

HOW EMPLOYERS SHOULD ADDRESS EMPLOYEE PROTESTS AND WALKOUTS OVER VACCINE MANDATES

Insights
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COVID-19 continues to present challenges to employers, who are generally obligated to provide their employees with a safe and healthy workplace. One of the most significant challenges as of late is addressing employee protests over mandatory vaccination policies. Such protests may include groups of employees confronting management at the workplace, distributing flyers to coworkers, picketing outside the property, or even striking. Employers may be surprised to learn that workers have significant rights in this area – regardless of whether they are part of a unionized workforce. However, employers also have important rights as well, so it is critical to understand where the lines can be drawn. Here is a summary of your rights and obligations when it comes to vaccine protests and walkouts and a detailed list of key considerations you should keep in mind as this situation develops.

Government Vaccine Mandates

Beyond the Executive Order requiring [most federal contractors to mandate that covered employees be fully vaccinated by December 8](#), the Occupational Safety and Health Administration (OSHA) is finalizing [a sweeping Emergency Temporary Standard \(ETS\)](#) mandating that private employers with 100 or more employees either ensure their workers are vaccinated against COVID-19 or require unvaccinated employees to produce a weekly negative test result before coming to work. Many employers that fall outside of the scope of the ETS will likely implement the same or similar measures, [as 30% of employers have](#)

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already implemented or are considering a mandate of their own accord.

The ETS is estimated to impact roughly 80 million workers who hold various stances on vaccination, and the federal contractor mandate (and a healthcare industry mandate) will ensure that tens of millions more will face a vaccine requirement. Beyond that, some state and local governments are requiring employers of a certain size or in certain industries to mandate vaccination as well, with more almost certain to come in the coming months.

Unfortunately, many employees may view these requirements as presenting an ultimatum of choosing between their jobs and their beliefs. There have already been widespread reports of employee protests and walkouts in various parts of the country in response to the federal contractor mandate, and we anticipate similar employee activity in response to the ETS.

The first question to tackle, then, is what rights these employees actually have when it comes to such activity.

Group Protests Over Vaccine Mandates Likely Constitute Protected Concerted Activity

Section 7 of the National Labor Relations Act (NLRA) protects workers at both unionized and non-unionized workplaces who engage in concerted activity for the purpose of mutual aid and protection. Not only does this cover union organizing activity, but it also covers protests over wages, hours, and working conditions. Notably, the protection such protests receive is not dependent on the extent to which other employees agree with the complaint or join in the protest.

In late March, the National Labor Relations Board (NLRB) issued Memorandum GC 21-03, which signals the Board's intention to more aggressively enforce employees' Section 7 rights. The GC Memorandum lists examples of employee advocacy involving "vital categories of workplace life" that the Board would find to be "inherently concerted" – and therefore protected – including complaints about racial discrimination and workplace health and safety. The GC Memorandum also suggests that Section 7 rights cover activities not explicitly connected to workplace concerns, such as employees' political and social justice advocacy connected to their "interests as employees."

Based on this latest guidance and the Board's long history of broadly construing the National Labor Relations Act (NLRA) to protect workers' rights, you should assume that employee protests and walkouts related to mandatory vaccination policies will likely be deemed protected concerted activity. Not only are there political and social overlays to vaccine mandates, they also have a direct connection to the workplace — particularly if a consequence of failing to comply with the mandate is termination.

This is true regardless of whether the activity is in response to your organization's decision to implement a mandate in direct response to a government order (e.g., federal contractors, healthcare organizations, and large employers) or merely because you want to promote a safer and healthier environment. Employee protests over an employer's decision to *not* implement a mandatory vaccination or testing policy altogether, or your decision to implement one but not the other (where they have the option), likely would also be protected, because employees may reasonably fear their employer is not doing enough to protect them.

That employers subject to a vaccination mandate requirement arguably have no (or limited) control over the mandate will not be enough to render employee protests unprotected. Indeed, the Board has previously found that employee protests over workplace policies dictated by government agencies are protected notwithstanding the employer's perceived lack of control over the matter.

Accordingly, you not only should be aware that employee protests related to mandatory vaccination policies likely will be deemed protected concerted activity, but that the newly constituted NLRB will be looking more closely at such activity as it aggressively pursues its enforcement agenda.

How You Should Address Employee Protests Over Vaccine Mandates

As a general rule, you should address employee protests over vaccine mandates the same as they would address any other form of protected concerted activity. You should understand that any discussion of protected activity under the NLRA this is a highly technical area of the law involving subtle fact-sensitive distinctions between lawful and unlawful conduct, but with significant ramifications from a remedial standpoint. For this reason, you should tread

cautiously and bring your labor counsel into your discussions before you take significant steps. However, here are some general considerations to keep in mind.

- The very first thing you should do – and you would be best served by taking action well before any protest or walkout occurs – is ensure that your **solicitation and distribution policies** are lawful. There have been frequent changes to this area of law in recent years, so if it has been years since your policy was written or amended, you should check with your labor counsel for a consult as soon as possible.
- You should also proactively **educate your supervisors and managers** on responding to protected concerted activity. Since your organization could be held liable based on their actions, you should ensure they understand the contours of your policies and what the law allows (and doesn't allow).
- Be prepared for your leaders to be engaged in **workplace conversations** about your vaccine mandate – and to do so in a lawful manner. You should prepare for increased conversation in the workplace regarding the mandate, possible protests, and related matters. Keep in mind that established labor law prevents you from prohibiting these conversations or firing an employee for discussing their concerns. Workers who bring complaints about the workplace to management are covered under the NLRA, whether or not they are unionized. Therefore, if you take adverse action against these workers for their concerted, protected activity, you could face an unfair labor practice charge. As a result, you should not discipline workers for engaging in such activity.
- Generally, handing out leaflets or handbills in non-working areas is an acceptable practice under the law. It is considered a protected form of speech, absent evidence of blatant vandalism, violence, trespass, or other unlawful behavior. But if your employees are **violating a lawful solicitation/distribution policy** — perhaps because they are in work areas passing out flyers that question the safety of vaccines – you should discipline the employees consistently with how others are disciplined for the violating the same policy.
- Protestors will often place a large banner nearby as another form of visible protest (sometimes known as

“**bannering**”). This behavior is also largely protected by law, unless there is evidence of unlawful confrontational activity such as threatening customers or other employees.

- Protest participants who engaged in **picketing** – carrying protest signs and standing or marching in front of your business – are subject to a greater degree of regulation. Because picketing usually contains an element of confrontation or coercion, such conduct is typically seen as something more than just speech. Pickets cannot block entrances or exits, cannot commit overt acts of intimidation, cannot contain threats or violence, and cannot enter private property unless invited there.
- If employees are engaging in **illegal conduct in the course of their protests**, such as trespassing, blocking entrances, or otherwise disrupting your production or services, their conduct could exceed the bounds of NLRA protection. This could permit you to implement disciplinary measures against them (again, consistent with other disciplinary actions).
- Know your **property rights**. In most states, third parties are not permitted to access your private property to engage in these protest activities. Even if you typically invite members of the public onto your premises to engage in business, they do not have the unfettered right to conduct protests there. If you don't already know, you should determine your own property rights, ascertain where your property lines begin and end, and mark your property lines where appropriate. If protestors encroach on your property or block access to it, you can take legal steps to enforce your rights by calling the law enforcement authorities. You may also have the right to gain a civil court injunction against protestors by working with your legal counsel. Of course, this also underscores the importance of recognizing that state and local ordinances may also impact your rights and obligations in this area.
- But you should also **know your limitations**. There are certain actions you should generally not take without first having a discussion with your labor lawyer. You should not spy on protestors (even your employees) gathering in public spaces. This means you should not watch them, stare at them, photograph or video record their protests, record the names of those protesting, or do anything else

that suggests or implies they will be punished for their participation in any sort of rally.

- Understand the rules related to **workplace absences** tied to protests. While you have a legitimate interest in maintaining normal levels of productivity at work and enforcing your attendance policies, under certain circumstances you may have to refrain from disciplining workers who fail to attend work. The NLRB will protect workers who engage in protected absences, but not necessarily those who are found to be participating in unlawful intermittent strikes. There is a detailed analysis to conduct to determine whether worker activity during protests is protected or not, but one of the key factors the NLRB would look to is how often the protests reoccur. The more frequently your workers walk out, the more likely their actions are considered unprotected. One-time protests are often deemed protected, while the NLRB is less likely to condone additional bites at the apple.
- Finally, if employees call a **strike or otherwise refuse to work** because of your vaccine mandate, you have the legal right to permanently replace them. Of course, if you are unionized and subject to a collective bargaining agreement with a no-strike clause, your employees likely would not be contractually permitted to strike over a vaccine mandate.

Conclusion

You should take steps now to minimize the risk of problems associated with employees protests over vaccine mandates. If you have any questions about this situation or how it may affect your business, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Labor Relations Practice Group](#).

We will continue to monitor issues surrounding this area so make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. You can also visit our [Vaccine Resource Center for Employers](#) for further information.