

Labor and Employment Alert

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NLRB General Counsel Memo Highlights Collective Bargaining Obligations in OSHA's Vaccinate-or-Test Mandate for Unionized Workplaces

November 15, 2021

Key Points:

- On November 11, 2021, the General Counsel to the NLRB issued a Memorandum concerning implementation of the OSHA ETS in unionized workplaces.
- The Memorandum is important to unionized employers because it signals that the General Counsel may not excuse them from their collective bargaining obligations in seeking to comply with the ETS. While the U.S. Court of Appeals for the 5th Circuit has temporarily blocked the rule, legal challenges are ongoing and there has not yet been a final determination on the enforceability of the ETS.
- Regardless of whether the ETS withstands court review, the Memorandum takes an expansive view of collective bargaining obligations regarding mandatory vaccination and testing policies in unionized workplaces.

On November 11, 2021, the General Counsel to the National Labor Relations Board (NLRB), issued a **guidance memorandum** (the "Memorandum") setting forth her position on unionized employers' collective bargaining obligations in implementing the Emergency Temporary Standard (ETS). The ETS requires that private employers with 100 or more employees ensure that their employees are fully vaccinated against COVID-19 or tested weekly for COVID-19.¹ The ETS also requires covered employers provide paid time to workers to get vaccinated² and to allow for paid leave to recover from side effects of the vaccine.³

But what are the implications of all these requirements for employers that are typically required to bargain the terms and conditions of employment with unions representing their employees? The ETS appears to leave that question to the NLRB. More specifically, the ETS purports to establish only "minimum requirements that employers must implement," while preserving collective bargaining rights.⁴ Notably, the ETS states that it does not prevent "employers from agreeing with workers and their representatives to additional measures" or "supplant collective bargaining agreements" that include "terms that exceed the requirements" of the ETS.⁵

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As explained in the Memorandum, covered “employers would 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.”⁶ The Memorandum also notes that “[t]o the extent elements of the ETS do not give covered employers discretion,” covered employers with unionized workforces still would be “obligated to bargain about the effects of the decision.”⁷

The Memorandum is important to unionized employers because it signals that the General Counsel will not excuse them from their collective bargaining obligations in seeking to comply with the ETS. In particular, the Memorandum suggests that unionized employers may still be required to bargain over policies that mandate vaccinations or COVID-19 testing for their unionized workers. Further, the Memorandum indicates that the General Counsel will require that unionized employers bargain the effects of such policies, even if the ETS leaves them little, if any, choice in implementing its mandates.

The ETS faces challenges in court. On November 12, 2021, the 5th Circuit blocked the U.S. Occupational Safety and Health Administration (OSHA) from implementing and enforcing the ETS while legal challenges are pending, labeling the ETS “staggeringly overbroad” and citing “serious constitutional concerns.”⁸ In particular, the 5th Circuit ruled that OSHA exceeded its statutory authority by, among other things, “attempt[ing] to shoehorn an airborne virus that is both widely present in society (and thus not particular to any workplace) and non-life threatening to a vast majority of employees into a neighboring phrase [of the Occupational Health and Safety Act] connoting toxicity and poisonousness.”⁹ But this ruling does not mark the end of the ETS. Challenges to the ETS remain pending in ten other circuits. Under federal law, when multiple lawsuits involving one or more common questions of fact are filed in separate courts, the petitions are consolidated and heard by one court chosen by lottery. The challenge before the 5th Circuit will likely be consolidated with the other pending lawsuits and submitted to a single appellate panel as early as this week.

Importantly, the Memorandum could have broader implications for unionized employers beyond the ETS. Notably, the Memorandum suggests that, without the ETS, unionized employers would have been required to bargain the decision to implement a mandatory vaccination or testing policy, and still would be required to bargain the “effects” of such a policy, including, for example, additional paid leave and payment for time spent obtaining a COVID-19 test.

The Memorandum nonetheless leaves questions unanswered. It does not address which, if any, decisions unionized employers seeking to comply with the ETS would be required to bargain before implementing a mandatory vaccination or testing policy. Nor does the Memorandum explain whether such a policy could be implemented unilaterally before the employer and the union have bargained effects or reached impasse. Instead, the Memorandum only notes that such questions “will depend on the facts of any given situation.”¹⁰ These unanswered questions could have negative ramifications for unionized employers seeking to comply with the ETS. For example, an employer seeking to announce a mandatory vaccination policy well enough in advance of regulatory deadlines may wish to put employees on alert that they need to get vaccinated or be prepared to submit to weekly testing. But, under the circumstances, the employer may be restricted from making such an announcement while mired in bargaining.

While not binding authority, the Memorandum signals that the General Counsel may pursue charges against unionized employers who unilaterally implement mandatory vaccination and testing policies.

The Memorandum also highlights the critical need for companies with unionized workforces to plan ahead and be mindful of the ways in which their collective bargaining obligations could potentially be implicated or slow down their compliance with the ETS and implementation of vaccination policies.

¹ See 29 C.F.R. § 1910.501(b)(1).

² *Id.* § 1910.501(f)(1)(iii).

³ *Id.* § 1910.501(f)(2).

⁴ *Id.* § 1910.501(a), Note 1 to paragraph (a).

⁵ *Id.*

⁶ Memorandum at 2 (emphasis added).

⁷ *Id.*

⁸ In *BST Holdings, L.L.C., et al. v. OSHA*, Case No. 21-60845 (Nov. 12, 2021).

⁹ *Id.*

¹⁰ Memorandum at 2.

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