

NLRB General Counsel Advises Employers May Have Duty To Bargain Over COVID-19 OSHA Rule

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Employers covered under [OSHA's Emergency Temporary Standard to Protect Workers from Coronavirus](#) ("ETS") have a duty to bargain with unions representing employees over certain aspects of the ETS, according to Jennifer Abruzzo, the General Counsel for the National Labor Relations Board ("NLRB"). The NLRB is the agency that enforces federal labor laws in the private sector.

In a memo issued November 10, 2021, the GC's office asserted that OSHA's ETS regarding vaccinations, testing, and mask requirements for employers with at least 100 workers "clearly affects the terms and conditions of employment-including the potential to affect the continued employment of employees who become subject to it-and gives covered employers discretion in implementing certain of its requirements."

Acknowledging that there is no duty to bargain where a change in the terms and conditions of employment is statutorily mandated, the memo emphasizes that "the General Counsel's position is that covered employers have decisional bargaining obligations regarding aspects of the ETS" that employers have discretion in implementing. For example, employers have the option of mandating vaccination for all employees or requiring unvaccinated employees to either become vaccinated or undergo weekly testing and wear a mask at work. Other discretionary actions an employer will have to bargain may include the cost of weekly testing and whether weekly testing is done on or off the clock.

For those aspects of the ETS that are mandated on employers, such as requiring employees to provide proof of vaccination status, "the employer is nonetheless obligated to bargain about the effects of the decision" on its unionized employees, but not the actual decision. This could mean bargaining over the process and timing of requiring proof.

The memo fails to address the fact that existing CBAs may contain management rights or workplace safety language which may grant the employer discretion in implementing health and safety rules in the workplace. If such language exists and is sufficiently broad, the employer may be relieved from its bargaining obligations with respect to these ETS decisions. Before engaging in any negotiation with a union over the ETS, an employer should carefully review the provisions of its CBA and consult legal counsel to determine whether it is obligated to bargain over these matters.

As of November 6, 2021, the [ETS has been stayed](#) pending a decision by the United States Court of Appeals for the Fifth Circuit. Employers are advised to be proactive and spend the next few weeks preparing as if the ETS will take effect in order to ensure compliance in the event a final judicial determination renders the ETS effective in its current form.

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