

NLRB General Counsel Issues Guidance on Bargaining Obligations under OSHA ETS

November 12, 2021

On November 10, 2021, the NLRB General Counsel issued a memorandum discussing the bargaining obligations imposed on covered employers under **OSHA's Emergency Temporary Standard to Protect Workers from Coronavirus ("ETS")**. Although the U.S. Court of Appeals for the Fifth Circuit has issued a stay on the ETS, the memorandum was nonetheless released to "offer guidance to parties, practitioners and the general public as needed."

The ETS describes the "minimum" requirements regarding vaccinations, vaccination verification, face covering, and testing to prevent the spread of COVID-19 in the workplace. In the memorandum, the General Counsel takes the position that certain aspects of the ETS affect the terms and conditions of employment and thus impose bargaining obligations on employers whose employees are represented by a union. For example, the ETS authorizes mandatory vaccinations or in the alternative requires employees to be regularly tested and wear a mask. Given that an employer has some discretion in how it implements the OSHA requirement, the employer must bargain with the union on how they may affect the terms and conditions of employment. As the memorandum notes, an employer "may not act unilaterally so long as it has some discretion in implementing" statutory requirements.

For areas in which the ETS does not provide discretion in its implementation, the General Counsel asserts that covered employers must still bargain the effects of the decision prior to implementing the changes. For example, the ETS requires covered employers to support COVID-19 vaccination by providing employees reasonable time to get the vaccine, including up to four hours of paid time, as well as reasonable time and paid sick leave to recover from side effects. Covered employers must also determine the vaccination status of each employee and require each vaccinated employee to provide acceptable proof of vaccination status. Although a covered employer can unilaterally implement these ETS mandates without bargaining, it will have to bargain over the effects of the policies, such as the consequences for employees who fail to comply.

It is thus prudent for employers with union-represented employees to remain vigilant of their bargaining obligations under the ETS, as their compliance efforts may potentially expose them to unfair labor practice charges by a union for failing to bargain in good faith.

If you have questions about these new developments or how they may impact your unionized workforce, please contact the authors of this alert or your Miller Canfield attorney.

This information is based on the facts and guidance available at the time of publication and may be subject to change.