

Employer Vaccine Bargaining Duties After NLRB Memo

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National Labor Relations Board General Counsel Jennifer Abruzzo issued a memorandum on Nov. 10 explaining her view of employers' bargaining obligations in response to the Occupational Safety and Health Administration's emergency temporary standard aimed at protecting workers from COVID-19.

According to Abruzzo, any issue involving employer discretion is subject to decision bargaining. The ETS may also trigger effects bargaining obligations for nondiscretionary issues.

There is some uncertainty surrounding the ETS. On Nov. 12, the U.S. Court of Appeals for the Fifth Circuit affirmed its initial stay of the ETS, and the U.S. Court of Appeals for the Sixth Circuit has been selected to hear the consolidated challenges to the ETS.

Employers, however, likely will want to continue to plan for ETS implementation, as we do not know whether or when the stay will be lifted. This will include bargaining, as discussed below, because in order to meet their legal obligations, employers must provide adequate opportunity for unions to bargain.

The GC's Memo

On Nov. 10, Abruzzo issued Operations-Management Memorandum 22-03,[1] which sets forth the general counsel's position on employer bargaining obligations stemming from the ETS. OSHA issued the ETS on Nov. 5, establishing binding requirements for certain employers to protect employees from the spread of COVID-19 in the workplace.

The ETS, which applies to employers with 100 or more employees, most notably requires employers to adopt a mandatory vaccination requirement, or subject employees to weekly testing. It also covers a range of other issues including establishing a written vaccine policy, verifying and maintaining records of the vaccination status of the workforce, and offering paid time off for vaccination.

Employers must comply with all ETS provisions by Dec. 6, except for the vaccination-or-testing deadline,



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which requires employees to have received their final dose of a vaccine series by Jan. 4, or be subject to weekly testing.

The memo briefly clarifies the general counsel's position on bargaining obligations related to the ETS in several ways.

First, the general counsel makes the obvious but legally significant point that the ETS affects employees' terms and conditions of employment, triggering bargaining obligations. Second, the memo highlights the distinction under the National Labor Relations Act between decision and effects bargaining obligations.

Decision bargaining requires the employer to give the union notice and the opportunity to bargain over the underlying decision to take a given action.

In contrast, in an effects bargaining situation, the employer can unilaterally decide to act, but must give the union notice and the opportunity to bargain over any impact (or effect) of implementing the decision on the employees' terms and conditions of employment.

Third, even though the ETS is federally mandated, the general counsel's memo asserts that any aspect of the ETS that grants employers discretion on implementation is subject to decision bargaining.

Finally, Abruzzo states that employers still possess an effects bargaining obligation for any nondiscretionary aspect of the ETS.

Aspects of the ETS Likely to Trigger Bargaining Obligations

Unfortunately, the memo explicitly refuses to provide any guidance on which ETS requirements impose bargaining obligations on employers, stating instead that "the General Counsel does not offer advisory opinions and each case stands on its own facts."

Nevertheless, the memo will likely trigger bargaining obligations on several issues. Most notably, employers will need to bargain over whether to adopt a mandatory vaccination policy or rely on weekly testing. They will also need to bargain over which parts of the workforce the policy will apply to, and who administers it.

While the ETS describes vaccination as the "preferred compliance option," employers have the discretion to choose whether to require vaccination.

Similarly, because the ETS grants employers discretion on how to allocate costs for testing or face coverings (subject to state or local law), employers may need to bargain over who pays for COVID-19 testing costs or costs associated with the face covering mandate for unvaccinated employees.

The ETS may also raise questions around whether paid time off for any side effects of the COVID-19 vaccine runs concurrently with existing sick time or other generic PTO and if there is a cap on reasonable PTO for any side effects of the COVID-19 vaccine.

Unlike time spent actually receiving the vaccine — which cannot run concurrent to any existing leave — the ETS grants employers the discretion to require employees to use existing sick time or generic PTO to cover time spent recovering from any side effects of the vaccine.

Additional issues triggered by the ETS that employers may have to bargain over include:

- How weekly testing for unvaccinated employees will be administered;
- Whether the employer will engage in contact tracing or require close contacts to be removed from the workplace following an employee testing positive for COVID-19; and
- How employees will be notified of the requirements of the ETS and receive other required information.

Employer Takeaways

The fact that covered employers must comply with the ETS does not absolve employers of bargaining obligations as they prepare to implement protocols to satisfy the ETS requirements, because the ETS leaves many issues open to employer discretion and thus a bargaining obligation.

It is the general counsel's position that all elements of the ETS that permit employer discretion are subject to decision bargaining, with effects bargaining required for nondiscretionary issues.

Given the above position outlined by the memo, employers would do well to assume the entire ETS triggers either or both decision or effects bargaining, and thus should quickly formulate and present an initial position on ETS implementation to unions representing employees in the workforce.

Employers must give unions reasonable notice and an opportunity to bargain over changes stemming from the ETS, under well-established law. Given the short period before the ETS requirements must be implemented, bargaining need not be protracted.

While the NLRB has not established a bright-line standard for determining what constitutes reasonable notice, the NLRB has found two to three weeks' notice to be reasonable in circumstances where swift action is required.

Employers, therefore, should move quickly to notify unions of the employer's deadline for implementing ETS-related changes, ensuring that the union has two to three weeks to bargain if it chooses to do so. For practical reasons, an employer's internal implementation deadline will likely be several days before the Dec. 6 and Jan. 4 deadlines.

As discussed above, the ETS continues to face challenges in federal court, while numerous state legislatures have passed or are considering legislation affecting the ability to mandate COVID-19 vaccines. Yet, at over 400 pages long, the ETS is complex, and bargaining over ETS requirements will have important consequences for the workforce.

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[1] "Responding to Inquiries Regarding Bargaining Obligations Under the Department of Labor's Emergency Temporary Standard to Protect Workers From Coronavirus."