



# Unionized Employers Confront Unique Challenges in Face of Federal Vaccine Mandate

Insights

9.30.21

When COVID-19 vaccines were made available to the public in January 2021, we published an Insight advising unionized employers of the unique challenges involving vaccine mandates from a bargaining perspective. Ten months later, the federal government will soon step into the fray – announcing plans to issue an emergency temporary standard (ETS), directing employers with 100 or more employees to choose between vaccine mandates (along with paid time off for jobs and recovery) or weekly COVID-19 testing (and removing the testing option completely from federal contractors and healthcare employers). So where does all that leave covered unionized employers with respect to their bargaining obligations?

## How Did We Get Here?

Late last year, the EEOC indicated that employers may generally mandate COVID-19 vaccinations, subject to certain exemptions under the American Disabilities Act and Title VII of the Civil Rights Act of 1964. As we subsequently explained, however, any such practice could be deemed a “mandatory subject of bargaining” by the National Labor Relations Board (NLRB) – at least with respect to current bargaining unit employees (as opposed to job applicants). This proved significant for unionized employers contemplating vaccine mandates, as the NLRB requires them to furnish unions with notice and (on demand) an opportunity to bargain over mandatory subjects *before* implementing them.

Under limited circumstances, mandatory subjects may be bargained to the point of impasse and subsequently implemented. Absent a binding no-strike clause, however, strikes may be used to exert economic pressure in opposition to the threat of implementation. By the same token, specific contractual language expressly conferring the unilateral right to implement vaccine or related health and safety mandates may operate as a waiver to union bargaining rights, but the vast majority of collective bargaining agreements (CBAs) fail to “cover” this issue with sufficient specificity. Consequently, unionized employers have been grappling with the prospect of “decision” bargaining over vaccine mandates for some time now.

## Decision vs. Effects Bargaining

Decision bargaining refers to an obligation to bargain over the actual decision at issue (as opposed

to the impact of that decision on unit employees). Employer decisional rights are often addressed within the CBA's Management's Rights clause. For example, a Management's Rights provision may reserve an employer's right "to establish and implement reasonable work rules to ensure the health and safety of staff, employees, and customers."

Applying the NLRB's current "contract coverage" standard, this language could conceivably be deemed broad enough to support unilateral implementation of a vaccine mandate. This employer-friendly standard, however, is now vulnerable to reversal as the Biden NLRB contemplates a return to the narrower "clear and unmistakable" waiver standard.

Even in the absence of decision-bargaining obligations, however, unionized employers remain obligated to furnish unions with meaningful advance notice for purposes of engaging in "effects bargaining" upon demand. This concept is often referred to as "impact bargaining," as it goes to the impact of the underlying decision on bargaining unit personnel. For example, even where the CBA clearly confers the unilateral right to require vaccinations, a union may nonetheless demand bargaining over the effects of that decision (including the means of employee selection, compensation for time spent undergoing the vaccine and recovery, availability of paid leave, disciplinary measures for non-compliance, etc.).

## **Back to the Future – Impact of the Impending ETS**

OSHA's impending ETS will require all employers with 100 or more employees (regardless of whether they are unionized) to either mandate vaccines or engage in weekly COVID-19 testing for unvaccinated employees. Separate guidance removes the latter option for federal contractors and healthcare employers – who are left with no choice but to implement vaccine mandates. That distinction could prove significant for unionized organizations.

Why? Because for the past several decades, the NLRB has adhered to the notion that unionized employers are generally under no obligation to bargain over the *decision* (as opposed to the effects of that decision) to comply with a mandate imposed by local, state or federal law – except with regard to any *discretionary* aspects of compliance. For example, in *Dickerson-Chapman, Inc.*, 313 NLRB 907, 942 (1994), the NLRB held that a failure to consult with the union over an OSHA-mandated designation of "competent persons" was unlawful where the selection methodology remained discretionary. Although OSHA regulations required the employer to designate "competent persons" to conduct daily inspection of jobsite excavations in that case, such designations involved mandatory subjects of bargaining because the employer retained discretion over the selection of those individuals.

Up to now, this doctrine has been relatively easy to administer. An employer facing the prospect of an increase to the applicable minimum wage standard has little choice but to comply with it. Discretion never enters the picture, as the employer either complies with the standard as written or exposes itself to liability for non-compliance. As such, the only obligation confronting the employer under those circumstances is to furnish the union with meaningful advance notice, and to subsequently bargain over the effects of that compliance decision on demand.

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The impending vaccine ETS, however, will inject a significant element of discretion into the means by which covered employers (other than federal contractors and healthcare employers) achieve compliance. Put simply – you will have a choice. And the discretion associated with that choice potentially imposes a duty to bargain with the union over the decision itself. Not the decision to comply – but the decision *how to* comply.

While some may argue that this is merely a form of effects bargaining (i.e., the effect of the compliance obligation on employees), that could amount to a distinction without a difference to the extent that covered unionized employers end up in the same place – bargaining over the choice between vaccine mandates and weekly testing. And what about unionized federal contractors and healthcare employers? The lack of a second option in their case likely removes the question from the realm of decision bargaining – moving it directly to the effects bargaining phase.

### **Where Do We Go from Here?**

Unionized employers should carefully evaluate the potential bargaining implications associated with the impending ETS in consultation with their labor relations and human resources teams, along with legal counsel. All legal and practical considerations should be taken into account before embarking on a communications strategy that comports with the unique aspects of your workplace culture, along with your existing union relationships.

A thorough analysis of any applicable CBAs (and an examination of past practice) may be necessary to evaluate the governing legal framework, along with the potential for work-stoppages and related concerns. While maintaining a safe and healthy working environment should remain a shared priority for all parties involved, achieving those objectives may require flexibility along with clear lines of communication.

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 your Fisher Phillips attorney, the authors of this Insight, any attorney in our [Labor Relations Practice Group](#), or any attorney in on our [FP Vaccine Subcommittee](#).

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