

Vaccine Mandates Don't Eliminate the Duty to Bargain in Unionized Workplaces

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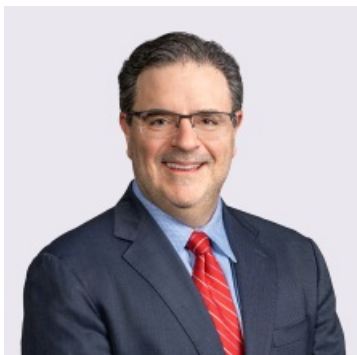
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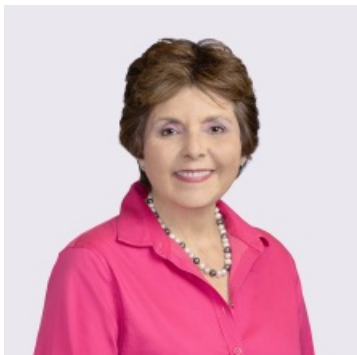


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While employers must take many legal issues into consideration when determining whether to mandate COVID-19 vaccination or testing, the issue becomes even more complex for employers with unionized employees.

[President Joe Biden's COVID-19 Action Plan](#) calls for the Department of Labor's Occupational Safety and Health Administration (OSHA) to develop a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA is currently working on drafting an Emergency Temporary Standard (ETS) to implement this requirement. These, as well as recent changes in Centers for Disease Control and Prevention guidance and surges in positive COVID-19 tests due to the highly contagious variants, particularly among unvaccinated populations, are motivating employers to mandate vaccinations or testing as a condition of employment.

As unionized employers are aware, section 8(a)(5) of the National Labor Relations Act (NLRA) requires bargaining with unions over hours and other terms and conditions of employment. This includes work rules such as vaccination or testing requirements. Whether the company's implementation of such requirements is a voluntary choice or a government mandate, the employer's duty to bargain must be considered.

Bargaining Over the Decision

If an employer has any choice over whether to institute a vaccine or testing rule, it must offer to bargain with the union over any decision to implement the policy. Such rules would introduce a new term and condition of employment for unionized employees. This duty to bargain may be avoided if the company's existing collective bargaining agreement (CBA) allows the employer to establish rules of this sort. These could be found in the management rights or workplace safety provisions. However, because the pandemic has created a unique set of concerns for employers, even a strong management rights provision might not encompass subjects such as mandatory vaccination or testing.

This is not to say an employer has an obligation to bargain over compliance with a compulsory regulation or statute. However, the extent to which an employer has discretion to implement, or when, and how to implement such rules will trigger the duty to bargain.

"Effects" Bargaining

Even if an employer must comply with a legal vaccination or testing mandate, depending upon OSHA's vaccine ETS, which may address issues such as cost of the vaccine and testing, there may still be an obligation to bargain with the union over the "effects" of its implementation. Subjects for bargaining employers must consider may include, but are

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not limited to:

1. The time frame for employees to get vaccinated;
2. Any paid time off entitlements;
3. Exceptions or accommodations for medical, pregnancy, and religious issues (and any requisite documents);
4. Consequences of non-compliance with the policy (*i.e.*, disciplinary action);
5. Whether periodic testing, masking, and social distancing are viable alternatives;
6. Who performs the vaccination or testing and who pays for them;
7. Paid time off for vaccination or testing;
8. How the employer will confirm vaccination status;
9. Paid time off for adverse reactions to the vaccine; and
10. Other incentives to encourage employee compliance (*e.g.*, avoiding insurance premium increases and the like).

This means an employer cannot lawfully implement and enforce a mandatory COVID-19 vaccination policy without first bargaining in good faith with the relevant union over these subjects. To satisfy this requirement, the employer must generally provide notice of the policy in advance of implementation, even if the implementation of the policy is permitted under the terms of a collective bargaining agreement. Once notice is provided, upon request of the union, the employer must bargain the effects of the policy. Absent a contract waiver that is broad enough to authorize the employer to unilaterally implement the policy and any effects on employees, the employer must bargain with the union to impasse or agreement.

Does the Collective Bargaining Agreement Contain a Union Bargaining Waiver?

The employer has an obligation to bargain with the union over either the decision to implement a vaccine or testing rule, the effects of implementing the rule, or both, unless the union has waived its right to bargain over this subject. The company's CBA may provide the employer with the right to unilaterally promulgate rules and regulations governing employee conduct and safety. Some CBAs, particularly in healthcare, could contain specific language that allows the employer to implement vaccination requirements. More commonly, CBAs are silent on the issue of mandatory vaccinations.

Whether or not a management rights clause would be deemed sufficient legal justification to unilaterally mandate COVID-19 vaccinations can be a difficult question. In assessing whether a CBA contains such a union waiver, the National Labor Relations Board (NLRB) currently applies a "contract coverage" standard:

Under contract coverage, the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. For example, if an agreement contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the employer would not violate [the NLRA] by unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies.

MV Transportation, Inc., 368 NLRB No. 66 (Sept. 10, 2019).

This principle holds that by agreeing to the management rights provision, the union has

already bargained over the company's ability to implement, change, or enforce rules governing employee conduct and safety. Whether the contract wording is broad enough to cover vaccinations or testing depends on the CBA.

However, *MV Transportation* may be short-lived. It is widely believed that the new Biden-appointed NLRB majority is hostile to this management-friendly interpretation and will revert to the prior, more restrictive "clear and unmistakable" waiver test. Under that interpretation, the NLRB will not find a union waiver unless the subject has been "fully discussed and consciously explored during negotiations and the union ... [had] consciously yielded or clearly and unmistakably waived its interest in the matter." *Johnson-Bateman Co.*, 295 NLRB 180 (1989). Under the "clear and unmistakable" test, a union would have to have expressly agreed to allow the employer the authority to promulgate a vaccination and testing policy.

Proceed with Caution

Employers should approach any plan to mandate COVID-19 vaccinations at unionized workplaces with due caution and a full evaluation of pertinent considerations. Implementing a mandatory vaccination policy is a substantial undertaking of management resources and could involve legal and practical risks. Without a waiver, the employer should offer to bargain with the union over either the decision or the effects of its policy, and not implement the policy until agreement is reached or the parties reach an impasse in bargaining. At impasse, an employer may consider unilaterally implementing the rule.

Several major unions have encouraged their members to obtain the vaccine and have even provided access to their members to obtain the vaccine. Many unions still oppose employer-mandated vaccination policies. The Teamsters have filed a lawsuit on behalf of the employees of TeamCare (a union health fund) challenging the fund's mandate for workers to vaccinate or face termination.

Whether there is a need to bargain over the decision to implement a policy or the effects of a policy on employees, whether there is bargaining waiver sufficient to allow unilateral implementation by an employer, and whether impasse has been reached, require legal analysis. Factors such as the evolving (and not yet finalized) OSHA ETS rules, anticipated changes in Board law, and the evolving nature of the pandemic itself further complicate the analysis. Employers should partner with competent labor counsel for guidance. For more information, employers may consult with the Jackson Lewis attorney with whom you regularly work.

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