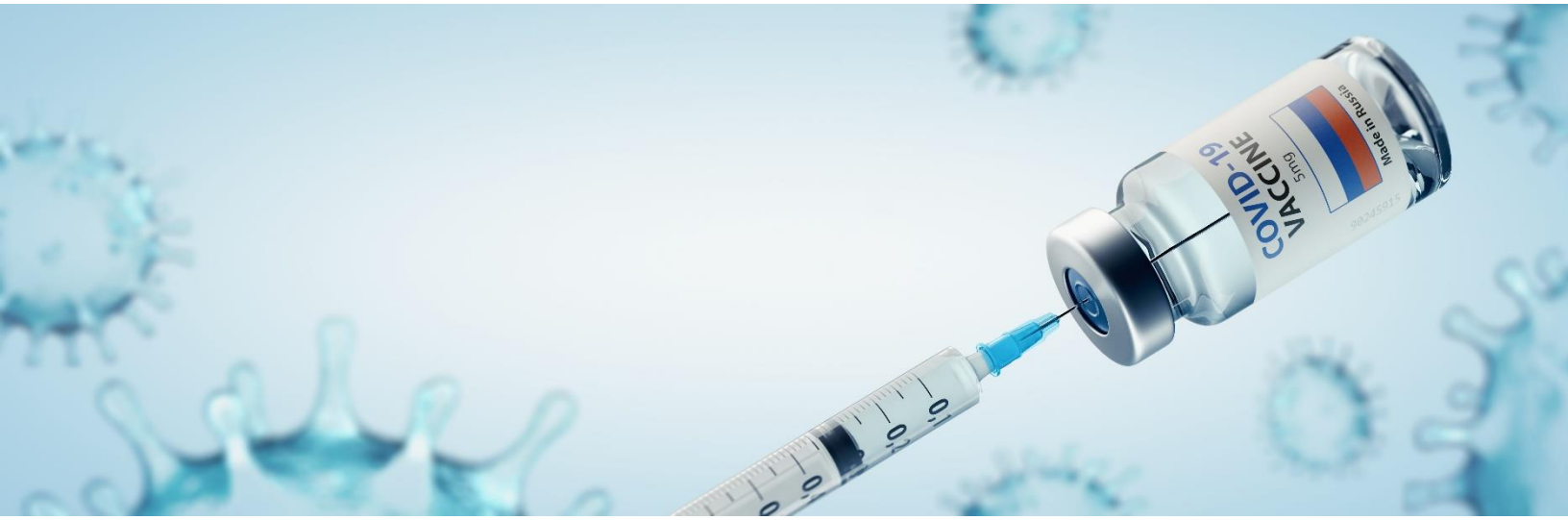
Vaccination and Protected Concerted Activity



A White Paper for Unionized and Non-Unionized Employers

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Executive Summary

While non-unionized employers are free to adopt vaccination policies (so long as they comply with EEOC guidelines, as well as state and local law), unionized employers have an obligation to bargain over the implementation of these policies, unless circumstances warrant an exception. To this end, depending on the language of their collective bargaining agreements, employers may argue that they are authorized to unilaterally implement vaccine mandates under the employer-friendly "contract coverage" standard adopted by the National Labor Relations Board in *MV Transportation;* however, employers should be warned that the case is likely to be overruled by a new component of Board members, and the less expansive standard will be applied retroactively. A unionized employer may also be excused from bargaining over the implementation of a policy if vaccination is mandated by state or federal law; however, this exception will only apply if the employer has no discretion over the terms of the policy.

Even if a unionized employer is entitled to unilaterally adopt a vaccination mandate without bargaining, the employer will still be required to bargain over the effects of that mandate. Some likely subjects for effects bargaining include any discipline that may be issued as a result of employees' refusal to accept vaccination; paid time off for workers to receive vaccinations; and paid time off for employees who have adverse reactions to the vaccinations. Practically speaking, unionized employers may see better outcomes by working with the union prior to the implementation of any policy in a joint effort to encourage vaccinations, find and address the reasons for vaccine hesitation, and limit noncompliance once the rules take effect.

Non-unionized employers who experience strikes, stoppages, or walkouts in response to the adoption of a lawful vaccination policy should generally treat the employees as economic strikers. As such, they cannot be terminated, but they can be permanently replaced, and will have to wait for a job opening before they can be reinstated. An argument can be made that, under certain circumstances, non-unionized employers may terminate striking employees when the purpose of their concerted activity is better classified as general political advocacy relating to vaccination – for example, if a state mandates vaccinations for healthcare workers, and the non-unionized employer must follow the law (and has no power to waive the requirement), the strikers' conduct could be viewed as political activity that falls beyond the scope of the Act. Along those same lines, employees who engage in strike activity that has no relationship to the terms and conditions of their employment (for example, walking off the job to attend rallies sponsored by anti-vaccination groups) are likely not entitled to the protection of the Act. Still, the facts surrounding the strike activity should be carefully considered before any action is taken in order to determine whether the conduct is concerted and protected.

In unionized workplaces, strike activity will generally be prohibited by a no-strike clause, unless the strike is in response to an employer's unfair labor practices, or an immediate safety concern. As there is no valid argument to support the notion that a vaccine mandate presents an immediate safety threat to employees, this exception is unlikely to apply. Employees who engage in valid unfair labor practice strikes over the unlawful implementation of a vaccination policy (or the employer's unlawful failure to bargain over the policy's effect) cannot be permanently replaced, and – barring serious misconduct – must be reinstated following their offer to return to work, even if this means terminating those employees who were hired in their place. On the other hand, if the employer has not committed an unfair labor practice and its implementation and application of the policy is lawful, the strikers

lose the protection of the Act, and can be terminated. Again, this will require a close review of the facts to determine whether the conduct is protected by the NLRA.

The most practical course for most employers may be to suspend employees who take part in strikes or work stoppages, pending an investigation into the purpose of the demonstration. This will ensure that the employer has time to properly classify the activity and determine the degree of protection (if any) is afforded the employee; this may also be a better solution for those employers who are experiencing staffing shortages, and who cannot easily replace any substantial component of their workforce.

Analysis

Introduction

As employers consider whether to mandate that their employees be vaccinated against COVID-19, they should also consider the opposition they may face from vaccine-hesitant employees, as well as labor organizations. Despite overwhelming scientific evidence that the COVID-19 vaccine is safe and effective – and the best tool for controlling the spread and future mutation of the virus – misinformation is rampant, and the politicization of the vaccine's development and roll-out has left many scared, confused, and angry. For some, any attempt to mandate vaccination is seen as an attack on personal liberty. And, unfortunately, some unions, as well as other "worker" organizations, have seized upon this rhetoric to oppose the implementation of vaccination policies in the workplace.

Indeed, despite their stated interest in protecting the health and safety of its members, some labor unions have gone so far as to organize rallies in opposition to vaccine requirements – on July 22, 2021, 1199SEIU United Healthcare Workers East staged a protest against the privately-owned New York Presbyterian Hospital's imposition of a vaccine requirement for employees, with the Union's Communication Director claiming that "our members are best equipped to make the healthcare decisions that are right for their bodies and for their families […] We have been promoting vaccination, but to make vaccination a condition of employment is absolutely wrong." Similarly, in late July, the American Postal Workers Union issued a statement in which it challenged vaccination requirements for public employees, claiming that "it is not the role of the federal government to mandate vaccinations for the employees we represent […] at this time the APWU opposes the mandating of COVID-19 vaccinations in relation to U.S. postal workers." Protests against employers' vaccination policies have occurred, and are planned, throughout the country.

Fortunately, not all unions are outwardly hostile toward vaccination requirements; in July, shortly before his death, AFL-CIO President Richard Trumka claimed the labor organization supported vaccine mandates, explaining that, "if you are coming back into the workplace, you have to know what's around you." Still, even those unions that do support vaccine mandates have largely taken the position that such requirements cannot be implemented without bargaining; for example, while various unions have voiced their agreement with the Washington State directive that healthcare workers be vaccinated, they nonetheless issued a joint statement noting that they "fully expect employers to bargain with us over this change to working conditions."

But it is not just the unions who are engaging in concerted activity to protest vaccination mandates. A group called America's Healthcare Workers for Medical Freedom is not known to be affiliated with

any labor organization, but is promoting and organizing anti-vaccination demonstrations across the county. Similar organizations, such as Nurses Against Mandatory Vaccines, have also spurred protest activity, as have groups dedicated to advancing COVID denial and Q-Anon based conspiracy theories. In some instances, these groups have advocated for workers to walk off their jobs in a show of political solidarity and to protest vaccine mandates.

This white paper will examine the labor law implications of implementing vaccine mandates, as well as the options an employer has when dealing with vaccine-related protests (including work stoppages, and strikes) in both union and non-union settings.

The Duty to Bargain over Vaccine Mandates

In general, employers have the right to require vaccination in their workplaces. To this end, the EEOC has issued a guidance explaining that:

> Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964 and other EEO considerations.

As such, for a non-unionized employer, federal law[1] does not prohibit the implementation of a vaccine requirement, so long as reasonable accommodations are made for individuals with disabilities or verified religious objections. For unionized employers, on the other hand, implementing a vaccine mandate may not be so simple, and will likely trigger their bargaining obligations under the National Labor Relations Act.

A. Bargaining Obligation, Generally

Generally speaking, in a unionized workplace, an employer has the obligation to bargain over terms and conditions of employment, including those relating to health and safety. The Board has long held that safety rules constitute a mandatory subject of bargaining. *Castle Hill Health Care Center,* 355 NLRB No. 196 (2010) (holding that "workplace safety is a mandatory subject of bargaining"); *Public Service Co. of Oklahoma,* 334 NLRB 487, 489 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003) (holding that "work and safety rules" are a mandatory subject of bargaining); *AK Steel Corp.,* 324 NLRB 173, 181 (1997) (holding that "equipment and work rules related to job safety" are mandatory subjects of bargaining); *American National Can Co.,* 293 NLRB 901, 904 (1989), enfd. 924 F.2d 518 (4th Cir. 1991) (holding that health and safety matters are mandatory subjects of bargaining). Any change to job requirements is also considered to be a mandatory subject of bargaining. *San Antonio Portland Cement Co.,* 277 NLRB 338, 338 (1985). Finally, where an employer imposes discipline for failing to follow safety rules or failing to meet newly imposed job requirements, the Board has held that this constitutes a *per se* mandatory subject of bargaining. *Praxair Inc.,* 317 NLRB 435, 436 (1995).

Accordingly, it follows that requiring an employee to be vaccinated or face discipline or discharge would trigger an employer's bargaining obligations. Still, there are some exceptions to this general

[1] While other federal laws may not restrict an employer's ability to implement a vaccine mandate, states may adopt such laws. At present, only Montana has passed a law prohibiting employers from requiring an employee to disclose their vaccination status, and prohibiting any employer mandate of a vaccine that is subject to the FDA's preliminary emergency use authorization status.

rule which would permit employers to unilaterally implement a vaccination mandate without first bargaining with the union.

B. Unilateral Policy Implementation Permitted Under Contract Language

The first exception to the general duty to bargain will depend on the specific language of a collective bargaining agreement, and whether that language empowers the employer to take unilateral action. In its 2019 *MV Transportation, Inc.* decision, the NLRB adopted the "contract coverage" standard to determine whether an employer is required to bargain before implementing a change to terms or conditions of employment. 368 NLRB No. 66 (2019). In applying this standard, the Board indicated that it will "examine the plain language of a collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." The Board explained as follows:

> For example, if an agreement contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the employer would not violate Section 8(a)(5) and (1) by unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies. In both instances, the employer will have made changes within the compass or scope of a contract provision granting it the right to act without further bargaining. In other words, under contract coverage the Board will honor the parties' agreement, and in each case, it will be governed by the plain terms of the agreement.
>
> *MV Transportation, Inc.*, 368 NLRB No. 66 at *2.

The Board went on to explain that it is not necessary that the contract refer to the action taken by the employer; rather, the Board will "find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally […] we will not require that the agreement specifically mention, refer to or address the employer decision at issue." *Id.* at *17.

The "contract coverage" analysis represents a significant break from the Board's previous long-held (and much maligned) "clear and unmistakable waiver" standard, which placed a significantly higher burden on employers to establish that the union "unequivocally and specifically" waived its interest in bargaining over the employer's action. And, while the Board's approach was frequently criticized by the circuit courts (many of which vacated Board decisions and applied the contract coverage doctrine instead), the Board has been resistant to change – until now.

Under *MV Transportation*, it can be argued that a management rights clause that empowers an employer to implement new policies or procedures, or to set job qualifications, could authorize an employer to implement a vaccine mandate. Moreover, as long as the employer has a "sound arguable basis" for believing that it has the authority to implement the policy and did not adopt the policy in bad faith or out of animus, the NLRB will not find a violation of the Act, even if the union disagrees with its interpretation:

> The employer's interpretation need not be the only reasonable interpretation in order to pass muster under the "sound arguable basis" standard. If an employer has a sound arguable basis for its interpretation and the General Counsel also presents a reasonable interpretation of the relevant contractual language, the Board will not seek to determine which interpretation is correct. Under those circumstances, the employer will not have violated the Act.
>
> *Id.* at *28.

In all, *MV Transportation* gives employers significant leeway in implementing new policies (including those relating to vaccination) – this, however, may prove to be a short-lived victory for employers, and many expect that the case will be overturned. To this end, the newly appointed NLRB Chair, Lauren McFerran, published a dissent sharply criticizing the majority's decision to abandon the longstanding "clear and unmistakable waiver" doctrine, in which she argued that the new standard gave employers unchecked power to make unilateral changes. With the addition of new Biden appointed Board members, the Board will soon shift back to Democratic control – and, while *MV Transportation* is good law now, any future Board decision will likely be applied retroactively, meaning that this will not help employers who rely on the standard to justify their unilateral actions. Moreover, this repudiation may occur sooner rather than later, as newly-appointed NLRB General Counsel Jennifer A. Abruzzo specifically mentioned *MV Transportation* in her first GC Memorandum (issued August 12, 2021), noting that the case required careful consideration based on its departure from well-established Board precedent.

Still, if *MV Transportation* is overruled, the Board has interpreted management rights clauses as permitting an employer to implement certain safety measures, even under the "clear and unmistakable" waiver standard. Indeed, this is what ultimately happened in *Virginia Mason Hosp.*, 357 NLRB 564 (2011), a case in which the Board rejected a hospital's initial argument that it had no duty to bargain before implementing a flu prevention policy because the policy went to the Hospital's "core purpose" of protecting patients, and was therefore exempt from mandatory bargaining under *Peerless Publications*, 283 NLRB 334 (1987). The Board disagreed, holding that the *Peerless* decision was of little precedential value, and was practically limited to the facts of that case: the Board further explained that, "[n]either the record here, nor the Board's own long experience […] suggests that collective bargaining – which inevitably implicates how, when, and by whom patients are cared for – has interfered with the core purposes of hospitals." 357 NLRB at 568.[2]

Following the Board's rejection of its *Peerless Plywood* argument, *Virginia Mason* was remanded to the ALJ to consider the hospital's alternate defenses. This time, the hospital argued that it was entitled

[2] The *Virginia Mason* decision has been the subject of significant discussion during the pandemic, both because it is the closest the Board has come to discussing vaccine mandates, and because it was specifically cited in former NLRB General Counsel Peter Robb's Memorandum GC 20-04, *Case Summaries Pertaining to the Duty to Bargain in Emergency Situations* (Mar. 27, 2020). There, Robb summarized the facts and holding of *Virginia Mason*, but also highlighted the dissent by Member Hayes, explaining that Hayes "did not believe *Peerless* 'has been--or should be--limited to its facts[,]'" and noting that, "In Member Hayes' view, the employer's flu-prevention policy satisfied [the core purpose test.]" At the time it was issued, Robb's reference to Member Hayes' dissent was seen by some as an indication that Robb agreed with Hayes' assessment, and would entertain arguments for COVID-19 related safety rules under the *Peerless* standard; however, with Robb's termination by President Biden and the subsequent appointment of GC Abruzzo on July 22, 2021, the chances of succeeding based on *Peerless* are significantly diminished. Still, particularly in the healthcare setting, a core purpose argument in support of the unilateral implementation of a vaccine mandate could be raised, on the grounds that the interest in stopping the spread of deadly global pandemic outweighs the interest in protecting against influenza, and may come closer to what the Board would consider to be a hospital's "core purpose."

to require flu prevention techniques based on its management rights clause, in which the Union "...recognizes the right of the Hospital to operate and manage the Hospital, including but not limited to the right to require standards of performance and [...] to direct the nurses [...] to determine the materials and equipment to be used; [...] and to promulgate rules, regulations, and personnel policies." Relying on this language (and the existence of an infection control policy already in place at the hospital), the ALJ found that the influenza policy was simply an extension of the infection control guidelines, and that such an extension was explicitly permitted under the management rights clause. As such, he concluded that, even under the Board's clear and unmistakable standard, the Union waived its right to bargain over the change – and his supplemental decision was affirmed by the Board. 358 NLRB No. 64 (2012).

C. Unilateral Implementation Permitted By State or Federal Law

Another possible exception to an employer's general duty to bargain over policy implementation can arise if the employer is forced to take action based on federal, state, or local law. Already, some jurisdictions are mandating that all healthcare employees be vaccinated; the federal government is in the process of implementing similar requirements for its workers.

As the Board explained in *Western Cab Co.*, 365 NLRB No. 78 (2017), "when an employer is compelled to make changes in terms and conditions of employment in order to comply with the mandates of another statute, it must provide the collective-bargaining representative of its employees with notice and an opportunity to bargain over the discretionary aspects of such changes[;]" applying this principle to legislative vaccination mandates, however, unionized employers may have very little discretion as to what the policy would contain.

If a unionized employer has no discretion over the policy, then its bargaining obligation is excused. To this end, in *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987), the Board adopted the ALJ's dismissal of an allegation relating to an employer's unilateral implementation of a rule against eating or drinking in the shop areas. Finding that the employer crafted the rule to comply with an OSHA standard that prohibited the consumption of food or drink in areas exposed to toxic materials, the ALJ held that the "Respondent was not only within its rights, but also legally bound to adopt a rule that complied with Federal law." As such, he concluded that the employer did not violate the Act by failing to bargain with the union over the policy. Similarly, in *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964), and Board affirmed the dismissal of allegations against an employer who unilaterally raised wages in order to comply with the minimum wage requirements of the FLSA, finding that there was no duty to bargain over the change.

On the other hand, the Board has found that an employer is not excused from bargaining where it has some degree of discretion in how it complies with the law, as the employer is still required to bargain over the discretionary aspect. *See, Hanes Corp.*, 260 NLRB 557, 562-563 (1982) (finding that the employer unlawfully failed to bargain over an OSHA-mandated respirator program where the type of respirator to be selected was discretionary); *Dickerson-Chapman, Inc.*, 313 NLRB 907 (1994) (finding that the employer unlawfully failed to bargain over an OSHA-mandated designation of "competent persons" because the selection methodology was discretionary).

Ultimately, whether a legal requirement excuses an employer from its bargaining obligations will depend on the specificity of the legislation; still, even if the law leaves no discretion in the terms of a policy, an employer is still likely to have an obligation to bargain over that policy's effects.

D. Effects Bargaining

Even if an employer is excused from bargaining over the implementation of a vaccination policy, this does not completely excuse them from any bargaining obligation, as they may still be required to engage in bargaining over the effects of the policy's implementation.[3] This could include timelines for implementation of the policy; terms of separation for employees discharged under the policy; exceptions to the policy and how to obtain an exception; and provisions for enabling employees to receive vaccinations. Simply put, to the extent that the implementation of a vaccination mandate would have any material effect on employees, the employer will have a bargaining obligation.

Still, depending on the policy being adopted, in some cases an employer may argue that the policy has only a de minimis effect on employees. For example, if a policy requires vaccination, but gives employees the alternative option of wearing masks and practicing social distancing, this may be considered too insignificant a change to the terms and conditions of employment to require bargaining. Of course, that approach may also be insufficient to protect others against the spread of COVID-19, but it might be feasible in industries where there is little interchange between employees or exposure to the public. For the most part, though, any effective vaccination policy should probably include regular mandated testing of unvaccinated employees – and, as regular testing is less likely to be viewed as de minimis (and could even be considered an adverse action if the employee is required to pay for the testing), the effects bargaining obligation would probably apply in the majority of situations.

E. Bargaining Strategies

In all, it is more likely than not that most unionized employers will have some duty to bargain over a vaccine mandate, even if that bargaining occurs post-implementation. Still, to the extent that an employer can work with the union to encourage all employees to be vaccinated (given that the union's stated purpose is to protect the health and safety of its members), communication and bargaining with the union may advance the employer's interests and lead to greater compliance – and, more importantly, to a safer workforce.

Some possible suggestions for bargaining strategies include:

- offering paid time off for employees to receive vaccinations;
- allowing paid time off for employees who have adverse reactions to the vaccinations;
- providing easy access to vaccines (including on-site vaccinations);
- offering an alternative to vaccination (above those exceptions recognized by the EEOC, and which relate to disability and religious accommodations), such as weekly testing and masking and social distancing requirements for non-vaccinated employees;
- financial or other incentives for employees who receive the vaccine; and

[3] While *MV Transportation* did not address the impact of the new standard on effects bargaining, presumably, employers would still have a duty to bargain with the union over how unilaterally adopted policies would impact employees.

- paid time off for vaccinated employees who suffer "breakthrough" infection, but requiring non-vaccinated employees to use their own PTO (as long as state law does not prohibit "discrimination" against non-vaccinated employees).

Depending on the industry, some unions may suggest that non-vaccinated employees be permitted to work remotely, or that they receive pay for additional time spent getting weekly COVID tests (and, there is anecdotal evidence that these demands have been raised in bargaining); however, we would strongly recommend against such concessions, and against any action that could be viewed as rewarding non-vaccinated employees.

Finally, while we fully anticipate that the new Board and General Counsel will be less sympathetic to employers, it bears noting that vaccination mandates are consistent with the policy of the current presidential administration, as President Biden has "announced sweeping new pandemic requirements aimed at boosting vaccination rates for millions of federal workers and contractors[,]" (and, notably, drawing the ire of unions himself). Moreover, in a July 29 news release, the White House explicitly encouraged private employers to "follow this strong [federal] model" and to mandate vaccinations in their own workforces. And, while this does not eliminate an employer's obligations under the NLRA (particularly with respect to its duty to engage in effects bargaining), it does provide a unique factual background in which an employer who imposes reasonable vaccination requirements can argue that it did so in support of the President's (and by extension, the Agency's) agenda. Finally, we can also hope that the political climate and growing backlash against labor organizations who oppose vaccination will serve to discourage unions from holding employers hostage over unreasonable bargaining demands, and will prompt all parties to adopt reasonable measures to keep employees safe.

Work Stoppages and Concerted Activity

Section 7 of the NLRA empowers both unionized and nonunionized employees to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[;]" this includes the right to strike or walk off the job in an effort to highlight employee concerns or demand employer action. Still, not all strikes are protected, and the degree of protection afforded to a striking employee will depend on various factors, including what the strike seeks to achieve.

To this end, there are two lawful types of strikes: economic strikes, and unfair labor practice strikes. Economic strikes are undertaken to force the employer to change a policy or improve some term or condition of employment; if the object of the strike is to secure higher wages, better hours, or improved working conditions, this will constitute an economic strike. Economic strikers cannot be discharged, but they can be permanently replaced by their employer, and can only return to work when there is a job opening.

The other lawful strike is an unfair labor practice (ULP) strike, which occurs when employees stop working in order to protest an unlawful act by the employer. ULP strikers are entitled to a higher degree of protection under the NLRA; they cannot be discharged or permanently replaced, and when the strike ends, they are entitled to reinstatement, even if it means terminating their replacement. It should be noted, however, that employees can only be designated as ULP strikers if the employer has committed an actual ULP – if the employer is cleared of any charges, then the strikers lose all protection of the Act, and can generally be terminated pursuant to the employer's neutral policies.

In addition to these general guidelines, not all strikes are lawful, and some strikes go beyond the scope of the Act. The NLRA does not protect strikers who protest for an unlawful purpose, or who stop working in order to participate in protests that are unrelated to their employment; it typically does not protect intermittent strikers, or those who engage in work slow-downs. Moreover, strikes may also be unlawful if they violate a no-strike provision in a current collective bargaining agreement, or if they violate the particular rules that apply to healthcare institutions, and which require labor organizations to provide 10 days advance notice before engaging in any concerted work stoppage.

Given this general framework, it is likely that the following laws will apply to protests and work stoppages relating to vaccine mandates.

A. Work Stoppages and Concerted Activity In Non-Union Facilities

Because nonunionized employers are entitled to implement vaccine requirements without engaging in bargaining with the union, there can be no argument that the employer's adoption of such a policy constitutes an unfair labor practice. Accordingly, if nonunion employees engage in a concerted work stoppage or strike in response to the implementation of a vaccine mandate, they are engaged in an economic strike.[4] An employer has the right to permanently replace economic strikers – they cannot be terminated, but the employer can hire permanent replacements, and the strikers would be entitled to be called back when job openings occur.

On the other hand, there is always the possibility that nonunion employees will engage in work stoppages and strikes not to protest working conditions, but to stand in solidarity with the groups opposing mandatory vaccination. Similarly, nonunion employees may engage in concerted activity in response to a governmental order, such as a state requirement that all healthcare personnel be vaccinated. In this case, there is an argument to be made that these individuals are striking for a political purpose, and not in an appeal to the employer, and are beyond the protection of the Act.

In 2008, the NLRB General Counsel issued a Memorandum in response to widespread immigration demonstrations. In that memo, the GC noted that the influx of cases had required the agency to review its approach to "political advocacy cases," and to create a framework for considering such cases in the future. This framework is described as a two-step inquiry – first, the Board will ask whether the advocacy falls within the "for mutual aid and protection" clause of the Act; and, second, it will ask whether the particular activity is protected.

With respect to the first part of the analysis, the memorandum notes the question is "whether there is a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees." Applying that test to the immigration demonstrations of 2006, the GC concluded that those activities were, in fact, for the mutual aid and protection of workers. – the stated concerns of the protesters included job protection for immigrant workers, and this qualified as a work-related concern in the view of the GC, so the "advocacy" requirement was satisfied.

[4] Note that this refers only to concerted activities for mutual aid and protection; obviously, individual walkouts or stoppages may not meet the requirements for concerted activity, and would therefore not be entitled to protection under the Act. Moreover, it should also be noted that a non-unionized employer may commit other unfair labor practices which would entitle strikers to ULP striker status (this could occur, for example, if the employer discriminated against union supporters in applying its policy); however, simply implementing and applying a neutral vaccination mandate would not constitute an unfair labor practice.

Nevertheless, just because a concern falls under the "mutual aid and protection" clause does not mean that any activity taken in support of that advocacy is necessarily protected. The NLRA offers significant protection for political actions that occur on non-working time in non-work areas; generally, employers cannot discipline employees for that type of activity. When the advocacy involves leaving or stopping work, however, this constitutes a strike – an economic weapon that seeks to force an employer to change a policy or practice that is within the employer's control. With matters of political advocacy — for example, legislative vaccine mandates – the employer lacks the ability to change the outcome, arguably rendering the activity unprotected. As described in the GC Memo:

> [When] employees leave work in support of a political cause, either to mobilize public sentiment or to urge governmental action (in either case a matter outside their employer's control), they are not withholding their services as an economic weapon in the employment relationship. It is primarily because the employees' underlying grievance is not usually one which their employer can address that the employees' conduct, while resembling a strike, is distinctly different from the typical strike specifically protected under Section 13.
>
> Indeed, [the Supreme Court has] suggested that economic pressure in support of a political dispute may not be protected when it is exerted on an employer with no control over the outcome of that dispute. We agree with that principle.
>
> GC Memorandum No. 08-10 (July 2008).

Where vaccinations are required by governmental action, the mandates are outside of the employer's control; as such, any protest activity would not be protected by the Act, and an employer would be entitled to apply its lawful work rules to employees who leave work without approval, or who violate the attendance policy, so long as those rules are applied in a neutral manner. The same is also true for employees who take part in any political activity that does not seek to compel the employer to action, such as an employee walking off the job to attend a political rally; this does not constitute activity protected by the NLRA.

While the Memorandum is from 2008, it has not been withdrawn, and the underlying law remains in effect; as such, the political advocacy exception constitutes a useful argument for employers who are faced with political activity related to COVID-19 vaccines, or who adopt vaccine mandates in response to legislative requirements.

Still, just because an employer can, does not mean an employer should – from a practical perspective, when dealing with a strike or stoppage in non-union facilities, an employer's best bet may be to take things slowly. Rather than immediately terminating or replacing any employees who participate in a strike or stoppage, it is usually preferable to suspend them, pending investigation. This will allow the employer additional time to determine whether the particular activity was protected (and to what degree), and to ensure that any adverse action is permissible under state or local rules. This may also be a reasonable option if staffing is an issue, or if there is extensive employee participation. Above all, the employer's response to strike activity should recognize the requirements of the NLRA, but should also take into consideration its own operational needs, its policies, and its past practices.

B. Work Stoppages and Concerted Activity In Unionized Facilities

For the most part, work stoppages and strikes in unionized facilities will be prohibited by a no-strike provision in a current collective bargaining agreement; however, there are some exceptions to this general rule. Specifically, the Act protects employees who strike in order to oppose unfair labor practices committed by the employer; it also protects those who engage in work stoppages or walkouts in protest of conditions that are abnormally dangerous to employee health.[5]

Turning to the first possibility, if unionized employees engage in a strike in response to a unilaterally implemented vaccination policy, they would likely be viewed as unfair labor practice strikers, if it is determined that the employer unlawfully failed to bargain with the union (either over the implementation of a policy or its effects), ULP strikers can neither be discharged nor permanently replaced, and when the strike ends, they are entitled to reinstatement, even if replacement employees have to be discharged.

This, obviously, can become complicated, as the determination as to whether or not the employer has committed an unfair labor practice may turn on a question of contract interpretation (in which case, it should be deferred to the parties' grievance and arbitration procedure), or it may turn on whether the employer has fulfilled its bargaining obligations under the Act (which could be resolved through NLRB processes). On the other hand, an employer in a unionized setting is likely to have more notice of a potential strike, and ultimately, greater ability to prevent a strike through negotiation. Moreover, if the employer and the union successfully bargain over the implementation of a vaccine policy (or over the effects of its implementation), then any employees who engage in work stoppages or strikes in protest of the policy can be generally terminated for their violation of the collective bargaining agreement.

Turning to the second possibility – that the employees engage in strike activity to oppose unsafe working conditions – this is unlikely to apply. Section 502 of the LMRA (which creates the safety exception) provides that such strikes are protected when the employees have a good faith belief that their working conditions are abnormally dangerous, and that belief is "supported by ascertainable, objective evidence." Given the overwhelming scientific data establishing the safety of the vaccines, it is extremely unlikely that employees would be able to provide objective evidence that vaccine requirements constitute an immediate threat of harm to their health and safety. Accordingly, employees who strike or refuse to work based on such concerns can generally be terminated pursuant to the contract and the employer's neutral policies.

Recommendations

In light of the various legal issues highlighted above, employers should consider the following recommendations before drafting or implementing their own policies:

- **The scope of a vaccination mandate.** While an employer may have little discretion where the mandate is required by law, in many workplaces, the employer will have to decide whether to mandate vaccination subject only to the exceptions set forth by the EEOC, or to allow additional exceptions or accommodations. When making this determination, employers

[5] There is no exception for political activity, and as such, if any employee refuses to work in order to take part in such a demonstration, their conduct will likely be prohibited by the collective bargaining agreement, and unprotected by the Act.

should consider the nature and location of the business; the attitudes of the workforce; the interchange between employees; the interactions employees may have with the public; the viability of remote work; and the effectiveness of allowing an alternative (such as weekly testing, masking, and social distancing for unvaccinated employees).

- **Communication to employees.** An employer with vaccine-hesitant employees may want to mount an educational campaign to inform employees about the safety and efficacy of the vaccinations. Community leaders, medical professionals, and health officials can be brought to an employer's facility to communicate directly with employees and answer their questions, and there is growing anecdotal evidence that these educational campaigns are effective in alleviating vaccine hesitancy, and addressing (and correcting) disinformation.

- **Incentive programs.** Employers may choose to reward vaccinated employees financially, or they may offer special perks or enhanced benefits to vaccinated employees. At a minimum, we would recommend offering paid time off for employees to receive the vaccine (and certain employers may be entitled to federal tax incentives for allowing such time off), as well as offering paid time off for any employees who experience adverse side effects from the vaccinations.

- **Partnering with the Union.** In unionized facilities, the Union may be willing to work in partnership with the employer to encourage vaccination as a first-step towards the implementation of a vaccination mandate. In some instances, unions have agreed to proposals in which all new employees must be vaccinated, but existing employees are given additional time to comply; however, this approach may be more effective if undertaken in conjunction with employee educational programs.

- **Policy Review.** Employers should review their existing rules on facility access, solicitation and distribution for currentness and legal compliance, and in case any protest activity occurs (and in particular, any protest activity that involves non-employees).

- **Supervisor Training.** Ensure that supervisors are aware of the potentially protected nature of any vaccine protests, and that they know to report such activity (or rumors of such activity) to labor relations/human resources. Additionally, both unionized and non-unionized employers should remember that supervisors are not covered by the NLRA, so if they engage in any strike activities, they are not entitled to the protection of the Act, and can be subject to discipline.

- **Plan for staffing issues.** Employers who anticipate non-compliance with vaccine requirements should prepare to replace employees who ultimately refuse to comply with vaccination protocols.

- **Public statements.** While this will depend on the industry, employers may want to prepare statements to be shared with the general public relating to the vaccination policies in effect for their employees, as well as an explanation of how the employer will keep customers, clients, or visitors safe.

Conclusion

While the questions surrounding vaccine mandates are new, the principles of labor law are well-established, both for unionized and non-unionized employers. If you or your clients have any additional questions, or if you would like to discuss a specific issue, please reach out to the Constangy Traditional Labor Group for further assistance.

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