

COVID-19 Vaccine and Related Bargaining Issues Under the NLRA

Does employer intend to mandate vaccine?



- Per EEOC guidance, employers can likely require the vaccine but must allow for exceptions for religious and health reasons
- NLRB case law suggests a mandatory vaccine policy is lawful under the NLRA. However, employers should consider employee morale

NO

YES

But will want to require employees who don't take a vaccine to follow different rules around the workplace.

- Likely will need to bargain over application of different work rules to bargaining unit members
- State/Local requirements may bolster case for requiring other safety precautions

Bargaining obligation triggered, absent ability to act unilaterally.

Read the CBA: Does the contract permit employer to act unilaterally? Does it bar employer from implementing this policy?

CBA does not authorize making changes but does not prevent it.

CBA authorizes unilateral change with respect to vaccine.

Employer will need to give union notice and opportunity to bargain over decision to mandate vaccine. Employer must bargain in good faith until agreement is reached or parties reach impasse.

Effects bargaining

Employer Makes Vaccine Available To Employees, but Does Not Mandate.



Will employer provide it apart from its health insurance program?

NO

YES

As long as it is offered on same terms to everyone, then only notice to union is likely required.

Should bargain with union over scope of agreement to pay (i.e., how long a period of time and how many vaccines will be provided). MOU should have clear terms and clear expiration.

- Does the management rights clause: Allow the employer to make decisions impacting health and safety? Give employer the right to require vaccinations? *The short answer is probably no unless explicitly stated.*
- Is there a broad zipper clause? If yes, this may preclude bargaining or implementing new changes by impasse during term of agreement.



Additional related mandatory bargaining topics concerning a mandatory vaccine policy include:

- Priority of vaccines determined by seniority or by some other means?
- Will the vaccine be administered at work or by sending employees to an offsite location?

Possible effects bargaining scenarios.

- Is the vaccine one time or yearly?
- What are the exceptions to the policy?
- Record keeping and access to medical records.
- Exemptions from policy and application process for exemption or accommodation.
- For those exempted/accommodated, will there be other safety measures required? If yes, then bargaining must occur over safety measures.
- Process/procedures for employees who experience side effects from vaccine.
- Consequences for employees who refuse to take vaccine.

