

Electronic Alert

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Vaccination, Testing, & Unions: Employers Must Negotiate with Unions over Parts of OSHA ETS

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On Wednesday, November 10, 2021, the National Labor Relations Board's Acting Associate General Counsel issued a Memo ([OM 22-03](#)) outlining their position on employers' bargaining obligations under OSHA's recent Emergency Temporary Standard (ETS) on vaccinations. We wrote an E-Alert covering OSHA's ETS [here](#). Among several requirements, the ETS states that covered employers with 100 or more employees need to mandate employee vaccination or weekly testing.

In short, the Memo explains that covered employers have decisional bargaining obligations regarding the aspects of the ETS that affect terms and conditions of employment to the extent employers have choices on how to implement the ETS. This is because while the duty to bargain is relieved where a change to terms and conditions of employment is required by law, the employer may not unilaterally implement the change if it has discretion in how to comply with the law.

The Memo also reminds employers that even where an employer does not have discretion in implementing parts of the ETS, they are obligated to bargain over the effects of those changes. As an example, the Memo references the *Blue Circle Cement* case. In that case, the NLRB held that the employer *could* unilaterally prohibit employees from eating lunch in a specific area because federal regulations prohibited the consumption of food in an area where certain chemicals were present, ***but the employer unlawfully failed to bargain*** about the effects of the change.

If you have questions about OSHA's ETS or any related bargaining obligations, contact Nicole Elgin at 503-276-2109 or nelgin@barran.com.