



The Realities Of Mandating COVID-19 Vaccination For Unionized Employees

Insights

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The Food and Drug Administration has now approved two different mRNA COVID-19 vaccines (Moderna and Pfizer) under the FDA's Emergency Use Authorization (EUA) to be distributed in the U.S. for use in persons 18 years of age and older. As the availability of the vaccine becomes more widespread, unionized businesses are now grappling with how best to protect the workplace while navigating the legal minefield regulating unilateral changes to working conditions.

Although figures differ, recent polls indicate that nearly two-thirds (66%) of all Americans say they will try to get the COVID-19 vaccine. Meanwhile, employers are trying to find ways to incentivize workers to get vaccinated while either encouraging or requiring vaccines. Additionally, the Equal Employment Opportunity Commission EEOC recently indicated that employers could require their workers to get a COVID-19 vaccine, even under the EUA. And while there are numerous issues for all employers to consider before mandating vaccination of employees, unionized employers are operating under additional regulatory considerations.

First Step: Mandatory Or Permissive Subjects

Under the National Labor Relations Act (NLRA), unionized employers must bargain collectively with the authorized collective-bargaining representative over all matters affecting "wages, hours, and other terms and conditions of employment." These "mandatory" subjects generally trigger an obligation to give notice to the union, as well as a corresponding obligation to bargain with the union (upon its request), prior to implementation of changes in terms and conditions of employment. Under limited circumstances, mandatory subjects may be bargained to the point of lawful impasse and subsequently implemented. Absent a binding no-strike clause, strikes or lock-outs may be used to exert economic pressure in furtherance of a mandatory subject of bargaining.

In contrast, "permissive" subjects of bargaining generally fall outside the scope of wages, hours, and other terms and employment conditions. Unlike mandatory subjects, parties are not required by law to bargain over permissive subjects, and it can be a violation of the NLRA for either party to initiate a work stoppage (or threaten to do so) to compel agreement on permissive subjects.

While the EEOC recently indicated that an employer may require COVID-19 vaccination of employees subject to certain exemptions under the American Disabilities Act and Title VII of the Civil Rights Act of 1964, any such practice would likely be deemed a mandatory bargaining subject for any unionized

business. Implementation of a mandatory vaccine policy for employees, especially where vaccinations or other medical subjects are not otherwise addressed within the contract, would therefore require notice and bargaining. That said, the issue of mandated vaccination for new hires may be treated differently, much like pre-employment drug testing, which is not a mandatory subject because applicants are not considered “employees” under the Act.

Unionized employers should consider the potential risk of work-stoppages and consult legal counsel before instituting any policy requiring COVID-19 vaccines as a condition of continued employment. Furthermore, employers should communicate proposed vaccine plans to labor unions given the increasing public support of the COVID-19 vaccine. Indeed, protecting the workforce from COVID-19 is a goal both management and unions will want to achieve, but getting there requires flexibility and clear communication.

Next Question: Decisional v. Effects Bargaining

When it comes to the unionized workforce, the question of whether an employer can mandate COVID-19 vaccination as a term and condition of employment may also turn upon language within any applicable collective-bargaining agreement (CBA). There are two forms of bargaining for which employers may be responsible under the NLRA: decisional bargaining and effects bargaining.

Decisional Bargaining

Decisional bargaining refers to an employer’s obligation to bargain over the actual decision at issue (as opposed to the impact of that decision on bargaining-unit employees). Employers’ decisional rights are often addressed within the Management’s Rights provision of the CBA or related subject-specific provisions. For example, a Management’s Rights provision may reserve to the employer the right “to establish and implement reasonable work rules to ensure the health and safety of staff, employees, and customers.” Applying the National Labor Relations Board’s (NLRB) current “contract coverage” standard, this language may be broad enough for the employer to unilaterally implement a policy requiring vaccination without decisional bargaining.

Similarly, a general vaccination provision (not limited to a particular type of vaccination) or health and safety provision in other parts of the CBA may also meet the NLRB’s contract coverage standard. Such employers should carefully review their Management’s Rights and related CBA language and seek appropriate counsel before rolling out a mandatory COVID-19 vaccination program.

Effects Bargaining

In evaluating their decisional bargaining obligations, unionized employers may inadvertently overlook the mutually exclusive obligation to negotiate over the effects of any such decision on bargaining-unit employees. This concept is referred to as “effects bargaining” or “impact”

bargaining, as it goes to the effect or impact of an employer's decisions on bargaining unit employees.

Under the NLRA, unionized employers may be obligated to bargain over the effects of their decision, even when the decision itself satisfies the NLRB's contract coverage standard. This obligation applies under common labor law unless the CBA (or some other instrument) contains language expressly waiving the union's right to effects bargaining.

For example, where the CBA confers the unilateral right to require vaccination, a union may nonetheless demand to bargain over the effects of that decision. Subjects over which a union may demand effects bargaining include the sequence of vaccination (e.g. most senior v. least senior employees, by department or by classification, etc.), pay for the time spent participating in the vaccination process, the vaccination locale and schedule, sick leave for employees experiencing an allergic reaction or side effects, exemptions from the vaccination policy (e.g. for disability or religious reasons), and consequences for non-compliance (e.g. progressive discipline v. immediate suspension or termination).

What If The CBA Is Silent – Or There Is No CBA Altogether?

In some cases, the parties have not yet reached a valid CBA, while in others, the CBA is silent with respect to health and safety rules and/or vaccination. Under these circumstances, any established policies or practices (i.e., the "status quo") would ordinarily govern. Any departure from the status quo must be preceded by notice to the union of the proposed change along with, upon the union's demand, an opportunity to bargain over the change. Here, there would exist an obligation to bargain over the decision *and* its effects.

The Wildcard: Exigent Circumstances

The NLRA recognizes an "exigent circumstances" exception to an employer's general duty to engage in decision or effects bargaining as set forth above. This narrow exception applies only where the employer can demonstrate that "economic exigencies" compelled prompt action before notifying the union and allowing it to bargain.

The NLRB has limited this exception to "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." "Absent a dire financial emergency," the NLRB has held that "economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not, alone, meet the economic exigency standard to justify unilateral action."

The NLRB has yet to issue any decisions, regulations, or general guidance specifically addressing the issue of vaccination as an "economic exigency." It is conceivable that certain organizations and industries facing imminent long-term shutdown or economically devastating penalties due to excessive COVID-19 outbreaks could potentially satisfy this standard. Even if an employer meets the

standard and is therefore privileged to implement a mandatory vaccination policy decision before negotiating with the union, it would still have an obligation to, thereafter, bargain with the union over the effects of that decision on request.

If your organization is unionized, considering mandatory vaccination for employees, and/or believes that it meets the exigent circumstances exception to *pre-implementation* bargaining, you should seek the assistance of an experienced traditional labor attorney prior to moving forward with a decision.

Conclusion

Whether you encourage or mandate vaccinations, all unionized employers should do so with the help and advice of an experienced traditional labor attorney. Doing this will help to ensure organizations bargain collectively to achieve the goal of protecting workforces.

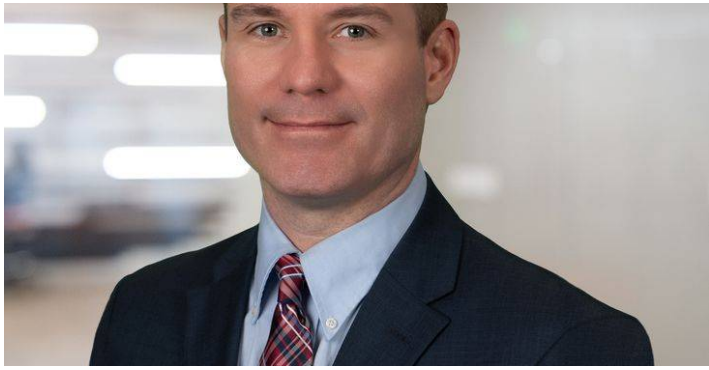
We will continue to monitor developments related to vaccines and related workplace questions that arise. Make sure you are subscribed to [Fisher Phillips' alert system](#) to get the most up-to-date information. If you have questions about ensuring that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact any attorney in on our [FP Vaccine Subcommittee](#).

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