

BREAKING: NLRB General Counsel Issues Memo on Bargaining Obligations Under OSHA's Vaccination Requirements

Labor Relations Update Blog on **November 11, 2021**

On November 10, 2021, General Counsel Jennifer Abruzzo issued a memorandum outlining bargaining obligations under OSHA's Emergency Temporary Standard to Protect Workers from Coronavirus ("ETS"). *Responding to Inquiries Regarding Bargaining Obligations Under the Department of Labor's Emergency Temporary Standard to Protect Workers from Coronavirus*, GC 22-03 (November 10, 2021).

The [ETS](#), which took effect on November 5, 2021, requires employers with 100 or more employees to "develop, implement, and enforce a mandatory COVID-19 vaccination policy." The ETS, however, provides an exception, permitting employers to adopt a policy either requiring employees to receive the vaccination or submit to regular COVID-19 testing if they opt to remain unvaccinated. Immediately following the ETS's implementation, numerous lawsuits challenging the rule were filed resulting in the Fifth Circuit Court of Appeals temporarily staying the ETS on November 6th.

In the memorandum, GC Abruzzo takes the position that "covered employers would have decisional bargaining obligations regarding aspects of the ETS that affect terms and conditions of employment." The memorandum argues that the ETS "clearly affects terms and conditions of employment" because of its potential to affect the continued employment of employees who are affected by the rule and thus bargaining is required. Although Abruzzo acknowledged that there is no duty to bargain where a change in the terms and conditions of employment is statutorily mandated, the memorandum emphasizes the discretion afforded to employers in complying with the ETS and the duty to bargain that arises as a result. Namely, employers have the option of mandating vaccination for all employees or requiring employees to either become vaccinated or undergo regular testing if they refuse the vaccine. As the memorandum notes, an employer "may not act unilaterally so long as it has some discretion in implementing" statutory requirements.

Even where the ETS does not provide employers any discretion, Abruzzo goes further, noting that large employers are required to bargain over the effects of their decision to implement changes under the ETS. The memorandum cites National Labor Relation Board (“NLRB”) precedent for the proposition that even where an employer can unilaterally change policies under federal law, failure to bargain over the effects of the change can constitute a violation of Section 8(a)(5) of the National Labor Relations Act.

Takeaways

Although the memorandum is relatively short, it plainly makes the NLRB’s position known. Failure to bargain and reach agreement or impasse over: (i) the effects of ETS-compliant policies; or (ii) the employer’s decision about how to comply with the ETS where it is afforded discretion may constitute an unfair labor practice. While each individual case may differ, employers aiming to comply with the ETS should immediately take steps to bargain with their unionized workforce prior to implementing any policy changes required by the regulation. As always, we will continue to keep you apprised of the latest developments at the NLRB.

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