

THOUGHT LEADERSHIP

LEGAL UPDATES

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Labor & Employment
Traditional Labor
Relations
Workplace Safety &
Health

Professionals

JON E. ANDERSON
MADISON:
608.234.6016
MINNEAPOLIS:
612.852.2700
JON.ANDERSON@
HUSCHBLACKWELL.COM

RUFINO GAYTÁN III
HOUSTON:
713.525.6229
RUFINO.GAYTAN@
HUSCHBLACKWELL.COM

Vaccine Mandates May Require Collective Bargaining

On November 5, 2021, the U.S. Department of Labor, through the Occupational Safety and Health Administration (OSHA), issued an Emergency Temporary Standard to Protect Workers from Coronavirus (ETS). The ETS covers employers with 100 or more employees—firm or company-wide—and provides options for compliance. The ETS requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy. Alternatively, covered employers may adopt a policy requiring employees to choose between vaccination and regular COVID-19 testing and wearing a face covering at work. The ETS also requires covered employers to provide up to four hours of paid time to workers to get vaccinated and to allow for paid leave to recover from side effects of the vaccination.

Vaccine mandates and obligations under the NLRA

Vaccine mandates present interesting issues for the unionized employer. The National Labor Relations Act (NLRA) requires employers to bargain with the unions that represent their employees over hours and other terms and conditions of employment. When new terms and conditions of employment like vaccination and/or testing requirements are under consideration, by choice or mandate, employers must consider their duty to bargain.

On November 10, 2021, the NLRB Office of the General Counsel issued a memo (Memorandum OM 22-03) reminding employers that they need to consider their bargaining obligations as these mandates emerge. The General Counsel takes the position that covered employers have decisional bargaining obligations regarding aspects of the ETS that affect terms and conditions of employment and that provide employers with choices regarding implementation. The General Counsel acknowledges that an employer has no duty to bargain where a specific change in terms and conditions of employment is statutorily mandated, but the employer may not act unilaterally

if it has some discretion in implementing those requirements. Undoubtedly, the ETS affects terms and conditions of employment—including the potential to affect the continued employment of employees who become subject to it—and to the extent the ETS gives covered employers some measure of discretion in implementing certain requirements, bargaining obligations may arise.

Process guidance for employers subject to a collective bargaining agreement

As a first step in any bargaining analysis, employers should review their existing collective bargaining agreements (CBA) to determine if the union has waived the right to bargain over the decision. If the CBA allows the employer to establish rules of this nature, then the employer can avoid bargaining. Employers should also review the management rights and workplace safety provisions of their CBAs to further support their waiver position.

Absent a waiver, employers may need to bargain over the decision to implement a vaccine mandate or testing/masking rule. Many unions recognize the value of vaccination and testing/masking as safety measures. Where an employer cannot establish a waiver or simply prefers to avoid labor strife, the employer should offer to bargain with the union and not implement the policy until the parties reach an agreement or an impasse in bargaining. Upon reaching an impasse, the employer may implement the terms of its last proposal to the union.

Even if an employer must comply with a legal vaccination mandate (e.g., the federal contractor vaccine mandate), the employer still has an obligation to bargain with the union over the “effects” of its implementation. Here, among other things, bargaining may address procedural issues, exemptions, pay obligations, incentives, time for compliance, or the consequences of failure to comply.

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In short, the implementation of legally mandated vaccine requirements brings bargaining obligations of some kind. Offering to bargain with the union over the mandate is probably the safest course of action where a strong waiver argument does not exist. Consult with Jon Anderson and Rufino Gaytán or a member of the Husch Blackwell Labor and Employment team if you have questions or need assistance in complying with a vaccine mandate in a union setting.