

NLRB Asserts Unionized Employers Must Bargain Over the Implementation of OSHA'S Emergency Temporary Standard

Following OSHA's November 5, 2021, publication of its [Emergency Temporary Standard](#) (ETS) on COVID-19 vaccination and testing, unionized employers have asked what bargaining obligations they may have with respect to implementing the ETS. On November 10, 2021, the National Labor Relations Board (NLRB) responded to such inquiries by issuing a short memorandum, [Memorandum OM 22-03](#), authored by its acting associate general counsel.

The memorandum's key principle is that whenever a unionized employer has some discretion in implementing a particular ETS requirement, the employer may not act unilaterally. In other words, whenever the ETS provides an employer with choices regarding implementation, the NLRB believes decisional bargaining is required. The NLRB asserts that such bargaining is required because the ETS affects terms and conditions of employment—including, potentially, a bargaining unit member's continued employment.

The NLRB also believes that even when a particular ETS requirement gives an employer no discretion in implementing that requirement, the employer is nonetheless obligated to bargain over the effects of the implementation. The memorandum adds that "[w]hether a covered employer may implement a mandatory regulation prior to a valid impasse or agreement when bargaining over effects will depend on the facts of any given situation."

Large, unionized employers should also take note of paragraph 2.F. of OSHA's "Frequently Asked Questions." That paragraph, titled "How will the ETS apply to unionized workplaces?," states that the ETS does not displace labor contract provisions that exceed ETS requirements, nor does the ETS prohibit employers and unions from agreeing to implement additional measures aimed at safeguarding the workforce from COVID-19.

If you have questions concerning your collective bargaining obligations when implementing the ETS, contact [Robert Sholl](#) or your Reinhart attorney.

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