

CLIENT ALERT: NLRB General Counsel Explains Bargaining Obligations for Unionized Employers regarding the New Emergency Temporary Standard to Protect Workers from Coronavirus (ETS)

On November 10, 2021, the National Labor Relations Board's General Counsel's Office issued Memorandum OM-22-03 outlining an employer's bargaining obligations with their unions relating to the recent Emergency Temporary Standard requiring employers with 100 or more employees to adopt a policy requiring employees to choose either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work. ([See prior MBJ Client Alert of November 4, 2021](#))

The Memorandum indicates that the General Counsel's position is that covered employers "would have decisional bargaining obligations regarding aspects of the ETS that affect terms and conditions of employment" in areas of the ETS that allow employers flexibility on implementation. Citing prior case law, the General Counsel notes that, while an employer is relieved of the duty to bargain where a specific change in working conditions is mandated by statute, it may not act unilaterally where it has some discretion in implementing those requirements. The ETS does provide employers some discretion in implementing its requirements and, as such, an employer must negotiate over such implementation questions with their unions.

In addition, regarding other aspects of the ETS where no discretion is afforded, the employer may still have a duty to bargain over the *effects* of the decision.

Check with your MBJ attorney for any questions regarding this new NLRB guidance.

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