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NLRB Issues Guidance for Employers Enforcing OSHA's ETS on Vaccine Mandates



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The Acting Associate General Counsel of the National Labor Relations Board (NLRB) recently published a memorandum addressing the types of bargaining obligations under the National Labor Relations Act (NLRA) that may arise out of OSHA's recently issued emergency temporary standards for mandated vaccination (ETS).

Given that the ETS requires employees to get vaccinated or, if the employer agrees, submit to weekly testing and masking, it is not surprising that the Acting Associate General Counsel has taken the position that the ETS affects terms and conditions of employment. Since the NLRA imposes a duty to bargain with unionized employees over the terms and conditions of their employment, the NLRB's new memorandum provides some guidance for unionized employers planning on how they will implement the ETS.

While the NLRB memorandum acknowledges that employers are relieved of their duty to bargain when conditions of employment are statutorily mandated (such as under the ETS), it also points to "longstanding precedent" that an employer may not act unilaterally "so long as it has some discretion in implementing those requirements."

As an example, the NLRB cites a case in which OSHA required employers to issue respirators but gave employers "significant flexibility and latitude in implementing steps necessary for compliance." In that case, while the employer did not have to bargain over the decision to use respirators, it was required to bargain over which respirators to use. Here, the NLRB memorandum plainly states that under the ETS, "covered employers [have] discretion in implementing certain of its requirements."

This bargaining obligation is referred to as "effects bargaining" and, according to the NLRB memorandum, is impacted by the ETS. For example, under the ETS, covered employers must either mandate vaccination or require weekly testing and masking. In other words, it is not within the employer's discretion to permit unvaccinated employees to access the workplace without testing and masks. Yet, where an employee refuses to submit to vaccination *and* refuses to mask, the memorandum suggests that the employer must bargain over the consequence for failing to comply.

Notably, while OSHA's recently issued ETS FAQ 3.H. states that employers may terminate employees for refusing to get vaccinated under a mandatory vaccination policy without violating the Occupational Safety and Health Act, the FAQ does remind employers that they should consult "applicable law and/or labor management contracts." The NLRB memorandum makes clear the position that the NLRA requires more of an analysis before taking such action.

If and when the ETS goes into effect (see [our update](#) regarding its timing pending existing litigation), the NLRB's position seems clear: Employees will have a say in company policy addressing certain aspects related to the implementation of the ETS. Should employers ignore their obligation to bargain with employees over the effects of the ETS, any leeway OSHA provides to employers could become a liability.

If you would like more information or would like to discuss these issues further, please contact a member of Gould & Ratner's [Human Resources and Employment Practice](#).