

Bodman PLC

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Unionized Employers Must Bargain About Vaccine Policies

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On November 10, 2021, the National Labor Relations Board's General Counsel published OM 22-03 regarding the duty to bargain over issues related to the Occupational Safety and Health Administration's ("OSHA") Emergency Temporary Standard ("ETS"), which requires employers with 100 or more employees to implement a mandatory vaccine or vaccine-or-test policy.

The General Counsel advises, not surprisingly, that the discretionary elements of the ETS are mandatory subjects of bargaining and, to the extent the ETS does not provide discretion, covered employers are obligated to bargain about the effects of the ETS required policy. This means that absent a clear and unmistakable waiver of the right to bargain over COVID-19 safety procedures and their effects, covered employers must provide unions with notice and an opportunity to bargain before implementing their mandatory vaccine or vaccine-or-test policy.

Subjects that might be raised in bargaining include, but are not limited to:

- Whether the policy will mandate vaccination or permit weekly testing as an alternative;
- Whether the employer will pay for the cost of COVID-19 testing;
- Whether the employer will provide paid time off for vaccines/adverse vaccine reactions beyond what is required by the ETS;
- The procedure for requesting exemptions from a mandatory vaccine policy;
- How proof of vaccination and test results will be collected and maintained;
- How employees must notify the company of a positive COVID-19 test result;
- Return to work procedures after a confirmed COVID-19 test;
- Compliance deadlines that are prior to ETS requirements; and
- The consequences of employee non-compliance

The bottom line is that unionized employers must provide notice and opportunity to bargain over the discretionary elements of their ETS required policy, and the effects of the non-discretionary elements. It should also be noted that at the time of this publication, OSHA's

ETS is subject to a [stay of enforcement](#). OSHA has been ordered to “take no steps to implement or enforce the [ETS] until further court order.”

Employers should contact any member of **Bodman’s Workplace Law Group** to discuss their compliance with OSHA’s ETS and/or the implementation of their policy in a unionized workforce. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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