



What The 'Vaccine Or Test' Mandate Means For The Union Workplace

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When the [Occupational Safety and Health Administration issued its Emergency Temporary Standard to Protect Workers from Coronavirus \(ETS\)](#) on Nov. 5, it was clear that there was no exemption for employers with unionized workforces. Although the presence of a union in a workplace presents some complications, OSHA still expected those employers to comply with the minimum requirements of the ETS.

The National Labor Relations Board is charged with consideration of these issues, and the NLRB General Counsel's office issued a short memo on Nov. 10 [in response to the ETS](#). Without offering much detail, it provides the basic legal framework within which unionized employers must approach the ETS in their workplaces. The framework is a familiar and longstanding one:

- Employers do not have to bargain over the mandatory aspects of the ETS, but they must bargain over the effects of the implementation of the ETS
- As to aspects of the ETS that leave the employer with discretion, employers whose employees are represented by a union must bargain over the use of that discretion

These bargaining obligations will hold unless the employer can show that the

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union has waived its right to bargain by, for instance, language in a collective bargaining agreement or by inaction after being notified of the employer's intention to implement the ETS in a certain manner. Given the context-specific nature of waiver arguments, these issues call for individualized analysis.

With this basic groundwork in place, what are some aspects of the ETS that are likely to be raised at bargaining tables around the country, and how do those issues fit into the framework?

1. **The decision whether to adopt a mandatory vaccination policy or offer employees the option to undergo weekly testing and wear a face covering.** The ETS leaves it to the employer to decide whether to require employees to be fully vaccinated against COVID-19 (except in cases of bona fide religious or disability accommodation), or to allow employees the option to submit to weekly COVID-19 testing and wear a face covering while at work. Because this choice is left to the employer's discretion, it must be bargained with the union if the union has not waived bargaining on the subject. Due to the nature of the ETS, employers wanting to permit the testing and face covering option are unlikely to meet resistance. However, employers opting for the mandatory vaccination option should prepare for some harder bargaining.
2. **Costs of testing, face coverings, medical removal.** If employers choose to permit the testing and face covering option, the ETS does not require them to pay for testing or face coverings. Nor does it require employers to provide payment to employees who must be removed from the workplace due to a positive COVID-19 test or diagnosis. However, these points must be bargained with any union representing a group of employees.
3. **Providing paid time off for vaccination.** The ETS requires employers to provide "up to 4 hours" of PTO per injection for employees to become vaccinated against COVID-19. This must be in addition to any PTO the employee may already have. However, unions may try to bargain for more PTO to for employees to receive injections of the vaccine. Indeed, employers are not prevented from providing more benefits and protections to employees than the ETS requires.
4. **Recovery time.** The ETS requires employers to provide time off for employees to recover from side effects of receiving the vaccine. While employers are not required to provide any additional PTO for this purpose, they must permit employees to use any banked paid sick leave they have available. However, employers cannot require employees to use non-sick leave time, like vacation time, to recover from the side effects of receiving the vaccine. Unions likely would be interested in obtaining additional PTO for recovery, even though the ETS doesn't require it. OSHA has stated that it will presume that two days is sufficient time for recovery, but noted that employers will need to be flexible in allowing for more time if an employee has a particularly severe reaction. Unions may seek more than two days across the board, whether some or all of it is paid.
5. **What happens to non-compliant employees.** The ETS does not require employers to terminate employees who refuse to comply with a vaccination or testing regime, but they must remove non-compliant employees from the workplace (unless they have been granted an accommodation for a disability or a sincerely held religious belief). Therefore, some unions may raise the issue of how to handle these

employees. Existing just cause termination provisions in a collective bargaining agreement may cover the termination of an employee refusing to comply with the employer's policy, but some employers may want to consider other options, particularly in a tight labor market. For instance, is placing the employee on a leave of absence an option? The ETS currently is slated to sunset after six months. Because of this, some employers may want to strike a deal allowing an extended leave of absence, or placing the employee on a preferential recall list after the ETS sunsets.

This certainly does not exhaust all of the issues employers with unions may face when (or if) they implement this ETS, but it should give those employers a head start in thinking strategically about their options and obligations.