



**National
Nurses
United**

The National Voice for Direct-Care RNs

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Sent via electronic mail and U.S. mail

Mr. James Wulff
Acting Regional Administrator
Region 9
Occupational Safety and Health Administration
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RE: CASPA regarding the failure of Arizona's State Plan to be "as effective as" Federal OSHA

Dear Acting Regional Administrator Wulff:

National Nurses United (NNU) is the largest labor union and professional association for registered nurses in the United States, with over 175,000 members nationwide and 750 members in Arizona who are represented by our affiliate, National Nurses Organizing Committee (NNOC). On behalf of NNU's members and nurses in Arizona, I am writing to submit a Complaint Against a State Plan Administration (CASPA) regarding the failure of Arizona's Division of Occupational Safety and Health (ADOSH) to meet the legal requirements to be "at least as effective" as the Federal Occupational Safety and Health Administration (Federal OSHA).

On June 21, 2021, Federal OSHA recognized the grave danger posed to health care workers by the Covid-19 pandemic and promulgated the Covid-19 Healthcare Emergency Temporary Standard (Covid-19 Healthcare ETS) requiring health care employers to implement comprehensive infection control plans.¹ State Plans were given 30 days to adopt an emergency temporary standard at least as effective as Federal OSHA's Covid-19 Healthcare ETS.² It is now 72 days past that deadline and Arizona's OSHA State Plan, ADOSH, has failed to adopt a similar or higher standard. ADOSH is thus violating legal requirements established for OSHA State Plans and knowingly placing nurses and other health care workers in Arizona in grave danger.

As the Acting Regional Administrator, you and your staff have the authority and responsibility to accept, investigate, and respond to CASPAs regarding State Plans in your

¹ 86 Fed. Reg. 32376-32628 (June 21, 2021)

² 29 CFR §1953.5(b)(1)

region.³ I urge you to take prompt action to investigate this CASPA and to hold ADOSH to the minimum legal requirements for State Plans.

Grounds for the CASPA Regarding ADOSH’s Failure to be “At Least As Effective” as Federal OSHA

ADOSH Has Not Provided for “Prompt and Effective” Standard-Setting and Has Failed to Meet the Deadline to Adopt the Covid-19 Healthcare ETS

In 1970, the U.S. Congress passed the Occupational Safety and Health Act, requiring that “each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.”⁴ Congress afforded states the ability to administer their own occupational safety and health enforcement programs so long as they “are at least as effective in providing safe and healthful employment and places of employment” as the Federal OSHA program.⁵ Since 1974, Arizona has enforced workers’ right to safe and healthful work through a State OSHA Plan, ADOSH.

Arizona’s State Plan no longer meets the requirements for State Plans to be “at least as effective” as Federal OSHA. The U.S. Code of Federal Regulations provides specific criteria to judge whether State Plans are “at least as effective as” Federal OSHA, including criteria on standards, administrative procedures, and staffing and personnel.⁶ Specifically, State Plans are required to promulgate standards on the same issues and provide for protections at least as effective as those promulgated by Federal OSHA, including providing for “prompt and effective standards setting actions for the protection of employees against new and unforeseen hazards, by such means as the authority to promulgate emergency temporary standards.”^{7,8}

ADOSH has failed to take any public action to adopt a standard at least as effective as the Covid-19 Healthcare ETS, and no other occupational safety and health standards in Arizona provide similar protections to the Covid-19 Healthcare ETS.⁹ It is now 72 days past the deadline provided by Federal OSHA’s Covid-19 Healthcare ETS. Each day of ADOSH’s inaction puts the lives of Arizona’s nurses and other health care workers at risk as the Covid-19 pandemic continues.

³ 29 CFR §1954.20

⁴ 29 U.S.C. §654 (a)(1)

⁵ 29 U.S.C. §667

⁶ 29 CFR §1902.3

⁷ 29 CFR §1902.3(c)(1)

⁸ 29 CFR §1902.4(b)(2)(i) and (b)(2)(v)

⁹ Arizona’s Administrative Code incorporates by reference all Federal OSHA General Industry Standards (29 CFR 1910) as of July 6, 2018 (A.A.C. R20-5-602). The most recent amendment was effective February 11, 2020 and did not include standards addressing Covid-related hazards (26 A.A.R. 373).

Arizona Health Care Employers Continue to Put Nurses and Other Health Care Workers at Risk of Covid-19 and ADOSH Fails to Protect Those Workers

Despite the essential and critical care work that nurses and other health care workers have and continue to provide during the Covid-19 pandemic, their health and safety are not being treated as essential. Health care employers in Arizona continue to fail to implement Covid-19 plans and other requirements of the Covid-19 Healthcare ETS.

National Nurses Organizing Committee/NNU (NNOC/NNU) is the collective bargaining representative for registered nurses at Carondelet St. Mary's Hospital and St. Joseph's Hospital Medical Center in Tucson. While some critical improvements have been made at these facilities, it continues to be a struggle with these employers to ensure that nurses have the protections they need to care for their patients safely during the Covid-19 pandemic. It is important to note that many of the gains that have been made on Covid-19 infection control in these facilities would not have happened had the nurses not fought for them throughout 2020 and early 2021. Infection control issues persist in these hospitals, as reported to NNOC/NNU by bargaining unit members:

- The health care employers failed to provide the union with a written plan when requested, even after Federal OSHA promulgated the Covid-19 Healthcare ETS. It was not until September 14, 2021, that the union received a written plan—more than two months after the federal implementation deadline. Even with the delay, the written plan is deficient in multiple ways:
 - Written plan contains very little detail. Most of the language is written in the future tense, e.g., “the employer will,” and does not provide required information regarding current policies and procedures for Covid-19 infection control.
 - Required hazard assessments were not attached to the plan.
 - Insufficient information is provided regarding PPE policies and procedures for Covid-19.
 - The employer's definition of aerosol-generating procedures is more limited than the Covid-19 Healthcare ETS requires.
 - The medical removal and medical removal protection benefits sections of the plan do not meet the Covid-19 Healthcare ETS requirements.
- While nurses do receive N95 filtering facepiece respirators (FFR) for single-use with patients with suspected and confirmed Covid-19, this was only possible because nurses took collective action and fought for single-use.
- Issues with personal protective equipment (PPE) remain.
 - Nurses who are not able to find an available N95 FFR model that passes a fit test are provided powered air-purifying respirators (PAPRs). However, nine nurses are expected to share one single PAPR hood.
 - When new N95 FFR models are introduced, there is no additional fit testing being performed despite the union repeatedly notifying management that this is a requirement.
- Ventilation in patient rooms is frequently lacking because the air-conditioning system is consistently broken and lacks sufficient fans to provide air circulation.

- Not all patients are screened or tested for Covid-19 prior to admission due to short staffing, including in the Emergency Department.
- Patients who are under investigation for Covid-19, who have not been tested for Covid-19, and Covid-positive patients on respiratory therapy are still receiving visitors.
- The employers continue to fail to notify employees of exposures. Often, nurses find out that they had a recent close contact exposure with a Covid-positive individual only by word of mouth from colleagues.
- The union's requests for the employer's log of employee Covid-19 cases took more than two months to provide and the information provided is limited.

NNU has attempted to seek enforcement by ADOSH regarding these issues, but ADOSH has thus far insisted that Covid-related protections are not required in Arizona. Specifically, in response to a complaint filed by NNOC/NNU regarding Covid-19 hazards at Carondelet St. Mary's Hospital, ADOSH Director Jessie Atencio responded in an email by stating: "At this time, ADOSH has not adopted the Federal ETS for Covid, although our Commission is going through the process and much of what you provided is not required by any employer in the state of Arizona."¹⁰ ADOSH's current enforcement related to Covid-19 is lacking.

Federal OSHA issued an emergency temporary standard exactly because it determined that existing enforcement tools were inadequate and that an emergency temporary standard was necessary to protect health care workers from the grave danger posed by the Covid-19 pandemic.¹¹ Immediate action is required by the Industrial Commission of Arizona and ADOSH to adopt and enforce the Covid-19 Healthcare ETS.

ADOSH Must Take Immediate Action to Protect Non-Union Nurses and Other Health Care Workers

Further, NNOC/NNU, as the largest union and professional association for registered nurses in the U.S., is also concerned with the health and safety of non-represented nurses and other health care workers. To this end, NNOC/NNU has conducted repeated surveys of both union and non-union nurses regarding Covid-19 infection control practices in their workplaces. NNU's most recent Covid-19 survey from June and July 2021 shows that employers needed to make significant improvements to comply with the OSHA Covid-19 Healthcare ETS, including in Arizona:¹²

- Only 30% of respondents from Arizona report that nurses are informed of exposures in a timely fashion; 18% report that nurses are informed of exposures but not in a timely fashion and 21% report that nurses are not informed of exposures.

¹⁰ The statement by ADOSH Director Jessie Atencio was sent by electronic mail to NNOC Labor Representative, Sean Armil, on September 21, 2021. A copy of this email can be provided upon request.

¹¹ 86 Fed. Reg. 32,376 (June 21, 2021)

¹² National Nurses United, "National nurse survey reveals that health care employers need to do more to comply with OSHA emergency temporary standard," Sept 27, 2021. Available at <https://www.nationalnursesunited.org/press/national-nurse-survey-reveals-health-care-employers-need-to-do-more-to-protect-workers>.

- 26% of Arizona registered nurses report that patients are not always screened for Covid-19 signs and symptoms.
- 17% of Arizona registered nurses report that visitors are not always screened for Covid-19 signs and symptoms.
- 52% of Arizona registered nurses report that surgical masks are used with patients who might have Covid-19 but who have not been tested or whose test results are not back yet. Only 32% report using N95 respirator with these patients.
- Only 61% of Arizona registered nurses report that they wear a respirator for every encounter with a Covid-positive patient, 17% report wearing a respirator only during aerosol-generating procedures on Covid-positive patients and a surgical mask during routine care, and 11% report surgical mask during routine care of Covid-positive patients.
- 48% of Arizona registered nurses report that they are expected to reuse single-use N95s. 44% report reusing single-use surgical masks.

Additionally, NNOC/NNU has received reports of health and safety issues from non-represented nurses in Arizona, which are consonant with the most recent survey findings for Arizona:

- Patients who are under investigation for Covid-19 are no longer being isolated separately from non-Covid patients. In some units, they are placed in the same room or same area. Covid-19 precautions are NOT always in place for patients under investigation.
- In the emergency department, known Covid-positive patients are being placed in the hallway, mixed with non-Covid patients, and staff are walking past frequently and stopping to provide emergency care with no PPE on at all (beyond the facemasks that everyone wears).
- Nurses are being told that a surgical mask is sufficient when caring for Covid-positive patients and that if “the nurse feels it’s necessary to upgrade” they can put an N95 FFR on.
- Not all nurses have been adequately fit-tested.
- There are PAPRs and controlled air-purifying respirators (CAPRs) but they are stuffed in a closet and not maintained so they are not currently safe or available to use.
- N95 FFRs are still being reused. Nurses report getting one N95 FFR per day and having to reuse it for the entire day, with multiple patients. Those patients are often mixed Covid-positive and non-Covid as mixed assignments are common.
- Dirty and clean reusable gown storage is not clearly marked and nurses sometimes end up with a dirty gown.
- Nurses report there is no exposure notification at all.

Note that the non-union health care workers who are in contact with NNOC/NNU will remain anonymous. They currently have limited protections for speaking out about unsafe conditions related to Covid-19, in large part because the Industrial Commission of Arizona and ADOSH have failed to adopt the Covid-19 Healthcare ETS, which would afford them such protections.

In Conclusion

ADOSH's failure to adopt the Covid-19 Healthcare ETS has not only violated the State Plan's legal obligations, but it places nurses and other health care workers in grave danger from the Covid-19 pandemic. I urge you to promptly and fully investigate this CASPA and to hold ADOSH to the requirements to be "at least as effective" as Federal OSHA. ADOSH must immediately adopt the Covid-19 Healthcare ETS in order to afford Arizona's nurses and other health care workers the same protections as health care workers in other states. If you have questions regarding this complaint, please do not hesitate to reach out.

Sincerely,

Phuong Tran
Tenet Division Director, Collective Bargaining
National Nurses Organizing Committee/National Nurses United

cc: Representative Ann Kirkpatrick
Representative Raúl Grijalva
Representative Ruben Gallego
Representative Bobby Scott, Chairman, House Committee on Education and Labor
Representative Alma Adams, Chairwoman, House Workforce Protections Subcommittee
Senator Kyrsten Sinema
Senator Mark Kelly
Senator Patty Murray, Chairwoman, Senate Committee on Health, Education, Labor and Pensions
Senator John Hickenlooper, Chairman, Senate Subcommittee on Employment and Workplace Safety
Jim Frederick, Acting Assistant Secretary, Occupational Safety and Health Administration
Doug Kalinowski, Directorate of Cooperative and State Programs, Occupational Safety and Health Administration
Dale L. Schultz, Chairman, Industrial Commission of Arizona
Joseph M. Hennelly, Jr., Vice Chairman, Industrial Commission of Arizona
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Kara Dimas, Secretary, Industrial Commission of Arizona
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Liz Shuler, President, AFL-CIO
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