



# NLRB's General Counsel Tells Unionized Employers They Must Bargain Over Mandate-or-Test Vaccine ETS Rule

Insights

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The National Labor Relations Board's General Counsel just issued a Memorandum staking out her position that unionized employers must bargain with their unions over the implementation of OSHA's recently announced mandate-or-test Emergency Temporary Standard (ETS). That rule – currently stalled in litigation but poised to potentially be resurrected at any moment – will require covered employers with 100 or more employees to either mandate their workforce receive the COVID-19 vaccination or test them weekly to ensure they are not infected. What do unionized employers need to know about the November 10 memorandum, and what should they do while waiting for the ETS implementation date?

## How Did We Get Here?

The question of whether unionized employers should bargain with their unions over mandatory vaccination issues has been percolating across the country since the turn of the year. Indeed, our January 2021 Insight explored the various concerns you should keep in mind when making any labor-related vaccine decisions. The matter has become all the more acute, however, since the White House announced plans to require large employers to either mandate the COVID-19 vaccine or require weekly testing, leading to a more recent Insight where we provided a conceptual framework for unionized employers to consider. With last week's Memorandum, we now have a definitive word as to how the NLRB's "top Sheriff" – and by extension the agency's regional offices – will treat these situations.

## Summary of Memorandum

The Memorandum unequivocally states the General Counsel's position that employers covered by the ETS "have decisional bargaining obligations regarding aspects of the ETS that affect terms and conditions of employment—to the extent the ETS provides employers with choices regarding implementation." According to Acting Associate General Counsel Joan A. Sullivan, this position is supported by longstanding Board precedent. She noted that employers have traditionally been relieved of their duty to bargain when a statute requires a change in the terms and conditions of employment, but that unilateral action is prohibited if the statute allows for employer discretion in implementing the statutory requirements.

Here, the ETS allows employers to either mandate the vaccine OR conduct weekly testing. Thus, the Office of the General Counsel has taken the position that employers have sufficient discretion in implementing the ETS requirements that they are prohibited from acting unilaterally without bargaining.

Furthermore, even where specific requirements of the ETS do not allow for employer discretion, the Office of the General Counsel takes the position employers must bargain over the effects of its decision(s). AGC Sullivan compared this situation to one in which the Board held that effects bargaining was required where employees were prohibited from eating lunch in an electricians' shop because federal regulations prohibited the consumption of food in an area where certain chemicals were present. While the employer did not have discretion to allow employees to eat in the electrical shop, the Board still required the employer to bargain with the union over the impact of this prohibition.

### **Decisional vs. Effects Bargaining**

Accordingly, the Office of the General Counsel has taken the position that covered unionized employers will have both decisional and effects bargaining obligations concerning implementation of the ETS requirements.

- **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 — here, whether to require vaccination or testing, or allow for employee choice for one vs. the other. Employers' decisional rights are often addressed within the Management's Rights provision of the CBA or related subject-specific provisions.
- On the other hand, **effects bargaining** refers to bargaining over the potential impact or effect of a particular decision on bargaining unit employees. 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.).

### **What Should You Do?**

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

### **Conclusion**

We will continue to monitor developments and related workplace questions that arise. Make sure you are subscribed to [Fisher Phillips' Insight 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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