

Employers Must Bargain with Unions Over OSHA's Vaccination-or-Testing Rule

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On November 10, 2021, following the announcement of OSHA's new [vaccination-or-testing rule](#), the Office of the General Counsel of the National Labor Relations Board released a memorandum addressing employers' obligation to bargain with unions representing their employees in complying with the rule. The General Counsel memo makes clear that employers covered by the OSHA rule must bargain with their employees' unions regarding the aspects of the rule that affect the terms and conditions of employment.

The memo relies upon "longstanding Board precedent" imposing a duty to bargain on employers concerning changes in terms and conditions of employment when an employer has discretion in implementing those changes. According to the General Counsel's Office, OSHA's vaccination-or-testing rule "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." As a result, employers will have to bargain with their employees' unions regarding those aspects of the vaccination-or-testing rule where employers have discretion in how they implement the rule.

Moreover, the memo makes clear that, as to those provisions of the rule that are mandatory and therefore do not allow employers discretion in implementation, employers still must bargain with their employees' unions over the effects of the implementation of those mandatory elements of the rule. Whether an employer may implement a mandatory rule prior to a valid impasse or agreement when bargaining over effects will depend on the facts of the given situation.

Given the Board's guidance, covered employers with unionized workers should be sure to engage their employees' unions when developing their vaccination and/or testing policies to comply with the new OSHA rule.

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