

OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM OM 22-03

November 10, 2021

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Joan A. Sullivan, Acting Associate General Counsel

SUBJECT: Responding to Inquiries Regarding Bargaining Obligations Under the
Department of Labor's Emergency Temporary Standard to Protect
Workers From Coronavirus

On November 5, 2021, the U.S. Department of Labor issued an Emergency Temporary Standard to Protect Workers from Coronavirus (ETS).¹ This Memorandum contains a brief summary of the ETS and provides Information Officers with the basic legal framework for answering questions concerning employers' duty to bargain regarding the ETS's requirements.

The ETS covers employers with 100 or more employees—firm or company-wide—and provides options for compliance. It requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy unless they adopt a policy requiring employees to choose to either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work. The ETS also requires covered employers to provide paid time to workers to get vaccinated and to allow for paid leave to recover from side effects.²

Information Officers may receive inquiries from employers, labor organizations, or their representatives regarding whether and what kind of bargaining obligations may arise

¹ On November 6, 2021, the U.S. Court of Appeals for the Fifth Circuit Court granted the petitioners' emergency motion to stay the enforcement of the ETS. *B.S.T. Holdings, L.L.C. et al. v. Occupational Health and Safety Administration et al.*, No. 21-60845. This Memo is being issued now as we hope it may ultimately offer guidance to parties, practitioners and the general public as needed.

² See <https://www.dol.gov/newsroom/releases/osha/osha20211104>. The ETS also requires covered employers to: determine the vaccination status of each employee, obtain acceptable proof of vaccination status from vaccinated employees, and maintain records and a roster of each employee's vaccination status; require employees to provide prompt notice when they test positive for COVID-19 or receive a COVID-19 diagnosis, remove the employee from the workplace (regardless of vaccination status), and not allow them to return to work until they meet required criteria; ensure each employee who is not vaccinated is tested for COVID-19 at least weekly (if the employee is in the workplace at least once per week) or within seven days before returning to work (if the employee is away from the workplace for a week or longer); and ensure that, in most circumstances, each employee who has not been fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes.

from the ETS. Although the General Counsel does not offer advisory opinions and each case stands on its own facts, 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—to the extent the ETS provides employers with choices regarding implementation.

Although an employer is relieved of its duty to bargain where a specific change in terms and conditions of employment is statutorily mandated, the employer may not act unilaterally so long as it has some discretion in implementing those requirements. This principle is supported by longstanding Board precedent, e.g., *Trojan Yacht*, 319 NLRB 741, 743 (1995) (rejecting employer's defense that unilateral freeze of benefit accruals was required by revised tax statute, as employer "had some choices over which the parties could have bargained"); *Keystone Consolidated Industries*, 309 NLRB 294, 297 (1992) (rejecting employer's argument that it was "legally compelled" to unilaterally implement pension plan changes pursuant to Internal Revenue Code and ERISA), *rev'd on other grounds*, 41 F.3d 746 (D.C. Cir. 1994); and *Hanes Corp.*, 260 NLRB 557, 558, 561-63 (1982) (rejecting employer's argument that OSHA regulation requiring employees to use respirators privileged its refusal to bargain over which respirators to use, as regulation gave employers "significant flexibility and latitude in implementing steps necessary for compliance").

The ETS clearly affects terms and conditions of employment—including the potential to affect the continued employment of employees who become subject to it—and gives covered employers discretion in implementing certain of its requirements.

To the extent elements of the ETS do not give covered employers discretion, leaving aside decisional bargaining obligations, the employer is nonetheless obligated to bargain about the effects of the decision. For example, in *Blue Circle Cement*,³ the Board held that an employer could unilaterally prohibit employees from eating lunch in the electricians' shop because Federal regulations prohibited the consumption of food in an area where certain chemicals were present, but the employer violated Section 8(a)(5) by failing to bargain about the effects of the change. Whether 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.

Please contact your Deputy or Assistant General Counsel should you have questions concerning this memorandum.

/s/
J.A.S.

Cc: NLRBU

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³ 319 NLRB 954, 954 n.1, 958-59 (1995), *enforcement denied mem.*, 106 F.3d 413 (10th Cir. 1997).