

NECA Bargaining and Vaccine Mandates and Testing

Applicable Bargaining Law

NECA Chapters will soon be faced with requests to bargain over both the Federal Executive Order (FED EO) that imposes a “hard” vaccine mandate on all federal contractors and the OSHA Emergency Temporary Standard (OSHA ETS) that imposes a “soft” mandate of vaccination or testing on all employers of 100 or more employees. This alert provides general guidance to Chapters on this issue. It should be kept **confidential**.

In general, the law requires an employer to bargain over the terms and conditions of employment with the union. That bargaining can be over the actual decision at issue or the impact (effects) of the decision that is unilaterally imposed by the employer. Employer decisional rights that are imposed without bargaining are often addressed within the CBA’s Management’s Rights clause. Legal mandates, like those imposed by the FED EO and the OSHA ETS that involve no discretion will also not require decisional bargaining. The NLRB has repeatedly held that unionized employers are generally under no obligation to bargain over the decision to comply with a mandate imposed by local, state or federal law, except with regard to any discretionary aspects of compliance. *See Dickerson-Chapman, Inc.*, 313 NLRB 907, 942 (1994).

However, even in the absence of decision-bargaining obligations, unionized employers remain obligated to furnish unions with meaningful advance notice for purposes of engaging in “effects bargaining” upon demand. Often referred to as “impact bargaining,” such bargaining goes to the impact of the underlying decision on bargaining unit personnel. Therefore, the first task for NECA Chapters is to determine what, if anything, is subject to bargaining when imposing the legal mandates in both the FED EO and the OSHA ETS.

On November 10, 2021, the National Labor Relations Board’s (NLRB) General Counsel’s office released Memorandum OM 22-03 (Exhibit A) regarding bargaining obligations arising from the OSHA ETS. Although unionized employers typically are not obligated to bargain over the decision to comply with statutorily mandated employment conditions, the Agency’s memorandum indicates that there are certain components of the ETS that afford employers some degree of discretion and those discretionary decisions must be bargained. OM Memo 22-03 explicitly (and unfortunately) refuses to provide any guidance on which ETS requirements impose bargaining obligations on employers, stating instead that “the General Counsel does not offer advisory opinions and each case stands on its own facts.”

The Stay

While the Fifth Circuit temporarily stayed the ETS, pending its review, employers with 100 or more employees begin to develop a mandatory vaccine policy by which all employees must be vaccinated (subject to reasonable accommodation under religious and disability non-discrimination laws) or permit all unvaccinated employee to undergo weekly testing for COVID-19 and wear a face covering at work. As the ETS is written, the employer must draft and issue a vaccine policy by December 6, 2021. This deadline hinges on the Fifth Circuit lifting its stay prior to December 6, 2021, but that could occur on very short notice.

The FED EO

Since the FED EO imposes a hard vaccine mandate, there is little discretion involved in its implementation. Federal Contractors facing the FED EO have 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.

Many Chapters may choose to simply advise members that they need to comply with the letter of the Executive Order or not be qualified to perform on federal contracts. In other words, no vaccine, no work. There may still be some effects bargaining demanded by the union¹, which could include things such as:

- The amount of time the employer must give employees to recover from side effects of the vaccine.
- What type of job separation results from a refusal to get vaccinated.
- The method for the maintenance of records of employee vaccination status.

It may be that there is no meaningful bargaining that occurs with regard to the FED EO. That said, it is best practice not to refuse a good faith bargaining request and risk an unfair labor practice charge. In addition, no bargaining delay should distract an employer from the compliance deadlines contained in the FED EO. Simply implement and bargain the effects at a later time.

The OSHA ETS

The impending OSHA ETS, on the other hand, 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.

The issues that will likely be the subject of the union’s request to bargain over the OSHA ETS (in addition to those listed above for the FED EO) include the following:

¹ We have seen both a letter from a local (Exhibit B) and a letter from IBEW International President (Exhibit C) referencing union expectations on bargaining.

- The option to implement a mandatory vaccine policy or to permit unvaccinated employees to work subject to weekly testing and wearing face coverings.
- The implementation of the face covering requirement for unvaccinated employees if the employer opts to permit unvaccinated workers to test weekly and wear a face covering.
- Paying for COVID-19 testing costs or costs associated with the face covering mandate for unvaccinated employees. The ETS does not require employers to pay for testing or face coverings (subject to state or local law), providing employers discretion as to how the costs are allocated.
- Whether the employer will engage in contact tracing or require close contacts to be removed from the workplace following an employee testing positive for COVID-19.
- Whether paid time off (PTO) for any side effects of the COVID-19 vaccine runs concurrently with existing sick time or other generic PTO.
- Unlike time spent actually receiving the vaccine (which cannot run concurrent to any existing leave), the ETS grants employers the discretion to require employees to use existing sick time or generic PTO to cover time spent recovering from any side effects of the vaccine.
- Administration of weekly testing for unvaccinated employees.
- How employees will be notified of the requirements of the ETS and receive other required communications. While employers must give employees notice of the ETS and related employer policies, the ETS gives employers flexibility regarding how to convey the required information to its workforce (or an employee representative—i.e., a union if one represents employees).

Chapters may indeed decide that the discretion involved in implementing the mandates in the OSHA ETS are management rights subsumed within the employer's right to provide and maintain a safe workplace; however, as previously stated that may be a distinction without difference. Best practice is to work with members to develop the policy and plan required by OSHA ETS and develop a bargaining strategy designed to protect the implementation of that plan in practice.

ADA Accommodations

The union is likely to argue that employers must bargain over the duty to provide religious and medical accommodations under the FED EO and the OSHA ETS consistent with the Americans with Disabilities Act. This accommodation process is the same required by all employers under the ADA for all religious and medical accommodation requests and need not be bargained.

As with most of the COVID-19 legislation and regulation, additional guidance is likely forthcoming. NECA will updated these resources, as necessary. Please seek competent legal or human resources advice for assistance with any specific factual scenarios.

This material is for informational purposes only. The material is general and is not intended to be legal advice. It should not be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, applicable CBAs, prime contracts, subcontracts, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.

OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM OM 22-03

November 10, 2021

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Joan A. Sullivan, Acting Associate General Counsel

SUBJECT: Responding to Inquiries Regarding Bargaining Obligations Under the
Department of Labor's Emergency Temporary Standard to Protect
Workers From Coronavirus

On November 5, 2021, the U.S. Department of Labor issued an Emergency Temporary Standard to Protect Workers from Coronavirus (ETS).¹ This Memorandum contains a brief summary of the ETS and provides Information Officers with the basic legal framework for answering questions concerning employers' duty to bargain regarding the ETS's requirements.

The ETS covers employers with 100 or more employees—firm or company-wide—and provides options for compliance. It requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy unless they adopt a policy requiring employees to choose to either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work. The ETS also requires covered employers to provide paid time to workers to get vaccinated and to allow for paid leave to recover from side effects.²

Information Officers may receive inquiries from employers, labor organizations, or their representatives regarding whether and what kind of bargaining obligations may arise

¹ On November 6, 2021, the U.S. Court of Appeals for the Fifth Circuit Court granted the petitioners' emergency motion to stay the enforcement of the ETS. *B.S.T. Holdings, L.L.C. et al. v. Occupational Health and Safety Administration et al.*, No. 21-60845. This Memo is being issued now as we hope it may ultimately offer guidance to parties, practitioners and the general public as needed.

² See <https://www.dol.gov/newsroom/releases/osha/osha20211104>. The ETS also requires covered employers to: determine the vaccination status of each employee, obtain acceptable proof of vaccination status from vaccinated employees, and maintain records and a roster of each employee's vaccination status; require employees to provide prompt notice when they test positive for COVID-19 or receive a COVID-19 diagnosis, remove the employee from the workplace (regardless of vaccination status), and not allow them to return to work until they meet required criteria; ensure each employee who is not vaccinated is tested for COVID-19 at least weekly (if the employee is in the workplace at least once per week) or within seven days before returning to work (if the employee is away from the workplace for a week or longer); and ensure that, in most circumstances, each employee who has not been fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes.

from the ETS. Although the General Counsel does not offer advisory opinions and each case stands on its own facts, the General Counsel's position is that 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.

Although an employer is relieved of its duty to bargain where a specific change in terms and conditions of employment is statutorily mandated, the employer may not act unilaterally so long as it has some discretion in implementing those requirements. This principle is supported by longstanding Board precedent, e.g., *Trojan Yacht*, 319 NLRB 741, 743 (1995) (rejecting employer's defense that unilateral freeze of benefit accruals was required by revised tax statute, as employer "had some choices over which the parties could have bargained"); *Keystone Consolidated Industries*, 309 NLRB 294, 297 (1992) (rejecting employer's argument that it was "legally compelled" to unilaterally implement pension plan changes pursuant to Internal Revenue Code and ERISA), *rev'd on other grounds*, 41 F.3d 746 (D.C. Cir. 1994); and *Hanes Corp.*, 260 NLRB 557, 558, 561-63 (1982) (rejecting employer's argument that OSHA regulation requiring employees to use respirators privileged its refusal to bargain over which respirators to use, as regulation gave employers "significant flexibility and latitude in implementing steps necessary for compliance").

The ETS clearly affects terms and conditions of employment—including the potential to affect the continued employment of employees who become subject to it—and gives covered employers discretion in implementing certain of its requirements.

To the extent elements of the ETS do not give covered employers discretion, leaving aside decisional bargaining obligations, the employer is nonetheless obligated to bargain about the effects of the decision. For example, in *Blue Circle Cement*,³ the Board held that an employer could unilaterally prohibit employees from eating lunch in the electricians' shop because Federal regulations prohibited the consumption of food in an area where certain chemicals were present, but the employer violated Section 8(a)(5) by failing to bargain about the effects of the change. Whether a covered employer may implement a mandatory regulation prior to a valid impasse or agreement when bargaining over effects will depend on the facts of any given situation.

Please contact your Deputy or Assistant General Counsel should you have questions concerning this memorandum.

/s/
J.A.S.

Cc: NLRBU

Release to the Public

Memorandum OM 22-03

³ 319 NLRB 954, 954 n.1, 958-59 (1995), *enforcement denied mem.*, 106 F.3d 413 (10th Cir. 1997).

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Electrical Work
for Electrical Workers



**International Brotherhood
of Electrical Workers**

**Local Union No. 176
Joliet, Illinois**

November 1, 2021

Mr. Scott Dworschak
Eastern Illinois Chapter
National Electrical Contractors Association
1308 Houbolt Road
Joliet, Illinois 60431

Re: COVID-19 - Request to Bargain

Dear Sir:

IBEW Local 176 demands bargaining regarding working conditions, a mandatory subject of bargaining, particularly COVID-19 testing process, vaccination, exceptions, medical, religious exemption or otherwise, appeal process in the event of exemption denial, leaves of absences, layoff, cost, frequency of testing, how and when it is to be conducted, who bears the expense, implementation and effects of the implementation of such a policy.

In addition to the above, to the extent any contractors are affected by the Federal Contractor Vaccine mandate, the Union demands bargaining over the mandate (to the extent aspects are discretionary) including the process for exemptions, limiting contact between workers on those contracts and unit employees.

To assist the Union in bargaining, please provide in advance of bargaining the following information:

1. Copies of the covered contracts or contract like instruments which are a basis for application of the Federal vaccine mandate and the jobs and employers involved,
2. Communications with or information from the Federal government about inclusion of a clause in the relevant contract or contract-like instruments for the vaccine mandate.
3. Identify the workers (by title and location) who are performing on or in connection with those contracts (if these are not Local 176 represented employees, then explain how Local 176 represented employees come into contact with those persons).

Thank you for your cooperation.

Fraternally yours,

Michael Clemmons
Business Manager



**INTERNATIONAL
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LONNIE R. STEPHENSON
International President

KENNETH W. COOPER
International
Secretary-Treasurer

October 14, 2021

VIA EMAIL

To: All Local Unions with Inside and Outside Jurisdiction in the United States

Re: Vaccination Requirements – Bargaining Obligations

Dear Sisters and Brothers:

The International Vice Presidents and my office have been receiving many questions concerning construction contractors' attempts to implement vaccination requirements.

As you know, I have made no secret about my views concerning COVID-19 vaccines: the vaccines are a major scientific achievement and provide us with our best chance of putting this pandemic behind us once and for all. Everyone who can get vaccinated, should do so.

Of course, my belief that everyone who can be vaccinated should do so does not mean that contractors can do whatever they want with respect to vaccination requirements. My position has been and will remain that a vaccination requirement is a mandatory subject of bargaining to be bargained at the local level.

The questions we have seen are: (1) what can be bargained? (2) who should the local union bargain with? and finally (3) what else, if anything should be done?

There are two parts of what can be bargained when it comes to a vaccination requirement. First, there is the question whether the decision to require vaccinations is itself subject to bargaining. That will depend on your collective bargaining agreement's language and in large part on whether the decision is a result of a requirement imposed by the government and/or owner. Second, and perhaps more important, is the question of the effects of a vaccination requirement, which are themselves a mandatory subject of bargaining. That means even if a contractor can decide to require vaccinations without bargaining, the contractor must still bargain over how that decision will be implemented. For example, the date by which employees must be vaccinated would be subject to bargaining, as would how employees will show proof of vaccination; how the employer is going to handle requests for exemptions; and a number of other issues, including whether employees will be compensated for being vaccinated. Indeed, there are too many "effects" of a vaccination requirement to outline here. The point is that even if the decision to implement a requirement is not subject to bargaining, the effects of that requirement should be negotiated.

The question of who to bargain with, turns on whether the contractor wanting to implement the policy is signed to a Letter of Assent-A. One NECA Chapter is pursuing unfair labor practices against several IBEW local unions because the local unions entered into non-economic modifications with a Letter of Assent-A holder





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without bargaining through the NECA Chapter. Those charges have not been withdrawn despite our complaints to NECA's national office that requiring a local union to bargain every single issue with the NECA Chapter is not practical. As a result, if a contractor that is signed to a Letter of Assent-A approaches your local union with a vaccine requirement, you should demand bargaining – perhaps over the decision, and certainly over the effects – with the NECA Chapter, even if the request is only from one contractor. If the NECA Chapter would rather that you bargain directly with the contractor, have the NECA Chapter put that in writing before bargaining with the contractor.

Finally, we have seen some contractors announce they are implementing a vaccine requirement without providing sufficient information. If you are unsure whether an owner has implemented a requirement, you should request a copy of that requirement from the NECA Chapter and contractor. You should also request any additional information necessary to bargain these issues.

I realize that vaccine requirements are controversial. As I stated, I believe that it is critical that members who can be vaccinated get the vaccine to protect their families and their sisters and brothers on the job site. But I also believe that these requirements need to be bargained in good faith at the local union level.

If you need further assistance, please contact your international representative.

With best wishes, I am

Fraternally yours,

Lonnie R. Stephenson
International President

Copy to Kenneth W. Cooper, International Secretary-Treasurer
All International Vice Presidents in the United States
Darrin E. Golden, Chief of Staff
Mike Richard, Director, Construction and Maintenance Department

