepts all alterations and omits all citations, footnotes, and internal quotation marks.

conclusions dressed as facts in favor of the plaintiffs. *See Iqbal*, 556 U.S. at 663 ("[T]he tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements.").

Additionally, district courts must police their own subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) ("if the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Lyndonville Savings Bank & Trust Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000) ("[F]ailure of subject matter jurisdiction is not waivable and may be raised at any time by a party or by the court *sua sponte*.").

III. Discussion

A. Occupational Safety and Health Act

In their first cause of action, plaintiffs assert that the City's policy of conditioning employment on vaccination violated their rights under the Occupational Safety and Health Act ("OSHA"). FAC ¶¶ 177-94. Plaintiffs cite the "right" – ostensibly emanating from Section 20(a)(5) of OSHA – to be free from discrimination for "refus[ing] any medical examination, medical treatment, or immunization/vaccine." *Id.* at ¶ 178; *see* 29 U.S.C. § 669(a)(5). The plaintiffs assert a claim directly under this Section, *see, e.g.*, *id.* ¶¶ 183-85; alternatively,

they contend that even if OSHA establishes no private right of action, this claim may be brought pursuant to 42 U.S.C. § 1983. *See id.* ¶¶ 189-190, 193-94.

The Court need not reach the merits of plaintiffs' OSHA claim. There is no private right of action under OSHA, and the claim may not be brought under Section 1983.

"Under OSHA, employees do not have a private right of action." *Donovan v. Occupational Safety & Health Rev. Comm'n*, 713 F.2d 918, 926 (2d Cir. 1983). On the contrary, "it is apparent from [OSHA's] detailed statutory scheme that the public rights created by the Act are to be protected by the Secretary and that enforcement of the Act is the sole responsibility of the Secretary." *Id.* at 927. Several recent cases in this circuit have applied this conclusion in virtually identical circumstances, barring private plaintiffs from bringing COVID-19-related claims under OSHA. *See, e.g.*, *Vasquez v. City of New York*, No. 22-CV-05068, 2024 WL 1348702, *11 (E.D.N.Y. Mar. 30, 2024), *reconsideration denied*, No. 22-CV-05068, 2024 WL 1886656 (E.D.N.Y. Apr. 30, 2024); *Quirk v. DiFiore*, 582 F. Supp. 3d 109, 115-16 (S.D.N.Y. 2022).

Plaintiffs argue that even in the absence of a private right of action under OSHA, 42 U.S.C. § 1983 provides the vehicle for a Section 20(a)(5) claim. *See* ¶¶ 189-190, 193-94. This is not correct. To seek redress through Section 1983, "a

plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). And even when a plaintiff can point to an individually enforceable right, *and* locate herself within the class of intended beneficiaries, a Section 1983 claim will still be dismissed if such an action "would be inconsistent with Congress'[s] carefully tailored [remedial] scheme." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989). That will be the case where, for example, Congress has created "a comprehensive enforcement scheme that is incompatible with individual § 1983 enforcement." *Blessing*, 520 U.S. at 330; *see City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

In the case of OSHA, "it is apparent from the detailed statutory scheme that the public rights created by the Act are to be protected by the Secretary" of Labor, "and that enforcement of the Act is the sole responsibility of the Secretary." *Donovan*, 713 F.2d at 927; *see also Jacobsen v. N.Y. City Health & Hosps. Corp.*, No. 12 Civ. 7460, 2013 WL 4565037, at *7 (S.D.N.Y. Aug. 28, 2013) (collecting cases noting the same). Given this detailed scheme – as well as the Second Circuit's directive to read enforcement as reserved to the

Secretary – it is clear that allowing OSHA enforcement under Section 1983 would be "incompatible" with Congress's dictates. *Blessing*, 520 U.S. at 341. Thus, plaintiffs may not prosecute their OSHA claim under Section 1983.

B. Constitutional Claims

Plaintiffs allege constitutional claims under both the First Amendment's Free Exercise Clause and under a Fourteenth Amendment substantive due process theory. *See* FAC ¶¶ 195-226. They seek remedies through 42 U.S.C. § 1983. *Id.* ¶ 196. However, plaintiffs have failed adequately to allege the necessary elements of a Section 1983 claim.

1. First Amendment: Free-Exercise Claim

Plaintiffs allege that the vaccine mandate unconstitutionally impinges on the free exercise of their religion. This argument has already been rejected by the Second Circuit, which held that a vaccine mandate covering certain New York *State* employees did not violate the Free Exercise Clause because the mandate was a neutral law of general applicability. *See We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 290 (2d Cir. 2021), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021).

The First Amendment dictates that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend I; *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Clause against the states). To state

a Free Exercise Claim, a plaintiff must, as a threshold matter, allege a "sincerely held" religious belief. *See Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002). Having done so, they must then plausibly allege that "the object of [the challenged] law is to infringe upon or restrict practices because of their religious motivation," or that the law's "purpose . . . is the suppression of religion or religious conduct." *Okwedy v. Molinari*, 69 F. App'x. 482, 484 (2d Cir. 2003).

As noted above, only one plaintiff has made even the faintest effort to describe the religious beliefs at issue with any specificity at all.[8] In that regard, the claims here are even weaker than those rejected in *We The Patriots*. *Cf. We The Patriots*, 17 F.4th at 272 (plaintiffs contended that vaccination "would violate their religious beliefs because those vaccines were developed or produced using cell lines derived from cells obtained from voluntarily aborted fetuses."). In making this observation, this Court need not – and does not – engage in sincerity analysis. That process is constitutionally fraught.[9]

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[8] Apart from the one plaintiff described as following the "biblical practice of plant-based lifestyle medicine," FAC ¶¶ 138-42, 203, plaintiffs do not enumerate their specific religious objections to the vaccine mandate. Plaintiffs instead refer generally to their "religious practice of abstaining from the COVID-19 [vaccine]." FAC ¶ 159.

[9] "In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591

It is also, however, inherently fact-intensive; as such it cannot even be attempted where, as here, plaintiffs have pled virtually nothing about the beliefs at issue.[10]

More importantly, the plaintiffs have not alleged that the mandates targeted religion or treated religious belief less generously than lay practice. Under existing precedent, a law does not violate the Free Exercise Clause if it is generally applicable, the government can articulate a rational basis for enforcement, and any burden upon religion is incidental rather than purposeful. *See Emp. Div., Dep't of Hum. Res. of Or. v. Smith,* 494 U.S. 872, 879 (1990); *Emilee Carpenter, LLC v. James,* 107 F.4th 92, 109 (2d Cir. 2024). At the same time, laws that treat religious belief less favorably than other conduct are not generally applicable (or, said differently, they are not "neutral" towards religion). *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020) (per curiam); *see Okwedy,* 69 F. App'x. at 484.

It was against this legal landscape that the Second Circuit rejected the Free Exercise Clause challenge to the State's vaccine mandate in *We The Patriots*, 17 F.4th at 290,

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U.S. 732, 757 (2020); *see also Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969) (civil courts should not resolve questions that would require them "to engage in the forbidden process of interpreting and weighing church doctrine").

[10] We return to this issue in the analysis of plaintiffs' Title VII religious-discrimination claims. *See* Section III.C below.

which post-dated *Roman Catholic Diocese*. There, the Court of Appeals held that the vaccine mandate was facially neutral because a) "the evidence before the district courts failed to raise an inference that the regulation was intended to be a covert suppression of particular religious beliefs," and b) certain comments made by Governor Kathy Hochul were not reasonably understood to reveal that the vaccine mandate was targeted at individuals with religious opposition to required vaccination. *Id.* at 282-284. Additionally, the Court held that despite medical exceptions to the mandate, the law was generally applicable because "[c]omparability is concerned with the risks various activities pose," and medical exemptions are far narrower and more connected to a compelling government interest in health promotion than religious exemptions. *Id.* at 285-288.[11] That holding binds this Court.

This case bears no material distinction from *We The Patriots* and other cases previously decided in this Circuit. Plaintiffs have failed to state a violation of the Free Exercise clause.

2. Substantive Due Process

[11] *See also Kane v. de Blasio*, 623 F. Supp. 3d 339, 356-58 (S.D.N.Y. 2022) (vaccine mandate for City employees was neutral and generally applicable, and DOE articulated a rational basis for the policy); *Rizzo v. NYC Dep't of Sanitation*, No. 23-CV-7190, 2024 WL 3274455, at *5 (S.D.N.Y. July 2, 2024) (collecting cases rejecting Free Exercise challenges to City employee vaccine policies).

The due process clause has been held to have a "substantive" component, guaranteeing some unenumerated rights. The first step in evaluating a substantive due process claim "is to identify the constitutional right at stake." *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995). Here, Plaintiffs invoke "the inherent right of every freeman to care for his own body and health in such way as to him seems best" and, on that basis, to decline unwanted medical treatment. FAC ¶ 199-202 (citing *Jacobson v. Massachusetts,* 197 U.S. 11, 26 (1905)).

To succeed, the plaintiffs must establish that the right they claim is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). They have not clearly attempted to do so, and any such effort would not succeed. The Supreme Court and Second Circuit have "consistently recognized that the Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional." *We The Patriots*, 17 F.4th at 293. Indeed, *Jacobson,* which plaintiffs cite for the right to decline medical treatment, held that "urgent public health needs of the community can outweigh the rights of an individual to refuse vaccination." *Id.* at 293 n.35 (explaining

why *Jacobson* remains binding). On this basis, a neighboring district court held that New York's vaccine mandate implicated no fundamental right, and that no substantive due process violation had been visited upon City employees. *See Kane,* 623 F. Supp. 3d at 360-61. The reasoning in that case applies with equal force here.

Because plaintiffs have not articulated a fundamental constitutional right, they fail to state a substantive due process claim upon which relief may be granted.

C. Title VII

Plaintiffs' claim of religious discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, is similarly without merit, for all plaintiffs but one.

Plaintiffs allege that the City "violated Title VII by placing Plaintiffs on indeterminate [leave without pay] for exercising their right to refuse to submit to the Vaccine orders. . . ." *See* FAC ¶ 233. To establish a prima facie case of religious discrimination under Title VII, a plaintiff must allege that that (1) she held a "bona fide religious belief conflicting with an employment requirement"; (2) she informed her employer of this belief; and (3) she was "disciplined for failure to comply with the conflicting employment requirement." *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001). The Second Circuit has explained that "the evidence

necessary to satisfy this initial burden [i]s minimal . . . ." *Zimmermann v. Asscs. First Cap. Corp.*, 251 F.3d 376, 381 (2d Cir. 2001). However, at the motion to dismiss stage, a plaintiff "must at a minimum assert nonconclusory factual matter sufficient to nudge its claims' across the line from conceivable to plausible to proceed." *E.E.O.C. v. Port Auth. of NY & NJ*, 768 F.3d 247, 254 (2d Cir. 2014). Individual defendants may not be held liable under Title VII. *Lore v. City of Syracuse,* 670 F.3d 127, 169 (2d Cir. 2012).

To identify a bona fide religious belief, courts assess "whether the beliefs professed by a claimant are sincerely held and whether they are, in his own scheme of things, religious." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (citing *United States v. Seeger*, 380 U.S. 163, 185 (1965). "Sincerity analysis is exceedingly amorphous, requiring the factfinder to delve into the claimant's most veiled motivations and vigilantly separate the issue of sincerity from the factfinder's perception of the religious nature of the claimant's beliefs. This need to dissever is most acute where unorthodox beliefs are implicated." *Id.* To determine whether a plaintiff's belief is "religious," courts must analyze whether the plaintiff's professed beliefs implicate "ultimate concern[s]." *Int'l Soc. For Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440 (2d Cir. 1981). A concern is

"ultimate" when "a believer would categorically disregard elementary self-interest in preference to transgressing its tenets." *Id.*

If a plaintiff satisfies her burden to allege a prima facie case of religious discrimination, the burden shifts to the employer "to show that it cannot reasonably accommodate the plaintiff without undue hardship on the conduct of the employer's business." *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60 (1986). An accommodation is an undue burden when it is "substantial in the overall context of an employer's business." *Groff v. DeJoy,* 600 U.S. 447, 468 (2023). This, too, is a "fact-specific inquiry," which requires the Court to analyze "all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer." *Id.* at 468, 470-71.

One plaintiff, Amoura Bryan, has cleared the (relatively low) hurdle to allege a prima facie case.[12] Ms. Bryan subscribes to the "religious Biblical medical practice of Plant-Based Lifestyle Medicine, which includes consuming a 100%

[12] Ms. Bryan did not attach a right-to-sue letter to the complaint. *See* Pl.'s Ex. 2, ECF No. 88-2. However, exhaustion of administrative remedies is not a pleading requirement, as "the burden of pleading and proving Title VII exhaustion lies with defendants and operates as an affirmative defense." *Hardaway v. Hartford Public Works Dep't*, 879 F.3d 486, 491 (2018).

plant-based diet according to the Bible instruction in Genesis 1:29 along with practicing the nine (9) lifestyle interventions also prescribed by the Bible, namely exercise, water, outdoor fresh air, cleanliness or hygiene to name a few." FAC ¶ 138. She alleges that receiving the COVID-19 vaccination is inconsistent with this belief because she hoped to rely upon biblical medical practices for protection from COVID-19. *See id.* ¶¶ 139-142. Additionally, Ms. Bryan pleads that "for exercising her religious practice" – that is, for declining to be vaccinated – she was placed on leave without pay. *Id.* ¶ 142. These allegations, while highly general, are sufficient at this stage. And the assessment of whether the City could have reasonably accommodated Ms. Bryan without undue hardship is a fact-intensive assessment that cannot be determined from within the four corners of the complaint. *See Groff,* 600 U.S. at 468.

Therefore, Ms. Bryan's Title VII claim may proceed, but only against certain municipal defendants: the City and the Department of Education (because, as noted above, individuals may not be liable under Title VII). *Lore,* 670 F.3d 169. The third municipal defendant, the Department of Health and Mental Hygiene, is not Ms. Bryan's employer. FAC ¶ 138.

For all other plaintiffs, the Fourth Amended Complaint does not allow the reader to divine a bona fide belief – even at the highest levels of generality. *See Cagle v. Weill Cornell*

Medicine, 680 F. Supp. 3d 428, 435-36 (S.D.N.Y. 2023) (plaintiff failed to allege bona fide belief, where complaint alleged only that she had "religious beliefs" and that those beliefs included "religious practices of non-vaccination"); *Friend v. AstraZeneca Pharms. LP*, 2023 WL 3390820, at *3 (D. Md. May 11, 2023) ("While Plaintiff's complaint asserts that he 'had bona fide religious beliefs that conflicted with AstraZeneca's COVID-19 vaccine mandate,' it alleges no facts to allow this Court to assess what Plaintiff's religious beliefs are and how they conflict."); *McKinley v. Princeton Univ.*, No. 22-CV-5069, 2023 WL 3168026, at *2 (D.N.J. Apr. 28, 2023) ("Without Plaintiff providing facts showing what sincerely held religious belief she holds that prevented her from complying with COVID-19 Policies, Plaintiff fails to adequately allege a cognizable claim for religious discrimination."). As described above, plaintiffs claim religious objections to the COVID-19 vaccine. FAC ¶ 1. Yet they provide no supporting facts, which prevents the Court from analyzing whether these beliefs are sincerely held or implicate ultimate concerns. *See, e.g.*, *id.* ¶¶ 16-18, 20-36.

In addition, there are portions of the complaint that invoke non-religious motivations for the plaintiffs' vaccine refusal. For example, in a single sentence that runs almost two pages, the plaintiffs refer to having exercised their "fundamental right" to refuse vaccination "on religious and non-

religious grounds." *Id.* ¶ 1; *see also id.* ¶ 36 (referring to requests for "religious and / or medical exemptions"). Absent any detail about plaintiffs' religious beliefs, the plaintiffs cannot claim that they are bona fide.

D. New York City Human Rights Law

Plaintiffs also allege religious discrimination under the New York City Human Rights Law ("NYCHRL"). The NYCHRL prohibits discrimination based on the actual or perceived "creed" or religion of any person. N.Y.C. Admin. Code § 8–107(1)(a). A NYCHRL claim must be construed "more liberally than its State and federal counterparts," in favor of plaintiffs, "to the extent that such a construction is reasonably possible." *Makinen v. City of New York*, 857 F.3d 491, 495 (2d Cir. 2017); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278–79 (2d Cir. 2009).

1. Plaintiff Bryan Has Alleged a Prima Facie Case of Religious Discrimination Under the NYCHRL

Like Title VII, the City's Human Rights Law requires a plaintiff to allege a bona fide religious belief to make out a prima facie case of discrimination. Specifically, under the NYCHRL, a plaintiff must demonstrate that "(1) they held a bona fide religious belief conflicting with an employment requirement; (2) they informed their employers of this belief; and (3) they were disciplined for failure to comply with the

conflicting employment requirement." *Weber v. City of New York*, 973 F. Supp. 2d 227, 263 (E.D.N.Y. 2013) (collecting cases).

Ms. Bryan is the only plaintiff who articulates a prima facie NYCHRL religious-discrimination claim. She (a) articulates a bona fide belief in the "biblical practice" of plant-based medicine; (b) pleads that she told her employers about this belief; and (c) alleges retaliation for refusal to receive vaccination. FAC ¶¶ 138-142. These claims meet the threshold for Ms. Bryan to proceed under the NYCHRL at this stage. No other plaintiffs, however, approach even this low pleading bar. *See Lugo v. City of New York*, 518 F. App'x 28, 30 (2d Cir. 2013) ("While the NYCHRL is indeed reviewed independently from and more liberally than federal or state discrimination claims, it still requires a showing of some evidence from which discrimination can be inferred."); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981).

At the next step of NYCHRL analysis, the burden shifts to the employer "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision." *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 (N.Y. 2004). Here, defendants cannot carry that burden. At the motion to dismiss stage, the Court may only consider the facts in the FAC, which pleads that

plaintiff's religion was not accommodated. *See* FAC ¶¶ 138-42; *Davis v. Boeheim*, 24 N.Y.3d 262, 268 (N.Y. 2014). Thus, Ms. Bryan's NYCHRL claim may proceed.

2. Bryan's NYCHRL Claim May Proceed Against Certain Municipal Defendants

Under the NYCHRL, an employer like New York City is liable for the conduct of its employee or agent "only where": (1) "the employee or agent exercised managerial or supervisory responsibility;" (2) "the employer knew of [an] employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action . . ."; or (3) the employer "should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent [it]." N.Y.C. Admin. Code § 8-107(13)(b).

Here, the third factor is easily satisfied at this stage: the City cannot (and does not) contend that it lacked knowledge of the vaccine mandate, the absence of a religious exemption therefrom, or the consequences of non-compliance. Thus, Ms. Bryan's NYCHRL claim is proper against the City of New York and the Department of Education. As noted above, however, the Department of Health and Mental Hygiene is not Ms. Bryan's employer. FAC ¶ 138.

3. Bryan's NYCHRL Claims Against the Individual Defendants Are Dismissed

Unlike Title VII claims, NYCHRL claims may be brought against individual defendants. *See McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 157 (2d Cir. 2017). In addition, supervisory liability for individual defendants is available under the statute – though not based on the supervisor's position alone. *See Marchuk v. Faruqi & Faruqi, LLP*, 100 F. Supp. 3d 302, 308 (2015).

To establish liability against a supervisor, a plaintiff must "prove at least some minimal culpability on the part of" that individual. *Id.* at 309. So, for example, the district court dismissed a NYCHRL claim against former New York State Attorney General Eric Schneiderman and another State executive where the plaintiff had "fail[ed] to allege any facts which could tend to show that either defendant was ever aware of [plaintiff's] allegations of discrimination or otherwise participated in discriminatory conduct." *Morgan v. N.Y. Atty. Gen.'s Office*, 11-CV-9389, 2013 WL 491525, at *13 (S.D.N.Y. Feb. 8, 2013).

Applying this standard, the individual defendants must be dismissed on this claim. [13] There are no allegations in the

[13] The individual defendants are Mayor Eric Adams, former Mayor Bill de Blasio, NYC Department of Health and Mental Hygiene Commissioner Ashwin Vasan, former Health and Mental Hygiene Commissioner Dave Chokshi, and "Does 1-20," about whom no details are pled in support of the discrimination claims. FAC ¶¶ 40-41, 43-44. The Does are referenced on the face of the

complaint that any individual defendant personally participated in the employment decisions at issue or bears any individual "culpability" for Ms. Bryan's termination. *Marchuk,* 100 F. Supp. 3d at 309. For instance, the complaint does not allege that Mayor de Blasio had any personal role in crafting the *employment* consequences for vaccine refusal, the contours of any exemptions or accommodations, or the application of those policies to any person. *See Morgan,* 2013 WL 491525, at *13; *see generally* FAC. Ms. Bryan's NYCHRL claim will therefore proceed only against the City and the Department of Education.

E. Federal Declaratory Judgment Act

Plaintiffs attempt to bring a cause of action under the Federal Declaratory Judgment Act, seeking declaratory and injunctive relief. *See* 28 U.S.C. § 2201; FAC ¶¶ 234-54. District courts have discretion to determine whether and when to entertain declaratory judgment actions. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). This court denied plaintiffs' request to amend their complaint to include claims for declaratory and injunctive relief under 28 U.S.C. §§ 2201-02, *see Women of Color for Equal Just. v. City of N.Y.*, 2022 WL 17083109, at *4 (E.D.N.Y. Nov. 18, 2022), and those rulings

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complaint but never again in the document. *See generally id.* Mayor Adams and Commissioner Vasan are sued in their official capacities, while former Mayor DeBlasio and former Commissioner Chokshi are sued in their personal capacities. FAC ¶¶ 40-41, 43-44.

remain the law of the case. See *Musacchio v. United States*, 577 U.S. 237, 244-45 (2016) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."). Thus, the Court declines to entertain a declaratory judgment action here, either.

F. Common Law Fraud

Finally, Plaintiffs allege that all defendants are liable for common-law fraud. Plaintiffs allege a handful of false statements and omissions made by New York City's Health Commissioner, Dave A. Chokshi, in the Vaccine Orders. For example, plaintiffs claim that Dr. Chokshi

> falsely represented in the Vaccine Orders that 'vaccination is an effective tool to prevent the spread of Covid-19 and benefits both vaccine recipients and those they come into contact with' when it is impossible for any vaccine to shield any person from exposure or prevent anyone from coming into contact with any hazardous airborne communicable disease in the workplace atmosphere.

FAC ¶ 275. No plaintiff has established standing to bring this claim.

In federal court, plaintiffs are obligated to "demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). In other words, standing must be alleged on a claim-by-claim basis. *See Friends of the Earth,*

Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81 (2000).

There are three familiar elements of Article III standing. First, a plaintiff must have suffered an "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016), *as revised* (May 24, 2016). Particularized means that it "affect[s] the plaintiff in a personal and individual way." *Id.*

Second, "the injury has to be fairly traceable to the challenged action of the defendant." *Lujan*, 504 U.S. at 560. "Fairly traceable" means that "there must be a causal connection between the injury and the conduct complained of." *Dep't of Ed. v. Brown*, 600 U.S. 551, 561 (2023) (discussing *Lujan*). To prove causation, "the plaintiff must show a predictable chain of events leading from the government action to the asserted injury – in other words, that the government action has caused or likely will cause injury in fact to the plaintiff." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 385 (2024).

Finally, it must be "likely" rather than "speculative" that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 561.

The FAC describes three classes of plaintiffs: (1) the "locked out class" of City employees who refused vaccination; (2) the "coerced class" who received COVID-19 vaccines "so that they could get their jobs and salary back"; and (3) "City employees who relied on the City's material misrepresentation that the Covid-19 vaccine 'is an effective tool to prevent the spread of Covid-19' (See Vaccine Orders) and submitted to the administrative injection of the Covid-19 into their bodies and thereafter experienced one or more Covid-19 infections that resulted in physical, and/or psychological injury . . . ." *Id.* ¶ 11(a)-(c).

The third class refers to a fraud-induced injury. The problem for the plaintiffs is that, while the FAC describes this class, no *individual* plaintiff alleges any injury traceable to the City's alleged misrepresentations. FAC ¶¶ 11-38 (describing the plaintiffs). Allegations that "thousands of people" were harmed is insufficient to state a particularized injury that any individual *plaintiff* was harmed. *Id.* ¶ 282; *see Spokeo*, 578 U.S. at 339 (2016). Indeed, it is axiomatic that "a citizen does not have standing to challenge a government regulation

simply because the plaintiff believes that the government is acting illegally." *All. for Hippocratic Med.*, 602 U.S. at 381.

A detailed, plaintiff-by-plaintiff assessment reveals that no plaintiff claims that he or she got vaccinated in reliance on the alleged misrepresentations at issue – or any other facts that could plausibly be construed as a basis for membership in the "misrepresentation class." Thus, no individual plaintiff has standing for plaintiffs' fraud claim.

Most plaintiffs refused COVID-19 vaccination and therefore could not be injured by reliance on allegedly false statements about the vaccine's effectiveness. FAC ¶ 12-36 (detailing that sixty out of the sixty-five named plaintiffs refused vaccination).[14] Three plaintiffs do not allege whether or not they were vaccinated and therefore similarly cannot state a particularized injury relating to the alleged misstatements.

The complaint describes the remaining two plaintiffs as belonging to the "coerced class" – those who received COVID-19 vaccines based on the threat of adverse employment consequences. *Id.* ¶¶ 11(b), 37-38. Only one of the two, Jesus Coombs, alleges that he was infected with COVID-19 following vaccination. *Id.* ¶ 38. Mr. Coombs pleads that he "took the

[14] The Court counts sixty-five named plaintiffs, assuming that a) plaintiffs whose names are spelled in different ways are the same person; and b) plaintiffs whose names are listed twice are only one person, rather than two people with the same name. *See generally* FAC; Docket No. 22-CV-2234.

Covid-19 vaccine and thereafter sustained a Covid-19 infection and health problems." *Id.*; *see also id.* ¶ 169. His allegation that he experienced health problems following vaccination states a concrete injury. *Spokeo*, 578 U.S. at 339. But, Mr. Coombs's injury is not "fairly traceable" to the *fraud* claim. *Lujan*, 504 U.S. at 560-61. The FAC pleads that:

> On January 13, 2022, Mr. Coombs was placed on leave without play for refusing to submit to the Vaccine Orders. He was scheduled to be terminated, but because he is the sole income earner in his home, he with much gilt, anxiety and distress, submitted to the Vaccine Order and returned to work on February 15, 2022.

FAC ¶ 38. This passage suggests no reliance on – or even awareness of – the Health Commissioner's allegedly false statements. *Id.* Put differently, Mr. Coombs does not allege a causal link between any allegedly fraudulent statement and his injury. *See All. for Hippocratic Med.*, 602 U.S. at 385. Therefore, Mr. Coombs, too, lacks standing to bring a *fraud* claim. Because no plaintiff has standing to bring this claim, it is dismissed for lack of jurisdiction.[15]

IV. Conclusion

With the exception of Ms. Bryan's Title VII and NYCHRL claims against the City and the Department of Education,

[15] This claim is also likely untimely, based on plaintiffs' failure to file a notice of claim with the City. *See* N.Y. Gen. Mun. Law 50-e (requiring that a plaintiff must file a notice of claim prior to commencement of an action against a municipality and must serve the notice of claim within ninety (90) days after the claim arises).

plaintiffs' claims are dismissed. Plaintiffs' fraud claim is dismissed without prejudice. *See Katz v. Donna Karan Co., L.L.C.*, 872 F.3d 114, 116 (2d Cir. 2017) (dismissal for lack of subject matter jurisdiction must be without prejudice). All other claims are dismissed with prejudice. *See, e.g., Liang v. Home Reno Concepts, LLC*, 803 F. App'x 444, 448 (2d Cir. 2020) (denying leave to amend was proper where plaintiff already had "three bites at the apple" and was still unable to state a claim); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (courts may deny leave to amend based on "futility of amendment"); *Wallace v. Conroy*, 945 F. Supp. 628, 639 (S.D.N.Y. 1996) (collecting cases).

Finally, plaintiffs' motion for sanctions and motion to vacate the denial of preliminary injunctive relief are denied. ECF Nos. 64, 74. The motion to strike the Fourth Amended Complaint and all other pending motions related to the Fourth Amended Complaint and the motion to dismiss are denied as moot. ECF Nos. 75, 82, 83, 87, 96, 98.

A status conference on the remaining claims shall be held at 10:30 AM on November 7, 2024 in Courtroom 6G North.

SO ORDERED.

/s/ Eric Komitee
ERIC KOMITEE
United States District Judge

Dated: September 25, 2024
Brooklyn, New York

[SPA-72]

OSHA®

Occupational Safety and Health Administration

U.S. Department of Labor

Occupational Safety and Health Act of 1970

To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.

Public Law 91-596
84 STAT. 1590
91st Congress, S.2193
December 29, 1970,
as amended through November 23, 2021. [1]

An Act

To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Occupational Safety and Health Act of 1970."

SEC. 2. CONGRESSIONAL FINDINGS AND PURPOSE

29 USC 651

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources --

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

Footnote [1] See Historical notes at the end of this document for changes and amendments affecting the OSH Act since its passage in 1970 through November 23, 2021.

29 USC 651

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

SEC. 3. DEFINITIONS

29 USC 652

For the purposes of this Act --

(1) The term "Secretary" means the Secretary of Labor.

(2) The term "Commission" means the Occupational Safety and Health Review Commission established under this Act.

For Trust Territory coverage, including the Northern Mariana Islands, *see Historical notes.*

(3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof.

(4) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

Pub. L. 105-241 United States Postal Service is an employer subject to the Act. *See Historical notes.*

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.

(6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

(7) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

(9) The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1), has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached

29 USC 652

substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

(10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act.

(11) The term "Committee" means the National Advisory Committee on Occupational Safety and Health established under this Act.

(12) The term "Director" means the Director of the National Institute for Occupational Safety and Health.

(13) The term "Institute" means the National Institute for Occupational Safety and Health established under this Act.

(14) The term "Workmen's Compensation Commission" means the National Commission on State Workmen's Compensation Laws established under this Act.

SEC. 4. APPLICABILITY OF THIS ACT

29 USC 653

For Canal Zone and Trust Territory coverage, including the Northern Mariana Islands, *see Historical notes.*

(a) This Act shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone. The Secretary of the Interior shall, by regulation, provide for judicial enforcement of this Act by the courts established for areas in which there are no United States district courts having jurisdiction.

(b) (1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

(2) The safety and health standards promulgated under the Act of June 30, 1936, commonly known as the Walsh-Healey Act (41 U.S.C. 35 et seq.), the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), Public Law 91-54, Act of August 9, 1969 (40 U.S.C. 333), Public Law 85-742, Act of August 23, 1958 (33 U.S.C. 941), and the National Foundation on Arts and Humanities Act (20 U.S.C. 951 et seq.) are superseded on the effective date of corresponding standards, promulgated under this Act, which are determined by the Secretary to be more effective. Standards issued under the laws listed in this paragraph and in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts.

(3) The Secretary shall, within three years after the effective date of this Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal laws.

(4) Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 USC 654

SEC. 5. DUTIES

29 USC 654

(a) Each employer --

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

SEC. 6. OCCUPATIONAL SAFETY AND HEALTH STANDARDS

29 USC 655

(a) Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this Act, the Secretary may request the recommendations of an advisory committee appointed under section 7 of this Act. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds

therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6) (A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that —

(i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date,

(ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and

(iii) he has an effective program for coming into compliance with the standard as quickly as practicable.

Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided,* That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more that twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to

29 USC 655

the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health and Human Services certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health and Human Services designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of title 5, United States Code, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

29 USC 655

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard.

(c) (1) The Secretary shall provide, without regard to the requirements of chapter 5, title 5, Unites States Code, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines —

(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and

(B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with section 6 (b) of this Act, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(e) Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this Act, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

(f) Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses,

29 USC 655

workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.

SEC. 7. ADVISORY COMMITTEES; ADMINISTRATION

29 USC 656

(a) (1) There is hereby established a National Advisory Committee on Occupational Safety and Health consisting of twelve members appointed by the Secretary, four of whom are to be designated by the Secretary of Health and Human Services, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and composed of representatives of management, labor, occupational safety and occupational health professions, and of the public. The Secretary shall designate one of the public members as Chairman. The members shall be selected upon the basis of their experience and competence in the field of occupational safety and health.

(2) The Committee shall advise, consult with, and make recommendations to the Secretary and the Secretary of Health and Human Services on matters relating to the administration of the Act. The Committee shall hold no fewer than two meetings during each calendar year. All meetings of the Committee shall be open to the public and a transcript shall be kept and made available for public inspection.

(3) The members of the Committee shall be compensated in accordance with the provisions of section 3109 of title 5, United States Code.

(4) The Secretary shall furnish to the Committee an executive secretary and such secretarial, clerical, and other services as are deemed necessary to the conduct of its business.

(b) An advisory committee may be appointed by the Secretary to assist him in his standard-setting functions under section 6 of this Act. Each such committee shall consist of not more than fifteen members and shall include as a member one or more designees of the Secretary of Health and Human Services, and shall include among its members an equal number of persons qualified by experience and affiliation to present the viewpoint of the employers involved, and of persons similarly qualified to present the viewpoint of the workers involved, as well as one or more representatives of health and safety agencies of the States. An advisory committee may also include such other persons as the Secretary may appoint who are qualified by knowledge and experience to make a useful contribution to the work of such committee, including one or more representatives of professional organizations of technicians or professionals specializing in occupational safety or health, and one or more representatives of nationally recognized standards-producing organizations, but the number of persons so appointed to any such advisory committee shall not exceed the number appointed to such committee as representatives of Federal and State agencies. Persons appointed to advisory committees from private life shall be compensated in the same manner as consultants or experts under section 3109 of title 5, United States Code. The Secretary shall pay to any State which is the employer of a member of such a committee who is a representative of the health or safety agency of that State, reimbursement sufficient to cover the actual cost to the State resulting from such representative's membership on such committee. Any meeting of such committee shall be open to the public and an accurate record shall be kept and made available to the public. No member of such committee (other than representatives of employers and employees) shall have an economic interest in any proposed rule.

29 USC 656

(c) In carrying out his responsibilities under this Act, the Secretary is authorized to --

(1) use, with the consent of any Federal agency, the services, facilities, and personnel of such agency, with or without reimbursement, and with the consent of any State or political subdivision thereof, accept and use the services, facilities, and personnel of any agency of such State or subdivision with reimbursement; and

(2) employ experts and consultants or organizations thereof as authorized by section 3109 of title 5, United States Code, except that contracts for such employment may be renewed annually; compensate individuals so employed at rates not in excess of the rate specified at the time of service for grade GS-18 under section 5332 of title 5, United States Code, including travel time, and allow them while away from their homes or regular places of business, travel expenses (including per diem in lieu of subsistence) as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently, while so employed.

Pub. L. 116-92 added subsection (d).

(d) There is established a Maritime Occupational Safety and Health Advisory Committee, which shall be a continuing body and shall provide advice to the Secretary in formulating maritime industry standards and regarding matters pertaining to the administration of this Act related to the maritime industry. The composition of such advisory committee shall be consistent with the advisory committees established under subsection (b). A member of the advisory committee who is otherwise qualified may continue to serve until a successor is appointed. The Secretary may promulgate or amend regulations as necessary to implement this subsection.

SEC. 8. INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING

29 USC 657

(a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized --

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

(b) In making his inspections and investigations under this Act the Secretary may require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of a contumacy, failure, or refusal of any person to obey such an order, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides or transacts business, upon the application by the Secretary, shall have jurisdiction to issue to such person an order requiring such person to appear to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) (1) Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health and Human Services, such records regarding his activities relating to this Act as the Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe by regulation

29 USC 657

as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this paragraph such regulations may include provisions requiring employers to conduct periodic inspections. The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act, including the provisions of applicable standards.

(2) The Secretary, in cooperation with the Secretary of Health and Human Services, shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(3) The Secretary, in cooperation with the Secretary of Health and Human Services, shall issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under section 6. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable occupational safety and health standard promulgated under section 6, and shall inform any employee who is being thus exposed of the corrective action being taken.

(d) Any information obtained by the Secretary, the Secretary of Health and Human Services, or a State agency under this Act shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible.

(e) Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

(f) (1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practica-

29 USC 657

ble, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

(2) Prior to or during any inspection of a workplace, any employees or representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which they have reason to believe exists in such workplace. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation and shall furnish the employees or representative of employees requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

(g) (1) The Secretary and Secretary of Health and Human Services are authorized to compile, analyze, and publish, either in summary or detailed form, all reports or information obtained under this section.

(2) The Secretary and the Secretary of Health and Human Services shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment.

(h) The Secretary shall not use the results of enforcement activities, such as the number of citations issued or penalties assessed, to evaluate employees directly involved in enforcement activities under this Act or to impose quotas or goals with regard to the results of such activities.

Pub. L. 105-198 added subsection (h).

SEC. 9. CITATIONS

29 USC 658

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

(b) Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.

(c) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

SEC. 10. PROCEDURE FOR ENFORCEMENT

29 USC 659

(a) If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice

29 USC 659

is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 17 by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 9(a) or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 9(a), any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

SEC. 11. JUDICIAL REVIEW

29 USC 660

(a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 10 may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this sub-

29 USC 660

section shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28, United States Code.

Pub. L. 98-620

(b) The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a), is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 10, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 17, in addition to invoking any other available remedies.

(c) (1) No person shall discharge or in any manner discriminate 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 or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.

29 USC 661

SEC. 12. THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 USC 661

(a) The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act. The President shall designate one of the members of the Commission to serve as Chairman.

(b) The terms of members of the Commission shall be six years except that (1) the members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years, and (2) a vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term.

A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

See notes on omitted text.

(c) (Text omitted.)

(d) The principal office of the Commission shall be in the District of Columbia. Whenever the Commission deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, it may hold hearings or conduct other proceedings at any other place.

Pub. L. 95-251

(e) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such administrative law judges and other employees as he deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: *Provided,* That assignment, removal and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5, United States Code.

(f) For the purpose of carrying out its functions under this Act, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(g) Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.

(h) The Commission may order testimony to be taken by deposition in any proceedings pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) For the purpose of any proceeding before the Commission, the provisions of section 11 of the National Labor Relations Act (29 U.S.C. 161) are hereby made applicable to the jurisdiction and powers of the Commission.

(j) An administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by

29 USC 661

the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

(k) Except as otherwise provided in this Act, the administrative law judges shall be subject to the laws governing employees in the classified civil service, except that appointments shall be made without regard to section 5108 of title 5, United States Code. Each administrative law judge shall receive compensation at a rate not less than that prescribed for GS-16 under section 5332 of title 5, United States Code.

SEC. 13. PROCEDURES TO COUNTERACT IMMINENT DANGERS

29 USC 662

(a) The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

(b) Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to this Act. The proceeding shall be as provided by Rule 65 of the Federal Rules, Civil Procedure, except that no temporary restraining order issued without notice shall be effective for a period longer than five days.

(c) Whenever and as soon as an inspector concludes that conditions or practices described in subsection (a) exist in any place of employment, he shall inform the affected employees and employers of the danger and that he is recommending to the Secretary that relief be sought.

(d) If the Secretary arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employees, might bring an action against the Secretary in the United States district court for the district in which the imminent danger is alleged to exist or the employer has its principal office, or for the District of Columbia, for a writ of mandamus to compel the Secretary to seek such an order and for such further relief as may be appropriate.

SEC. 14. REPRESENTATION IN CIVIL LITIGATION

29 USC 663

Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this Act but all such litigation shall be subject to the direction and control of the Attorney General.

29 USC 664

SEC. 15. CONFIDENTIALITY OF TRADE SECRETS

29 USC 664

All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceeding under this Act which contains or which might reveal a trade secret referred to in section 1905 of title 18 of the United States Code shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this Act or when relevant in any proceeding under this Act. In any such proceeding the Secretary, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

SEC. 16. VARIATIONS, TOLERANCES, AND EXEMPTIONS

29 USC 665

The Secretary, on the record, after notice and opportunity for a hearing may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper to avoid serious impairment of the national defense. Such action shall not be in effect for more than six months without notification to affected employees and an opportunity being afforded for a hearing.

SEC. 17. PENALTIES

29 USC 666

(a) Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

Pub. L. 101-508 increased the civil penalties in subsections (a)-(d) & (i). *See Historical notes.*

(b) Any employer who has received a citation for a serious violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, shall be assessed a civil penalty of up to $7,000 for each such violation.

(c) Any employer who has received a citation for a violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of regulations prescribed pursuant to this Act, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $7,000 for each violation.

(d) Any employer who fails to correct a violation for which a citation has been issued under section 9(a) within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 10 initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

Pub. L. 98-473 Maximum criminal fines are increased by the Sentencing Reform Act of 1984, 18 USC § 3551 et seq. *See Historical notes.*

(e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Any person who gives advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

29 USC 666

(g) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

See historical notes.

(h) (1) Section 1114 of title 18, United States Code, is hereby amended by striking out "designated by the Secretary of Health and Human Services to conduct investigations, or inspections under the Federal Food, Drug, and Cosmetic Act" and inserting in lieu thereof "or of the Department of Labor assigned to perform investigative, inspection, or law enforcement functions".

(2) Notwithstanding the provisions of sections 1111 and 1114 of title 18, United States Code, whoever, in violation of the provisions of section 1114 of such title, kills a person while engaged in or on account of the performance of investigative, inspection, or law enforcement functions added to such section 1114 by paragraph (1) of this subsection, and who would otherwise be subject to the penalty provisions of such section 1111, shall be punished by imprisonment for any term of years or for life.

(i) Any employer who violates any of the posting requirements, as prescribed under the provisions of this Act, shall be assessed a civil penalty of up to $7,000 for each violation.

(j) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(l) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.

SEC. 18. STATE JURISDICTION AND STATE PLANS

29 USC 667

(a) Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.

(c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgement --

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6 which relate to the same issues, and

29 USC 667

which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to the Act which is at least as effective as that provided in section 8, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

(d) If the Secretary rejects a plan submitted under subsection (b), he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing.

(e) After the Secretary approves a State plan submitted under subsection (b), he may, but shall not be required to, exercise his authority under sections 8, 9, 10, 13, and 17 with respect to comparable standards promulgated under section 6, for the period specified in the next sentence. The Secretary may exercise the authority referred to above until he determines, on the basis of actual operations under the State plan, that the criteria set forth in subsection (c) are being applied, but he shall not make such determination for at least three years after the plan's approval under subsection (c). Upon making the determination referred to in the preceding sentence, the provisions of sections 5(a)(2), 8 (except for the purpose of carrying out subsection (f) of this section), 9, 10, 13, and 17, and standards promulgated under section 6 of this Act, shall not apply with respect to any occupational safety or health issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 9 or 10 before the date of determination.

(f) The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

29 USC 667

(g) The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of title 28, United States Code. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(h) The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from the date of enactment of this Act, whichever is earlier.

SEC. 19. FEDERAL AGENCY SAFETY PROGRAMS AND RESPONSIBILITIES

29 USC 668

(a) It shall be the responsibility of the head of each Federal agency (not including the United States Postal Service) to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 6. The head of each agency shall (after consultation with representatives of the employees thereof) --

Pub. L. 150-241

(1) provide safe and healthful places and conditions of employment, consistent with the standards set under section 6;

(2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees;

(3) keep adequate records of all occupational accidents and illnesses for proper evaluation and necessary corrective action;

(4) consult with the Secretary with regard to the adequacy as to form and content of records kept pursuant to subsection (a)(3) of this section; and

(5) make an annual report to the Secretary with respect to occupational accidents and injuries and the agency's program under this section. Such report shall include any report submitted under section 7902(e)(2) of title 5, United States Code.

Pub. L. 97-375

(b) The Secretary shall report to the President a summary or digest of reports submitted to him under subsection (a)(5) of this section, together with his evaluations of and recommendations derived from such reports.

(c) Section 7902(c)(1) of title 5, United States Code, is amended by inserting after "agencies" the following: "and of labor organizations representing employees".

(d) The Secretary shall have access to records and reports kept and filed by Federal agencies pursuant to subsections (a)(3) and (5) of this section unless those records and reports are specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy, in which case the Secretary shall have access to such information as will not jeopardize national defense or foreign policy.

29 USC 669

SEC. 20. RESEARCH AND RELATED ACTIVITIES

29 USC 669

(a) (1) The Secretary of Health and Human Services, after consultation with the Secretary and with other appropriate Federal departments or agencies, shall conduct (directly or by grants or contracts) research, experiments, and demonstrations relating to occupational safety and health, including studies of psychological factors involved, and relating to innovative methods, techniques, and approaches for dealing with occupational safety and health problems.

(2) The Secretary of Health and Human Services shall from time to time consult with the Secretary in order to develop specific plans for such research, demonstrations, and experiments as are necessary to produce criteria, including criteria identifying toxic substances, enabling the Secretary to meet his responsibility for the formulation of safety and health standards under this Act; and the Secretary of Health and Human Services, on the basis of such research, demonstrations, and experiments and any other information available to him, shall develop and publish at least annually such criteria as will effectuate the purposes of this Act.

(3) The Secretary of Health and Human Services, on the basis of such research, demonstrations, and experiments, and any other information available to him, shall develop criteria dealing with toxic materials and harmful physical agents and substances which will describe exposure levels that are safe for various periods of employment, including but not limited to the exposure levels at which no employee will suffer impaired health or functional capacities or diminished life expectancy as a result of his work experience.

(4) The Secretary of Health and Human Services shall also conduct special research, experiments, and demonstrations relating to occupational safety and health as are necessary to explore new problems, including those created by new technology in occupational safety and health, which may require ameliorative action beyond that which is otherwise provided for in the operating provisions of this Act. The Secretary of Health and Human Services shall also conduct research into the motivational and behavioral factors relating to the field of occupational safety and health.

(5) The Secretary of Health and Human Services, in order to comply with his responsibilities under paragraph (2), and in order to develop needed information regarding potentially toxic substances or harmful physical agents, may prescribe regulations requiring employers to measure, record, and make reports on the exposure of employees to substances or physical agents which the Secretary of Health and Human Services reasonably believes may endanger the health or safety of employees. The Secretary of Health and Human Services also is authorized to establish such programs of medical examinations and tests as may be necessary for determining the incidence of occupational illnesses and the susceptibility of employees to such illnesses. Nothing in this or any other provision of this Act shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others. Upon the request of any employer who is required to measure and record exposure of employees to substances or physical agents as provided under this subsection, the Secretary of Health and Human Services shall furnish full financial or other assistance to such employer for the purpose of defraying any additional expense incurred by him in carrying out the measuring and recording as provided in this subsection.

(6) The Secretary of Health and Human Services shall publish within six months of enactment of this Act and thereafter as needed but at least annually a list of all known toxic substances by generic family or other useful grouping, and the concentrations at which such toxicity is known to occur. He shall deter-

29 USC 669

mine following a written request by any employer or authorized representative of employees, specifying with reasonable particularity the grounds on which the request is made, whether any substance normally found in the place of employment has potentially toxic effects in such concentrations as used or found; and shall submit such determination both to employers and affected employees as soon as possible. If the Secretary of Health and Human Services determines that any substance is potentially toxic at the concentrations in which it is used or found in a place of employment, and such substance is not covered by an occupational safety or health standard promulgated under section 6, the Secretary of Health and Human Services shall immediately submit such determination to the Secretary, together with all pertinent criteria.

(7) Within two years of enactment of the Act, and annually thereafter the Secretary of Health and Human Services shall conduct and publish industry wide studies of the effect of chronic or low-level exposure to industrial materials, processes, and stresses on the potential for illness, disease, or loss of functional capacity in aging adults.

(b) The Secretary of Health and Human Services is authorized to make inspections and question employers and employees as provided in section 8 of this Act in order to carry out his functions and responsibilities under this section.

(c) The Secretary is authorized to enter into contracts, agreements, or other arrangements with appropriate public agencies or private organizations for the purpose of conducting studies relating to his responsibilities under this Act. In carrying out his responsibilities under this subsection, the Secretary shall cooperate with the Secretary of Health and Human Services in order to avoid any duplication of efforts under this section.

(d) Information obtained by the Secretary and the Secretary of Health and Human Services under this section shall be disseminated by the Secretary to employers and employees and organizations thereof.

(e) The functions of the Secretary of Health and Human Services under this Act shall, to the extent feasible, be delegated to the Director of the National Institute for Occupational Safety and Health established by section 22 of this Act.

EXPANDED RESEARCH ON WORKER SAFETY AND HEALTH

29 USC 669a

Pub. L. 107-188, Title I, § 153 added this text.

The Secretary of Health and Human Services (referred to in this section as the "Secretary"), acting through the Director of the National Institute of Occupational Safety and Health, shall enhance and expand research as deemed appropriate on the health and safety of workers who are at risk for bioterrorist threats or attacks in the workplace, including research on the health effects of measures taken to treat or protect such workers for diseases or disorders resulting from a bioterrorist threat or attack. Nothing in this section may be construed as establishing new regulatory authority for the Secretary or the Director to issue or modify any occupational safety and health rule or regulation.

SEC. 21. TRAINING AND EMPLOYEE EDUCATION

29 USC 670

Pub. L. 96-88 substituted Secretary of Health and Human Services for Secretary of Health, Education, and Welfare.

(a) The Secretary of Health and Human Services, after consultation with the Secretary and with other appropriate Federal departments and agencies, shall conduct, directly or by grants or contracts ––

(1) education programs to provide an adequate supply of qualified personnel to carry out the purposes of this Act, and

(2) informational programs on the importance of and proper use of adequate safety and health equipment.

(b) The Secretary is also authorized to conduct, directly or by grants or contracts, short-term training of personnel engaged in work related to his responsibilities under this Act.

29 USC 670

(c) The Secretary, in consultation with the Secretary of Health and Human Services, shall —

(1) provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe or unhealthful working conditions in employments covered by this Act, and

Pub. L. 105-97, §2 added subsection (d). *See Historical notes.*

(2) consult with and advise employers and employees, and organizations representing employers and employees as to effective means of preventing occupational injuries and illnesses.

(d) (1) The Secretary shall establish and support cooperative agreements with the States under which employers subject to this Act may consult with State personnel with respect to --

(A) the application of occupational safety and health requirements under this Act or under State plans approved under section 18; and

(B) voluntary efforts that employers may undertake to establish and maintain safe and healthful employment and places of employment. Such agreements may provide, as a condition of receiving funds under such agreements, for contributions by States towards meeting the costs of such agreements.

(2) Pursuant to such agreements the State shall provide on-site consultation at the employer's worksite to employers who request such assistance. The State may also provide other education and training programs for employers and employees in the State. The State shall ensure that on-site consultations conducted pursuant to such agreements include provision for the participation by employees.

(3) Activities under this subsection shall be conducted independently of any enforcement activity. If an employer fails to take immediate action to eliminate employee exposure to an imminent danger identified in a consultation or fails to correct a serious hazard so identified within a reasonable time, a report shall be made to the appropriate enforcement authority for such action as is appropriate.

(4) The Secretary shall, by regulation after notice and opportunity for comment, establish rules under which an employer --

(A) which requests and undergoes an on-site consultative visit provided under this subsection;

(B) which corrects the hazards that have been identified during the visit within the time frames established by the State and agrees to request a subsequent consultative visit if major changes in working conditions or work processes occur which introduce new hazards in the workplace; and

(C) which is implementing procedures for regularly identifying and preventing hazards regulated under this Act and maintains appropriate involvement of, and training for, management and non-management employees in achieving safe and healthful working conditions,

may be exempt from an inspection (except an inspection requested under section 8(f) or an inspection to determine the cause of a workplace accident which resulted in the death of one or more employees or hospitalization for three or more employees) for a period of 1 year from the closing of the consultative visit.

(5) A State shall provide worksite consultations under paragraph (2) at the request of an employer. Priority in scheduling such consultations shall be assigned to requests from small businesses which are in higher hazard industries or have the most hazardous conditions at issue in the request.

SEC. 22. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH

29 USC 671

(a) It is the purpose of this section to establish a National Institute for Occupational Safety and Health in the Department of Health and Human Services in order to carry out the policy set forth in section 2 of this Act and to perform the

29 USC 671

functions of the Secretary of Health and Human Services under sections 20 and 21 of this Act.

(b) There is hereby established in the Department of Health and Human Services a National Institute for Occupational Safety and Health. The Institute shall be headed by a Director who shall be appointed by the Secretary of Health and Human Services, and who shall serve for a term of six years unless previously removed by the Secretary of Health and Human Services.

(c) The Institute is authorized to --

(1) develop and establish recommended occupational safety and health standards; and

(2) perform all functions of the Secretary of Health and Human Services under sections 20 and 21 of this Act.

(d) Upon his own initiative, or upon the request of the Secretary of Health and Human Services, the Director is authorized (1) to conduct such research and experimental programs as he determines are necessary for the development of criteria for new and improved occupational safety and health standards, and (2) after consideration of the results of such research and experimental programs make recommendations concerning new or improved occupational safety and health standards. Any occupational safety and health standard recommended pursuant to this section shall immediately be forwarded to the Secretary of Labor, and to the Secretary of Health and Human Services.

(e) In addition to any authority vested in the Institute by other provisions of this section, the Director, in carrying out the functions of the Institute, is authorized to --

(1) prescribe such regulations as he deems necessary governing the manner in which its functions shall be carried out;

(2) receive money and other property donated, bequeathed, or devised, without condition or restriction other than that it be used for the purposes of the Institute and to use, sell, or otherwise dispose of such property for the purpose of carrying out its functions;

(3) receive (and use, sell, or otherwise dispose of, in accordance with paragraph (2)), money and other property donated, bequeathed, or devised to the Institute with a condition or restriction, including a condition that the Institute use other funds of the Institute for the purposes of the gift;

(4) in accordance with the civil service laws, appoint and fix the compensation of such personnel as may be necessary to carry out the provisions of this section;

(5) obtain the services of experts and consultants in accordance with the provisions of section 3109 of title 5, United States Code;

(6) accept and utilize the services of voluntary and noncompensated personnel and reimburse them for travel expenses, including per diem, as authorized by section 5703 of title 5, United States Code;

(7) enter into contracts, grants or other arrangements, or modifications thereof to carry out the provisions of this section, and such contracts or modifications thereof may be entered into without performance or other bonds, and without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5), or any other provision of law relating to competitive bidding;

(8) make advance, progress, and other payments which the Director deems necessary under this title without regard to the provisions of section 3324 (a) and (b) of Title 31; and — Pub. L. 97-258

(9) make other necessary expenditures.

(f) The Director shall submit to the Secretary of Health and Human Services, to the President, and to the Congress an annual report of the operations of the Institute under this Act, which shall include a detailed statement of all private and public funds received and expended by it, and such recommendations as he deems appropriate.

(g) Lead-Based Paint Activities. — Pub. L. 102-550 added subsection (g).

29 USC 671

(1) Training Grant Program.

(A) The Institute, in conjunction with the Administrator of the Environmental Protection Agency, may make grants for the training and education of workers and supervisors who are or may be directly engaged in lead-based paint activities.

(B) Grants referred to in subparagraph (A) shall be awarded to nonprofit organizations (including colleges and universities, joint labor-management trust funds, States, and nonprofit government employee organizations) --

15 USC 2681 et. seq.

(i) which are engaged in the training and education of workers and supervisors who are or who may be directly engaged in lead-based paint activities (as defined in Title IV of the Toxic Substances Control Act),

(ii)which have demonstrated experience in implementing and operating health and safety training and education programs, and

(iii) with a demonstrated ability to reach, and involve in lead-based paint training programs, target populations of individuals who are or will be engaged in lead-based paint activities.

Grants under this subsection shall be awarded only to those organizations that fund at least 30 percent of their lead-based paint activities training programs from non-Federal sources, excluding in-kind contributions. Grants may also be made to local governments to carry out such training and education for their employees.

(C) There are authorized to be appropriated, a minimum, $10,000,000 to the Institute for each of the fiscal years 1994 through 1997 to make grants under this paragraph.

(2) Evaluation of Programs. The Institute shall conduct periodic and comprehensive assessments of the efficacy of the worker and supervisor training programs developed and offered by those receiving grants under this section. The Director shall prepare reports on the results of these assessments addressed to the Administrator of the Environmental Protection Agency to include recommendations as may be appropriate for the revision of these programs. The sum of $500,000 is authorized to be appropriated to the Institute for each of the fiscal years 1994 through 1997 to carry out this paragraph.

WORKERS' FAMILY PROTECTION

29 USC 671a

(a) Short title

This section may be cited as the ``Workers' Family Protection Act''.

Pub. L. 102-522, Title II, §209 added this text.

(b) Findings and purpose

(1) Findings

Congress finds that--

(A) hazardous chemicals and substances that can threaten the health and safety of workers are being transported out of industries on workers' clothing and persons;

(B) these chemicals and substances have the potential to pose an additional threat to the health and welfare of workers and their families;

(C) additional information is needed concerning issues related to employee transported contaminant releases; and

(D) additional regulations may be needed to prevent future releases of this type.

(2) Purpose

It is the purpose of this section to--

(A) increase understanding and awareness concerning the extent and possible health impacts of the problems and incidents described in paragraph (1);

(B) prevent or mitigate future incidents of home contamination that could adversely affect the health and safety of workers and their families;

29 USC 671a

(C) clarify regulatory authority for preventing and responding to such incidents; and

(D) assist workers in redressing and responding to such incidents when they occur.

(c) Evaluation of employee transported contaminant releases

(1) Study

(A) In general

Not later than 18 months after October 26, 1992, the Director of the National Institute for Occupational Safety and Health (hereafter in this section referred to as the "Director"), in cooperation with the Secretary of Labor, the Administrator of the Environmental Protection Agency, the Administrator of the Agency for Toxic Substances and Disease Registry, and the heads of other Federal Government agencies as determined to be appropriate by the Director, shall conduct a study to evaluate the potential for, the prevalence of, and the issues related to the contamination of workers' homes with hazardous chemicals and substances, including infectious agents, transported from the workplaces of such workers.

(B) Matters to be evaluated

In conducting the study and evaluation under subparagraph (A), the Director shall--

(i) conduct a review of past incidents of home contamination through the utilization of literature and of records concerning past investigations and enforcement actions undertaken by--

(I) the National Institute for Occupational Safety and Health;

(II) the Secretary of Labor to enforce the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.);

(III) States to enforce occupational safety and health standards in accordance with section 18 of such Act (29 U.S.C. 667); and

(IV) other government agencies (including the Department of Energy and the Environmental Protection Agency), as the Director may determine to be appropriate;

(ii) evaluate current statutory, regulatory, and voluntary industrial hygiene or other measures used by small, medium and large employers to prevent or remediate home contamination;

(iii) compile a summary of the existing research and case histories conducted on incidents of employee transported contaminant releases, including--

(I) the effectiveness of workplace housekeeping practices and personal protective equipment in preventing such incidents;

(II) the health effects, if any, of the resulting exposure on workers and their families;

(III) the effectiveness of normal house cleaning and laundry procedures for removing hazardous materials and agents from workers' homes and personal clothing;

(IV) indoor air quality, as the research concerning such pertains to the fate of chemicals transported from a workplace into the home environment; and

(V) methods for differentiating exposure health effects and relative risks associated with specific agents from other sources of exposure inside and outside the home;

(iv) identify the role of Federal and State agencies in responding to incidents of home contamination;

(v) prepare and submit to the Task Force established under paragraph (2) and to the appropriate committees of Congress, a report concerning the results of the matters studied or evaluated under clauses (i) through (iv); and

29 USC 671a

(vi) study home contamination incidents and issues and worker and family protection policies and practices related to the special circumstances of firefighters and prepare and submit to the appropriate committees of Congress a report concerning the findings with respect to such study.

(2) Development of investigative strategy

(A) Task Force

Not later than 12 months after October 26, 1992, the Director shall establish a working group, to be known as the "Workers' Family Protection Task Force". The Task Force shall--

(i) be composed of not more than 15 individuals to be appointed by the Director from among individuals who are representative of workers, industry, scientists, industrial hygienists, the National Research Council, and government agencies, except that not more than one such individual shall be from each appropriate government agency and the number of individuals appointed to represent industry and workers shall be equal in number;

(ii) review the report submitted under paragraph (1)(B)(v);

(iii) determine, with respect to such report, the additional data needs, if any, and the need for additional evaluation of the scientific issues related to and the feasibility of developing such additional data; and

(iv) if additional data are determined by the Task Force to be needed, develop a recommended investigative strategy for use in obtaining such information.

(B) Investigative strategy

(i) Content

The investigative strategy developed under subparagraph (A)(iv) shall identify data gaps that can and cannot be filled, assumptions and uncertainties associated with various components of such strategy, a timetable for the implementation of such strategy, and methodologies used to gather any required data.

(ii) Peer review

The Director shall publish the proposed investigative strategy under subparagraph (A)(iv) for public comment and utilize other methods, including technical conferences or seminars, for the purpose of obtaining comments concerning the proposed strategy.

(iii) Final strategy

After the peer review and public comment is conducted under clause (ii), the Director, in consultation with the heads of other government agencies, shall propose a final strategy for investigating issues related to home contamination that shall be implemented by the National Institute for Occupational Safety and Health and other Federal agencies for the period of time necessary to enable such agencies to obtain the information identified under subparagraph (A)(iii).

(C) Construction

Nothing in this section shall be construed as precluding any government agency from investigating issues related to home contamination using existing procedures until such time as a final strategy is developed or from taking actions in addition to those proposed in the strategy after its completion.

(3) Implementation of investigative strategy

Upon completion of the investigative strategy under subparagraph (B)(iii), each Federal agency or department shall fulfill the role assigned to it by the strategy.

29 USC 671a

(d) Regulations

(1) In general

Not later than 4 years after October 26, 1992, and periodically thereafter, the Secretary of Labor, based on the information developed under subsection (c) of this section and on other information available to the Secretary, shall--

(A) determine if additional education about, emphasis on, or enforcement of existing regulations or standards is needed and will be sufficient, or if additional regulations or standards are needed with regard to employee transported releases of hazardous materials; and

(B) prepare and submit to the appropriate committees of Congress a report concerning the result of such determination.

(2) Additional regulations or standards

If the Secretary of Labor determines that additional regulations or standards are needed under paragraph (1), the Secretary shall promulgate, pursuant to the Secretary's authority under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), such regulations or standards as determined to be appropriate not later than 3 years after such determination.

(e) Authorization of appropriations

There are authorized to be appropriated from sums otherwise authorized to be appropriated, for each fiscal year such sums as may be necessary to carry out this section.

SEC. 23. GRANTS TO THE STATES

29 USC 672

(a) The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States which have designated a State agency under section 18 to assist them --

(1) in identifying their needs and responsibilities in the area of occupational safety and health,

(2) in developing State plans under section 18, or

(3) in developing plans for --

(A) establishing systems for the collection of information concerning the nature and frequency of occupational injuries and diseases;

(B) increasing the expertise and enforcement capabilities of their personnel engaged in occupational safety and health programs; or

(C) otherwise improving the administration and enforcement of State occupational safety and health laws, including standards thereunder, consistent with the objectives of this Act.

(b) The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States for experimental and demonstration projects consistent with the objectives set forth in subsection (a) of this section.

(c) The Governor of the State shall designate the appropriate State agency for receipt of any grant made by the Secretary under this section.

(d) Any State agency designated by the Governor of the State desiring a grant under this section shall submit an application therefor to the Secretary.

(e) The Secretary shall review the application, and shall, after consultation with the Secretary of Health and Human Services, approve or reject such application.

(f) The Federal share for each State grant under subsection (a) or (b) of this section may not exceed 90 per centum of the total cost of the application. In the event the Federal share for all States under either such subsection is not the same, the differences among the States shall be established on the basis of objective criteria.

(g) The Secretary is authorized to make grants to the States to assist them in administering and enforcing programs for occupational safety and health contained

29 USC 672

in State plans approved by the Secretary pursuant to section 18 of this Act. The Federal share for each State grant under this subsection may not exceed 50 per centum of the total cost to the State of such a program. The last sentence of subsection (f) shall be applicable in determining the Federal share under this subsection.

(h) Prior to June 30, 1973, the Secretary shall, after consultation with the Secretary of Health and Human Services, transmit a report to the President and to the Congress, describing the experience under the grant programs authorized by this section and making any recommendations he may deem appropriate.

SEC. 24. STATISTICS

29 USC 673

(a) In order to further the purposes of this Act, the Secretary, in consultation with the Secretary of Health and Human Services, shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics. Such program may cover all employments whether or not subject to any other provisions of this Act but shall not cover employments excluded by section 4 of the Act. The Secretary shall compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(b) To carry out his duties under subsection (a) of this section, the Secretary may --

(1) promote, encourage, or directly engage in programs of studies, information and communication concerning occupational safety and health statistics;

(2) make grants to States or political subdivisions thereof in order to assist them in developing and administering programs dealing with occupational safety and health statistics; and

(3) arrange, through grants or contracts, for the conduct of such research and investigations as give promise of furthering the objectives of this section.

(c) The Federal share for each grant under subsection (b) of this section may be up to 50 per centum of the State's total cost.

(d) The Secretary may, with the consent of any State or political subdivision thereof, accept and use the services, facilities, and employees of the agencies of such State or political subdivision, with or without reimbursement, in order to assist him in carrying out his functions under this section.

(e) On the basis of the records made and kept pursuant to section 8(c) of this Act, employers shall file such reports with the Secretary as he shall prescribe by regulation, as necessary to carry out his functions under this Act.

(f) Agreements between the Department of Labor and States pertaining to the collection of occupational safety and health statistics already in effect on the effective date of this Act shall remain in effect until superseded by grants or contracts made under this Act.

SEC. 25. AUDITS

29 USC 674

(a) Each recipient of a grant under this Act shall keep such records as the Secretary or the Secretary of Health and Human Services shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such grant, the total cost of the project or undertaking in connection with which such grant is made or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

29 USC 674

(b) The Secretary or the Secretary of Health and Human Services, and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients of any grant under this Act that are pertinent to any such grant.

SEC. 26. ANNUAL REPORT

29 USC 675

Pub. L. 104-66 §3003 terminated provision relating to transmittal of report to Congress.

Within one hundred and twenty days following the convening of each regular session of each Congress, the Secretary and the Secretary of Health and Human Services shall each prepare and submit to the President for transmittal to the Congress a report upon the subject matter of this Act, the progress toward achievement of the purpose of this Act, the needs and requirements in the field of occupational safety and health, and any other relevant information. Such reports shall include information regarding occupational safety and health standards, and criteria for such standards, developed during the preceding year; evaluation of standards and criteria previously developed under this Act, defining areas of emphasis for new criteria and standards; an evaluation of the degree of observance of applicable occupational safety and health standards, and a summary of inspection and enforcement activity undertaken; analysis and evaluation of research activities for which results have been obtained under governmental and nongovernmental sponsorship; an analysis of major occupational diseases; evaluation of available control and measurement technology for hazards for which standards or criteria have been developed during the preceding year; description of cooperative efforts undertaken between Government agencies and other interested parties in the implementation of this Act during the preceding year; a progress report on the development of an adequate supply of trained manpower in the field of occupational safety and health, including estimates of future needs and the efforts being made by Government and others to meet those needs; listing of all toxic substances in industrial usage for which labeling requirements, criteria, or standards have not yet been established; and such recommendations for additional legislation as are deemed necessary to protect the safety and health of the worker and improve the administration of this Act.

SEC. 27. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS

29 USC 676

(Text omitted.)

See notes on omitted text.

SEC. 28. ECONOMIC ASSISTANCE TO SMALL BUSINESSES

(Text omitted.)

See notes on omitted text.

SEC. 29. ADDITIONAL ASSISTANT SECRETARY OF LABOR

(Text omitted.)

See notes on omitted text.

SEC. 30. ADDITIONAL POSITIONS

(Text omitted.)

See notes on omitted text.

SEC. 31. EMERGENCY LOCATOR BEACONS

(Text omitted.)

See notes on omitted text.

29 USC 677

SEC. 32. SEPARABILITY

29 USC 677 If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 33. APPROPRIATIONS

29 USC 678 There are authorized to be appropriated to carry out this Act for each fiscal year such sums as the Congress shall deem necessary.

SEC. 34. EFFECTIVE DATE

This Act shall take effect one hundred and twenty days after the date of its enactment.

Approved December 29, 1970.

HISTORICAL NOTES

This reprint generally retains the section numbers originally created by Congress in the Occupational Safety and Health (OSH) Act of 1970, Pub. L. 91-596, 84 Stat. 1590. This document includes some editorial changes, such as changing the format to make it easier to read, correcting typographical errors, and updating some of the margin notes. Because Congress enacted amendments to the Act since 1970, this version differs from the original version of the OSH Act. It also differs slightly from the version published in the United States Code at 29 U.S.C. 661 *et seq.* For example, this reprint refers to the statute as the "Act" rather than the "chapter."

This reprint reflects the provisions of the OSH Act that are in effect as of November 23, 2021. Citations to Public Laws which made important amendments to the OSH Act since 1970 are set forth in the margins and explanatory notes are included below.

NOTE: Some provisions of the OSH Act may be affected by the enactment of, or amendments to, other statutes. Section 17(h)(1), 29 U.S.C. 666, is an example. The original provision amended section 1114 of title 18 of the United States Code to include employees of "the Department of Labor assigned to perform investigative, inspection, or law enforcement functions" within the list of persons protected by the provisions to allow prosecution of persons who have killed or attempted to kill an officer or employee of the U.S. government while performing official duties. This reprint sets forth the text of section 17(h) as enacted in 1970. However, since 1970, Congress has enacted multiple amendments to 18 U.S.C. 1114. The current version does not specifically include the Department of Labor in a list; rather it states that "Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance shall be punished . . ." as provided by the statute. Readers are reminded that the official version of statutes can be found in the current volumes of the United States Code, and more extensive historical notes can be found in the current volumes of the United States Code Annotated.

Amendments

On January 2, 1974, section 2(c) of Pub. L. 93-237 replaced the phrase "7(b)(6)" in section 28(d) of the OSH Act with "7(b)(5)". 87 Stat. 1023. Note: The text of Section 28 (Economic Assistance to Small Business) amended Sections 7(b) and Section 4(c)(1) of the Small Business Act. Because these amendments are no longer current, the text of section 28 is omitted in this reprint. For the current version, see 15 U.S.C. 636.

In 1977, the U.S. entered into the Panama Canal Treaty of 1977, Sept. 7, 1977, U.S.-Panama, T.I.A.S. 10030, 33 U.S.T. 39. In 1979, Congress enacted implementing legislation. Panama Canal Act of 1979, Pub. L. 96-70, 93 Stat. 452 (1979). Although no corresponding amendment to the OSH Act was enacted, the Canal Zone ceased to exist in 1979. The U.S. continued to manage, operate and facilitate the transit of ships through the Canal under the authority of the Panama Canal Treaty until December 31, 1999, at which time authority over the Canal was transferred to the Republic of Panama.

On March 27, 1978, Pub. L. 95-251, 92 Stat. 183, replaced the term "hearing examiner(s)" with "administrative law judge(s)" in all federal laws, including sections 12(e), 12(j), and 12(k) of the OSH Act, 29 U.S.C. 661.

On October 13, 1978, Pub. L. 95-454, 92 Stat. 1111, 1221, which redesignated section numbers concerning personnel matters and compensation, resulted in the substitution of section 5372 of Title 5 for section 5362 in section 12(e) of the OSH Act, 29 U.S.C. 661.

On October 17, 1979, Pub. L. 96-88, Title V, section 509(b), 93 Stat. 668, 695, redesignated references to the Department of Health, Education, and Welfare to the Department of Health and Human Services and redesignated references to the Secretary of Health, Education, and Welfare to the Secretary of Health and Human Services.

On September 13, 1982, Pub. L. 97-258, §4(b), 96 Stat. 877, 1067, effectively substituted "Section 3324(a) and (b) of Title 31" for "Section 3648 of the Revised Statutes, as amended (31 U.S.C. 529)" in section 22 (e)(8), 29 U.S.C. 671, relating to NIOSH procurement authority.

On December 21, 1982, Pub. L. 97-375, 96 Stat. 1819, deleted the sentence in section 19(b) of the Act, 29 U.S.C. 668, that directed the President of the United States to transmit annual reports of the activities of federal agencies to the House of Representatives and the Senate.

On October 12, 1984, Pub. L. 98-473, Chapter II, 98 Stat. 1837, 1987, (commonly referred to as the "Sentencing Reform Act of 1984") instituted a classification system for criminal offenses punishable under the United States Code. Under this system, an offense with imprisonment terms of "six months or less but more than thirty days," such as that found in 29 U.S.C. 666(e) for a willful violation of the OSH Act, is classified as a criminal "Class B misdemeanor." 18 U.S.C. 3559(a)(7). The criminal code increases the monetary penalties for criminal misdemeanors beyond what is provided for in the OSH Act: a fine for a Class B misdemeanor resulting in death, for example, is not more than $250,000 for an individual, and is not more than $500,000 for an organization. 18 U.S.C. 3571(b)(4), (c)(4). The

criminal code also provides for authorized terms of probation for both individuals and organizations. 18 U.S.C. 3551, 3561. The term of imprisonment for individuals is the same as that authorized by the OSH Act. 18 U.S.C. 3581(b)(7).

On November 8, 1984, Pub. L. 98-620, 98 Stat. 3335, deleted the last sentence in section 11(a) of the Act, 29 U.S.C. 660, that required petitions filed under the subsection to be heard expeditiously.

On November 5, 1990, Pub. L. 101-508, 104 Stat. 1388, amended section 17 of the Act, 29 U.S.C. 666, by increasing the penalties in section 17(a) from $10,000 for each violation to "$70,000 for each violation, but not less than $5,000 for each willful violation," and increased the limitation on penalties in sections (b), (c), (d), and (i) from $1,000 to $7,000.

On October 26, 1992, Pub. L. 102-522, 106 Stat. 3410, 3420, added to Title 29, section 671a "Workers' Family Protection" to grant authority to the Director of NIOSH to evaluate, investigate and if necessary, for the Secretary of Labor to regulate employee transported releases of hazardous material that result from contamination on the employee's clothing or person and may adversely affect the health and safety of workers and their families. Note: section 671a was enacted as section 209 of the Fire Administration Authorization Act of 1992, but it is reprinted here because it is codified within the chapter that comprises the OSH Act.

On October 28, 1992, the Housing and Community Development Act of 1992, Pub. L. 102-550, 106 Stat. 3672, 3924, amended section 22 of the Act, 29 U.S.C. 671, by adding subsection (g), which requires NIOSH to institute a training grant program for lead-based paint activities.

On July 5, 1994, section 7(b) of Pub. L. 103-272, 108 Stat. 745, repealed section 31 of the OSH Act, "Emergency Locator Beacons." Section 1(e) of the same Public Law, however, enacted a modified version of section 31 of the OSH Act. This provision, titled "Emergency Locator Transmitters," is codified at 49 U.S.C. 44712.

On December 21, 1995, Section 3003 of Pub. L. 104-66, 109 Stat. 707, as amended, effective May 15, 2000, terminated the provisions relating to the transmittal to Congress of reports under section 26 of the OSH Act. 29 U.S.C. 675.

On July 16, 1998, Pub. L. 105-197, 112 Stat. 638, amended section 21 of the Act, 29 U.S.C. 670, by adding subsection (d), which required the Secretary to establish a compliance assistance program by which employers can consult with state personnel regarding the application of and compliance with OSHA standards.

On July 16, 1998, Pub. L. 105-198, 112 Stat. 640, amended section 8 of the Act, 29 U.S.C. 657, by adding subsection (h), which forbids the Secretary to use the results of enforcement activities to evaluate the employees involved in such enforcement or to impose quotas or goals.

On September 29, 1998, Pub. L. 105-241, 112 Stat. 1572, amended sections 3(5) and 19(a) of the Act, 29 U.S.C. 652 and 668, to include the United States Postal Service as an "employer" subject to OSHA enforcement.

On June 12, 2002, Pub. L. 107-188, Title I, Section 153, 116 Stat. 631, Congress enacted 29 U.S.C. 669a, to expand research on the "health and safety of workers who are at risk for bioterrorist threats or attacks in the workplace."

On December 20, 2019, the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, 133 Stat. 1198, 1977-78, amended section 7 of the Act, 29 U.S.C. 656, by adding subsection (d), which established a Maritime Occupational Safety and Health Advisory Committee.

Jurisdictional Note

Although no corresponding amendments to the OSH Act have been made, OSHA no longer exercises jurisdiction over the entity formerly known as the Trust Territory of the Pacific Islands. The Trust Territory, which consisted of the Former Japanese Mandated Islands, was established in 1947 by the Security Council of the United Nations, and administered by the United States. *Trusteeship Agreement for the Former Japanese Mandated Islands,* Apr. 2-July 18, 1947, 61 Stat. 3301, T.I.A.S. 1665, 8 U.N.T.S. 189.

From 1947 to 1994, the people of these islands exercised the right of self-determination conveyed by the Trusteeship four times, resulting in the division of the Trust Territory into four separate entities. Three entities: the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, became "Freely Associated States," to which U.S. Federal Law does not apply. Since the OSH Act is a generally applicable law that applies to Guam, it applies to the Commonwealth of Northern Mariana Islands, which elected to become a "Flag Territory" of the United States. *See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America,* Article V, section 502(a) as contained in Pub. L. 94-24, 90 Stat. 263 (Mar. 24, 1976)[citations to amendments omitted]; 48 U.S.C. 1801 and note (1976); s*ee also Saipan Stevedore Co., Inc. v. Director, Office of Workers' Compensation Programs,* 133 F.3d 717, 722 (9th Cir. 1998)(Longshore and Harbor Workers' Compensation Act applies to the Commonwealth of Northern Mariana Islands pursuant to section 502(a) of the Covenant because the Act has general application to the states and to Guam). For up-to-date information on the legal status of these freely associated states and territories, contact the Office of Insular Affairs of the Department of the Interior. (Web address: http://www.doi.gov/oia/)

Omitted Text. Reasons for textual deletions vary. Some deletions may result from amendments to the OSH Act; others to subsequent amendments to other statutes which the original provisions of the OSH Act may have amended in 1970. In some instances, the original provision of the OSH Act was date-limited and is no longer operative.

The text of section 12(c), 29 U.S.C. 661, is omitted. Subsection (c) amended sections 5314 and 5315 of Title 5, United States Code, to add the positions of Chairman and members of the Occupational Safety and Health Review Commission.

The text of section 27, 29 U.S.C. 676, is omitted. Section 27 listed Congressional findings on workers' compensation and established the National Commission on State Workmen's Compensation Laws, which ceased to exist ninety days after the submission of its final report, which was due no later than July 31, 1972.

The text of section 28 (Economic Assistance to Small Business) amended sections 7(b) and section 4(c)(1) of the Small Business Act to allow for small business loans in order to comply with applicable standards. Because these amendments are no longer current, the text is omitted here. For the current version see 15 U.S.C. 636.

The text of section 29, (Additional Assistant Secretary of Labor), created an Assistant Secretary for Occupational Safety and Health, and section 30 (Additional Positions) created additional positions within the Department of Labor and the Occupational Safety and Health Review Commission in order to carry out the provisions of the OSH Act. The text of these sections is omitted here because it no longer reflects the current statutory provisions for staffing and pay. For current provisions, see 29 U.S.C. 553 and 5 U.S.C. 5108 (c).

Section 31 of the original OSH Act amended 49 U.S.C. 1421 by inserting a section entitled "Emergency Locator Beacons." The text of that section is omitted in this reprint because Pub. L. 103-272, 108 Stat.745, (July 5, 1994), repealed the text of section 31 and enacted a modified version of the provision, entitled "Emergency Locator Transmitters," which is codified at 49 U.S.C. 44712.

Notes on other legislation affecting the administration of the Occupational Safety and Health Act. Sometimes legislation does not directly amend the OSH Act, but does place requirements on the Secretary of Labor either to act or to refrain from acting under the authority of the OSH Act. Included below are some examples of such legislation. Please note that this is not intended to be a comprehensive list.

STANDARDS PROMULGATION.
For example, legislation may require the Secretary to promulgate specific standards pursuant to authority under section 6 of the OSH Act, 29 U.S.C. 655. Some examples include the following:

Hazardous Waste Operations. Pub. L. 99-499, Title I, section 126(a)-(f), 100 Stat. 1613 (1986), as amended by Pub. L. 100-202, section 101(f), Title II, section 201, 101 Stat. 1329 (1987), required the Secretary of Labor to promulgate standards concerning hazardous waste operations.

Chemical Process Safety Management. Pub. L. 101-549, Title III, section 304, 104 Stat. 2399 (1990), required the Secretary of Labor, in coordination with the Administrator of the Environmental Protection Agency, to promulgate a chemical process safety standard.

Hazardous Materials. Pub. L. 101-615, section 29, 104 Stat. 3244 (1990), required the Secretary of Labor, in consultation with the Secretaries of Transportation and Treasury, to issue specific standards concerning the handling of hazardous materials.

Bloodborne Pathogens Standard. Pub. L. 102-170, Title I, section 100, 105 Stat. 1107 (1991), required the Secretary of Labor to promulgate a final Bloodborne Pathogens standard.

Lead Standard. The Housing and Community Development Act of 1992, Pub. L. 102-550, Title X, sections 1031 and 1032, 106 Stat. 3672 (1992), required the Secretary of Labor to issue an interim final lead standard.

Needlestick Safety and Prevention Act. Pub. L. 106-430, 114 Stat. 1901 (2000), required changes in the Bloodborne Pathogens standard.

PENALTIES.
On November 2, 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, 129 Stat. 584, 599-601 (the "Inflation Adjustment Act"), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 as previously amended by the 1996 Debt Collection Improvement Act, to improve the effectiveness of civil monetary penalties and maintain their deterrent effect. The Inflation Adjustment Act required agencies to: (1) adjust the level of civil monetary penalties with an initial "catch-up" adjustment through an interim final rule; and (2) make subsequent annual adjustments for inflation, no later than January 15 of each year. Effective January 15, 2021, the maximum civil monetary penalties for violations of the Act were adjusted as follows: $136,532 per willful or repeat violation under section 17(a), 29 U.S.C. 666(a); $13,653 for a serious, other-than serious, or posting requirement violation under section 17, subsections (b)-(c) & (i); and $13,653 per day for a failure to correct a violation under section 17(d). See 29 C.F.R. § 1903.15. Pursuant to the Inflation Adjustment Act, the Department must adjust these penalties for inflation no later than January 15, 2022.

EXTENSION OF COVERAGE.
Sometimes a statute may make some OSH Act provisions applicable to certain entities that are not subject to those provisions by the terms of the OSH Act. For example, the Congressional Accountability Act of 1995, Pub. L. 104-1, 109 Stat. 3, (1995), extended certain OSH Act coverage, such as the duty to comply with Section 5 of the OSH Act, to the Legislative Branch. Among other provisions, this legislation authorizes the General Counsel of the Office of Compliance within the Legislative Branch to exercise the authority granted to the Secretary of Labor in the OSH Act to inspect places of employment and issue a citation or notice to correct the violation found. This statute does not make all the provisions of the OSH Act applicable to the Legislative Branch. Another example is the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Title IX, Section 947, Pub. L. 108-173, 117 Stat. 2066 (2003), which requires public hospitals not otherwise subject to the OSH Act to comply with OSHA's Bloodborne Pathogens standard, 29 CFR 1910.1030. This statute provides for the imposition and collection of civil money penalties by the Department of Health and Human Services in the event that a hospital fails to comply with OSHA's Bloodborne Pathogens standard.

PROGRAM CHANGES ENACTED THROUGH APPROPRIATIONS LEGISLATION.
Sometimes an appropriations statute may allow or restrict certain substantive actions by OSHA or the Secretary of Labor. For example, sometimes an appropriation statute may restrict the use of money appropriated to run the Occupational Safety and Health Administration or the Department of Labor. One example of such a restriction, that has been included in OSHA's appropriation for many years, limits the applicability of OSHA requirements with respect to farming operations that employ ten or fewer workers and do not maintain a temporary labor camp. Another example is a restriction that limits OSHA's authority to conduct certain enforcement activity with respect to employers of ten or fewer employees in low hazard industries. See Consolidated Appropriations Act, 2021, Public Law No. 116-260, Div. H, Departments of Labor, Health and Human Services, and

Education, and Related Agencies Appropriations Act, 2021, Title I – Department of Labor, 134 Stat. 1182 (2020). Sometimes an appropriations statute may allow OSHA to retain some money collected to use for occupational safety and health training or grants. For example, the Consolidated Appropriations Act, 2021, Div. H, Title I, cited above, allows OSHA to retain up to $499,000 of training institute course tuition and fees per fiscal year for such uses. For the statutory text of currently applicable appropriations provisions, consult the OSHA appropriations statute for the fiscal year in question.

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Medium	1/8 to 1/2	3.2 to 12.7	5
Heavy	Over 1/2	Over 12.7	6
Oxygen cutting:			
Light	Under 1	Under 25	3
Medium	1 to 6	25 to 150	4
Heavy	Over 6	Over 150	5

* As a rule of thumb, start with a shade that is too dark to see the weld zone. Then go to a lighter shade which gives sufficient view of the weld zone without going below the minimum. In oxyfuel gas welding or cutting where the torch produces a high yellow light, it is desirable to use a filter lens that absorbs the yellow or sodium line in the visible light of the (spectrum) operation.

** These values apply where the actual arc is clearly seen. Experience has shown that lighter filters may be used when the arc is hidden by the workpiece.

(b) *Criteria for protective eye and face protection.* (1) Protective eye and face protection devices must comply with any of the following consensus standards:

(i) ANSI/ISEA Z87.1–2010, Occupational and Educational Personal Eye and Face Protection Devices, incorporated by reference in §1910.6;

(ii) ANSI Z87.1–2003, Occupational and Educational Personal Eye and Face Protection Devices, incorporated by reference in §1910.6; or

(iii) ANSI Z87.1–1989 (R–1998), Practice for Occupational and Educational Eye and Face Protection, incorporated by reference in §1910.6;

(2) Protective eye and face protection devices that the employer demonstrates are at least as effective as protective eye and face protection devices that are constructed in accordance with one of the above consensus standards will be deemed to be in compliance with the requirements of this section.

[59 FR 16360, Apr. 6, 1994; 59 FR 33911, July 1, 1994, as amended at 61 FR 9238, Mar. 7, 1996; 61 FR 19548, May 2, 1996; 74 FR 46356, Sept. 9, 2009; 81 FR 16090, Mar. 25, 2016]

§1910.134 Respiratory protection.

This section applies to General Industry (part 1910), Shipyards (part 1915), Marine Terminals (part 1917), Longshoring (part 1918), and Construction (part 1926).

(a) *Permissible practice.* (1) In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors, the primary objective shall be to prevent atmospheric contamination. This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitution of less toxic materials). When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to this section.

(2) A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section. The program shall cover each employee required by this section to use a respirator.

(b) *Definitions.* The following definitions are important terms used in the respiratory protection standard in this section.

Air-purifying respirator means a respirator with an air-purifying filter,

cartridge, or canister that removes specific air contaminants by passing ambient air through the air-purifying element.

Assigned protection factor (APF) means the workplace level of respiratory protection that a respirator or class of respirators is expected to provide to employees when the employer implements a continuing, effective respiratory protection program as specified by this section.

Atmosphere-supplying respirator means a respirator that supplies the respirator user with breathing air from a source independent of the ambient atmosphere, and includes supplied-air respirators (SARs) and self-contained breathing apparatus (SCBA) units.

Canister or cartridge means a container with a filter, sorbent, or catalyst, or combination of these items, which removes specific contaminants from the air passed through the container.

Demand respirator means an atmosphere-supplying respirator that admits breathing air to the facepiece only when a negative pressure is created inside the facepiece by inhalation.

Emergency situation means any occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment that may or does result in an uncontrolled significant release of an airborne contaminant.

Employee exposure means exposure to a concentration of an airborne contaminant that would occur if the employee were not using respiratory protection.

End-of-service-life indicator (ESLI) means a system that warns the respirator user of the approach of the end of adequate respiratory protection, for example, that the sorbent is approaching saturation or is no longer effective.

Escape-only respirator means a respirator intended to be used only for emergency exit.

Filter or air purifying element means a component used in respirators to remove solid or liquid aerosols from the inspired air.

Filtering facepiece (dust mask) means a negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium.

Fit factor means a quantitative estimate of the fit of a particular respirator to a specific individual, and typically estimates the ratio of the concentration of a substance in ambient air to its concentration inside the respirator when worn.

Fit test means the use of a protocol to qualitatively or quantitatively evaluate the fit of a respirator on an individual. (See also Qualitative fit test QLFT and Quantitative fit test QNFT.)

Helmet means a rigid respiratory inlet covering that also provides head protection against impact and penetration.

High efficiency particulate air (HEPA) filter means a filter that is at least 99.97% efficient in removing monodisperse particles of 0.3 micrometers in diameter. The equivalent NIOSH 42 CFR 84 particulate filters are the N100, R100, and P100 filters.

Hood means a respiratory inlet covering that completely covers the head and neck and may also cover portions of the shoulders and torso.

Immediately dangerous to life or health (IDLH) means an atmosphere that poses an immediate threat to life, would cause irreversible adverse health effects, or would impair an individual's ability to escape from a dangerous atmosphere.

Interior structural firefighting means the physical activity of fire suppression, rescue or both, inside of buildings or enclosed structures which are involved in a fire situation beyond the incipient stage. (See 29 CFR 1910.155)

Loose-fitting facepiece means a respiratory inlet covering that is designed to form a partial seal with the face.

Maximum use concentration (MUC) means the maximum atmospheric concentration of a hazardous substance from which an employee can be expected to be protected when wearing a respirator, and is determined by the assigned protection factor of the respirator or class of respirators and the exposure limit of the hazardous substance. The MUC can be determined mathematically by multiplying the assigned protection factor specified for a

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respirator by the required OSHA permissible exposure limit, short-term exposure limit, or ceiling limit. When no OSHA exposure limit is available for a hazardous substance, an employer must determine an MUC on the basis of relevant available information and informed professional judgment.

Negative pressure respirator (tight fitting) means a respirator in which the air pressure inside the facepiece is negative during inhalation with respect to the ambient air pressure outside the respirator.

Oxygen deficient atmosphere means an atmosphere with an oxygen content below 19.5% by volume.

Physician or other licensed health care professional (PLHCP) means an individual whose legally permitted scope of practice (*i.e.,* license, registration, or certification) allows him or her to independently provide, or be delegated the responsibility to provide, some or all of the health care services required by paragraph (e) of this section.

Positive pressure respirator means a respirator in which the pressure inside the respiratory inlet covering exceeds the ambient air pressure outside the respirator.

Powered air-purifying respirator (PAPR) means an air-purifying respirator that uses a blower to force the ambient air through air-purifying elements to the inlet covering.

Pressure demand respirator means a positive pressure atmosphere-supplying respirator that admits breathing air to the facepiece when the positive pressure is reduced inside the facepiece by inhalation.

Qualitative fit test (QLFT) means a pass/fail fit test to assess the adequacy of respirator fit that relies on the individual's response to the test agent.

Quantitative fit test (QNFT) means an assessment of the adequacy of respirator fit by numerically measuring the amount of leakage into the respirator.

Respiratory inlet covering means that portion of a respirator that forms the protective barrier between the user's respiratory tract and an air-purifying device or breathing air source, or both. It may be a facepiece, helmet, hood, suit, or a mouthpiece respirator with nose clamp.

Self-contained breathing apparatus (SCBA) means an atmosphere-supplying respirator for which the breathing air source is designed to be carried by the user.

Service life means the period of time that a respirator, filter or sorbent, or other respiratory equipment provides adequate protection to the wearer.

Supplied-air respirator (SAR) or airline respirator means an atmosphere-supplying respirator for which the source of breathing air is not designed to be carried by the user.

This section means this respiratory protection standard.

Tight-fitting facepiece means a respiratory inlet covering that forms a complete seal with the face.

User seal check means an action conducted by the respirator user to determine if the respirator is properly seated to the face.

(c) *Respiratory protection program.* This paragraph requires the employer to develop and implement a written respiratory protection program with required worksite-specific procedures and elements for required respirator use. The program must be administered by a suitably trained program administrator. In addition, certain program elements may be required for voluntary use to prevent potential hazards associated with the use of the respirator. The Small Entity Compliance Guide contains criteria for the selection of a program administrator and a sample program that meets the requirements of this paragraph. Copies of the Small Entity Compliance Guide will be available on or about April 8, 1998 from the Occupational Safety and Health Administration's Office of Publications, Room N 3101, 200 Constitution Avenue, NW, Washington, DC, 20210 (202–219–4667).

(1) In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with worksite-specific procedures. The program shall be updated as necessary to reflect those changes in workplace conditions that affect respirator use. The employer

shall include in the program the following provisions of this section, as applicable:

(i) Procedures for selecting respirators for use in the workplace;

(ii) Medical evaluations of employees required to use respirators;

(iii) Fit testing procedures for tight-fitting respirators;

(iv) Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;

(v) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators;

(vi) Procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators;

(vii) Training of employees in the respiratory hazards to which they are potentially exposed during routine and emergency situations;

(viii) Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance; and

(ix) Procedures for regularly evaluating the effectiveness of the program.

(2) Where respirator use is not required:

(i) An employer may provide respirators at the request of employees or permit employees to use their own respirators, if the employer determines that such respirator use will not in itself create a hazard. If the employer determines that any voluntary respirator use is permissible, the employer shall provide the respirator users with the information contained in appendix D to this section (''Information for Employees Using Respirators When Not Required Under the Standard''); and

(ii) In addition, the employer must establish and implement those elements of a written respiratory protection program necessary to ensure that any employee using a respirator voluntarily is medically able to use that respirator, and that the respirator is cleaned, stored, and maintained so that its use does not present a health hazard to the user. Exception: Employers are not required to include in a written respiratory protection program those employees whose only use of respirators involves the voluntary use of filtering facepieces (dust masks).

(3) The employer shall designate a program administrator who is qualified by appropriate training or experience that is commensurate with the complexity of the program to administer or oversee the respiratory protection program and conduct the required evaluations of program effectiveness.

(4) The employer shall provide respirators, training, and medical evaluations at no cost to the employee.

(d) *Selection of respirators.* This paragraph requires the employer to evaluate respiratory hazard(s) in the workplace, identify relevant workplace and user factors, and base respirator selection on these factors. The paragraph also specifies appropriately protective respirators for use in IDLH atmospheres, and limits the selection and use of air-purifying respirators.

(1) *General requirements.* (i) The employer shall select and provide an appropriate respirator based on the respiratory hazard(s) to which the worker is exposed and workplace and user factors that affect respirator performance and reliability.

(ii) The employer shall select a NIOSH-certified respirator. The respirator shall be used in compliance with the conditions of its certification.

(iii) The employer shall identify and evaluate the respiratory hazard(s) in the workplace; this evaluation shall include a reasonable estimate of employee exposures to respiratory hazard(s) and an identification of the contaminant's chemical state and physical form. Where the employer cannot identify or reasonably estimate the employee exposure, the employer shall consider the atmosphere to be IDLH.

(iv) The employer shall select respirators from a sufficient number of respirator models and sizes so that the respirator is acceptable to, and correctly fits, the user.

(2) *Respirators for IDLH atmospheres.* (i) The employer shall provide the following respirators for employee use in IDLH atmospheres:

(A) A full facepiece pressure demand SCBA certified by NIOSH for a minimum service life of thirty minutes, or

(B) A combination full facepiece pressure demand supplied-air respirator (SAR) with auxiliary self-contained air supply.

(ii) Respirators provided only for escape from IDLH atmospheres shall be NIOSH-certified for escape from the atmosphere in which they will be used.

(iii) All oxygen-deficient atmospheres shall be considered IDLH. Exception: If the employer demonstrates that, under all foreseeable conditions, the oxygen concentration can be maintained within the ranges specified in Table II of this section (i.e., for the altitudes set out in the table), then any atmosphere-supplying respirator may be used.

(3) *Respirators for atmospheres that are not IDLH.* (i) The employer shall provide a respirator that is adequate to protect the health of the employee and ensure compliance with all other OSHA statutory and regulatory requirements, under routine and reasonably foreseeable emergency situations.

(A) *Assigned Protection Factors (APFs).* Employers must use the assigned protection factors listed in Table 1 to select a respirator that meets or exceeds the required level of employee protection. When using a combination respirator (e.g., airline respirators with an air-purifying filter), employers must ensure that the assigned protection factor is appropriate to the mode of operation in which the respirator is being used.

TABLE 1—ASSIGNED PROTECTION FACTORS[5]

Type of respirator[1,2]	Quarter mask	Half mask	Full facepiece	Helmet/hood	Loose-fitting facepiece
1. Air-Purifying Respirator	5	[3]10	50	.....	.....
2. Powered Air-Purifying Respirator (PAPR)	.....	50	1,000	[4]25/1,000	25
3. Supplied-Air Respirator (SAR) or Airline Respirator.					
• Demand mode	.....	10	50	.....	.....
• Continuous flow mode	.....	50	1,000	[4]25/1,000	25
• Pressure-demand or other positive-pressure mode	.....	50	1,000	.....	.....
4. Self-Contained Breathing Apparatus (SCBA).					
• Demand mode	.....	10	50	50	.....
• Pressure-demand or other positive-pressure mode (e.g., open/closed circuit)	.....	.....	10,000	10,000	.....

Notes:

[1] Employers may select respirators assigned for use in higher workplace concentrations of a hazardous substance for use at lower concentrations of that substance, or when required respirator use is independent of concentration.

[2] The assigned protection factors in Table 1 are only effective when the employer implements a continuing, effective respirator program as required by this section (29 CFR 1910.134), including training, fit testing, maintenance, and use requirements.

[3] This APF category includes filtering facepieces, and half masks with elastomeric facepieces.

[4] The employer must have evidence provided by the respirator manufacturer that testing of these respirators demonstrates performance at a level of protection of 1,000 or greater to receive an APF of 1,000. This level of performance can best be demonstrated by performing a WPF or SWPF study or equivalent testing. Absent such testing, all other PAPRs and SARs with helmets/hoods are to be treated as loose-fitting facepiece respirators, and receive an APF of 25.

[5] These APFs do not apply to respirators used solely for escape. For escape respirators used in association with specific substances covered by 29 CFR 1910 subpart Z, employers must refer to the appropriate substance-specific standards in that subpart. Escape respirators for other IDLH atmospheres are specified by 29 CFR 1910.134 (d)(2)(ii).

(B) *Maximum Use Concentration (MUC).* (*1*) The employer must select a respirator for employee use that maintains the employee's exposure to the hazardous substance, when measured outside the respirator, at or below the MUC.

(*2*) Employers must not apply MUCs to conditions that are immediately dangerous to life or health (IDLH); instead, they must use respirators listed for IDLH conditions in paragraph (d)(2) of this standard.

(*3*) When the calculated MUC exceeds the IDLH level for a hazardous substance, or the performance limits of the cartridge or canister, then employers must set the maximum MUC at that lower limit.

(ii) The respirator selected shall be appropriate for the chemical state and physical form of the contaminant.

(iii) For protection against gases and vapors, the employer shall provide:

(A) An atmosphere-supplying respirator, or

(B) An air-purifying respirator, provided that:

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(*1*) The respirator is equipped with an end-of-service-life indicator (ESLI) certified by NIOSH for the contaminant; or

(*2*) If there is no ESLI appropriate for conditions in the employer's workplace, the employer implements a change schedule for canisters and cartridges that is based on objective information or data that will ensure that canisters and cartridges are changed before the end of their service life. The employer shall describe in the respirator program the information and data relied upon and the basis for the canister and cartridge change schedule and the basis for reliance on the data.

(iv) For protection against particulates, the employer shall provide:

(A) An atmosphere-supplying respirator; or

(B) An air-purifying respirator equipped with a filter certified by NIOSH under 30 CFR part 11 as a high efficiency particulate air (HEPA) filter, or an air-purifying respirator equipped with a filter certified for particulates by NIOSH under 42 CFR part 84; or

(C) For contaminants consisting primarily of particles with mass median aerodynamic diameters (MMAD) of at least 2 micrometers, an air-purifying respirator equipped with any filter certified for particulates by NIOSH.

TABLE I—ASSIGNED PROTECTION FACTORS [RESERVED]

TABLE II

Altitude (ft.)	Oxygen deficient Atmospheres (% O_2) for which the employer may rely on atmosphere-supplying respirators
Less than 3,001	16.0–19.5
3,001–4,000	16.4–19.5
4,001–5,000	17.1–19.5
5,001–6,000	17.8–19.5
6,001–7,000	18.5–19.5
7,001–8,000[1]	19.3–19.5.

[1] Above 8,000 feet the exception does not apply. Oxygen-enriched breathing air must be supplied above 14,000 feet.

(e) *Medical evaluation.* Using a respirator may place a physiological burden on employees that varies with the type of respirator worn, the job and workplace conditions in which the respirator is used, and the medical status of the employee. Accordingly, this paragraph specifies the minimum requirements for medical evaluation that employers must implement to determine the employee's ability to use a respirator.

(1) *General.* The employer shall provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace. The employer may discontinue an employee's medical evaluations when the employee is no longer required to use a respirator.

(2) *Medical evaluation procedures.* (i) The employer shall identify a physician or other licensed health care professional (PLHCP) to perform medical evaluations using a medical questionnaire or an initial medical examination that obtains the same information as the medical questionnaire.

(ii) The medical evaluation shall obtain the information requested by the questionnaire in Sections 1 and 2, part A of appendix C of this section.

(3) *Follow-up medical examination.* (i) The employer shall ensure that a follow-up medical examination is provided for an employee who gives a positive response to any question among questions 1 through 8 in Section 2, part A of appendix C or whose initial medical examination demonstrates the need for a follow-up medical examination.

(ii) The follow-up medical examination shall include any medical tests, consultations, or diagnostic procedures that the PLHCP deems necessary to make a final determination.

(4) *Administration of the medical questionnaire and examinations.* (i) The medical questionnaire and examinations shall be administered confidentially during the employee's normal working hours or at a time and place convenient to the employee. The medical questionnaire shall be administered in a manner that ensures that the employee understands its content.

(ii) The employer shall provide the employee with an opportunity to discuss the questionnaire and examination results with the PLHCP.

(5) *Supplemental information for the PLHCP.* (i) The following information must be provided to the PLHCP before the PLHCP makes a recommendation

concerning an employee's ability to use a respirator:

(A) The type and weight of the respirator to be used by the employee;

(B) The duration and frequency of respirator use (including use for rescue and escape);

(C) The expected physical work effort;

(D) Additional protective clothing and equipment to be worn; and

(E) Temperature and humidity extremes that may be encountered.

(ii) Any supplemental information provided previously to the PLHCP regarding an employee need not be provided for a subsequent medical evaluation if the information and the PLHCP remain the same.

(iii) The employer shall provide the PLHCP with a copy of the written respiratory protection program and a copy of this section.

NOTE TO PARAGRAPH (e)(5)(iii): When the employer replaces a PLHCP, the employer must ensure that the new PLHCP obtains this information, either by providing the documents directly to the PLHCP or having the documents transferred from the former PLHCP to the new PLHCP. However, OSHA does not expect employers to have employees medically reevaluated solely because a new PLHCP has been selected.

(6) *Medical determination.* In determining the employee's ability to use a respirator, the employer shall:

(i) Obtain a written recommendation regarding the employee's ability to use the respirator from the PLHCP. The recommendation shall provide only the following information:

(A) Any limitations on respirator use related to the medical condition of the employee, or relating to the workplace conditions in which the respirator will be used, including whether or not the employee is medically able to use the respirator;

(B) The need, if any, for follow-up medical evaluations; and

(C) A statement that the PLHCP has provided the employee with a copy of the PLHCP's written recommendation.

(ii) If the respirator is a negative pressure respirator and the PLHCP finds a medical condition that may place the employee's health at increased risk if the respirator is used, the employer shall provide a PAPR if the PLHCP's medical evaluation finds that the employee can use such a respirator; if a subsequent medical evaluation finds that the employee is medically able to use a negative pressure respirator, then the employer is no longer required to provide a PAPR.

(7) *Additional medical evaluations.* At a minimum, the employer shall provide additional medical evaluations that comply with the requirements of this section if:

(i) An employee reports medical signs or symptoms that are related to ability to use a respirator;

(ii) A PLHCP, supervisor, or the respirator program administrator informs the employer that an employee needs to be reevaluated;

(iii) Information from the respiratory protection program, including observations made during fit testing and program evaluation, indicates a need for employee reevaluation; or

(iv) A change occurs in workplace conditions (e.g., physical work effort, protective clothing, temperature) that may result in a substantial increase in the physiological burden placed on an employee.

(f) *Fit testing.* This paragraph requires that, before an employee may be required to use any respirator with a negative or positive pressure tight-fitting facepiece, the employee must be fit tested with the same make, model, style, and size of respirator that will be used. This paragraph specifies the kinds of fit tests allowed, the procedures for conducting them, and how the results of the fit tests must be used.

(1) The employer shall ensure that employees using a tight-fitting facepiece respirator pass an appropriate qualitative fit test (QLFT) or quantitative fit test (QNFT) as stated in this paragraph.

(2) The employer shall ensure that an employee using a tight-fitting facepiece respirator is fit tested prior to initial use of the respirator, whenever a different respirator facepiece (size, style, model or make) is used, and at least annually thereafter.

(3) The employer shall conduct an additional fit test whenever the employee reports, or the employer, PLHCP, supervisor, or program administrator

makes visual observations of, changes in the employee's physical condition that could affect respirator fit. Such conditions include, but are not limited to, facial scarring, dental changes, cosmetic surgery, or an obvious change in body weight.

(4) If after passing a QLFT or QNFT, the employee subsequently notifies the employer, program administrator, supervisor, or PLHCP that the fit of the respirator is unacceptable, the employee shall be given a reasonable opportunity to select a different respirator facepiece and to be retested.

(5) The fit test shall be administered using an OSHA-accepted QLFT or QNFT protocol. The OSHA-accepted QLFT and QNFT protocols and procedures are contained in appendix A of this section.

(6) QLFT may only be used to fit test negative pressure air-purifying respirators that must achieve a fit factor of 100 or less.

(7) If the fit factor, as determined through an OSHA-accepted QNFT protocol, is equal to or greater than 100 for tight-fitting half facepieces, or equal to or greater than 500 for tight-fitting full facepieces, the QNFT has been passed with that respirator.

(8) Fit testing of tight-fitting atmosphere-supplying respirators and tight-fitting powered air-purifying respirators shall be accomplished by performing quantitative or qualitative fit testing in the negative pressure mode, regardless of the mode of operation (negative or positive pressure) that is used for respiratory protection.

(i) Qualitative fit testing of these respirators shall be accomplished by temporarily converting the respirator user's actual facepiece into a negative pressure respirator with appropriate filters, or by using an identical negative pressure air-purifying respirator facepiece with the same sealing surfaces as a surrogate for the atmosphere-supplying or powered air-purifying respirator facepiece.

(ii) Quantitative fit testing of these respirators shall be accomplished by modifying the facepiece to allow sampling inside the facepiece in the breathing zone of the user, midway between the nose and mouth. This requirement shall be accomplished by installing a permanent sampling probe onto a surrogate facepiece, or by using a sampling adapter designed to temporarily provide a means of sampling air from inside the facepiece.

(iii) Any modifications to the respirator facepiece for fit testing shall be completely removed, and the facepiece restored to NIOSH-approved configuration, before that facepiece can be used in the workplace.

(g) *Use of respirators.* This paragraph requires employers to establish and implement procedures for the proper use of respirators. These requirements include prohibiting conditions that may result in facepiece seal leakage, preventing employees from removing respirators in hazardous environments, taking actions to ensure continued effective respirator operation throughout the work shift, and establishing procedures for the use of respirators in IDLH atmospheres or in interior structural firefighting situations.

(1) *Facepiece seal protection.* (i) The employer shall not permit respirators with tight-fitting facepieces to be worn by employees who have:

(A) Facial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function; or

(B) Any condition that interferes with the face-to-facepiece seal or valve function.

(ii) If an employee wears corrective glasses or goggles or other personal protective equipment, the employer shall ensure that such equipment is worn in a manner that does not interfere with the seal of the facepiece to the face of the user.

(iii) For all tight-fitting respirators, the employer shall ensure that employees perform a user seal check each time they put on the respirator using the procedures in appendix B–1 or procedures recommended by the respirator manufacturer that the employer demonstrates are as effective as those in appendix B–1 of this section.

(2) *Continuing respirator effectiveness.* (i) Appropriate surveillance shall be maintained of work area conditions and degree of employee exposure or stress. When there is a change in work area conditions or degree of employee

exposure or stress that may affect respirator effectiveness, the employer shall reevaluate the continued effectiveness of the respirator.

(ii) The employer shall ensure that employees leave the respirator use area:

(A) To wash their faces and respirator facepieces as necessary to prevent eye or skin irritation associated with respirator use; or

(B) If they detect vapor or gas breakthrough, changes in breathing resistance, or leakage of the facepiece; or

(C) To replace the respirator or the filter, cartridge, or canister elements.

(iii) If the employee detects vapor or gas breakthrough, changes in breathing resistance, or leakage of the facepiece, the employer must replace or repair the respirator before allowing the employee to return to the work area.

(3) *Procedures for IDLH atmospheres.* For all IDLH atmospheres, the employer shall ensure that:

(i) One employee or, when needed, more than one employee is located outside the IDLH atmosphere;

(ii) Visual, voice, or signal line communication is maintained between the employee(s) in the IDLH atmosphere and the employee(s) located outside the IDLH atmosphere;

(iii) The employee(s) located outside the IDLH atmosphere are trained and equipped to provide effective emergency rescue;

(iv) The employer or designee is notified before the employee(s) located outside the IDLH atmosphere enter the IDLH atmosphere to provide emergency rescue;

(v) The employer or designee authorized to do so by the employer, once notified, provides necessary assistance appropriate to the situation;

(vi) Employee(s) located outside the IDLH atmospheres are equipped with:

(A) Pressure demand or other positive pressure SCBAs, or a pressure demand or other positive pressure supplied-air respirator with auxiliary SCBA; and either

(B) Appropriate retrieval equipment for removing the employee(s) who enter(s) these hazardous atmospheres where retrieval equipment would contribute to the rescue of the employee(s) and would not increase the overall risk resulting from entry; or

(C) Equivalent means for rescue where retrieval equipment is not required under paragraph (g)(3)(vi)(B).

(4) *Procedures for interior structural firefighting.* In addition to the requirements set forth under paragraph (g)(3), in interior structural fires, the employer shall ensure that:

(i) At least two employees enter the IDLH atmosphere and remain in visual or voice contact with one another at all times;

(ii) At least two employees are located outside the IDLH atmosphere; and

(iii) All employees engaged in interior structural firefighting use SCBAs.

NOTE 1 TO PARAGRAPH (g): One of the two individuals located outside the IDLH atmosphere may be assigned to an additional role, such as incident commander in charge of the emergency or safety officer, so long as this individual is able to perform assistance or rescue activities without jeopardizing the safety or health of any firefighter working at the incident.

NOTE 2 TO PARAGRAPH (g): Nothing in this section is meant to preclude firefighters from performing emergency rescue activities before an entire team has assembled.

(h) *Maintenance and care of respirators.* This paragraph requires the employer to provide for the cleaning and disinfecting, storage, inspection, and repair of respirators used by employees.

(1) *Cleaning and disinfecting.* The employer shall provide each respirator user with a respirator that is clean, sanitary, and in good working order. The employer shall ensure that respirators are cleaned and disinfected using the procedures in appendix B–2 of this section, or procedures recommended by the respirator manufacturer, provided that such procedures are of equivalent effectiveness. The respirators shall be cleaned and disinfected at the following intervals:

(i) Respirators issued for the exclusive use of an employee shall be cleaned and disinfected as often as necessary to be maintained in a sanitary condition;

(ii) Respirators issued to more than one employee shall be cleaned and disinfected before being worn by different individuals;

(iii) Respirators maintained for emergency use shall be cleaned and disinfected after each use; and

(iv) Respirators used in fit testing and training shall be cleaned and disinfected after each use.

(2) *Storage.* The employer shall ensure that respirators are stored as follows:

(i) All respirators shall be stored to protect them from damage, contamination, dust, sunlight, extreme temperatures, excessive moisture, and damaging chemicals, and they shall be packed or stored to prevent deformation of the facepiece and exhalation valve.

(ii) In addition to the requirements of paragraph (h)(2)(i) of this section, emergency respirators shall be:

(A) Kept accessible to the work area;

(B) Stored in compartments or in covers that are clearly marked as containing emergency respirators; and

(C) Stored in accordance with any applicable manufacturer instructions.

(3) *Inspection.* (i) The employer shall ensure that respirators are inspected as follows:

(A) All respirators used in routine situations shall be inspected before each use and during cleaning;

(B) All respirators maintained for use in emergency situations shall be inspected at least monthly and in accordance with the manufacturer's recommendations, and shall be checked for proper function before and after each use; and

(C) Emergency escape-only respirators shall be inspected before being carried into the workplace for use.

(ii) The employer shall ensure that respirator inspections include the following:

(A) A check of respirator function, tightness of connections, and the condition of the various parts including, but not limited to, the facepiece, head straps, valves, connecting tube, and cartridges, canisters or filters; and

(B) A check of elastomeric parts for pliability and signs of deterioration.

(iii) In addition to the requirements of paragraphs (h)(3)(i) and (ii) of this section, self-contained breathing apparatus shall be inspected monthly. Air and oxygen cylinders shall be maintained in a fully charged state and shall be recharged when the pressure falls to 90% of the manufacturer's recommended pressure level. The employer shall determine that the regulator and warning devices function properly.

(iv) For respirators maintained for emergency use, the employer shall:

(A) Certify the respirator by documenting the date the inspection was performed, the name (or signature) of the person who made the inspection, the findings, required remedial action, and a serial number or other means of identifying the inspected respirator; and

(B) Provide this information on a tag or label that is attached to the storage compartment for the respirator, is kept with the respirator, or is included in inspection reports stored as paper or electronic files. This information shall be maintained until replaced following a subsequent certification.

(4) *Repairs.* The employer shall ensure that respirators that fail an inspection or are otherwise found to be defective are removed from service, and are discarded or repaired or adjusted in accordance with the following procedures:

(i) Repairs or adjustments to respirators are to be made only by persons appropriately trained to perform such operations and shall use only the respirator manufacturer's NIOSH-approved parts designed for the respirator;

(ii) Repairs shall be made according to the manufacturer's recommendations and specifications for the type and extent of repairs to be performed; and

(iii) Reducing and admission valves, regulators, and alarms shall be adjusted or repaired only by the manufacturer or a technician trained by the manufacturer.

(i) *Breathing air quality and use.* This paragraph requires the employer to provide employees using atmosphere-supplying respirators (supplied-air and SCBA) with breathing gases of high purity.

(1) The employer shall ensure that compressed air, compressed oxygen, liquid air, and liquid oxygen used for respiration accords with the following specifications:

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(i) Compressed and liquid oxygen shall meet the United States Pharmacopoeia requirements for medical or breathing oxygen; and

(ii) Compressed breathing air shall meet at least the requirements for Grade D breathing air described in ANSI/Compressed Gas Association Commodity Specification for Air, G–7.1–1989, to include:

(A) Oxygen content (v/v) of 19.5–23.5%;

(B) Hydrocarbon (condensed) content of 5 milligrams per cubic meter of air or less;

(C) Carbon monoxide (CO) content of 10 ppm or less;

(D) Carbon dioxide content of 1,000 ppm or less; and

(E) Lack of noticeable odor.

(2) The employer shall ensure that compressed oxygen is not used in atmosphere-supplying respirators that have previously used compressed air.

(3) The employer shall ensure that oxygen concentrations greater than 23.5% are used only in equipment designed for oxygen service or distribution.

(4) The employer shall ensure that cylinders used to supply breathing air to respirators meet the following requirements:

(i) Cylinders are tested and maintained as prescribed in the Shipping Container Specification Regulations of the Department of Transportation (49 CFR part 180);

(ii) Cylinders of purchased breathing air have a certificate of analysis from the supplier that the breathing air meets the requirements for Grade D breathing air; and

(iii) The moisture content in the cylinder does not exceed a dew point of −50 °F (−45.6 °C) at 1 atmosphere pressure.

(5) The employer shall ensure that compressors used to supply breathing air to respirators are constructed and situated so as to:

(i) Prevent entry of contaminated air into the air-supply system;

(ii) Minimize moisture content so that the dew point at 1 atmosphere pressure is 10 degrees F (5.56 °C) below the ambient temperature;

(iii) Have suitable in-line air-purifying sorbent beds and filters to further ensure breathing air quality. Sorbent beds and filters shall be maintained and replaced or refurbished periodically following the manufacturer's instructions.

(iv) Have a tag containing the most recent change date and the signature of the person authorized by the employer to perform the change. The tag shall be maintained at the compressor.

(6) For compressors that are not oil-lubricated, the employer shall ensure that carbon monoxide levels in the breathing air do not exceed 10 ppm.

(7) For oil-lubricated compressors, the employer shall use a high-temperature or carbon monoxide alarm, or both, to monitor carbon monoxide levels. If only high-temperature alarms are used, the air supply shall be monitored at intervals sufficient to prevent carbon monoxide in the breathing air from exceeding 10 ppm.

(8) The employer shall ensure that breathing air couplings are incompatible with outlets for nonrespirable worksite air or other gas systems. No asphyxiating substance shall be introduced into breathing air lines.

(9) The employer shall use only the respirator manufacturer's NIOSH-approved breathing-gas containers, marked and maintained in accordance with the Quality Assurance provisions of the NIOSH approval for the SCBA as issued in accordance with the NIOSH respirator-certification standard at 42 CFR part 84.

(j) *Identification of filters, cartridges, and canisters.* The employer shall ensure that all filters, cartridges and canisters used in the workplace are labeled and color coded with the NIOSH approval label and that the label is not removed and remains legible.

(k) *Training and information.* This paragraph requires the employer to provide effective training to employees who are required to use respirators. The training must be comprehensive, understandable, and recur annually, and more often if necessary. This paragraph also requires the employer to provide the basic information on respirators in appendix D of this section to employees who wear respirators when not required by this section or by the employer to do so.

(1) The employer shall ensure that each employee can demonstrate knowledge of at least the following:

(i) Why the respirator is necessary and how improper fit, usage, or maintenance can compromise the protective effect of the respirator;

(ii) What the limitations and capabilities of the respirator are;

(iii) How to use the respirator effectively in emergency situations, including situations in which the respirator malfunctions;

(iv) How to inspect, put on and remove, use, and check the seals of the respirator;

(v) What the procedures are for maintenance and storage of the respirator;

(vi) How to recognize medical signs and symptoms that may limit or prevent the effective use of respirators; and

(vii) The general requirements of this section.

(2) The training shall be conducted in a manner that is understandable to the employee.

(3) The employer shall provide the training prior to requiring the employee to use a respirator in the workplace.

(4) An employer who is able to demonstrate that a new employee has received training within the last 12 months that addresses the elements specified in paragraph (k)(1)(i) through (vii) is not required to repeat such training provided that, as required by paragraph (k)(1), the employee can demonstrate knowledge of those element(s). Previous training not repeated initially by the employer must be provided no later than 12 months from the date of the previous training.

(5) Retraining shall be administered annually, and when the following situations occur:

(i) Changes in the workplace or the type of respirator render previous training obsolete;

(ii) Inadequacies in the employee's knowledge or use of the respirator indicate that the employee has not retained the requisite understanding or skill; or

(iii) Any other situation arises in which retraining appears necessary to ensure safe respirator use.

(6) The basic advisory information on respirators, as presented in appendix D of this section, shall be provided by the employer in any written or oral format, to employees who wear respirators when such use is not required by this section or by the employer.

(l) *Program evaluation.* This section requires the employer to conduct evaluations of the workplace to ensure that the written respiratory protection program is being properly implemented, and to consult employees to ensure that they are using the respirators properly.

(1) The employer shall conduct evaluations of the workplace as necessary to ensure that the provisions of the current written program are being effectively implemented and that it continues to be effective.

(2) The employer shall regularly consult employees required to use respirators to assess the employees' views on program effectiveness and to identify any problems. Any problems that are identified during this assessment shall be corrected. Factors to be assessed include, but are not limited to:

(i) Respirator fit (including the ability to use the respirator without interfering with effective workplace performance);

(ii) Appropriate respirator selection for the hazards to which the employee is exposed;

(iii) Proper respirator use under the workplace conditions the employee encounters; and

(iv) Proper respirator maintenance.

(m) *Recordkeeping.* This section requires the employer to establish and retain written information regarding medical evaluations, fit testing, and the respirator program. This information will facilitate employee involvement in the respirator program, assist the employer in auditing the adequacy of the program, and provide a record for compliance determinations by OSHA.

(1) *Medical evaluation.* Records of medical evaluations required by this section must be retained and made available in accordance with 29 CFR 1910.1020.

(2) *Fit testing.* (i) The employer shall establish a record of the qualitative

and quantitative fit tests administered to an employee including:

(A) The name or identification of the employee tested;

(B) Type of fit test performed;

(C) Specific make, model, style, and size of respirator tested;

(D) Date of test; and

(E) The pass/fail results for QLFTs or the fit factor and strip chart recording or other recording of the test results for QNFTs.

(ii) Fit test records shall be retained for respirator users until the next fit test is administered.

(3) A written copy of the current respirator program shall be retained by the employer.

(4) Written materials required to be retained under this paragraph shall be made available upon request to affected employees and to the Assistant Secretary or designee for examination and copying.

(n) *Effective date.* Paragraphs (d)(3)(i)(A) and (d)(3)(i)(B) of this section become effective November 22, 2006.

(o) Appendices. Compliance with appendix A, appendix B–1, appendix B–2, appendix C, and appendix D to this section are mandatory.

APPENDIX A TO § 1910.134—FIT TESTING PROCEDURES (MANDATORY)

PART I. OSHA-ACCEPTED FIT TEST PROTOCOLS

A. Fit Testing Procedures—General Requirements

The employer shall conduct fit testing using the following procedures. The requirements in this appendix apply to all OSHA-accepted fit test methods, both QLFT and QNFT.

1. The test subject shall be allowed to pick the most acceptable respirator from a sufficient number of respirator models and sizes so that the respirator is acceptable to, and correctly fits, the user.

2. Prior to the selection process, the test subject shall be shown how to put on a respirator, how it should be positioned on the face, how to set strap tension and how to determine an acceptable fit. A mirror shall be available to assist the subject in evaluating the fit and positioning of the respirator. This instruction may not constitute the subject's formal training on respirator use, because it is only a review.

3. The test subject shall be informed that he/she is being asked to select the respirator that provides the most acceptable fit. Each respirator represents a different size and shape, and if fitted and used properly, will provide adequate protection.

4. The test subject shall be instructed to hold each chosen facepiece up to the face and eliminate those that obviously do not give an acceptable fit.

5. The more acceptable facepieces are noted in case the one selected proves unacceptable; the most comfortable mask is donned and worn at least five minutes to assess comfort. Assistance in assessing comfort can be given by discussing the points in the following item A.6. If the test subject is not familiar with using a particular respirator, the test subject shall be directed to don the mask several times and to adjust the straps each time to become adept at setting proper tension on the straps.

6. Assessment of comfort shall include a review of the following points with the test subject and allowing the test subject adequate time to determine the comfort of the respirator:

(a) Position of the mask on the nose

(b) Room for eye protection

(c) Room to talk

(d) Position of mask on face and cheeks

7. The following criteria shall be used to help determine the adequacy of the respirator fit:

(a) Chin properly placed;

(b) Adequate strap tension, not overly tightened;

(c) Fit across nose bridge;

(d) Respirator of proper size to span distance from nose to chin;

(e) Tendency of respirator to slip;

(f) Self-observation in mirror to evaluate fit and respirator position.

8. The test subject shall conduct a user seal check, either the negative and positive pressure seal checks described in appendix B–1 of this section or those recommended by the respirator manufacturer which provide equivalent protection to the procedures in appendix B–1. Before conducting the negative and positive pressure checks, the subject shall be told to seat the mask on the face by moving the head from side-to-side and up and down slowly while taking in a few slow deep breaths. Another facepiece shall be selected and retested if the test subject fails the user seal check tests.

9. The test shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface, such as stubble beard growth, beard, mustache or sideburns which cross the respirator sealing surface. Any type of apparel which interferes with a satisfactory fit shall be altered or removed.

10. If a test subject exhibits difficulty in breathing during the tests, she or he shall be referred to a physician or other licensed health care professional, as appropriate, to determine whether the test subject can wear

a respirator while performing her or his duties.

11. If the employee finds the fit of the respirator unacceptable, the test subject shall be given the opportunity to select a different respirator and to be retested.

12. Exercise regimen. Prior to the commencement of the fit test, the test subject shall be given a description of the fit test and the test subject's responsibilities during the test procedure. The description of the process shall include a description of the test exercises that the subject will be performing. The respirator to be tested shall be worn for at least 5 minutes before the start of the fit test.

13. The fit test shall be performed while the test subject is wearing any applicable safety equipment that may be worn during actual respirator use which could interfere with respirator fit.

14. Test Exercises. (a) Employers must perform the following test exercises for all fit testing methods prescribed in this appendix, except for the CNP quantitative fit testing protocol and the CNP REDON quantitative fit testing protocol. For these two protocols, employers must ensure that the test subjects (*i.e.*, employees) perform the exercise procedure specified in part I.C.4(b) of this appendix for the CNP quantitative fit testing protocol, or the exercise procedure described in part I.C.5(b) of this appendix for the CNP REDON quantitative fit-testing protocol. For the remaining fit testing methods, employers must ensure that employees perform the test exercises in the appropriate test environment in the following manner:

(1) Normal breathing. In a normal standing position, without talking, the subject shall breathe normally.

(2) Deep breathing. In a normal standing position, the subject shall breathe slowly and deeply, taking caution so as not to hyperventilate.

(3) Turning head side to side. Standing in place, the subject shall slowly turn his/her head from side to side between the extreme positions on each side. The head shall be held at each extreme momentarily so the subject can inhale at each side.

(4) Moving head up and down. Standing in place, the subject shall slowly move his/her head up and down. The subject shall be instructed to inhale in the up position (i.e., when looking toward the ceiling).

(5) Talking. The subject shall talk out loud slowly and loud enough so as to be heard clearly by the test conductor. The subject can read from a prepared text such as the Rainbow Passage, count backward from 100, or recite a memorized poem or song.

Rainbow Passage

When the sunlight strikes raindrops in the air, they act like a prism and form a rainbow. The rainbow is a division of white light into many beautiful colors. These take the shape of a long round arch, with its path high above, and its two ends apparently beyond the horizon. There is, according to legend, a boiling pot of gold at one end. People look, but no one ever finds it. When a man looks for something beyond reach, his friends say he is looking for the pot of gold at the end of the rainbow.

(6) Grimace. The test subject shall grimace by smiling or frowning. (This applies only to QNFT testing; it is not performed for QLFT)

(7) Bending over. The test subject shall bend at the waist as if he/she were to touch his/her toes. Jogging in place shall be substituted for this exercise in those test environments such as shroud type QNFT or QLFT units that do not permit bending over at the waist.

(8) Normal breathing. Same as exercise (1).

(b) Each test exercise shall be performed for one minute except for the grimace exercise which shall be performed for 15 seconds. The test subject shall be questioned by the test conductor regarding the comfort of the respirator upon completion of the protocol. If it has become unacceptable, another model of respirator shall be tried. The respirator shall not be adjusted once the fit test exercises begin. Any adjustment voids the test, and the fit test must be repeated.

B. Qualitative Fit Test (QLFT) Protocols

1. General

(a) The employer shall ensure that persons administering QLFT are able to prepare test solutions, calibrate equipment and perform tests properly, recognize invalid tests, and ensure that test equipment is in proper working order.

(b) The employer shall ensure that QLFT equipment is kept clean and well maintained so as to operate within the parameters for which it was designed.

2. Isoamyl Acetate Protocol

NOTE: This protocol is not appropriate to use for the fit testing of particulate respirators. If used to fit test particulate respirators, the respirator must be equipped with an organic vapor filter.

(a) Odor Threshold Screening

Odor threshold screening, performed without wearing a respirator, is intended to determine if the individual tested can detect the odor of isoamyl acetate at low levels.

(1) Three 1 liter glass jars with metal lids are required.

(2) Odor-free water (e.g., distilled or spring water) at approximately 25 °C (77 °F) shall be used for the solutions.

(3) The isoamyl acetate (IAA) (also known at isopentyl acetate) stock solution is prepared by adding 1 ml of pure IAA to 800 ml of odor-free water in a 1 liter jar, closing the

lid and shaking for 30 seconds. A new solution shall be prepared at least weekly.

(4) The screening test shall be conducted in a room separate from the room used for actual fit testing. The two rooms shall be well-ventilated to prevent the odor of IAA from becoming evident in the general room air where testing takes place.

(5) The odor test solution is prepared in a second jar by placing 0.4 ml of the stock solution into 500 ml of odor-free water using a clean dropper or pipette. The solution shall be shaken for 30 seconds and allowed to stand for two to three minutes so that the IAA concentration above the liquid may reach equilibrium. This solution shall be used for only one day.

(6) A test blank shall be prepared in a third jar by adding 500 cc of odor-free water.

(7) The odor test and test blank jar lids shall be labeled (e.g., 1 and 2) for jar identification. Labels shall be placed on the lids so that they can be peeled off periodically and switched to maintain the integrity of the test.

(8) The following instruction shall be typed on a card and placed on the table in front of the two test jars (i.e., 1 and 2): "The purpose of this test is to determine if you can smell banana oil at a low concentration. The two bottles in front of you contain water. One of these bottles also contains a small amount of banana oil. Be sure the covers are on tight, then shake each bottle for two seconds. Unscrew the lid of each bottle, one at a time, and sniff at the mouth of the bottle. Indicate to the test conductor which bottle contains banana oil."

(9) The mixtures used in the IAA odor detection test shall be prepared in an area separate from where the test is performed, in order to prevent olfactory fatigue in the subject.

(10) If the test subject is unable to correctly identify the jar containing the odor test solution, the IAA qualitative fit test shall not be performed.

(11) If the test subject correctly identifies the jar containing the odor test solution, the test subject may proceed to respirator selection and fit testing.

(b) Isoamyl Acetate Fit Test

(1) The fit test chamber shall be a clear 55-gallon drum liner suspended inverted over a 2-foot diameter frame so that the top of the chamber is about 6 inches above the test subject's head. If no drum liner is available, a similar chamber shall be constructed using plastic sheeting. The inside top center of the chamber shall have a small hook attached.

(2) Each respirator used for the fitting and fit testing shall be equipped with organic vapor cartridges or offer protection against organic vapors.

(3) After selecting, donning, and properly adjusting a respirator, the test subject shall wear it to the fit testing room. This room shall be separate from the room used for odor threshold screening and respirator selection, and shall be well-ventilated, as by an exhaust fan or lab hood, to prevent general room contamination.

(4) A copy of the test exercises and any prepared text from which the subject is to read shall be taped to the inside of the test chamber.

(5) Upon entering the test chamber, the test subject shall be given a 6-inch by 5-inch piece of paper towel, or other porous, absorbent, single-ply material, folded in half and wetted with 0.75 ml of pure IAA. The test subject shall hang the wet towel on the hook at the top of the chamber. An IAA test swab or ampule may be substituted for the IAA wetted paper towel provided it has been demonstrated that the alternative IAA source will generate an IAA test atmosphere with a concentration equivalent to that generated by the paper towel method.

(6) Allow two minutes for the IAA test concentration to stabilize before starting the fit test exercises. This would be an appropriate time to talk with the test subject; to explain the fit test, the importance of his/her cooperation, and the purpose for the test exercises; or to demonstrate some of the exercises.

(7) If at any time during the test, the subject detects the banana-like odor of IAA, the test is failed. The subject shall quickly exit from the test chamber and leave the test area to avoid olfactory fatigue.

(8) If the test is failed, the subject shall return to the selection room and remove the respirator. The test subject shall repeat the odor sensitivity test, select and put on another respirator, return to the test area and again begin the fit test procedure described in (b) (1) through (7) above. The process continues until a respirator that fits well has been found. Should the odor sensitivity test be failed, the subject shall wait at least 5 minutes before retesting. Odor sensitivity will usually have returned by this time.

(9) If the subject passes the test, the efficiency of the test procedure shall be demonstrated by having the subject break the respirator face seal and take a breath before exiting the chamber.

(10) When the test subject leaves the chamber, the subject shall remove the saturated towel and return it to the person conducting the test, so that there is no significant IAA concentration buildup in the chamber during subsequent tests. The used towels shall be kept in a self-sealing plastic bag to keep the test area from being contaminated.

3. Saccharin Solution Aerosol Protocol

The entire screening and testing procedure shall be explained to the test subject prior to the conduct of the screening test.

(a) Taste threshold screening. The saccharin taste threshold screening, performed

without wearing a respirator, is intended to determine whether the individual being tested can detect the taste of saccharin.

(1) During threshold screening as well as during fit testing, subjects shall wear an enclosure about the head and shoulders that is approximately 12 inches in diameter by 14 inches tall with at least the front portion clear and that allows free movements of the head when a respirator is worn. An enclosure substantially similar to the 3M hood assembly, parts # FT 14 and # FT 15 combined, is adequate.

(2) The test enclosure shall have a ¾-inch (1.9 cm) hole in front of the test subject's nose and mouth area to accommodate the nebulizer nozzle.

(3) The test subject shall don the test enclosure. Throughout the threshold screening test, the test subject shall breathe through his/her slightly open mouth with tongue extended. The subject is instructed to report when he/she detects a sweet taste.

(4) Using a DeVilbiss Model 40 Inhalation Medication Nebulizer or equivalent, the test conductor shall spray the threshold check solution into the enclosure. The nozzle is directed away from the nose and mouth of the person. This nebulizer shall be clearly marked to distinguish it from the fit test solution nebulizer.

(5) The threshold check solution is prepared by dissolving 0.83 gram of sodium saccharin USP in 100 ml of warm water. It can be prepared by putting 1 ml of the fit test solution (see (b)(5) below) in 100 ml of distilled water.

(6) To produce the aerosol, the nebulizer bulb is firmly squeezed so that it collapses completely, then released and allowed to fully expand.

(7) Ten squeezes are repeated rapidly and then the test subject is asked whether the saccharin can be tasted. If the test subject reports tasting the sweet taste during the ten squeezes, the screening test is completed. The taste threshold is noted as ten regardless of the number of squeezes actually completed.

(8) If the first response is negative, ten more squeezes are repeated rapidly and the test subject is again asked whether the saccharin is tasted. If the test subject reports tasting the sweet taste during the second ten squeezes, the screening test is completed. The taste threshold is noted as twenty regardless of the number of squeezes actually completed.

(9) If the second response is negative, ten more squeezes are repeated rapidly and the test subject is again asked whether the saccharin is tasted. If the test subject reports tasting the sweet taste during the third set of ten squeezes, the screening test is completed. The taste threshold is noted as thirty regardless of the number of squeezes actually completed.

(10) The test conductor will take note of the number of squeezes required to solicit a taste response.

(11) If the saccharin is not tasted after 30 squeezes (step 10), the test subject is unable to taste saccharin and may not perform the saccharin fit test.

NOTE TO PARAGRAPH 3(a): If the test subject eats or drinks something sweet before the screening test, he/she may be unable to taste the weak saccharin solution.

(12) If a taste response is elicited, the test subject shall be asked to take note of the taste for reference in the fit test.

(13) Correct use of the nebulizer means that approximately 1 ml of liquid is used at a time in the nebulizer body.

(14) The nebulizer shall be thoroughly rinsed in water, shaken dry, and refilled at least each morning and afternoon or at least every four hours.

(b) Saccharin solution aerosol fit test procedure.

(1) The test subject may not eat, drink (except plain water), smoke, or chew gum for 15 minutes before the test.

(2) The fit test uses the same enclosure described in 3. (a) above.

(3) The test subject shall don the enclosure while wearing the respirator selected in section I. A. of this appendix. The respirator shall be properly adjusted and equipped with a particulate filter(s).

(4) A second DeVilbiss Model 40 Inhalation Medication Nebulizer or equivalent is used to spray the fit test solution into the enclosure. This nebulizer shall be clearly marked to distinguish it from the screening test solution nebulizer.

(5) The fit test solution is prepared by adding 83 grams of sodium saccharin to 100 ml of warm water.

(6) As before, the test subject shall breathe through the slightly open mouth with tongue extended, and report if he/she tastes the sweet taste of saccharin.

(7) The nebulizer is inserted into the hole in the front of the enclosure and an initial concentration of saccharin fit test solution is sprayed into the enclosure using the same number of squeezes (either 10, 20 or 30 squeezes) based on the number of squeezes required to elicit a taste response as noted during the screening test. A minimum of 10 squeezes is required.

(8) After generating the aerosol, the test subject shall be instructed to perform the exercises in section I. A. 14. of this appendix.

(9) Every 30 seconds the aerosol concentration shall be replenished using one half the original number of squeezes used initially (e.g., 5, 10 or 15).

(10) The test subject shall indicate to the test conductor if at any time during the fit test the taste of saccharin is detected. If the

test subject does not report tasting the saccharin, the test is passed.

(11) If the taste of saccharin is detected, the fit is deemed unsatisfactory and the test is failed. A different respirator shall be tried and the entire test procedure is repeated (taste threshold screening and fit testing).

(12) Since the nebulizer has a tendency to clog during use, the test operator must make periodic checks of the nebulizer to ensure that it is not clogged. If clogging is found at the end of the test session, the test is invalid.

4. Bitrex™ (Denatonium Benzoate) Solution Aerosol Qualitative Fit Test Protocol

The Bitrex™ (Denatonium benzoate) solution aerosol QLFT protocol uses the published saccharin test protocol because that protocol is widely accepted. Bitrex is routinely used as a taste aversion agent in household liquids which children should not be drinking and is endorsed by the American Medical Association, the National Safety Council, and the American Association of Poison Control Centers. The entire screening and testing procedure shall be explained to the test subject prior to the conduct of the screening test.

(a) Taste Threshold Screening.

The Bitrex taste threshold screening, performed without wearing a respirator, is intended to determine whether the individual being tested can detect the taste of Bitrex.

(1) During threshold screening as well as during fit testing, subjects shall wear an enclosure about the head and shoulders that is approximately 12 inches (30.5 cm) in diameter by 14 inches (35.6 cm) tall. The front portion of the enclosure shall be clear from the respirator and allow free movement of the head when a respirator is worn. An enclosure substantially similar to the 3M hood assembly, parts # FT 14 and # FT 15 combined, is adequate.

(2) The test enclosure shall have a ¾ inch (1.9 cm) hole in front of the test subject's nose and mouth area to accommodate the nebulizer nozzle.

(3) The test subject shall don the test enclosure. Throughout the threshold screening test, the test subject shall breathe through his or her slightly open mouth with tongue extended. The subject is instructed to report when he/she detects a bitter taste.

(4) Using a DeVilbiss Model 40 Inhalation Medication Nebulizer or equivalent, the test conductor shall spray the Threshold Check Solution into the enclosure. This Nebulizer shall be clearly marked to distinguish it from the fit test solution nebulizer.

(5) The Threshold Check Solution is prepared by adding 13.5 milligrams of Bitrex to 100 ml of 5% salt (NaCl) solution in distilled water.

(6) To produce the aerosol, the nebulizer bulb is firmly squeezed so that the bulb collapses completely, and is then released and allowed to fully expand.

(7) An initial ten squeezes are repeated rapidly and then the test subject is asked whether the Bitrex can be tasted. If the test subject reports tasting the bitter taste during the ten squeezes, the screening test is completed. The taste threshold is noted as ten regardless of the number of squeezes actually completed.

(8) If the first response is negative, ten more squeezes are repeated rapidly and the test subject is again asked whether the Bitrex is tasted. If the test subject reports tasting the bitter taste during the second ten squeezes, the screening test is completed. The taste threshold is noted as twenty regardless of the number of squeezes actually completed.

(9) If the second response is negative, ten more squeezes are repeated rapidly and the test subject is again asked whether the Bitrex is tasted. If the test subject reports tasting the bitter taste during the third set of ten squeezes, the screening test is completed. The taste threshold is noted as thirty regardless of the number of squeezes actually completed.

(10) The test conductor will take note of the number of squeezes required to solicit a taste response.

(11) If the Bitrex is not tasted after 30 squeezes (step 10), the test subject is unable to taste Bitrex and may not perform the Bitrex fit test.

(12) If a taste response is elicited, the test subject shall be asked to take note of the taste for reference in the fit test.

(13) Correct use of the nebulizer means that approximately 1 ml of liquid is used at a time in the nebulizer body.

(14) The nebulizer shall be thoroughly rinsed in water, shaken to dry, and refilled at least each morning and afternoon or at least every four hours.

(b) Bitrex Solution Aerosol Fit Test Procedure.

(1) The test subject may not eat, drink (except plain water), smoke, or chew gum for 15 minutes before the test.

(2) The fit test uses the same enclosure as that described in 4. (a) above.

(3) The test subject shall don the enclosure while wearing the respirator selected according to section I. A. of this appendix. The respirator shall be properly adjusted and equipped with any type particulate filter(s).

(4) A second DeVilbiss Model 40 Inhalation Medication Nebulizer or equivalent is used to spray the fit test solution into the enclosure. This nebulizer shall be clearly marked to distinguish it from the screening test solution nebulizer.

(5) The fit test solution is prepared by adding 337.5 mg of Bitrex to 200 ml of a 5% salt (NaCl) solution in warm water.

(6) As before, the test subject shall breathe through his or her slightly open mouth with tongue extended, and be instructed to report if he/she tastes the bitter taste of Bitrex.

(7) The nebulizer is inserted into the hole in the front of the enclosure and an initial concentration of the fit test solution is sprayed into the enclosure using the same number of squeezes (either 10, 20 or 30 squeezes) based on the number of squeezes required to elicit a taste response as noted during the screening test.

(8) After generating the aerosol, the test subject shall be instructed to perform the exercises in section I. A. 14. of this appendix.

(9) Every 30 seconds the aerosol concentration shall be replenished using one half the number of squeezes used initially (e.g., 5, 10 or 15).

(10) The test subject shall indicate to the test conductor if at any time during the fit test the taste of Bitrex is detected. If the test subject does not report tasting the Bitrex, the test is passed.

(11) If the taste of Bitrex is detected, the fit is deemed unsatisfactory and the test is failed. A different respirator shall be tried and the entire test procedure is repeated (taste threshold screening and fit testing).

5. Irritant Smoke (Stannic Chloride) Protocol

This qualitative fit test uses a person's response to the irritating chemicals released in the "smoke" produced by a stannic chloride ventilation smoke tube to detect leakage into the respirator.

(a) General Requirements and Precautions

(1) The respirator to be tested shall be equipped with high efficiency particulate air (HEPA) or P100 series filter(s).

(2) Only stannic chloride smoke tubes shall be used for this protocol.

(3) No form of test enclosure or hood for the test subject shall be used.

(4) The smoke can be irritating to the eyes, lungs, and nasal passages. The test conductor shall take precautions to minimize the test subject's exposure to irritant smoke. Sensitivity varies, and certain individuals may respond to a greater degree to irritant smoke. Care shall be taken when performing the sensitivity screening checks that determine whether the test subject can detect irritant smoke to use only the minimum amount of smoke necessary to elicit a response from the test subject.

(5) The fit test shall be performed in an area with adequate ventilation to prevent exposure of the person conducting the fit test or the build-up of irritant smoke in the general atmosphere.

(b) Sensitivity Screening Check

The person to be tested must demonstrate his or her ability to detect a weak concentration of the irritant smoke.

(1) The test operator shall break both ends of a ventilation smoke tube containing stannic chloride, and attach one end of the smoke tube to a low flow air pump set to deliver 200 milliliters per minute, or an aspirator squeeze bulb. The test operator shall cover the other end of the smoke tube with a short piece of tubing to prevent potential injury from the jagged end of the smoke tube.

(2) The test operator shall advise the test subject that the smoke can be irritating to the eyes, lungs, and nasal passages and instruct the subject to keep his/her eyes closed while the test is performed.

(3) The test subject shall be allowed to smell a weak concentration of the irritant smoke before the respirator is donned to become familiar with its irritating properties and to determine if he/she can detect the irritating properties of the smoke. The test operator shall carefully direct a small amount of the irritant smoke in the test subject's direction to determine that he/she can detect it.

(c) Irritant Smoke Fit Test Procedure

(1) The person being fit tested shall don the respirator without assistance, and perform the required user seal check(s).

(2) The test subject shall be instructed to keep his/her eyes closed.

(3) The test operator shall direct the stream of irritant smoke from the smoke tube toward the faceseal area of the test subject, using the low flow pump or the squeeze bulb. The test operator shall begin at least 12 inches from the facepiece and move the smoke stream around the whole perimeter of the mask. The operator shall gradually make two more passes around the perimeter of the mask, moving to within six inches of the respirator.

(4) If the person being tested has not had an involuntary response and/or detected the irritant smoke, proceed with the test exercises.

(5) The exercises identified in section I.A. 14. of this appendix shall be performed by the test subject while the respirator seal is being continually challenged by the smoke, directed around the perimeter of the respirator at a distance of six inches.

(6) If the person being fit tested reports detecting the irritant smoke at any time, the test is failed. The person being retested must repeat the entire sensitivity check and fit test procedure.

(7) Each test subject passing the irritant smoke test without evidence of a response (involuntary cough, irritation) shall be given a second sensitivity screening check, with the smoke from the same smoke tube used during the fit test, once the respirator has been removed, to determine whether he/she still reacts to the smoke. Failure to evoke a response shall void the fit test.

(8) If a response is produced during this second sensitivity check, then the fit test is passed.

C. Quantitative Fit Test (QNFT) Protocols

The following quantitative fit testing procedures have been demonstrated to be acceptable: Quantitative fit testing using a non-hazardous test aerosol (such as corn oil, polyethylene glycol 400 [PEG 400], di-2-ethyl hexyl sebacate [DEHS], or sodium chloride) generated in a test chamber, and employing instrumentation to quantify the fit of the respirator; Quantitative fit testing using ambient aerosol as the test agent and appropriate instrumentation (condensation nuclei counter) to quantify the respirator fit; Quantitative fit testing using controlled negative pressure and appropriate instrumentation to measure the volumetric leak rate of a facepiece to quantify the respirator fit.

1. General

(a) The employer shall ensure that persons administering QNFT are able to calibrate equipment and perform tests properly, recognize invalid tests, calculate fit factors properly and ensure that test equipment is in proper working order.

(b) The employer shall ensure that QNFT equipment is kept clean, and is maintained and calibrated according to the manufacturer's instructions so as to operate at the parameters for which it was designed.

2. Generated Aerosol Quantitative Fit Testing Protocol

(a) Apparatus.

(1) Instrumentation. Aerosol generation, dilution, and measurement systems using particulates (corn oil, polyethylene glycol 400 [PEG 400], di-2-ethyl hexyl sebacate [DEHS] or sodium chloride) as test aerosols shall be used for quantitative fit testing.

(2) Test chamber. The test chamber shall be large enough to permit all test subjects to perform freely all required exercises without disturbing the test agent concentration or the measurement apparatus. The test chamber shall be equipped and constructed so that the test agent is effectively isolated from the ambient air, yet uniform in concentration throughout the chamber.

(3) When testing air-purifying respirators, the normal filter or cartridge element shall be replaced with a high efficiency particulate air (HEPA) or P100 series filter supplied by the same manufacturer.

(4) The sampling instrument shall be selected so that a computer record or strip chart record may be made of the test showing the rise and fall of the test agent concentration with each inspiration and expiration at fit factors of at least 2,000. Integrators or computers that integrate the amount of test agent penetration leakage into the respirator for each exercise may be used provided a record of the readings is made.

(5) The combination of substitute air-purifying elements, test agent and test agent concentration shall be such that the test subject is not exposed in excess of an established exposure limit for the test agent at any time during the testing process, based upon the length of the exposure and the exposure limit duration.

(6) The sampling port on the test specimen respirator shall be placed and constructed so that no leakage occurs around the port (e.g., where the respirator is probed), a free air flow is allowed into the sampling line at all times, and there is no interference with the fit or performance of the respirator. The in-mask sampling device (probe) shall be designed and used so that the air sample is drawn from the breathing zone of the test subject, midway between the nose and mouth and with the probe extending into the facepiece cavity at least ¼ inch.

(7) The test setup shall permit the person administering the test to observe the test subject inside the chamber during the test.

(8) The equipment generating the test atmosphere shall maintain the concentration of test agent constant to within a 10 percent variation for the duration of the test.

(9) The time lag (interval between an event and the recording of the event on the strip chart or computer or integrator) shall be kept to a minimum. There shall be a clear association between the occurrence of an event and its being recorded.

(10) The sampling line tubing for the test chamber atmosphere and for the respirator sampling port shall be of equal diameter and of the same material. The length of the two lines shall be equal.

(11) The exhaust flow from the test chamber shall pass through an appropriate filter (i.e., high efficiency particulate filter) before release.

(12) When sodium chloride aerosol is used, the relative humidity inside the test chamber shall not exceed 50 percent.

(13) The limitations of instrument detection shall be taken into account when determining the fit factor.

(14) Test respirators shall be maintained in proper working order and be inspected regularly for deficiencies such as cracks or missing valves and gaskets.

(b) Procedural Requirements.

(1) When performing the initial user seal check using a positive or negative pressure check, the sampling line shall be crimped closed in order to avoid air pressure leakage during either of these pressure checks.

(2) The use of an abbreviated screening QLFT test is optional. Such a test may be utilized in order to quickly identify poor fitting respirators that passed the positive and/or negative pressure test and reduce the amount of QNFT time. The use of the CNC

QNFT instrument in the count mode is another optional method to obtain a quick estimate of fit and eliminate poor fitting respirators before going on to perform a full QNFT.

(3) A reasonably stable test agent concentration shall be measured in the test chamber prior to testing. For canopy or shower curtain types of test units, the determination of the test agent's stability may be established after the test subject has entered the test environment.

(4) Immediately after the subject enters the test chamber, the test agent concentration inside the respirator shall be measured to ensure that the peak penetration does not exceed 5 percent for a half mask or 1 percent for a full facepiece respirator.

(5) A stable test agent concentration shall be obtained prior to the actual start of testing.

(6) Respirator restraining straps shall not be over-tightened for testing. The straps shall be adjusted by the wearer without assistance from other persons to give a reasonably comfortable fit typical of normal use. The respirator shall not be adjusted once the fit test exercises begin.

(7) The test shall be terminated whenever any single peak penetration exceeds 5 percent for half masks and 1 percent for full facepiece respirators. The test subject shall be refitted and retested.

(8) Calculation of fit factors.

(i) The fit factor shall be determined for the quantitative fit test by taking the ratio of the average chamber concentration to the concentration measured inside the respirator for each test exercise except the grimace exercise.

(ii) The average test chamber concentration shall be calculated as the arithmetic average of the concentration measured before and after each test (i.e., 7 exercises) or the arithmetic average of the concentration measured before and after each exercise or the true average measured continuously during the respirator sample.

(iii) The concentration of the challenge agent inside the respirator shall be determined by one of the following methods:

(*A*) Average peak penetration method means the method of determining test agent penetration into the respirator utilizing a strip chart recorder, integrator, or computer. The agent penetration is determined by an average of the peak heights on the graph or by computer integration, for each exercise except the grimace exercise. Integrators or computers that calculate the actual test agent penetration into the respirator for each exercise will also be considered to meet the requirements of the average peak penetration method.

(*B*) Maximum peak penetration method means the method of determining test agent penetration in the respirator as determined by strip chart recordings of the test. The highest peak penetration for a given exercise is taken to be representative of average penetration into the respirator for that exercise.

(*C*) Integration by calculation of the area under the individual peak for each exercise except the grimace exercise. This includes computerized integration.

(*D*) The calculation of the overall fit factor using individual exercise fit factors involves first converting the exercise fit factors to penetration values, determining the average, and then converting that result back to a fit factor. This procedure is described in the following equation:

$$\text{Overall Fit Factor} = \frac{\text{Number of exercises}}{1/ff_1 + 1/ff_2 + 1/ff_3 + 1/ff_4 + 1/ff_5 + 1/ff_7 + 1/ff_8}$$

Where ff_1, ff_2, ff_3, etc. are the fit factors for exercises 1, 2, 3, etc.

(9) The test subject shall not be permitted to wear a half mask or quarter facepiece respirator unless a minimum fit factor of 100 is obtained, or a full facepiece respirator unless a minimum fit factor of 500 is obtained.

(10) Filters used for quantitative fit testing shall be replaced whenever increased breathing resistance is encountered, or when the test agent has altered the integrity of the filter media.

3. Ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol.

The ambient aerosol condensation nuclei counter (CNC) quantitative fit testing (Portacount™) protocol quantitatively fit tests respirators with the use of a probe. The probed respirator is only used for quantitative fit tests. A probed respirator has a special sampling device, installed on the respirator, that allows the probe to sample the air from inside the mask. A probed respirator is required for each make, style, model, and size that the employer uses and can be obtained from the respirator manufacturer or distributor. The CNC instrument

manufacturer, TSI Inc., also provides probe attachments (TSI sampling adapters) that permit fit testing in an employee's own respirator. A minimum fit factor pass level of at least 100 is necessary for a half-mask respirator and a minimum fit factor pass level of at least 500 is required for a full facepiece negative pressure respirator. The entire screening and testing procedure shall be explained to the test subject prior to the conduct of the screening test.

(a) Portacount Fit Test Requirements. (1) Check the respirator to make sure the sampling probe and line are properly attached to the facepiece and that the respirator is fitted with a particulate filter capable of preventing significant penetration by the ambient particles used for the fit test (e.g., NIOSH 42 CFR 84 series 100, series 99, or series 95 particulate filter) per manufacturer's instruction.

(2) Instruct the person to be tested to don the respirator for five minutes before the fit test starts. This purges the ambient particles trapped inside the respirator and permits the wearer to make certain the respirator is comfortable. This individual shall already have been trained on how to wear the respirator properly.

(3) Check the following conditions for the adequacy of the respirator fit: Chin properly placed; Adequate strap tension, not overly tightened; Fit across nose bridge; Respirator of proper size to span distance from nose to chin; Tendency of the respirator to slip; Self-observation in a mirror to evaluate fit and respirator position.

(4) Have the person wearing the respirator do a user seal check. If leakage is detected, determine the cause. If leakage is from a poorly fitting facepiece, try another size of the same model respirator, or another model of respirator.

(5) Follow the manufacturer's instructions for operating the Portacount and proceed with the test.

(6) The test subject shall be instructed to perform the exercises in section I. A. 14. of this appendix.

(7) After the test exercises, the test subject shall be questioned by the test conductor regarding the comfort of the respirator upon completion of the protocol. If it has become unacceptable, another model of respirator shall be tried.

(b) Portacount Test Instrument.

(1) The Portacount will automatically stop and calculate the overall fit factor for the entire set of exercises. The overall fit factor is what counts. The Pass or Fail message will indicate whether or not the test was successful. If the test was a Pass, the fit test is over.

(2) Since the pass or fail criterion of the Portacount is user programmable, the test operator shall ensure that the pass or fail criterion meet the requirements for minimum respirator performance in this Appendix.

(3) A record of the test needs to be kept on file, assuming the fit test was successful. The record must contain the test subject's name; overall fit factor; make, model, style, and size of respirator used; and date tested.

4. Controlled negative pressure (CNP) quantitative fit testing protocol.

The CNP protocol provides an alternative to aerosol fit test methods. The CNP fit test method technology is based on exhausting air from a temporarily sealed respirator facepiece to generate and then maintain a constant negative pressure inside the facepiece. The rate of air exhaust is controlled so that a constant negative pressure is maintained in the respirator during the fit test. The level of pressure is selected to replicate the mean inspiratory pressure that causes leakage into the respirator under normal use conditions. With pressure held constant, air flow out of the respirator is equal to air flow into the respirator. Therefore, measurement of the exhaust stream that is required to hold the pressure in the temporarily sealed respirator constant yields a direct measure of leakage air flow into the respirator. The CNP fit test method measures leak rates through the facepiece as a method for determining the facepiece fit for negative pressure respirators. The CNP instrument manufacturer Occupational Health Dynamics of Birmingham, Alabama also provides attachments (sampling manifolds) that replace the filter cartridges to permit fit testing in an employee's own respirator. To perform the test, the test subject closes his or her mouth and holds his/her breath, after which an air pump removes air from the respirator facepiece at a pre-selected constant pressure. The facepiece fit is expressed as the leak rate through the facepiece, expressed as milliliters per minute. The quality and validity of the CNP fit tests are determined by the degree to which the in-mask pressure tracks the test pressure during the system measurement time of approximately five seconds. Instantaneous feedback in the form of a real-time pressure trace of the in-mask pressure is provided and used to determine test validity and quality. A minimum fit factor pass level of 100 is necessary for a half-mask respirator and a minimum fit factor of at least 500 is required for a full facepiece respirator. The entire screening and testing procedure shall be explained to the test subject prior to the conduct of the screening test.

(a) CNP Fit Test Requirements.

(1) The instrument shall have a non-adjustable test pressure of 15.0 mm water pressure.

(2) The CNP system defaults selected for test pressure shall be set at −15 mm of water (-0.58 inches of water) and the modeled inspiratory flow rate shall be 53.8 liters per minute for performing fit tests.

NOTE: CNP systems have built-in capability to conduct fit testing that is specific to unique work rate, mask, and gender situations that might apply in a specific workplace. Use of system default values, which were selected to represent respirator wear with medium cartridge resistance at a low-moderate work rate, will allow inter-test comparison of the respirator fit.)

(3) The individual who conducts the CNP fit testing shall be thoroughly trained to perform the test.

(4) The respirator filter or cartridge needs to be replaced with the CNP test manifold. The inhalation valve downstream from the manifold either needs to be temporarily removed or propped open.

(5) The employer must train the test subject to hold his or her breath for at least 10 seconds.

(6) The test subject must don the test respirator without any assistance from the test administrator who is conducting the CNP fit test. The respirator must not be adjusted once the fit-test exercises begin. Any adjustment voids the test, and the test subject must repeat the fit test.

(7) The QNFT protocol shall be followed according to section I. C. 1. of this appendix with an exception for the CNP test exercises.

(b) CNP Test Exercises.

(1) Normal breathing. In a normal standing position, without talking, the subject shall breathe normally for 1 minute. After the normal breathing exercise, the subject needs to hold head straight ahead and hold his or her breath for 10 seconds during the test measurement.

(2) Deep breathing. In a normal standing position, the subject shall breathe slowly and deeply for 1 minute, being careful not to hyperventilate. After the deep breathing exercise, the subject shall hold his or her head straight ahead and hold his or her breath for 10 seconds during test measurement.

(3) Turning head side to side. Standing in place, the subject shall slowly turn his or her head from side to side between the extreme positions on each side for 1 minute. The head shall be held at each extreme momentarily so the subject can inhale at each side. After the turning head side to side exercise, the subject needs to hold head full left and hold his or her breath for 10 seconds during test measurement. Next, the subject needs to hold head full right and hold his or her breath for 10 seconds during test measurement.

(4) Moving head up and down. Standing in place, the subject shall slowly move his or her head up and down for 1 minute. The subject shall be instructed to inhale in the up position (i.e., when looking toward the ceiling). After the moving head up and down exercise, the subject shall hold his or her head full up and hold his or her breath for 10 seconds during test measurement. Next, the subject shall hold his or her head full down and hold his or her breath for 10 seconds during test measurement.

(5) Talking. The subject shall talk out loud slowly and loud enough so as to be heard clearly by the test conductor. The subject can read from a prepared text such as the Rainbow Passage, count backward from 100, or recite a memorized poem or song for 1 minute. After the talking exercise, the subject shall hold his or her head straight ahead and hold his or her breath for 10 seconds during the test measurement.

(6) Grimace. The test subject shall grimace by smiling or frowning for 15 seconds.

(7) Bending Over. The test subject shall bend at the waist as if he or she were to touch his or her toes for 1 minute. Jogging in place shall be substituted for this exercise in those test environments such as shroud-type QNFT units that prohibit bending at the waist. After the bending over exercise, the subject shall hold his or her head straight ahead and hold his or her breath for 10 seconds during the test measurement.

(8) Normal Breathing. The test subject shall remove and re-don the respirator within a one-minute period. Then, in a normal standing position, without talking, the subject shall breathe normally for 1 minute. After the normal breathing exercise, the subject shall hold his or her head straight ahead and hold his or her breath for 10 seconds during the test measurement. After the test exercises, the test subject shall be questioned by the test conductor regarding the comfort of the respirator upon completion of the protocol. If it has become unacceptable, another model of a respirator shall be tried.

(c) CNP Test Instrument.

(1) The test instrument must have an effective audio-warning device, or a visual-warning device in the form of a screen tracing, that indicates when the test subject fails to hold his or her breath during the test. The test must be terminated and restarted from the beginning when the test subject fails to hold his or her breath during the test. The test subject then may be refitted and retested.

(2) A record of the test shall be kept on file, assuming the fit test was successful. The record must contain the test subject's name; overall fit factor; make, model, style and size of respirator used; and date tested.

5. Controlled negative pressure (CNP) REDON quantitative fit testing protocol.

(a) When administering this protocol to test subjects, employers must comply with the requirements specified in paragraphs (a) and (c) of part I.C.4 of this appendix ("Controlled negative pressure (CNP) quantitative fit testing protocol"), as well as use the test exercises described below in paragraph (b) of this protocol instead of the test exercises specified in paragraph (b) of part I.C.4 of this appendix.

(b) Employers must ensure that each test subject being fit tested using this protocol follows the exercise and measurement procedures, including the order of administration, described below in Table A–1 of this appendix.

TABLE A–1—CNP REDON QUANTITATIVE FIT TESTING PROTOCOL

Exercises [1]	Exercise procedure	Measurement procedure
Facing Forward	Stand and breathe normally, without talking, for 30 seconds.	Face forward, while holding breath for 10 seconds.
Bending Over	Bend at the waist, as if going to touch his or her toes, for 30 seconds.	Face parallel to the floor, while holding breath for 10 seconds
Head Shaking	For about three seconds, shake head back and forth vigorously several times while shouting.	Face forward, while holding breath for 10 seconds
REDON 1	Remove the respirator mask, loosen all facepiece straps, and then redon the respirator mask.	Face forward, while holding breath for 10 seconds.
REDON 2	Remove the respirator mask, loosen all facepiece straps, and then redon the respirator mask again.	Face forward, while holding breath for 10 seconds.

[1] Exercises are listed in the order in which they are to be administered.

(c) After completing the test exercises, the test administrator must question each test subject regarding the comfort of the respirator. When a test subject states that the respirator is unacceptable, the employer must ensure that the test administrator repeats the protocol using another respirator model.

(d) Employers must determine the overall fit factor for each test subject by calculating the harmonic mean of the fit testing exercises as follows:

$$\text{Overall Fit Factor} = \frac{N}{\left[1/FF_1 + 1/FF_2 + \ldots\ 1/FF_N\right]}$$

Where:

N = The number of exercises;
FF_1 = The fit factor for the first exercise;
FF_2 = The fit factor for the second exercise; and
FF_N = The fit factor for the nth exercise.

PART II. NEW FIT TEST PROTOCOLS

A. Any person may submit to OSHA an application for approval of a new fit test protocol. If the application meets the following criteria, OSHA will initiate a rulemaking proceeding under section 6(b)(7) of the OSH Act to determine whether to list the new protocol as an approved protocol in this appendix A.

B. The application must include a detailed description of the proposed new fit test protocol. This application must be supported by either:

1. A test report prepared by an independent government research laboratory (e.g., Lawrence Livermore National Laboratory, Los Alamos National Laboratory, the National Institute for Standards and Technology) stating that the laboratory has tested the protocol and had found it to be accurate and reliable; or

2. An article that has been published in a peer-reviewed industrial hygiene journal describing the protocol and explaining how test data support the protocol's accuracy and reliability.

C. If OSHA determines that additional information is required before the Agency commences a rulemaking proceeding under this section, OSHA will so notify the applicant and afford the applicant the opportunity to submit the supplemental information. Initiation of a rulemaking proceeding will be deferred until OSHA has received and evaluated the supplemental information.

APPENDIX B–1 TO § 1910.134: USER SEAL CHECK PROCEDURES (MANDATORY)

The individual who uses a tight-fitting respirator is to perform a user seal check to ensure that an adequate seal is achieved each time the respirator is put on. Either the positive and negative pressure checks listed in this appendix, or the respirator manufacturer's recommended user seal check method shall be used. User seal checks are not substitutes for qualitative or quantitative fit tests.

I. Facepiece Positive and/or Negative Pressure Checks

A. *Positive pressure check.* Close off the exhalation valve and exhale gently into the facepiece. The face fit is considered satisfactory if a slight positive pressure can be built up inside the facepiece without any evidence of outward leakage of air at the seal. For most respirators this method of leak testing requires the wearer to first remove the exhalation valve cover before closing off the exhalation valve and then carefully replacing it after the test.

B. *Negative pressure check.* Close off the inlet opening of the canister or cartridge(s) by covering with the palm of the hand(s) or by replacing the filter seal(s), inhale gently so that the facepiece collapses slightly, and hold the breath for ten seconds. The design

of the inlet opening of some cartridges cannot be effectively covered with the palm of the hand. The test can be performed by covering the inlet opening of the cartridge with a thin latex or nitrile glove. If the facepiece remains in its slightly collapsed condition and no inward leakage of air is detected, the tightness of the respirator is considered satisfactory.

II. Manufacturer's Recommended User Seal Check Procedures

The respirator manufacturer's recommended procedures for performing a user seal check may be used instead of the positive and/or negative pressure check procedures provided that the employer demonstrates that the manufacturer's procedures are equally effective.

APPENDIX B–2 TO § 1910.134: RESPIRATOR CLEANING PROCEDURES (MANDATORY)

These procedures are provided for employer use when cleaning respirators. They are general in nature, and the employer as an alternative may use the cleaning recommendations provided by the manufacturer of the respirators used by their employees, provided such procedures are as effective as those listed here in appendix B–2. Equivalent effectiveness simply means that the procedures used must accomplish the objectives set forth in appendix B–2, i.e., must ensure that the respirator is properly cleaned and disinfected in a manner that prevents damage to the respirator and does not cause harm to the user.

I. Procedures for Cleaning Respirators

A. Remove filters, cartridges, or canisters. Disassemble facepieces by removing speaking diaphragms, demand and pressure-demand valve assemblies, hoses, or any components recommended by the manufacturer. Discard or repair any defective parts.

B. Wash components in warm (43 °C [110 °F] maximum) water with a mild detergent or with a cleaner recommended by the manufacturer. A stiff bristle (not wire) brush may be used to facilitate the removal of dirt.

C. Rinse components thoroughly in clean, warm (43 °C [110 °F] maximum), preferably running water. Drain.

D. When the cleaner used does not contain a disinfecting agent, respirator components should be immersed for two minutes in one of the following:

1. Hypochlorite solution (50 ppm of chlorine) made by adding approximately one milliliter of laundry bleach to one liter of water at 43 °C (110 °F); or,

2. Aqueous solution of iodine (50 ppm iodine) made by adding approximately 0.8 milliliters of tincture of iodine (6–8 grams ammonium and/or potassium iodide/100 cc of 45% alcohol) to one liter of water at 43 °C (110 °F); or,

3. Other commercially available cleansers of equivalent disinfectant quality when used as directed, if their use is recommended or approved by the respirator manufacturer.

E. Rinse components thoroughly in clean, warm (43 °C [110 °F] maximum), preferably running water. Drain. The importance of thorough rinsing cannot be overemphasized. Detergents or disinfectants that dry on facepieces may result in dermatitis. In addition, some disinfectants may cause deterioration of rubber or corrosion of metal parts if not completely removed.

F. Components should be hand-dried with a clean lint-free cloth or air-dried.

G. Reassemble facepiece, replacing filters, cartridges, and canisters where necessary.

H. Test the respirator to ensure that all components work properly.

APPENDIX C TO § 1910.134: OSHA RESPIRATOR MEDICAL EVALUATION QUESTIONNAIRE (MANDATORY)

To the employer: Answers to questions in Section 1, and to question 9 in Section 2 of part A, do not require a medical examination.

To the employee:

Your employer must allow you to answer this questionnaire during normal working hours, or at a time and place that is convenient to you. To maintain your confidentiality, your employer or supervisor must not look at or review your answers, and your employer must tell you how to deliver or send this questionnaire to the health care professional who will review it.

Part A. Section 1. (Mandatory) The following information must be provided by every employee who has been selected to use any type of respirator (please print).

1. Today's date: _____
2. Your name: _____
3. Your age (to nearest year): _____
4. Sex (circle one): Male/Female
5. Your height: ____ ft. ____ in.
6. Your weight: ____ lbs.
7. Your job title: _____
8. A phone number where you can be reached by the health care professional who reviews this questionnaire (include the Area Code): _____
9. The best time to phone you at this number: ____
10. Has your employer told you how to contact the health care professional who will review this questionnaire (circle one): Yes/No
11. Check the type of respirator you will use (you can check more than one category):
    a. ____ N, R, or P disposable respirator (filter-mask, non-cartridge type only).

b. ____ Other type (for example, half- or full-facepiece type, powered-air purifying, supplied-air, self-contained breathing apparatus).

12. Have you worn a respirator (circle one): Yes/No

7 If "yes," what type(s): _____

Part A. Section 2. (Mandatory) Questions 1 through 9 below must be answered by every employee who has been selected to use any type of respirator (please circle "yes" or "no").

1. Do you *currently* smoke tobacco, or have you smoked tobacco in the last month: Yes/No
2. Have you *ever had* any of the following conditions?
   a. Seizures: Yes/No
   b. Diabetes (sugar disease): Yes/No
   c. Allergic reactions that interfere with your breathing: Yes/No
   d. Claustrophobia (fear of closed-in places): Yes/No
   e. Trouble smelling odors: Yes/No
3. Have you *ever had* any of the following pulmonary or lung problems?
   a. Asbestosis: Yes/No
   b. Asthma: Yes/No
   c. Chronic bronchitis: Yes/No
   d. Emphysema: Yes/No
   e. Pneumonia: Yes/No
   f. Tuberculosis: Yes/No
   g. Silicosis: Yes/No
   h. Pneumothorax (collapsed lung): Yes/No
   i. Lung cancer: Yes/No
   j. Broken ribs: Yes/No
   k. Any chest injuries or surgeries: Yes/No
   l. Any other lung problem that you've been told about: Yes/No
4. Do you *currently* have any of the following symptoms of pulmonary or lung illness?
   a. Shortness of breath: Yes/No
   b. Shortness of breath when walking fast on level ground or walking up a slight hill or incline: Yes/No
   c. Shortness of breath when walking with other people at an ordinary pace on level ground: Yes/No
   d. Have to stop for breath when walking at your own pace on level ground: Yes/No
   e. Shortness of breath when washing or dressing yourself: Yes/No
   f. Shortness of breath that interferes with your job: Yes/No
   g. Coughing that produces phlegm (thick sputum): Yes/No
   h. Coughing that wakes you early in the morning: Yes/No
   i. Coughing that occurs mostly when you are lying down: Yes/No
   j. Coughing up blood in the last month: Yes/No
   k. Wheezing: Yes/No
   l. Wheezing that interferes with your job: Yes/No
   m. Chest pain when you breathe deeply: Yes/No
   n. Any other symptoms that you think may be related to lung problems: Yes/No
5. Have you *ever had* any of the following cardiovascular or heart problems?
   a. Heart attack: Yes/No
   b. Stroke: Yes/No
   c. Angina: Yes/No
   d. Heart failure: Yes/No
   e. Swelling in your legs or feet (not caused by walking): Yes/No
   f. Heart arrhythmia (heart beating irregularly): Yes/No
   g. High blood pressure: Yes/No
   h. Any other heart problem that you've been told about: Yes/No
6. Have you *ever had* any of the following cardiovascular or heart symptoms?
   a. Frequent pain or tightness in your chest: Yes/No
   b. Pain or tightness in your chest during physical activity: Yes/No
   c. Pain or tightness in your chest that interferes with your job: Yes/No
   d. In the past two years, have you noticed your heart skipping or missing a beat: Yes/No
   e. Heartburn or indigestion that is not related to eating: Yes/No
   f. Any other symptoms that you think may be related to heart or circulation problems: Yes/No
7. Do you *currently* take medication for any of the following problems?
   a. Breathing or lung problems: Yes/No
   b. Heart trouble: Yes/No
   c. Blood pressure: Yes/No
   d. Seizures: Yes/No
8. If you've used a respirator, have you *ever had* any of the following problems? (If you've never used a respirator, check the following space and go to question 9:)
   a. Eye irritation: Yes/No
   b. Skin allergies or rashes: Yes/No
   c. Anxiety: Yes/No
   d. General weakness or fatigue: Yes/No
   e. Any other problem that interferes with your use of a respirator: Yes/No
9. Would you like to talk to the health care professional who will review this questionnaire about your answers to this questionnaire: Yes/No

Questions 10 to 15 below must be answered by every employee who has been selected to use either a full-facepiece respirator or a self-contained breathing apparatus (SCBA). For employees who have been selected to use other types of respirators, answering these questions is voluntary.

10. Have you *ever lost* vision in either eye (temporarily or permanently): Yes/No
11. Do you *currently* have any of the following vision problems?
    a. Wear contact lenses: Yes/No
    b. Wear glasses: Yes/No

c. Color blind: Yes/No
d. Any other eye or vision problem: Yes/No
12. Have you *ever had* an injury to your ears, including a broken ear drum: Yes/No
13. Do you *currently* have any of the following hearing problems?
a. Difficulty hearing: Yes/No
b. Wear a hearing aid: Yes/No
c. Any other hearing or ear problem: Yes/No
14. Have you *ever had* a back injury: Yes/No
15. Do you *currently* have any of the following musculoskeletal problems?
a. Weakness in any of your arms, hands, legs, or feet: Yes/No
b. Back pain: Yes/No
c. Difficulty fully moving your arms and legs: Yes/No
d. Pain or stiffness when you lean forward or backward at the waist: Yes/No
e. Difficulty fully moving your head up or down: Yes/No
f. Difficulty fully moving your head side to side: Yes/No
g. Difficulty bending at your knees: Yes/No
h. Difficulty squatting to the ground: Yes/No
i. Climbing a flight of stairs or a ladder carrying more than 25 lbs: Yes/No
j. Any other muscle or skeletal problem that interferes with using a respirator: Yes/No

Part B Any of the following questions, and other questions not listed, may be added to the questionnaire at the discretion of the health care professional who will review the questionnaire.

1. In your present job, are you working at high altitudes (over 5,000 feet) or in a place that has lower than normal amounts of oxygen: Yes/No
If "yes," do you have feelings of dizziness, shortness of breath, pounding in your chest, or other symptoms when you're working under these conditions: Yes/No
2. At work or at home, have you ever been exposed to hazardous solvents, hazardous airborne chemicals (*e.g.*, gases, fumes, or dust), or have you come into skin contact with hazardous chemicals: Yes/No
If "yes," name the chemicals if you know them: _____
3. Have you ever worked with any of the materials, or under any of the conditions, listed below:
a. Asbestos: Yes/No
b. Silica (*e.g.*, in sandblasting): Yes/No
c. Tungsten/cobalt (*e.g.*, grinding or welding this material): Yes/No
d. Beryllium: Yes/No
e. Aluminum: Yes/No
f. Coal (for example, mining): Yes/No
g. Iron: Yes/No
h. Tin: Yes/No
i. Dusty environments: Yes/No
j. Any other hazardous exposures: Yes/No
If "yes," describe these exposures: _____
4. List any second jobs or side businesses you have: _____
5. List your previous occupations: _____
6. List your current and previous hobbies: _____
7. Have you been in the military services? Yes/No
If "yes," were you exposed to biological or chemical agents (either in training or combat): Yes/No
8. Have you ever worked on a HAZMAT team? Yes/No
9. Other than medications for breathing and lung problems, heart trouble, blood pressure, and seizures mentioned earlier in this questionnaire, are you taking any other medications for any reason (including over-the-counter medications): Yes/No
If "yes," name the medications if you know them: _____
10. Will you be using any of the following items with your respirator(s)?
a. HEPA Filters: Yes/No
b. Canisters (for example, gas masks): Yes/No
c. Cartridges: Yes/No
11. How often are you expected to use the respirator(s) (circle "yes" or "no" for all answers that apply to you)?:
a. Escape only (no rescue): Yes/No
b. Emergency rescue only: Yes/No
c. Less than 5 hours *per week:* Yes/No
d. Less than 2 hours *per day:* Yes/No
e. 2 to 4 hours *per day:* Yes/No
f. Over 4 hours *per day:* Yes/No
12. During the period you are using the respirator(s), is your work effort:
a. *Light* (less than 200 kcal per hour): Yes/No

If "yes," how long does this period last during the average shift:_____hrs._____mins.

Examples of a light work effort are *sitting* while writing, typing, drafting, or performing light assembly work; or *standing* while operating a drill press (1–3 lbs.) or controlling machines.

b. *Moderate* (200 to 350 kcal per hour): Yes/No

If "yes," how long does this period last during the average shift:_____hrs._____mins.

Examples of moderate work effort are *sitting* while nailing or filing; *driving* a truck or bus in urban traffic; *standing* while drilling, nailing, performing assembly work, or transferring a moderate load (about 35 lbs.) at trunk level; *walking* on a level surface about

[SPA-138]

2 mph or down a 5-degree grade about 3 mph; or *pushing* a wheelbarrow with a heavy load (about 100 lbs.) on a level surface.

c. *Heavy* (above 350 kcal per hour): Yes/No

If "yes," how long does this period last during the average shift:_____hrs._____mins.

Examples of heavy work are *lifting* a heavy load (about 50 lbs.) from the floor to your waist or shoulder; *working* on a loading dock; *shoveling; standing* while bricklaying or chipping castings; *walking* up an 8-degree grade about 2 mph; *climbing* stairs with a heavy load (about 50 lbs.).

13. Will you be wearing protective clothing and/or equipment (other than the respirator) when you're using your respirator: Yes/No

If "yes," describe this protective clothing and/or equipment: _____

14. Will you be working under hot conditions (temperature exceeding 77 °F): Yes/No

15. Will you be working under humid conditions: Yes/No

16. Describe the work you'll be doing while you're using your respirator(s):

17. Describe any special or hazardous conditions you might encounter when you're using your respirator(s) (for example, confined spaces, life-threatening gases):

18. Provide the following information, if you know it, for each toxic substance that you'll be exposed to when you're using your respirator(s):

Name of the first toxic substance: _____

Estimated maximum exposure level per shift: _____

Duration of exposure per shift _____

Name of the second toxic substance: _____

Estimated maximum exposure level per shift: _____

Duration of exposure per shift: _____

Name of the third toxic substance: _____

Estimated maximum exposure level per shift: _____

Duration of exposure per shift: _____

The name of any other toxic substances that you'll be exposed to while using your respirator:

19. Describe any special responsibilities you'll have while using your respirator(s) that may affect the safety and well-being of others (for example, rescue, security):

APPENDIX D TO § 1910.134 (MANDATORY) INFORMATION FOR EMPLOYEES USING RESPIRATORS WHEN NOT REQUIRED UNDER THE STANDARD

Respirators are an effective method of protection against designated hazards when properly selected and worn. Respirator use is encouraged, even when exposures are below the exposure limit, to provide an additional level of comfort and protection for workers. However, if a respirator is used improperly or not kept clean, the respirator itself can become a hazard to the worker. Sometimes, workers may wear respirators to avoid exposures to hazards, even if the amount of hazardous substance does not exceed the limits set by OSHA standards. If your employer provides respirators for your voluntary use, or if you provide your own respirator, you need to take certain precautions to be sure that the respirator itself does not present a hazard.

You should do the following:

1. Read and heed all instructions provided by the manufacturer on use, maintenance, cleaning and care, and warnings regarding the respirators limitations.

2. Choose respirators certified for use to protect against the contaminant of concern. NIOSH, the National Institute for Occupational Safety and Health of the U.S. Department of Health and Human Services, certifies respirators. A label or statement of certification should appear on the respirator or respirator packaging. It will tell you what the respirator is designed for and how much it will protect you.

3. Do not wear your respirator into atmospheres containing contaminants for which your respirator is not designed to protect against. For example, a respirator designed to filter dust particles will not protect you against gases, vapors, or very small solid particles of fumes or smoke.

4. Keep track of your respirator so that you do not mistakenly use someone else's respirator.

[63 FR 1270, Jan. 8, 1998; 63 FR 20098, 20099, Apr. 23, 1998, as amended at 69 FR 46993, Aug. 4, 2004; 71 FR 16672, Apr. 3, 2006; 71 FR 50187, Aug. 24, 2006; 73 FR 75584, Dec. 12, 2008; 76 FR 33607, June 8, 2011; 77 FR 46949, Aug. 7, 2012]

§ 1910.135 Head protection.

(a) *General requirements.* (1) The employer shall ensure that each affected employee wears a protective helmet when working in areas where there is a potential for injury to the head from falling objects.

- **Standard Number:** 1910.1200
- **OSH Act:** Section 5(a)(1)

OSHA requirements are set by statute, standards and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at https://www.osha.gov.

Nov 02, 2018

MEMORANDUM FOR: REGIONAL ADMINISTRATORS

FROM: KIMBERLY STILLE, Acting Director
Directorate of Enforcement Programs

SUBJECT: Enforcement Policy for Respiratory Hazards Not Covered by OSHA Permissible Exposure Limits

As you are aware, Section 5(a)(1) of the Occupational Safety and Health Act (OSH Act) is occasionally used to cite respiratory hazards from exposure to an air contaminant that is not covered by an OSHA permissible exposure limit (PEL). This memorandum serves to clarify existing Agency enforcement policy for developing these citations.

Specifically, Section 5(a)(1) of the OSH Act requires each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." As explained in the OSHA Field Operations Manual (FOM) (CPL 02-00-160), when enforcing this requirement, the Occupational Safety and Health Review Commission and court precedent have determined that the following elements must be established in order for OSHA to prove a violation of the general duty clause:

1. The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
2. The hazard was recognized;
3. The hazard was causing or was likely to cause death or serious physical harm; and,
4. There was a feasible and useful method to correct the hazard.

When applying these elements to respiratory hazards, it is important for Area Directors to *ensure that 5(a)(1) citations are not based solely on evidence that a measured exposure exceeded a recommended occupational exposure limit (OEL)*, such as a Threshold Limit Value (TLV)[1], or based on the fact that there is a documented exposure to a recognized carcinogen.[2] Unless the case file evidence proves *all four* of the above elements, the Area Office should issue a hazard alert letter (HAL). The HAL should advise the employer that one or more employees at the establishment was being, or had been, exposed to a potentially serious respiratory hazard from a chemical that exceeded an OEL, and provide a series of recommended exposure control suggestions. For your information, attached is a sample HAL for a respiratory hazard.

However, if the evidence *does* provide sufficient proof of the four elements listed above, then the general duty clause should be cited, following the general guidance in the FOM, Chapter 4. We are providing the following additional guidance for developing evidence for each of these elements when specifically applied to *respiratory* hazards:

a. *The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed* - Evidence that documents this element includes personal air sampling results, written workplace observations, photographs, and witness statements noting how workers were exposed to the chemical, and descriptions of any implemented engineering, work practice, and administrative control measures, and personal protective equipment. The evidence should also substantiate that regular and continuing employee exposure to the chemical at the measured levels could reasonably occur. However, if the exposed employees were wearing appropriate respiratory protection with no deficiencies in the respirator program, then the likelihood that OSHA could establish a respiratory hazard covered by the general duty clause would be low.

b. *The hazard was recognized* - OSHA can establish this element in one of two ways. (1) For employer recognition: Evidence may include employee complaints to management, illness and injury logs, consultant reports, a previous HAL, internal safety and health policies related to workplace operations involving the chemical that may refer to an OEL, or information from a manufacturer describing safety and health precautions for equipment or chemicals used in the workplace such as the chemical manufacturers' safety data sheet (SDS). (2) For industry recognition: Evidence may include an industry or trade association's guidance document, or an assessment from an industry expert describing the work practice or operation used at the establishment and explaining the particular health hazards and recommended control measures. Alternatively, a similar publication from a (non-OSHA) federal, state, or local government agency, or from a professional organization, may also provide good evidence. Some examples of government agencies include the National Institute for Occupational Safety and Health (NIOSH), the National Toxicology Program (NTP), and the U.S. Environmental Protection Agency (EPA). Examples of organizations include The Center for Construction Research and Training (CPWR, formerly The Center to Protect Workers' Rights), the American Conference of Governmental Industrial Hygienists (ACGIH™), and the Occupational Alliance for Risk Science (OARS).

c. *The hazard was causing or was likely to cause death or serious physical harm* - Although an illness or injury from the measured exposure need not have occurred yet, the strongest evidence is an employee illness/injury, hospitalization, fatality, or medical diagnosis related to workplace exposure. In the absence of this, the evidence must include more than just the fact that a measured exposure exceeded a TLV or REL, because these recommended limits may be much lower than the level at which a serious heath effect may be experienced. In most cases, proving this element will require an expert or industry-related peer reviewed study to document that serious physical harm could occur at the measured level with continuing employee exposure. Additionally, establishing serious physical harm for some respiratory hazards may be particularly difficult if the resulting illness, such as cancer, would require a substantial period of time to occur.

d. *There was a feasible and useful method to correct the hazard* - Evidence may include the SDS describing work practices for safe handling, engineering controls, and personal protective equipment, or published industry and/or NIOSH studies (e.g., health hazard evaluations (HHEs)) involving similar chemical processes or operations. Proving that feasible abatement measures would eliminate or materially reduce workplace exposure to a level that no longer presents a serious health hazard will likely require expert testimony.

For technical assistance in developing the required evidence related to the above elements, OSHA compliance officers may coordinate with their Regional Office to contact the Directorate of Technical Support and Emergency Management's (DTSEM) Salt Lake Technical Center (SLTC) at (801) 233-4900 and the Office of Occupational Medicine and Nursing (OOMN) at (202) 693-2323. For additional guidance for compliance officers, the Directorate of Training and Education's (DTE) OSHA Training Institute (OTI) has developed a job aid on this subject, which also includes tips for writing chemical 5(a)(1) citations.

Please distribute this memorandum to all health compliance officers. If you have any questions on this, please contact the Office of Health Enforcement at (202) 693-2190.

Attachment

Endnote (1) - Per 29 CFR 1910.1200, *Hazard Communication*, chemical manufacturers must list on their product's safety data sheet (SDS) all known exposure limits. Specifically, Section 8 of the SDS must include: "OSHA permissible exposure limit (PEL), American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Value (TLV), and any other exposure limit used or recommended by the chemical manufacturer, importer, or employer preparing the safety data sheet, where available." [*See* Table D.1, 1910.1200 Appendix D]. For evaluating respiratory hazards of chemicals without a PEL, compliance officers may refer to applicable published OELs, which include, but are not limited to, the following:

a. Recommended Exposure Limits (RELs) issued by the National Institute for Occupational Safety and Health (NIOSH);
b. Threshold Limit Values™ (TLVs™) published by the American Conference of Governmental Industrial Hygienists (ACGIH™); and
c. Workplace Environmental Exposure Levels™ (WEELs™) published by the Occupational Alliance for Risk Science (OARS), which is managed by Toxicology Excellence for Risk Assessment (TERA™).
d. Other recommended exposure limits from chemical manufacturers or industry/trade associations, such as may be provided on SDSs or in industry guidance publications.

Endnote (2) - Per 29 CFR 1910.1200, *Hazard Communication*, chemical manufacturers must also list on their product's SDS all known carcinogenic ingredients when greater than 0.1% of the product

mixture. Specifically, Section 11 of the SDS must include all known toxicological information, including: "Whether the hazardous chemical is listed in the National Toxicology Program (NTP) Report on Carcinogens (latest edition) or has been found to be a potential carcinogen in the International Agency for Research on Cancer (IARC) Monographs (latest edition), or by OSHA." [*See* Table D.1, 1910.1200 Appendix D].

Attachment - Sample Hazard Alert Letter for a Chemical with no PEL

[Date]

ABC Company
[Address]

RE: Inspection Number XXXXXXX

Dear Company Owner:

An inspection of your workplace at [address], initiated on [date], disclosed conditions that are consistent with employee exposure to 1-bromopropane. 1-bromopropane (CAS: 106-94-5), as covered in this inspection, was used as a solvent in your vapor degreasing operations. Symptoms of exposure to 1-bromopropane (or 1BP) include irritation and damage to the nervous system. Neurological damage can appear as headaches, dizziness, loss of consciousness, slurred speech, confusion, difficulty walking, and/or loss of feeling in the arms and legs. Exposure to employees can occur by inhalation and absorption through skin contact. Studies have shown that health effects from exposure to this chemical may present within as little as two days, however most serious effects are more commonly associated with prolonged exposure.

Currently, Federal OSHA does not have a specific exposure standard for 1BP. However, OSHA and the National Institute for Occupational Safety and Health (NIOSH) jointly issued a hazard alert for occupational exposure to 1BP in 2013. (*See* enclosed copy). In 2014, the American Conference of Governmental Industrial Hygienists (ACGIH™) adopted a Threshold Limit Value™ (TLV™) for 1-bromopropane of 0.1 parts per million (ppm), or 0.5 milligrams per cubic meter (0.5 mg/m^3), as an 8-hour time-weighted average (TWA).

Monitoring Results: Measured employee exposures to 1-bromopropane were well above the AGCIH 8-hour TLV of 0.1 ppm as discussed in the below sampling results.

During the inspection at your facility, three employees were monitored to determine their exposure to 1BP. On [date], one employee spraying the interior of metal parts with different concentrations of 1BP solutions in the [spray area] was exposed to [xx] ppm of 1BP, as an 8-hr TWA. The employee conducting the spraying was sampled for [aaa] minutes, with zero exposure assumed for the remainder of the 480-minute shift. On [date], one employee manually coating the exterior of metal parts with various 1BP solutions in the [coating area] was exposed to [YY] ppm 1BP as an 8-hr TWA. The employee conducting the coating was sampled for [bbb] minutes, with zero exposure assumed for the remainder of the 480-minute shift. On [date], one employee operating the flush-and-blow system in close proximity to the degreaser was exposed to [ZZ] ppm 1BP as an 8-hr TWA. The flush-and-blow operator was sampled for [ccc] minutes, with zero exposure assumed for the remainder of the 480-minute shift. All three employees' 8-hr TWAs for 1BP was significantly greater than the ACGIH TLV of 0.1 ppm.

We recommend that you voluntarily take the necessary steps to materially reduce or eliminate your employees' exposures to the conditions listed above.

While the risk of health hazards associated with exposure to 1BP can be reduced or eliminated by implementing a single means of abatement, in most cases a variety of abatement methods will provide a more effective method of addressing these hazards. These include workplace analysis of jobs and tasks to assess hazards associated with those jobs and tasks and the steps to abate them: product substitutions; engineering, administrative, and work practice controls; accurate injury and illness recordkeeping; medical surveillance; medical management of occupational illnesses and injuries; education and training of employees; and management oversight.

We have examined available information on the hazards associated with the degreasing operation conducted at your facility. The evaluation suggests that one or more of the following additional methods of abatement should be implemented.

1. Engineering Controls.
   Engineering controls are the first line of defense in employee protection. Therefore, your company should provide appropriate engineering controls throughout the facility. Employees should be trained on the use of the engineering controls to ensure that occupational exposure to 1BP is maintained below levels that are hazardous to employees. The following engineering controls are recommended:
   - Engineering of the spray and coating areas so that employees are isolated from the operation where 1BP is applied to the interior or exterior of the metal parts. This could include a system that automatically coats the parts or by means of increasing the distance between the employees and the spray operation.
   - Installation of local exhaust ventilation systems where the employees conduct the operations to reduce the amount of exposure. For the spray area, a local ventilation should be located where the employee is spraying the interior of the parts, and for the coating area, a local hood ventilation system should be set up such that any vapors from the rags are collected before reaching the employee's breathing zone. Additionally, ventilation should be considered around the degreasing tank in order to capture fugitive 1BP vapors escaping from the degreasing tank during the degreasing process.
2. Administrative and Work Practices Controls.
   The following work practices should be used to reduce occupational exposure to 1BP during degreasing operations:
   - Evaluation of employee body positioning during the various operations. By observing and evaluating the operator's location during various points in the coating operations, it may be possible to prevent the operator from standing in an area where exposure to fugitive 1BP vapors is likely. This includes consideration for where the fans are located in relation to the employees, as well.
   - Revise the coating operation's standard operating procedure to document how often the spray hood requires cleaning, how to effectively conduct the cleaning with less employee exposure, and how much solution is required on a rag to effectively coat the exterior of the parts.
   - Instituting a job rotation schedule for the spray area and activities around the degreaser. Other company employees should be trained on these operations so that employees could rotate in and out during the course of the day.
   - Ensuring appropriate preventative maintenance is conducted on the degreaser and still according to the manufacturer's recommendations.
   - Conducting personal air monitoring on a regular basis to determine employee exposure levels to 1BP, ensuring that personal air samples are taken from the employee's breathing zone. Breathing zone samples provide the best indication of the concentration of contaminants in the air the employee is actually breathing.
   - Ensuring employees immediately and thoroughly wash their skin with soap and flowing water if dermal contact with 1BP occurs.
3. Personal Protective Equipment.
   To be effective, personal protective equipment must be individually selected, properly fitted and periodically refitted, conscientiously and properly worn, regularly maintained, and replaced as necessary. In addition, employers must:
   - Perform a revised workplace hazard assessment in accordance with 29 CFR 1910.132(d) to determine if hazards are present, or are likely to be present which necessitate the use of personal protective equipment (PPE), and identify and evaluate respiratory hazards as required by 29 CFR 1910.134(d)(1)(iii).
   - Establish, implement, and maintain a written respiratory protection program in accordance with 29 CFR 1910.134(c) in any workplace where respirators are necessary to protect employee health.
   - Provide and ensure that employees use appropriate respiratory protection where necessary to protect employee health.
   - Provide and ensure the use of the appropriate gloves (e.g., butyl, nitrile), goggles, and protective clothing when necessary to protect employees from workplace hazards (e.g., exposure to contaminated equipment, chemical containers).
   - Train employees on the limitations and proper use and maintenance of required PPE in accordance with 29 CFR 1910.132(f).
4. Training and Information.
   Employers must comply with the OSHA Hazard Communication standard, 29 CFR 1910.1200. In particular, employers must ensure that employees exposed to 1BP are trained in and have access to the following information:
   - The operations in their workplace where hazardous chemicals are present;
   - Safety data sheets (SDSs) for chemicals containing 1BP, which must include information about the signs and symptoms of exposure and the hazards of dermal contact with 1BP;
   - Any protective measures the employer is using to reduce employee exposures to 1BP;
   - Specific work practices employees can use to reduce exposure to 1BP;
   - Appropriate use of personal protective equipment;
   - Methods that may be used to detect the presence of the 1BP in the workplace, such as workplace monitoring.

You may voluntarily provide this Area Office with progress reports on your efforts to address these conditions. OSHA may return to your work site in one year to further examine employee exposures to 1BP.

Enclosed is the above-mentioned OSHA publication that may be of assistance to you in preventing work-related injuries and illnesses in your workplace. If you have any questions, please feel free to call [###].

Sincerely,

Area Director

Enclosure (OSHA/NIOSH Hazard Alert publication)

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U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration
200 Constitution Ave NW
Washington, DC 20210
1-800-321-OSHA
1-800-321-6742
www.osha.gov

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Benefits.gov
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DisasterAssistance.gov
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[g] For sectors excluded from § 1926.1128 the limit is 10 ppm TWA.

[h] [Reserved]

[i] [Reserved]

[j] Millions of particles per cubic foot of air, based on impinger samples counted by light-field techniques.

[k] The percentage of crystalline silica in the formula is the amount determined from airborne samples, except in those instances in which other methods have been shown to be applicable.

[l] [Reserved]

[m] Covers all organic and inorganic particulates not otherwise regulated. Same as Particulates Not Otherwise Regulated.

The 1970 TLV uses letter designations instead of a numerical value as follows:

A [1] [Reserved]

A [2] Polytetrafluoroethylene decomposition products. Because these products decompose in part by hydrolysis in alkaline solution, they can be quantitatively determined in air as fluoride to provide an index of exposure. No TLV is recommended pending determination of the toxicity of the products, but air concentrations should be minimal.

A [3] Gasoline and/or Petroleum Distillates. The composition of these materials varies greatly and thus a single TLV for all types of these materials is no longer applicable. The content of benzene, other aromatics and additives should be determined to arrive at the appropriate TLV.

E Simple asphyxiants. The limiting factor is the available oxygen which shall be at least 19.5% and be within the requirements addressing explosion in part 1926.

[39 FR 22801, June 24, 1974, as amended at 51 FR 37007, Oct. 17, 1986; 52 FR 46312, Dec. 4, 1987; 58 FR 35089, June 30, 1993; 61 FR 9249, 9250, Mar. 7, 1996; 61 FR 56856, Nov. 4, 1996; 62 FR 1619, Jan. 10, 1997]

§ 1926.56 Illumination.

(a) *General.* Construction areas, ramps, runways, corridors, offices, shops, and storage areas shall be lighted to not less than the minimum illumination intensities listed in Table D–3 while any work is in progress:

TABLE D–3—MINIMUM ILLUMINATION INTENSITIES IN FOOT-CANDLES

Foot-candles	Area or operation
5	General construction area lighting.
3	General construction areas, concrete placement, excavation and waste areas, accessways, active storage areas, loading platforms, refueling, and field maintenance areas.
5	Indoors: warehouses, corridors, hallways, and exitways.
5	Tunnels, shafts, and general underground work areas: (Exception: minimum of 10 foot-candles is required at tunnel and shaft heading during drilling, mucking, and scaling. Bureau of Mines approved cap lights shall be acceptable for use in the tunnel heading.)
10	General construction plant and shops (e.g., batch plants, screening plants, mechanical and electrical equipment rooms, carpenter shops, rigging lofts and active storerooms, barracks or living quarters, locker or dressing rooms, mess halls, and indoor toilets and workrooms).
30	First aid stations, infirmaries, and offices.

(b) *Other areas.* For areas or operations not covered above, refer to the American National Standard A11.1–1965, R1970, Practice for Industrial Lighting, for recommended values of illumination.

§ 1926.57 Ventilation.

(a) *General.* Whenever hazardous substances such as dusts, fumes, mists, vapors, or gases exist or are produced in the course of construction work, their concentrations shall not exceed the limits specified in § 1926.55(a). When ventilation is used as an engineering control method, the system shall be installed and operated according to the requirements of this section.

(b) *Local exhaust ventilation.* Local exhaust ventilation when used as described in (a) shall be designed to prevent dispersion into the air of dusts, fumes, mists, vapors, and gases in concentrations causing harmful exposure. Such exhaust systems shall be so designed that dusts, fumes, mists, vapors, or gases are not drawn through the work area of employees.

(c) *Design and operation.* Exhaust fans, jets, ducts, hoods, separators, and all necessary appurtenances, including refuse receptacles, shall be so designed, constructed, maintained and operated as to ensure the required protection by maintaining a volume and velocity of exhaust air sufficient to gather dusts, fumes, vapors, or gases from said equipment or process, and to convey them to suitable points of safe disposal, thereby preventing their dispersion in harmful quantities into the atmosphere where employees work.

(d) *Duration of operations.* (1) The exhaust system shall be in operation continually during all operations which it is designed to serve. If the employee remains in the contaminated zone, the

Personal Protective Equipment
Subpart I
29 CFR 1910.132
Adopted from OSHA Office of Training and Education
PPE/ppe/1-95

Hard hats, goggles, face shields, steel-toed shoes, respirators, aprons, gloves, full body suits! What do all these items have in common? They are all various forms of personal protective equipment (PPE).

Personal protective equipment should **not** be used as a substitute for engineering, work practice, and/or administrative controls. Personal protective equipment should be used in conjunction with these controls to provide for employee safety and health in the workplace. Personal protective equipment includes all clothing and other work accessories designed to create a barrier against workplace hazards. The basic element of any management program for PPE should be an in-depth evaluation of the equipment needed to protect against the hazards at the workplace. Management dedicated to the safety and health of employees should use that evaluation to set a standard operating procedure for personnel, then train employees on the protective limitations of PPE, and on its proper use and maintenance.

Using personal protective equipment requires hazard awareness and training on the part f the user. Employees must be aware that the equipment does not eliminate the hazard. If the equipment fails, exposure will occur. To reduce the possibility of failure, equipment must be properly fitted and maintained in a clean and serviceable condition.

Selection of the proper personal protective equipment for a job is important. Employers and employees must understand the equipment's purpose and its limitations. The equipment must not be altered or removed even though an employee may find it uncomfortable simply because it does not fit properly.

GENERAL REQUIREMENTS – 1910.132

Application

This regulation requires employers to ensure that personal protective equipment be "provided, used, and maintained in a sanitary and reliable condition whenever it is necessary……" to prevent injury. This includes protection of any part of the body from hazards through absorption, inhalation, or physical contact.

For example, many hazards can threaten the torso: heat, splashes from hot metals and liquids, impacts, cuts, acids, and radiation. A variety of protective clothing is available: vests, jackets, aprons, coveralls, and full body suits.

Wool and specially treated cotton are two natural fibers that are fire-resistant, comfortable and adapt well to a variety of workplace temperatures.

Duck, a closely woven cotton fabric, is good for light-duty protective equipment. It can protect against cuts and bruises on jobs where employees handle heavy, sharp, or rough material.

Heat-resistant, material such as leather, is often used in protective clothing to guard against dry heat and flame. Rubber and rubberized fabrics, neoprene, and plastics give protection against some acids and chemicals.

It is important to refer to manufacturer's selection guides for effectiveness of specific materials against specific chemicals.

Disposable suits of plastic-like or similar synthetic material are particularly important for protection from dusty materials or materials that can splash. If the substance is extremely toxic, a completely enclosed chemical suit may be necessary. The clothing should be inspected to ensure proper fit and function for continued protection.

Employee-Owned Equipment

When employees provide their own equipment, the employer shall assure the adequacy, including the proper maintenance and sanitation, of such equipment.

Design

All personal protective equipment must be of safe design and construction for the work to be performed.

Hazard Assessment and Equipment Selection

Employers are required to assess the workplace to determine if hazards that require the use of personal protective equipment are present or are likely to be present. If hazards or the likelihood of hazards are found, employers must select and have affected employees use properly fitted PPE suitable for protection and existing hazards.

Employers must certify in writing that a workplace hazard assessment has been performed.

Defective and Damaged Equipment

Defective or damaged personal protective equipment shall not be used.

Training

Before doing work requiring use of personal protective equipment, employees must be trained to know when personal protective equipment is necessary; what type is necessary; how it is to be worn; and what its limitations are, as well as know its proper care, maintenance, useful life, and disposal.

Employers are required to certify in writing that training has been carried out and that employees understand it. Each written certification shall contain the name of each employee trained, the date(s) of training, and identify the subject certified.

SPA - 8

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. OSHA–2020–0004]

RIN 1218–AD36

Occupational Exposure to COVID–19; Emergency Temporary Standard

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is issuing an emergency temporary standard (ETS) to protect healthcare and healthcare support service workers from occupational exposure to COVID–19 in settings where people with COVID–19 are reasonably expected to be present. During the period of the emergency standard, covered healthcare employers must develop and implement a COVID–19 plan to identify and control COVID–19 hazards in the workplace. Covered employers must also implement other requirements to reduce transmission of COVID–19 in their workplaces, related to the following: Patient screening and management; Standard and Transmission-Based Precautions; personal protective equipment (PPE), including facemasks or respirators; controls for aerosol-generating procedures; physical distancing of at least six feet, when feasible; physical barriers; cleaning and disinfection; ventilation; health screening and medical management; training; anti-retaliation; recordkeeping; and reporting. The standard encourages vaccination by requiring employers to provide reasonable time and paid leave for employee vaccinations and any side effects. It also encourages use of respirators, where respirators are used in lieu of required facemasks, by including a mini respiratory protection program that applies to such use. Finally, the standard exempts from coverage certain workplaces where all employees are fully vaccinated and individuals with possible COVID–19 are prohibited from entry; and it exempts from some of the requirements of the standard fully vaccinated employees in well-defined areas where there is no reasonable expectation that individuals with COVID–19 will be present.

DATES:

Effective dates: The rule is effective June 21, 2021. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of June 21, 2021.

Compliance dates: Compliance dates for specific provisions are in 29 CFR 1910.502(s). Employers must comply with all requirements of this section, except for requirements in paragraphs (i), (k), and (n) by July 6, 2021. Employers must comply with the requirements in paragraphs (i), (k), and (n) by July 21, 2021.

Comments due: Written comments, including comments on any aspect of this ETS and whether this ETS should become a final rule, must be submitted by July 21, 2021 in Docket No. OSHA–2020–0004. Comments on the information collection determination described in Section VII.K of the preamble (OMB Review under the Paperwork Reduction Act of 1995) may be submitted by August 20, 2021 in Docket Number OSHA–2021–003.

ADDRESSES: In accordance with 28 U.S.C. 2112(a), the agency designates Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor, U.S. Department of Labor, to receive petitions for review of the ETS. Service can be accomplished by email to *zzSOL-Covid19-ETS@dol.gov*.

Written comments: You may submit comments and attachments, identified by Docket No. OSHA–2020–0004, electronically at *www.regulations.gov*, which is the Federal e-Rulemaking Portal. Follow the online instructions for making electronic submissions.

Instructions: All submissions must include the agency's name and the docket number for this rulemaking (Docket No. OSHA–2020–0004). All comments, including any personal information you provide, are placed in the public docket without change and may be made available online at *www.regulations.gov*. Therefore, OSHA cautions commenters about submitting information they do not want made available to the public or submitting materials that contain personal information (either about themselves or others), such as Social Security Numbers and birthdates.

Docket: To read or download comments or other material in the docket, go to Docket No. OSHA–2020–0004 at *www.regulations.gov*. All comments and submissions are listed in the *www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download through that website. All comments and submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Documents submitted to the docket by OSHA or stakeholders are assigned document identification numbers (Document ID) for easy identification and retrieval. The full Document ID is the docket number plus a unique four-digit code. OSHA is identifying supporting information in this ETS by author name and publication year, when appropriate. This information can be used to search for a supporting document in the docket at *http://www.regulations.gov*. Contact the OSHA Docket Office at 202–693–2350 (TTY number: 877–889–5627) for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

General information and press inquiries: Contact Frank Meilinger, Director, Office of Communications, U.S. Department of Labor; telephone (202) 693–1999; email *meilinger.francis2@dol.gov*.

For technical inquiries: Contact Andrew Levinson, Directorate of Standards and Guidance, U.S. Department of Labor; telephone (202) 693–1950.

SUPPLEMENTARY INFORMATION: The preamble to the ETS on occupational exposure to COVID–19 follows this outline:

Table of Contents

I. Executive Summary

This ETS is based on the requirements of the Occupational Safety and Health Act (OSH Act or Act) and legal precedent arising under the Act. Under section 6(c)(1) of the OSH Act, 29 U.S.C. 655(c)(1), OSHA shall issue an ETS if the agency determines that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and an ETS is necessary to protect employees from such danger. These legal requirements are more fully discussed in *Pertinent Legal Authority* (Section III of this preamble).

For the first time in its 50-year history, OSHA faces a new hazard so grave that it has killed nearly 600,000

people in the United States in barely over a year, and infected millions more (CDC, May 24, 2021a). And the impact of this new illness has been borne disproportionately by the healthcare and healthcare support workers tasked with caring for those infected by this disease. As of May 24, 2021, over 491,816 healthcare workers have contracted COVID–19, and more than 1,600 of those workers have died (CDC, May 24, 2021b). OSHA has determined that employee exposure to this new hazard, SARS–CoV–2 (the virus that causes COVID–19), presents a grave danger to workers in all healthcare settings in the United States and its territories where people with COVID–19 are reasonably expected to be present. This finding of grave danger is based on the science of how the virus spreads and the elevated risk in workplaces where COVID–19 patients are cared for, as well as the adverse health effects suffered by those diagnosed with COVID–19, as discussed in *Grave Danger* (Section IV.A. of this preamble).

OSHA has also determined that an ETS is necessary to protect healthcare and healthcare support employees in covered healthcare settings from exposures to SARS–CoV–2, as discussed in *Need for the ETS* (Section IV.B. of this preamble). Workers face a particularly elevated risk of exposure to SARS–CoV–2 in settings where patients with suspected or confirmed COVID–19 receive treatment or where patients with undiagnosed illnesses come for treatment (*e.g.*, emergency rooms, urgent care centers), especially when providing care or services directly to those patients. Through its enforcement efforts to date, OSHA has encountered significant obstacles, revealing that existing standards, regulations, and the OSH Act's General Duty Clause are inadequate to address the COVID–19 hazard for employees covered by this ETS. The agency has determined that a COVID–19 ETS is necessary to address these inadequacies. Additionally, as states and localities have taken increasingly more divergent approaches to COVID–19 workplace regulation—ranging from states with their own COVID–19 ETSs to states with no workplace protections at all—it has become clear that a Federal standard is needed to ensure sufficient protection for healthcare employees in all states.

The development of safe and highly effective vaccines and the on-going nationwide distribution of these vaccines are encouraging milestones in the nation's response to COVID–19. OSHA recognizes the promise of vaccines to protect workers, but as of the time of the promulgation of the ETS, vaccination has not eliminated the grave danger presented by the SARS–CoV–2 virus to the entire healthcare workforce. Indeed, approximately a quarter of healthcare workers have not yet completed COVID–19 vaccination (King et al., April 24, 2021). Nonetheless, vaccination is critical in combatting COVID–19, and the standard requires employers to provide paid leave to employees so that they can be vaccinated and recover from any side effects. Additionally, certain workplaces and well-defined areas where all employees are fully vaccinated are exempted from all of the standard's requirements, and certain fully vaccinated workers are exempted from several of the standard's requirements. OSHA will continue to monitor trends in COVID–19 infections and deaths as more of the workforce and the general population become vaccinated and the pandemic continues to evolve. Where OSHA finds a grave danger from the virus no longer exists for the covered workforce (or some portion thereof), or new information indicates a change in measures necessary to address the grave danger, OSHA will update the ETS, as appropriate.

To protect workers in the meantime, however, a multi-layered approach to controlling occupational exposures to SARS–CoV–2 in healthcare workplaces is required. As discussed in the *Need for Specific Provisions* (Section V of this preamble), OSHA relied on the best available science for its decisions concerning appropriate provisions for the ETS and its determinations regarding the kind and degree of protective actions needed to protect against exposure to SARS–CoV–2 at work and the feasibility of instituting these provisions. More specifically, the agency's analysis demonstrates that an effective COVID–19 control program must utilize a suite of overlapping controls in a layered approach to protect workers from workplace exposure to SARS–CoV–2. OSHA emphasizes that the infection control practices required by the ETS are most effective when used together; however, they are also each individually protective.

The agency has also evaluated the feasibility of this ETS and has determined that the requirements of the ETS are both economically and technologically feasible, as outlined in *Feasibility* (Section VI of this preamble). Table I.–1, which is derived from material presented in Section VI of this preamble, provides a summary of OSHA's best estimate of the costs and benefits of the rule using a discount rate of 3 percent. The specific requirements of the ETS are outlined and described in the *Summary and Explanation* (Section VIII of this preamble). OSHA requests comments on the provisions of the ETS and whether it should be adopted as a permanent standard.

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OSHA® Occupational Safety and Health Administration
www.osha.gov

Workers' Rights

OSHA 3021-12R 2024

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Workers' Rights

U.S. Department of Labor
Occupational Safety and Health Administration
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Introduction

Worker Protection is the Law of the Land

You have the right to a safe workplace. The *Occupational Safety and Health Act of 1970* (OSH Act) was passed to prevent workers from being killed or otherwise harmed at work. The law requires employers to provide their employees with working conditions that are free of known dangers. The OSH Act created the Occupational Safety and Health Administration (OSHA), which sets and enforces protective workplace safety and health standards. OSHA also provides information, training and assistance to employers and workers.

Contact us if you have questions or want to file a complaint. We will keep your information confidential. **We are here to help you.**

Workers' Rights under the OSH Act

The OSH Act gives workers the right to safe and healthful working conditions. It is the duty of employers to provide workplaces that are free of known dangers that could harm their employees. This law also gives workers important rights to participate in activities to ensure their protection from job hazards. This booklet explains workers' rights to:

- File a confidential complaint with OSHA to have their workplace inspected.
- Receive information and training about hazards, methods to prevent harm, and the OSHA standards that apply to their workplace. The training must be done in a language and vocabulary workers can understand.
- Review records of work-related injuries and illnesses that occur in their workplace.
- Receive copies of the results from tests and monitoring done to find and measure hazards in the workplace.
- Get copies of their workplace medical records.
- Participate in an OSHA inspection and speak in private with the inspector.
- File a complaint with OSHA if they have been retaliated against by their employer as the result of requesting an inspection or using any of their other rights under the OSH Act.
- File a complaint if punished or retaliated against for acting as a "whistleblower" under the more than 20 additional federal statutes for which OSHA has jurisdiction.

A job must be safe or it cannot be called a good job. OSHA strives to make sure that every worker in the nation goes home unharmed at the end of the workday, the most important right of all.

Employer Responsibilities

Employers have the responsibility to provide a safe workplace. **Employers MUST provide their employees with a workplace that does not have serious hazards and must follow all OSHA safety and health standards.** Employers must find and correct safety and health problems. OSHA further requires that employers must try to eliminate or reduce hazards first by making feasible changes in working conditions – switching to safer chemicals, enclosing processes to trap harmful fumes, or using ventilation systems to clean the air are examples of effective ways to get rid of or minimize risks – rather than just relying on personal protective equipment such as masks, gloves, or earplugs.

Employers **MUST** also:

- Prominently display the official OSHA poster that describes rights and responsibilities under the OSH Act. **This poster is free and can be downloaded from www.osha.gov.**
- Inform workers about hazards through training, labels, alarms, color-coded systems, chemical information sheets and other methods.
- Train workers in a language and vocabulary they can understand.
- Keep accurate records of work-related injuries and illnesses.
- Perform tests in the workplace, such as air sampling, required by some OSHA standards.
- Provide hearing exams or other medical tests required by OSHA standards.
- Post OSHA citations and injury and illness data where workers can see them.
- Notify OSHA within 8 hours of a workplace fatality or within 24 hours of any work-related inpatient hospitalization, amputation or loss of an eye.
- Not retaliate against workers for using their rights under the law, including their right to report a work-related injury or illness.

§ 1904.34 Change in business ownership.

If your business changes ownership, you are responsible for recording and reporting work-related injuries and illnesses only for that period of the year during which you owned the establishment. You must transfer the part 1904 records to the new owner. The new owner must save all records of the establishment kept by the prior owner, as required by § 1904.33 of this Part, but need not update or correct the records of the prior owner.

§ 1904.35 Employee involvement.

(a) *Basic requirement.* Your employees and their representatives must be involved in the recordkeeping system in several ways.

(1) You must inform each employee of how he or she is to report an injury or illness to you.

(2) You must provide limited access to your injury and illness records for your employees and their representatives.

(b) *Implementation*—(1) *What must I do to make sure that employees report work-related injuries and illnesses to me?* (i) You must set up a way for employees to report work-related injuries and illnesses promptly; and

(ii) You must tell each employee how to report work-related injuries and illnesses to you.

(2) *Do I have to give my employees and their representatives access to the OSHA injury and illness records?* Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA injury and illness records, with some limitations, as discussed below.

(i) *Who is an authorized employee representative?* An authorized employee representative is an authorized collective bargaining agent of employees.

(ii) *Who is a ''personal representative'' of an employee or former employee?* A personal representative is:

(A) Any person that the employee or former employee designates as such, in writing; or

(B) The legal representative of a deceased or legally incapacitated employee or former employee.

(iii) *If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it?* When an employee, former employee, personal representative, or authorized employee representative asks for copies of your current or stored OSHA 300 Log(s) for an establishment the employee or former employee has worked in, you must give the requester a copy of the relevant OSHA 300 Log(s) by the end of the next business day.

(iv) *May I remove the names of the employees or any other information from the OSHA 300 Log before I give copies to an employee, former employee, or employee representative?* No, you must leave the names on the 300 Log. However, to protect the privacy of injured and ill employees, you may not record the employee's name on the OSHA 300 Log for certain ''privacy concern cases,'' as specified in paragraphs 1904.29(b)(6) through 1904.29(b)(9).

(v) *If an employee or representative asks for access to the OSHA 301 Incident Report, when do I have to provide it?* (A) When an employee, former employee, or personal representative asks for a copy of the OSHA 301 Incident Report describing an injury or illness to that employee or former employee, you must give the requester a copy of the OSHA 301 Incident Report containing that information by the end of the next business day.

(B) When an authorized employee representative asks for a copies of the OSHA 301 Incident Reports for an establishment where the agent represents employees under a collective bargaining agreement, you must give copies of those forms to the authorized employee representative within 7 calendar days. You are only required to give the authorized employee representative information from the OSHA 301 Incident Report section titled ''Tell us about the case.'' You must remove all other information from the copy of the OSHA 301 Incident Report or the equivalent substitute form that you give to the authorized employee representative.

(vi) *May I charge for the copies?* No, you may not charge for these copies the first time they are provided. However, if one of the designated persons

asks for additional copies, you may assess a reasonable charge for retrieving and copying the records.

§ 1904.36 Prohibition against discrimination.

Section 11(c) of the Act prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the part 1904 records, or otherwise exercises any rights afforded by the OSH Act.

§ 1904.37 State recordkeeping regulations.

(a) *Basic requirement.* Some States operate their own OSHA programs, under the authority of a State Plan approved by OSHA. States operating OSHA-approved State Plans must have occupational injury and illness recording and reporting requirements that are substantially identical to the requirements in this part (see 29 CFR 1902.3(k), 29 CFR 1952.4 and 29 CFR 1956.10(i)).

(b) *Implementation.* (1) State-Plan States must have the same requirements as Federal OSHA for determining which injuries and illnesses are recordable and how they are recorded.

(2) For other part 1904 provisions (for example, industry exemptions, reporting of fatalities and hospitalizations, record retention, or employee involvement), State-Plan State requirements may be more stringent than or supplemental to the Federal requirements, but because of the unique nature of the national recordkeeping program, States must consult with and obtain approval of any such requirements.

(3) Although State and local government employees are not covered Federally, all State-Plan States must provide coverage, and must develop injury and illness statistics, for these workers. State Plan recording and reporting requirements for State and local government entities may differ from those for the private sector but must meet the requirements of paragraphs 1904.37(b)(1) and (b)(2).

(4) A State-Plan State may not issue a variance to a private sector employer and must recognize all variances issued by Federal OSHA.

(5) A State Plan State may only grant an injury and illness recording and reporting variance to a State or local government employer within the State after obtaining approval to grant the variance from Federal OSHA.

§ 1904.38 Variances from the recordkeeping rule.

(a) *Basic requirement.* If you wish to keep records in a different manner from the manner prescribed by the part 1904 regulations, you may submit a variance petition to the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Washington, DC 20210. You can obtain a variance only if you can show that your alternative recordkeeping system:

(1) Collects the same information as this part requires;

(2) Meets the purposes of the Act; and

(3) Does not interfere with the administration of the Act.

(b) *Implementation*—(1) *What do I need to include in my variance petition?* You must include the following items in your petition:

(i) Your name and address;

(ii) A list of the State(s) where the variance would be used;

(iii) The address(es) of the business establishment(s) involved;

(iv) A description of why you are seeking a variance;

(v) A description of the different recordkeeping procedures you propose to use;

(vi) A description of how your proposed procedures will collect the same information as would be collected by this part and achieve the purpose of the Act; and

(vii) A statement that you have informed your employees of the petition by giving them or their authorized representative a copy of the petition and by posting a statement summarizing the petition in the same way as notices are posted under § 1903.2(a).

(2) *How will the Assistant Secretary handle my variance petition?* The Assistant Secretary will take the following steps to process your variance petition.

(i) The Assistant Secretary will offer your employees and their authorized

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Overview

- Initial Approval: June 01, 1984 (49 FR 23000)
- State Plan Certification: August 16, 2006 (71 FR 47089)

The New York Public Employee Safety and Health (PESH) Bureau is part of the New York Department of Labor. The New York Department of Labor is headed by the Commissioner. The main office is located in Albany with nine district offices located throughout the state.

Coverage

New York PESH coversall state and local government workers in the state. It does not cover federal government workers. Federal government workers, including those employed by the United States Postal Service and civilian workers on military bases, are covered by OSHA. OSHA also exercises authority over private sector employers in the state and federal OSHA standards apply to these workers. A brief summary of the New York State Plan is included in the Code of Federal Regulations (CFR) at 29 CFR 1952.24. OSHA retains the authority to monitor the State Plan under Section 18(f) of the OSH Act.

State Plan Standards and Regulations

New York PESH has generally adopted all OSHA standards applicable to state and local government employment. In addition, the Commissioner has the authority to develop alternative and/or state-initiated standards to protect the safety and health of state and local government workers in New York in consultation with the Hazard Abatement Board. The procedures for adoption of alternative standards contain criteria for consideration of expert technical advice and allow interested persons to request development of any standard and to participate in any hearing for the development or modification of standards. PESH's state-initiated standards include:

- Workplace Violence Prevention – 12 NYCRR Part 800.6
- Emergency Escape and Self-Rescue Ropes and System Components for Firefighters (*in cities below one million residents*)– 12 NYCRR Part 800.7
- Permissible Exposure Limits – 12 NYCRR Part 800.5
- Right-to-Know – 12 NYCRR Part 820

New York PESH also has its own regulation on the recording and reporting of occupational injuries and illnesses (12 NYCRR Part 801).

Enforcement Programs

New York PESH utilizes its Field Operations Manual (FOM) which provides policy guidance for its enforcement program. The Enforcement Branch conducts unannounced mandatory inspections which results in a "Notice of Violation and Order to Comply" for hazards and/or violations of OSHA standards. Abatement periods to comply with the violations are established and verification of abatement is required. Penalties may be assessed for failure to comply with abatement orders. For more information on these programs, please visit the New York State Plan website.

Voluntary and Cooperative Programs

New York PESH offers voluntary and cooperative programs that focus on reducing injuries, illnesses, and fatalities. New York PESH also offers on-site consultation services which help employers comply with PESH's standards and identify and correct potential safety and health hazards. New York DOSH also has an agreement with OSHA, under Section 21(d) of the OSH Act, to provide free on-site consultation services to the private sector. For more information on these programs, please visit the New York State Plan website.

Informal Conferences and Appeals

Employers and workers may seek formal administrative review of New York Department of Labor notices and orders to comply by petitioning the New York Industrial Board of Appeals (IBA) no later than 60 days after the issuance of the notice and order. The IBA is the independent state agency authorized by McKinney's Labor Law §27(a)(6)(c) to consider petitions from affected parties for review of the Commissioner of Labor's determinations. For more information on these proceedings

Contact Information

New York Department of Labor

Roberta Reardon, Commissioner
(518) 457-2746
(518) 457-5545

Division of Safety and Health

Public Employee Safety and Health (PESH) Bureau Governor W. Averell Harriman State Building Campus, Building 12, Room 158

Albany, New York 12240

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Public Employee Safety and Health Bureau

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John Usher

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Olushola Abolarinwa

Disclaimer

OSHA makes every effort to ensure that this webpage is accurate and up-to-date; however, for the latest information please

please visit the New York State Plan website.

UNITED STATES
DEPARTMENT OF LABOR

Occupational Safety & Health Administration
200 Constitution Ave NW
Washington, DC 20210
800-321-6742 (OSHA)
TTY
www.OSHA.gov

FEDERAL GOVERNMENT

White House
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N.Y. Comp. Codes R. & Regs. tit. 12 § 800.3

Current through Register Vol. 44, No. 27, July 6, 2022

Section 800.3 - Adoption of standards

The Commissioner of Labor adopts, as the occupational safety and health standards for the protection of the safety and health of public employees, all of the standards in the below-listed parts of Title 29 of the Code of Federal Regulations:

Part 1910--General Industry Standards; June 1, 2016 edition, with the exception of Section 1910.1000 -Air Contaminants, which is addressed by Section 800.5 of this Part.

Part 1915--Shipyard Employment Standards; June 1, 2016 edition

Part 1917--Marine Terminals Standards; June 1, 2016 edition

Part 1918--Longshoring Standards; June 1, 2016 edition

Part 1926--Construction Standards; June 1, 2016 edition

Part 1928--Agricultural Standards; June 1, 2016 edition

N.Y. Comp. Codes R. & Regs. Tit. 12 § 800.3

Adopted New York State Register April 26, 2017/Volume XXXIX, Issue 17, eff.4/26/2017

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ublic Employee Safety & Health

Overview

The Public Employee Safety and Health Bureau (PESH), created in 1980, enforces safety and health standards promulgated under the United States Occupational Safety and Health Act (OSHA (https://www.osha.gov/)) and several state standards.

The Public Employee Safety and Health (PESH) Act (https://www.nysenate.gov/legislation/laws/LAB/27-A) created this unit to give occupational safety and health protection to all public sector employees.

Public sector employers include:

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Public Employee Safety & Health

- School Districts
- Paid and Volunteer Fire Departments

The Public Employee Safety and Health Bureau responds to:

- Deaths related to occupational safety and health
- Accidents that send two or more public employees to the hospital
- Complaints from public employees or their representatives

The Public Employee Safety and Health Bureau also:

- Inspects public employer work sites
- Gives technical assistance during statewide emergencies

SEE PUBLIC EMPLOYEE SAFETY & HEALTH FREQUENTLY ASKED QUESTIONS

(/public-employee-safety-and-health-programs-frequently-asked-questions)

To help prevent heat-related fatalities and illness among New York's public sector workers, the Public Employee Safety and Health (PESH) Bureau adopted OSHA's Heat National Emphasis Program (NEP) on June 8, 2022. The purpose of the NEP is to better protect workers from the hazards associated with outdoor work during heat waves, and indoor work near radiant heat sources. Heat stress can be safely managed using time-proven measures that are simple, common sense, and low cost. PESH has slightly altered implementation to cover appropriate public sector industries (see list below) and to allow for available resources. Protective measures will be assessed during

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ensure that procedures are in place before it is too late to implement them.

NAICS Code	Industry Description
2213	Water, Sewage and Other (Heating) Systems
2373	Highway, Street and Bridge Construction (Highway, DPW)
6117	Educational Support Services (Food Preparation/Groundskeeping/Maintenance)
622110	General Medical and Surgical Hospitals (Food Preparation/Laundry)
623110	Health Services, Nursing Home (Food Preparation/Laundry)
922160	Fire Protection
712190	Nature Parks and Other Similar Institutions (Groundskeeping/Maintenance)
922141	Correctional Institutions (Food Preparation/Laundry)
985112	Commuter Rail Systems (Multi-level Terminals/Stations)

More information about the OSHA initiative and helpful resources can be found on the OSHA website (https://www.osha.gov/heat) .

Check out our Consultation Program fact sheet (/consultation-assistance-fact-sheet-p-206) to learn how to ask for free and confidential assistance.

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Public Employee Safety & Health

Employee Safety and Health (PESH) Bureau has adopted the OSHA Emergency Temporary Standard (ETS) for Healthcare on October 21, 2021 for public employers in New York State. The ETS will remain in effect for 90 days until January 18, 2022, at which time it may be extended if appropriate. The healthcare ETS establishes new requirements for settings where employees provide healthcare or healthcare support services, including skilled nursing homes and home healthcare, with some exemptions for healthcare providers who screen out patients who may have COVID-19. More information about the rule and ways to implement it can be found at the COVID-19 Healthcare ETS website (https://www.osha.gov/coronavirus/ets).

Effective 6/21/2021, OSHA has issued an Emergency Temporary Standard (ETS) to address the danger COVID-19 poises to public healthcare workers. Under the ETS, employers must follow requirements such as screening patients, cleaning and disinfecting surfaces, installing physical barriers, and more. The goal is to protect workers facing the highest COVID-19 hazards.

For more information, visit the COVID-19 Healthcare ETS website (https://www.osha.gov/coronavirus/ets).

NEXT SECTION Continue (#) ↓

Services - PESH Can Help (#)

the purposes of this order as the order applies to programs administered by it; and is directed to cooperate with the Committee, to furnish it, in accordance with law, such information and assistance as it may request in the performance of its functions, and to report to it at such intervals as the Committee may require.

SEC. 203. Each such department and agency shall, within thirty days from the date of this order, issue such rules and regulations, adopt such procedures and policies, and make such exemptions and exceptions as may be consistent with law and necessary or appropriate to effectuate the purposes of this order. Each such department and agency shall consult with the Committee in order to achieve such consistency and uniformity as may be feasible.

PART III—ENFORCEMENT

SEC. 301. The Committee, any subcommittee thereof, and any officer or employee designated by any executive department or agency subject to this order may hold such hearings, public or private, as the Committee, department, or agency may deem advisable for compliance, enforcement, or educational purposes.

SEC. 302. If any executive department or agency subject to this order concludes that any person or firm (including but not limited to any individual, partnership, association, trust, or corporation) or any State or local public agency has violated any rule, regulation, or procedure issued or adopted pursuant to this order, or any nondiscrimination provision included in any agreement or contract pursuant to any such rule, regulation, or procedure, it shall endeavor to end and remedy such violation by informal means, including conference, conciliation, and persuasion unless similar efforts made by another Federal department or agency have been unsuccessful. In conformity with rules, regulations, procedures, or policies issued or adopted by it pursuant to Section 203 hereof, a department or agency may take such action as may be appropriate under its governing laws, including, but not limited to, the following:

It may—

(a) cancel or terminate in whole or in part any agreement or contract with such person, firm, or State or local public agency providing for a loan, grant, contribution, or other Federal aid, or for the payment of a commission or fee;

(b) refrain from extending any further aid under any program administered by it and affected by this order until it is satisfied that the affected person, firm, or State or local public agency will comply with the rules, regulations, and procedures issued or adopted pursuant to this order, and any nondiscrimination provisions included in any agreement or contract;

(c) refuse to approve a lending institution or any other lender as a beneficiary under any program administered by it which is affected by this order or revoke such approval if previously given.

SEC. 303. In appropriate cases executive departments and agencies shall refer to the Attorney General violations of any rules, regulations, or procedures issued or adopted pursuant to this order, or violations of any nondiscrimination provisions included in any agreement or contract, for such civil or criminal action as he may deem appropriate. The Attorney General is authorized to furnish legal advice concerning this order to the Committee and to any department or agency requesting such advice.

SEC. 304. Any executive department or agency affected by this order may also invoke the sanctions provided in Section 302 where any person or firm, including a lender, has violated the rules, regulations, or procedures issued or adopted pursuant to this order, or the nondiscrimination provisions included in any agreement or contract, with respect to any program affected by this order administered by any other executive department or agency.

PART IV—ESTABLISHMENT OF THE PRESIDENT'S COMMITTEE ON EQUAL OPPORTUNITY IN HOUSING

[Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, §6–604, Jan. 17, 1994, 59 F.R. 2939.]

PART V—POWERS AND DUTIES OF THE PRESIDENT'S COMMITTEE ON EQUAL OPPORTUNITY IN HOUSING

SEC. 501. [Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, §6–604, Jan. 17, 1994, 59 F.R. 2939.]

SEC. 502. (a) The Committee shall take such steps as it deems necessary and appropriate to promote the coordination of the activities of departments and agencies under this order. In so doing, the Committee shall consider the overall objectives of Federal legislation relating to housing and the right of every individual to participate without discrimination because of race, color, religion (creed), sex, disability, familial status or national origin in the ultimate benefits of the Federal programs subject to this order.

(b) The Committee may confer with representatives of any department or agency, State or local public agency, civic, industry, or labor group, or any other group directly or indirectly affected by this order; examine the relevant rules, regulations, procedures, policies, and practices of any department or agency subject to this order and make such recommendations as may be necessary or desirable to achieve the purposes of this order.

(c) The Committee shall encourage educational programs by civic, educational, religious, industry, labor, and other nongovernmental groups to eliminate the basic causes of discrimination in housing and related facilities provided with Federal assistance.

SEC. 503. [Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, §6–604, Jan. 17, 1994, 59 F.R. 2939.]

PART VI—MISCELLANEOUS

SEC. 601. As used in this order, the term ''departments and agencies'' includes any wholly-owned or mixed-ownership Government corporation, and the term ''State'' includes the District of Columbia, the Commonwealth of Puerto Rico, and the territories of the United States.

SEC. 602. This order shall become effective immediately.

[Functions of President's Committee on Equal Opportunity in Housing under Ex. Ord. No. 11063 delegated to Secretary of Housing and Urban Development by Ex. Ord. No. 12892, §6–604(a), Jan. 17, 1994, 59 F.R. 2939, set out as a note under section 3608 of this title.]

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Pub. L. 96–170, §1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, §309(c), Oct. 19, 1996, 110 Stat. 3853.)

CODIFICATION

R.S. § 1979 derived from act Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13.

Section was formerly classified to section 43 of Title 8, Aliens and Nationality.

AMENDMENTS

1996—Pub. L. 104–317 inserted before period at end of first sentence '', except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable''.

1979—Pub. L. 96–170 inserted ''or the District of Columbia'' after ''Territory'', and provisions relating to Acts of Congress applicable solely to the District of Columbia.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96–170 applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after Dec. 29, 1979, see section 3 of Pub. L. 96–170, set out as a note under section 1343 of Title 28, Judiciary and Judicial Procedure.

§ 1984. Omitted

CODIFICATION

Section, act Mar. 1, 1875, ch. 114, § 5, 18 Stat. 337, which was formerly classified to section 46 of Title 8, Aliens and Nationality, related to Supreme Court review of cases arising under act Mar. 1, 1875. Sections 1 and 2 of act Mar. 1, 1875 were declared unconstitutional in *U.S. v. Singleton*, 109 U.S. 3, and sections 3 and 4 of such act were repealed by act June 25, 1948, ch. 645, § 21, 62 Stat. 862.

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(R.S. § 1980.)

CODIFICATION

R.S. § 1980 derived from acts July 31, 1861, ch. 33, 12 Stat. 284; Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13.

Section was formerly classified to section 47 of Title 8, Aliens and Nationality.

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not

Title 17: Health

Chapter 1: Department of Health and Mental Hygiene

§ 17-101 Definitions.

Whenever used in this title the following terms shall have the following meanings:

(a) "Board" means the board of health.

(b) "Commissioner" means the commissioner of the department of health and mental hygiene.

(c) "Department" means the department of health and mental hygiene.

§ 17-102 Secretary; certification by chief clerk.

a. The secretary of the department, subject to the direction of the commissioner, shall keep and authenticate the acts, records, papers and proceedings of the department, preserve its books and papers, conduct its correspondence, and aid generally in accomplishing the purposes of the department.

b. Papers certified by the chief clerk of the department or by an assistant chief clerk shall be of the same effect as evidence and otherwise, as if certified by the secretary.

§ 17-103 Proofs and affidavits.

Proofs, affidavits and examinations as to any matter under the jurisdiction of the department may be taken by or before the board or other person as the commissioner or board shall authorize. The commissioner, the secretary and any member of the department, shall, severally have authority to administer oaths in such matters.

§ 17-104 Measures to prevent the spread of disease.

a. It shall be the duty of the department:

1. To cause any avenue, street, alley or other passage whatever, to be fenced up or otherwise inclosed if it shall deem the public safety requires it, and to adopt suitable measures for preventing all persons from going to any part of the city so inclosed;

2. To forbid all communication with the house or family infected with any communicable disease except by means of physicians, nurses or messengers to carry the necessary advice, medicines and provisions to the afflicted;

3. To adopt such means for preventing all communication between any part of the city infected with a disease of communicable character and all other parts of the city, as shall be prompt and effectual.

b. Failure to comply with the provisions adopted by the department pursuant to this section shall constitute a misdemeanor, punishable by a fine of not exceeding two hundred fifty dollars, or imprisonment not exceeding six months, or both.

§ 17-105 Commercial paper during epidemic; duties of city clerk.

a. Whenever the board of health, by public notice, shall designate any portion or district of the city as being the seat of any infectious or contagious disease, and declare communication with such portion or district to be dangerous, or shall prohibit such communication, the city clerk, during the continuance of such disease in such district, shall provide and keep in his or her office a book for the purpose of registering in alphabetical order, the names, firms and places of business of any inhabitant of the city who shall request such registry to be made.

b. All persons and firms usually resident or doing business within such infected district shall register, in the books so provided, their names or firms, with the place or places out of such infected district, but within the city to which they may have removed the transaction of their business, or to

firms, with the place or places out of such infected district, but within the city to which they may have removed the transaction of their business, or to which they may desire any notices to be sent or served, or any notes, drafts, or bills to be presented for acceptance or for payment. Twenty-five cents may be claimed and received by the city clerk for every such registry; but the book in which the same shall be entered shall be open to public examination free of all charges at all times during office hours.

c. During the continuance of any such disease in such infected district, all drafts, notes and bills, which by law are required to be presented for acceptance or for payment, may be presented for such purpose at the place so designated in such registry, and all notices of nonacceptance and non-payment of any note, draft or bill, or of protest for such non-acceptance or non-payment, may be served by leaving the same at the place so designated.

d. In case any person or firm usually resident or doing business within such infected district shall neglect to make and cause to be entered in the book so provided, the registry herein required, all notes, drafts or bills which by law are required to be presented to such person or firm for acceptance or for payment, may be presented to the city clerk during the continuance of such disease, at any time during office hours, and demand of acceptance or payment thereof may be made of such city clerk, to the same purpose and with the same effect as if the same had been presented and acceptance or payment demanded of such person or firm at their usual place of doing business.

e. In case of omission to make the registry herein required, all notices of the non-acceptance or non-payment of any note, draft, or bill, or of protest for such non-acceptance or non-payment, may be served on any person or firm usually resident or doing business within such infected district, by leaving the same at one of the post-offices in the city. Such service shall be as valid and effectual as if the notices had been served personally on such person or one of such firm at his, her or their usual place of doing business.

f. Whenever proclamation shall be made by the board of health, that an infectious or contagious disease in any infected district has subsided, it shall be deemed to have subsided for all purposes contemplated in this section.

§ 17-106 Inspection of sick; reports.

Any officer or employee of the department may visit any person who shall be reported to the department as being apparently or presumably sick of any communicable disease and report his or her opinion of such sickness to it in writing.

§ 17-107 Inspection of vessels; removal; violation of orders, punishment for.

a. An officer or employee of the department shall visit and inspect all vessels coming to the wharves, landing places, or shores of the city, or within three hundred yards thereof, which are suspected of having on board any communicable disease, or of being likely to communicate such disease to the inhabitants of the city. Such officer or employee shall report in writing, stating the vessel so inspected and the nature, state, and situation thereof, and his or her opinion as to the probability of disease being communicated by or from the same, and shall file such report in the main office of the department.

b. If the department deem it probable that any such disease may be brought into the city or communicated to the inhabitants thereof, it may by order direct any vessel lying at a place within three hundred yards of any wharf, landing place or shore of the city to be removed at least three hundred yards therefrom within six hours after a copy of such order, certified by the secretary of the department, shall be delivered to the person or persons having command of such vessel, or to the master, owner or consignee thereof. Every person to whom such copy of such order shall be delivered shall forthwith comply with the same.

c. Failure to comply with the provisions of this section shall constitute a misdemeanor, punishable by a fine of not exceeding two hundred fifty dollars, or imprisonment not exceeding six months, or both.

§ 17-108 Infected places outside the city; proclamation.

a. The board may issue a proclamation declaring any place where there shall be reason to believe a communicable disease actually exists, to be an infected place within the meaning of the health laws of this state. Such proclamation shall fix the time when it shall cease to have effect but such period, from time to time, may be extended by the board if it shall judge the public health to require such extension. Notice of an extension shall be published in one or more newspapers of the city.

b. After such proclamation shall have been issued, all vessels arriving in the port of New York from such infected place shall be subject to a quarantine of at least thirty days or until the termination of the proclamation period, and together with their officers, crews, passengers and cargoes, shall be subject to all the provisions, regulations and penalties in relation to vessels subject to quarantine.

c. The board may prohibit or regulate the internal intercourse by land or water between the city and the infected place; and may direct that all persons who come into the city contrary to its prohibition or regulations shall be apprehended and conveyed to the vessel or places from where they last came, or if sick, to such place as the board shall direct.

d. Failure to comply with the provisions of this section shall constitute a misdemeanor, punishable by a fine of not exceeding two hundred fifty dollars, or imprisonment not exceeding six months, or both.

§ 17-109 Vaccinations.

a. The department is empowered to collect and preserve pure vaccine lymph or virus, produce diphtheria antitoxin and other vaccines and antitoxins, and add necessary additional provisions to the health code in order to most effectively prevent the spread of communicable diseases.

b. The department may take measures, and supply agents and offer inducements and facilities for general and gratuitous vaccination, disinfection, and for the use of diphtheria antitoxin and other vaccines and antitoxins.

§ 17-110 Sale and exchange of lymph and antitoxin.

a. The department may authorize the sale at reasonable rates to be fixed by it, of surplus vaccine lymph, virus, diphtheria antitoxin and other vaccines and antitoxins, when the amount collected shall exceed the amount required by it in the proper performance of its duties. The avails of such sales shall be credited by the department to the general fund of the city of New York and included in its semi-monthly transmission of revenue collections to the commissioner of finance of the city of New York.

b. The bureau of laboratories of the department may also exchange, upon authority and approval of the commissioner, and upon the written approval of the mayor, a portion of its laboratory products for other and different laboratory products, manufactured by the laboratories of the United States government and of other cities and laboratories, which the department may need for the prevention of the spread of disease.

§ 17-111 Appropriation for prevention of communicable diseases.

The city shall appropriate funds for the use of the department, for the prevention of dangers from communicable diseases found to exist in any part of the city, or for the care of persons exposed to danger from communicable diseases.

§ 17-112 Publication of reports and statistics.

The department, to promote the public good and public service, may establish reasonable regulations as to the publicity of any of its papers, files, reports, records and proceedings; and may publish such information as, in its opinion, may be useful, concerning births, deaths, marriages, sickness and the general sanitary conditions of the city, or any matter, place or thing therein.

§ 17-113 Repairs of buildings; removal of obstructions; regulation of public markets.

a. The powers of the department shall include the ordering and enforcing in the same manner as other orders are provided to be enforced, the repairs of buildings, houses and other structures; the regulation and control of all public markets in relation to the cleanliness, ventilation and drainage thereof and the prevention of sale or offering for sale of improper articles; the removal of any obstruction, matter or thing in or upon the public streets, sidewalks or places, which, in the opinion of the department, may lead to conditions dangerous to life or health; the prevention of accidents by which life or health may be endangered; and generally the abatement of all nuisances.

b. The department shall possess full power with reference to the ventilation, drainage and cleanliness, of the stands or stalls in or around all markets.

§ 17-114 Nuisances; abatement without suit.

The department shall have within the city all common law rights to abate any nuisance without suit, which can or does in this state belong to any person.

§ 17-115 Right of inspection.

It is hereby made the duty of all departments, officers, and agents, having the control, charge or custody of any public structure, work, ground, or erection, or of any plan, description, outline, drawing or charts thereof, or relating thereto, made, kept or controlled under any public authority, to permit and facilitate the examination and inspection, and the making of copies of the same by any officer or person, authorized to do so by the department of health and mental hygiene.

§ 17-116 Medical examiners' returns.

The department, from time to time may make rules and regulations fixing the time of rendering, and defining the form of returns and reports to be made to it by the chief medical examiner, in all cases of death which shall be investigated by him or her. The chief medical examiner shall conform to such rules and regulations.

§ 17-117 Removal of bodies.

a. It shall be the duty of the department upon receiving a certificate of death, made in accordance with its rules, to grant a permit for the removal from the city of the body of the person described in such certificate if such body has not been buried

from the city, of the body of the person described in such certificate if such body has not been buried.

b. It may grant a permit for the removal of the remains of any person interred within the city to a place without the city, on the application of a relative or friend of such person, when there shall appear to be no just objection to the same.

§ 17-118 Putrid cargoes, et cetera, may be destroyed.

The department, when it shall judge it necessary, may cause any cargo or part thereof, or any matter or thing within the city, that may be putrid or otherwise dangerous to the public health, to be destroyed or removed. Such removal, when ordered, shall be to such place as the department shall direct; such removal or destruction shall be made at the expense of the owner or owners of the property so removed or destroyed. Money expended for the same may be recovered from such owner or owners, in an action at law by the department.

§ 17-119 Drainage; orders therefor; maps.

a. Whenever in its opinion the protection of the public health requires the drainage of any lands in the city, by means other than sewers, the department may make an order describing the location of such lands, and directing the proper drainage thereof, and construction of drains therefor, by the commissioner of design and construction.

b. The department after making such order, shall cause a map to be made on which shall be shown the location of such proposed drains and the lands required for the construction thereof.

c. The order shall be entered at length in the records of the department and a copy thereof shall be delivered to the commissioner of design and construction.

d. The map shall be filed in the department. A copy thereof shall be filed in the office of the register or county clerk of the county in which the lands are situated; another copy thereof shall be filed with the borough president of the borough in which the lands are situated; another copy with the copy of the order shall be filed with the commissioner of design and construction, who shall immediately thereafter have the power, and is hereby directed to make and adopt proper and suitable plans for the construction of such drains.

Editor's note: For related unconsolidated provisions, see Appendix A at L.L. 1996/059.

§ 17-120 Orders for paving, et cetera, yards and cellars; notice.

An order for the paving, filling, concreting, draining or regulating of any yards or cellars within the city shall be made by the department only upon reasonable notice to the owner or agent thereof.

§ 17-121 Care and treatment of physically handicapped children.

a. As used in this section, the following terms shall mean or include:

1. "Physically handicapped child." A person under twenty-one years of age who, by reason of a physical defect or infirmity, whether congenital or acquired by accident, injury or disease, is or may be expected to be totally or partially incapacitated for education or for remunerative occupation.

2. "Legally responsible relatives." The parent or parents of a physically handicapped child or any other person or persons liable under the law for the support of such child.

3. "Legal custodian." The parent or parents of a physically handicapped child having lawful custody of such child, or any other person or persons having lawful custody of such child.

b. Whenever the commissioner shall find, after investigation, that any physically handicapped child is in need of surgical, medical or therapeutic treatment or hospital care or appliances or devices, the commissioner, upon the request or with the consent of the legal custodian of such child, may order such surgical, medical or therapeutic treatment, hospital care or appliances or devices, and after investigation as provided in subdivision c hereof, may order the legally responsible relatives to pay the cost thereof.

c. The commissioner shall investigate the financial responsibility of the legally responsible relatives of such physically handicapped child. If the commissioner shall find, after such investigation, that the legally responsible relatives of such child are able to pay the whole or any part of the cost of such treatment, care or appliances and devices, and if such legally responsible relatives shall fail or refuse to comply with an order of the commissioner requiring them to pay the whole or any part of such cost, he or she may institute a proceeding in the family court of the state of New York within the city of New York, pursuant to the provisions of sections two hundred thirty-two through two hundred thirty-five of the family court act. Such a proceeding may likewise be instituted in the absence of an order requiring payment, where ability to pay is found.

§ 17-122 Judicial notice of seal and presumptions.

All courts shall take judicial notice of the seal of the department and of the signature of its secretary, chief clerk and assistant chief clerks.

§ 17-123 Window guards; notification to tenants

§ 17-123 Window guards; notification to tenants

a. All leases offered to tenants in multiple dwellings must contain a notice, conspicuously set forth therein, which advises tenants of the obligation of the owner, lessee, agent or other person who manages or controls a multiple dwelling to install window guards, and where further information regarding the procurement of such window guards is available.

SPA - 14

Education Law

Article 131, Medicine

Effective June 18, 2010

§6520. Introduction.

This article applies to the profession of medicine. The general provisions for all professions contained in article one hundred thirty of this title apply to this article.

§6521. Definition of practice of medicine.

The practice of the profession of medicine is defined as diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition.

§6522. Practice of medicine and use of title "physician".

Only a person licensed or otherwise authorized under this article shall practice medicine or use the title "physician".

§6523. State board for medicine.

A state board for medicine shall be appointed by the board of regents on recommendation of the commissioner for the purpose of assisting the board of regents and the department on matters of professional licensing in accordance with section sixty-five hundred eight of this title. The board shall be composed of not less than twenty physicians licensed in this state for at least five years, two of whom shall be doctors of osteopathy. To the extent such physician appointees are available for appointment, at least one of the physician appointees to the state board for medicine shall be an expert on reducing health disparities among demographic subgroups, and one shall be an expert on women's health. The board shall also consist of not less than two physician's assistants licensed to practice in this state. The participation of physician's assistant members shall be limited to matters relating to article one hundred thirty-one-B of this chapter. An executive secretary to the board shall be appointed by the board of regents on recommendation of the commissioner and shall be either a physician licensed in this state or a non-physician, deemed qualified by the commissioner and board of regents.

§6524. Requirements for a professional license.

To qualify for a license as a physician, an applicant shall fulfill the following requirements:

1. Application: file an application with the department;
2. Education: have received an education, including a degree of doctor of medicine, "M.D.", or doctor of osteopathy, "D.O.", or equivalent degree in accordance with the commissioner's regulations;
3. Experience: have experience satisfactory to the board and in accordance with the commissioner's regulations;
4. Examination: pass an examination satisfactory to the board and in accordance with the commissioner's regulations;
5. Age: be at least twenty-one years of age; however, the commissioner may waive the age requirement for applicants who have attained the age of eighteen and will be in a residency program until the age of twenty-one;
6. Citizenship or immigration status: be a United States citizen or an alien lawfully admitted for permanent residence in the United States; provided, however that the board of regents may grant a three year waiver for an alien physician to practice in an area which has been designated by the department as medically underserved, except that the board of regents may grant an additional extension not to exceed six years to an alien physician to enable him or her to secure citizenship or permanent resident status, provided such status is being actively pursued; and provided further that the board of regents may grant an additional three year waiver, and at its expiration, an extension for a period not to exceed six additional years, for the holder of an H-1b visa, an O-1 visa, or an equivalent or successor visa thereto;
7. Character: be of good moral character as determined by the department; and
8. Fees: pay a fee of two hundred sixty dollars to the department for admission to a department conducted examination and for an initial license, a fee of one hundred seventy-five dollars for each reexamination, a fee of one hundred thirty-five dollars for an initial license for persons not requiring admission to a department conducted examination, a fee of five hundred seventy dollars for any biennial registration period commencing August first, nineteen hundred ninety-six and thereafter. The comptroller is hereby authorized and

UNAUTHORIZED PRACTICE OF A PROFESSION
(E Felony)
EDUCATION LAW 6512 (1)

The (*specify)* count is Unauthorized Practice of a Profession.

Under our law, a person is guilty of the Unauthorized Practice of a Profession when he or she,

Select the appropriate alternative:

not being authorized to practice (*specify profession*) for which a license is a prerequisite, practices or offers to practice or holds himself or herself out as being able to practice *(specify profession).*

practices (*specify the profession*) as an exempt person during the time when his or her professional license is suspended, revoked or annulled.

aids or abets an unlicensed person to practice (*specify the profession*).[1]

fraudulently sells, files, furnishes, obtains, or who attempts fraudulently to sell, file, furnish or obtain any diploma,

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[1] *People v Santi*, 3 NY3d 234 (2004) explained: "In interpreting the statute we are guided by a well-settled principle of statutory construction: courts normally accord statutes their plain meaning, but 'will not blindly apply the words of a statute to arrive at an unreasonable or absurd result'. Indeed, '[t]he primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature'. Legislative intent drives judicial interpretations in matters of statutory construction . . . If the phrase 'not authorized to practice under this title' modified the pronoun '[a]nyone' as defendant urges, the statute would necessarily be applied in an unreasonable manner . . . We conclude that Education Law § 6512 (1) does not exempt licensed physicians from prosecution under the statute. To the contrary, section 6512 (1) allows for the prosecution of any individual, licensed or not, that aids and abets an unauthorized individual in the practice of medicine."

license, record or permit purporting to authorize the practice of (*specify the profession*).

The following terms used in that definition have a special meaning:

To "practice" the profession of (*specify the object profession*) means to (*read the applicable portion of the statutory definition of the object profession*)[2].

[An "exempt person" is (*read the applicable portion of the statutory definition for the object profession*)[3].]

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in this case, beyond a reasonable doubt, each of the following two elements:

1. That on or about (*date*), in the County of (*County*), the defendant, (*defendant's name*),

Select the appropriate element two:

2. not being authorized to practice (*specify the profession*) for which a license is a prerequisite, practiced or offered to practice or held himself or herself out as being able to practice *(specify the profession).*

2. practiced (*specify the profession*) as an exempt person during the time when his or her professional license was suspended, revoked or annulled.

2. aided or abetted an unlicensed person to practice (*specify the profession*).

2. fraudulently sold, filed, furnished, obtained, or attempted

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[2] See Education Law §§ 6500 - 8800 for definitions of each profession.

[3] See Education Law §§ 6500 - 8800 for definitions of each profession.

fraudulently to sell, file, furnish or obtain any diploma, license, record or permit purporting to authorize the practice of (*specify the profession*).

If you find the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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Amoura Bryan,

Plaintiff,

MEMORANDUM & ORDER
22-cv-2234(EK)(LB)

-against-

City of New York et al.,

Defendants.

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ERIC KOMITEE, United States District Judge:

This case was initially filed as a putative class action challenging several New York City orders requiring City employees to receive COVID-19 vaccinations. *See* Fourth Am. Compl., ECF No. 88; Orders, ECF Nos. 17-19 to 17-27. On September 25, 2024, this Court granted Defendants' motion to dismiss all claims except for Plaintiff Amoura Bryan's Title VII and New York City Human Rights Law claims. *See* Mem. & Order, ECF No. 99. Bryan alleged that Defendants failed to accommodate her religious objection to receiving the COVID-19 vaccination, which was mandatory for New York City employees. *Id.* at 19-20, 22-23.[1]

Following the decision on the motion to dismiss, class counsel sought to withdraw from representing Ms. Bryan. *See*

[1] As Ms. Bryan is the only remaining plaintiff, the Clerk of Court is respectfully directed to amend the case caption as indicated above.

Mot. to Withdraw, ECF No. 102; Saint-George Decl., ECF No. 106. After Ms. Bryan indicated that she did not wish to be represented by that counsel, the Court permitted counsel's withdrawal. *See* Let., ECF No. 107; Oct. 30, 2024 Order. Class counsel has continued to represent all other (now dismissed) plaintiffs. *See, e.g.*, Mot. for Misjoinder, ECF No. 120.

Class counsel has filed a motion seeking the Court's disqualification under 28 U.S.C. § 455. *See* Mot. for Recusal, ECF No. 110. Defendants have also sought reconsideration of the Court's ruling on Ms. Bryan's claims. *See* Mot. for Reconsider., ECF No. 100. Ms. Bryan has responded, now representing herself. *See* ECF No. 121. For the following reasons, the motion for disqualification is denied, and the motion for reconsideration is granted. This case will be dismissed.

I. Disqualification is Denied

The precise basis for the motion for recusal is difficult to discern, but it cites my supposed "extrajudicial involvement in the commercialization" of "the Moderna Technology mRNA vaccine." Mot. for Recusal 2. The motion also invokes my "financial equity ownership in Moderna" through a fund managed by my former employer. *Id.*[2] The motion is denied.

[2] The motion also alleges that the Court's "dismissal of Plaintiffs' individual fraud claims against Mayor Adams after his indictment looks like a cover-up and appears that your may [sic] have been bribed to dismiss Plaintiffs [sic] case against Mayor Adams to also cover up your own self-

First, Section 455(d)(4) provides a safe harbor for securities held through a "mutual or common investment fund," and that provision applies here. Plaintiffs do not point to any direct investment in Moderna (and I have made none). Instead, the motion speaks to my "equity ownership in Moderna through [my] ownership of Viking [Global] Equities," which is a diversified investment fund. *See generally United States v. Watson*, No. 23-CR-82, 2024 WL 4827734, at *8-11 (E.D.N.Y. Nov. 19, 2024).

The disqualification motion points to a press release indicating that one or more funds managed by my former employer invested in Moderna in early 2018, when it was still a private company. Moderna went public in December 2018, well before the pandemic. Thus, by the time of a COVID vaccine's development, any interest I *might have had* in Moderna would have been indirect: an investment in a common investment fund that, in turn, held shares in a publicly traded company. This is no different than mutual fund ownership, and it is well settled that no recusal obligation arises in these circumstances.

In any event, the motion does not describe how this litigation, which began in 2022, might even theoretically have affected the value of Moderna's stock. Moderna is not a party

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dealing in this case because [etc.]." Mot. for Recusal 3. This assertion does not warrant a response.

here. Nor is it alleged to be a victim. And the vaccine mandates that the complaint challenged have long since expired. *See* Order of the Board of Health to Amend the Requirement for COVID-19 Vaccination for City Employees and Employees of Certain City Contractors (repealing vaccination requirements on Feb. 9, 2023); Order of the Board of Health Amending COVID-19 Vaccination Requirements for Department of Education Employees, Contractors, Visitors and Others (same).

The motion also nods in the direction of Section 455(a)'s general provision regarding the appearance of partiality. But it is settled that, when the safe harbor of Section 455(d) applies, Section 455(a) cannot be used to circumvent it in respect of an investment in a common investment fund. *See Liteky v. United States,* 510 U.S. 540, 552 (1994); *New York City Dev. Corp. v. Hart,* 796 F.2d 976, 980 (7th Cir. 1986).[3]

Thus, the motion for recusal is denied. Plaintiffs also filed a motion to vacate the Order adjudicating the motion to dismiss, contingent on the Court granting the motion for

[3] Finally, Plaintiffs allege that I should recuse because I did not investigate and sanction defense counsel for "fraud on the Court." Mot. for Recusal 18. But defense counsel did no such thing. Plaintiffs merely disagree with the Defendants' position that the Occupational Safety and Health Act lacks a private right of action. *See id.* In the Order on the motion to dismiss, I agreed with Defendants. Mem. & Order 10, ECF No. 99. And "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky*, 510 U.S. at 555.

recusal. *See* Mot. to Vacate 30, ECF No. 109. As the latter is denied, the former is as well.

II. Reconsideration is Granted

The standard for granting a motion for reconsideration is strict. "[R]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).[4]

Defendants do indeed point to such data. They assert that Ms. Bryan's remaining Title VII and New York City Human Rights Law ("NYCHRL") claims are barred by the doctrine of *res judicata* because of a previously adjudicated case in which she was a plaintiff. Under that doctrine, a plaintiff is precluded from relitigating claims where "(1) the previous action involved an adjudication of the merits; (2) the previous action involved the same plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000).

[4] Unless otherwise noted, when quoting judicial decisions this order accepts all alterations and omits all citations, footnotes, and internal quotation marks.

The case the Defendants cite satisfies these conditions. Amidst the hundreds of pages comprising multiple complaints, exhibits, and briefs, Defendants had referenced Ms. Bryan's participation in *Kane v. De Blasio*, 623 F. Supp. 3d 339 (S.D.N.Y. 2022), *aff'd in part, vacated in part, remanded sub nom. New Yorkers For Religious Liberty, Inc. v. City of New York*, 121 F.4th 448 (2d Cir. 2024), and *aff'd in part, vacated in part, remanded sub nom. New Yorkers for Religious Liberty, Inc. v. New York*, 125 F.4th 319 (2d Cir. 2024).[5]

Ms. Bryan acknowledges that she was a plaintiff in *Kane*. *See* Opp'n 3; *see also* Consolidated Am. Compl. ¶ 38, *Kane*, 623 F. Supp. 3d 339 (No. 21-cv-7863), ECF No. 102 (showing Ms. Bryan as a named plaintiff); *New Yorkers for Religious Liberty*, 125 F.4th at 325 n.1 (identifying Ms. Bryan as a plaintiff).

Kane adjudicated all federal claims on the merits: they were dismissed with prejudice. *See Kane*, 623 F. Supp. 3d at 364. "A dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant and bars

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[5] *Kane* was consolidated with *Keil v. City of New York*, No. 21-cv-8773 (S.D.N.Y.) on December 14, 2021. *See* Order, Dec. 14, 2021, ECF No. 90. Additionally, the vacated sections of the *Kane* district court opinion are not applicable to Ms. Bryan. *See New Yorkers for Religious Liberty*, 125 F.4th at 334-35 (reversing denial of two plaintiffs' as-applied challenges to the vaccine mandates).

Ms. Bryan was also a plaintiff in *Broecker v. N.Y. City Dep't. of Educ.*, No. 21-CV-6387, 2023 WL 2710245 (E.D.N.Y. 2023), *aff'd* 2023 WL 8888588 (2d Cir. 2023); and *Matter of Bryan v. Board of Education of the City School District of the City of N.Y.*, 222 A.D.3d 473 (N.Y. App. Div. 1st Dep't 2023). However, the Court need not analyze all three cases for *res judicata* — one is sufficient.

future suits brought by plaintiff upon the same cause of action." *Samuels v. N. Telecom, Inc.*, 942 F.2d 834, 836 (2d Cir. 1991). Plaintiffs also brought a NYCHRL claim in *Kane*. *See* Consolidated Am. Compl. ¶¶ 929-42. However, the Court declined to exercise supplemental jurisdiction over state law claims, which is a dismissal without prejudice. *See Kane*, 623 F. Supp. 3d at 364; *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, (1988).

Ms. Bryan had brought a Title VII claim in *Kane*. The *Kane* consolidated amended complaint did not include an explicit claim for relief under Title VII. However, it contained a cause of action for "Violation of Amoura Bryan's Constitutional and Statutory Rights," and discussed Title VII at length. *See* Consolidated Am. Compl. ¶¶ 894-95 (Bryan claim); *id.* ¶¶ 101, 132, 139, 155, 202, 803, 817, 936, 939-40, 949, 952 (Title VII). In turn, the *Kane* court adjudicated Ms. Bryan's claim pursuant to Title VII. *See Kane*, 623 F. Supp. 3d at 362-63.

Plaintiff's Title VII claim here is virtually identical to that in *Kane.* In both cases, she alleged that a) compulsory COVID-19 vaccination conflicted with her sincerely held religious beliefs; and b) she was denied reasonable accommodations from the City's vaccine mandates. *See* Mem. & Order 19-20; Consolidated Am. Compl. ¶¶ 690-731. *Kane* also addresses one of the same City mandate orders as discussed in

the case here. *See* Mem. & Order 3; *Kane*, 623 F. Supp. 3d at 347.

Moreover, though *Kane* was not an adjudication of Ms. Bryan's NYCHRL claim on the merits, her NYCHRL claim in this action is still barred by *res judicata*. "Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *Monahan,* 214 F.3d at 28. Ms. Bryan's *Kane* Title VII claim arises from the identical transaction as her NYCHRL claim does here: her religious objection to COVID-19 vaccination and denial of accommodations from the mandates. Indeed, in *Kane,* Bryan alleged a more detailed version of the facts than emerged here; the essential facts were present in the earlier action, and she has made the same NYCHRL claim twice in federal court. *See* Mem. & Order 22-23; Consolidated Am. Compl. ¶¶ 690-731; *see also Twersky v. Yeshiva Univ.,* 112 F. Supp. 3d 173, 179-80 (S.D.N.Y. 2015), *aff'd sub nom. Gutman v. Yeshiva Univ.*, 637 F. App'x 48 (2d Cir. 2016) (finding that plaintiffs' NYCHRL and N.Y. Social Services Law claims were barred by their Title IX claim in a prior action).

Therefore, Ms. Bryan's Title VII and NYCHRL claims are barred by *res judicata*. The Court need not reach Defendants'

other arguments for reconsideration, as all claims against Defendants are dismissed. The Clerk of Court is respectfully directed to close this case.

SO ORDERED.

/s/ Eric Komitee
ERIC KOMITEE
United States District Judge

Dated: March 25, 2025
Brooklyn, New York