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# Deployment of COVID-19 Vaccines In A Unionized Workforce Frequently Asked Questions

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As we enter the second year of the pandemic, it has become increasingly apparent the various vaccinations approved for safeguarding against COVID-19 are a key element to returning to normal business operations.  Employers have raised a number of questions about how the vaccine can be deployed effectively to assist the business.

In a unionized environment, there are additional legal obligations—primarily in the bargaining context—and this document focuses on those issues.

**Basic Legal Principles:**  In situations where part of the employer's workforce is represented by a union, there may be bargaining obligations before implementation of a vaccination or related program. In such situations, the first step for the employer is to consult the relevant collective bargaining agreement to determine if it authorizes (through a management rights clause) or restricts (through a zipper/complete agreement/wrap-up clause) implementation of a medical program during the term of the agreement.  If the collective bargaining agreement is silent on the issue, the employer should be mindful of its legal obligations toward the union.

Under Section 8(a)(5) of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. §158(a)(5), an employer has an obligation to bargain with the existing union over wages, hours, and other terms and conditions of employment before implementing any changes. These subjects are commonly referred to as mandatory subjects of bargaining. While there appears to be no case directly on point concerning the mandatory requirement that a union represented employee receive a vaccination, the case law of the National Labor Relations Board ("NLRB" or "Board") provides sufficient guidance in this area to conclude bargaining would be required. "[L]abor law presumes that a matter which affects the terms and conditions of employment will be a subject of mandatory bargaining." *Newspaper Guild v. NLRB*, 636 F.2d 550, 561 (D.C. Cir. 1980). The most common ways a new workplace rule affects a term or condition of employment is if an employee's breach of the rule can lead to discipline or the loss of an opportunity. Consequently, any new requirement or rule that is enforceable through discipline or causes a change to an employee's terms of employment is considered by the NLRB to be a mandatory subject of bargaining. *Praxair, Inc.,* 317 NLRB 435, 436 (1995) ("A union with a duty to represent employees in disciplinary proceedings has the right to be informed of the existing rules that might lead to discipline of unit employees").

**Question:** Can the employer mandate the vaccination?

**Answer:** Generally speaking, with the exception of religious and medical accommodations, there is no legal restriction on an employer making the decision to mandate that employees receive the vaccination. In a unionized environment, however, the employer must first notify and give the union representing its employees an opportunity to bargain over the decision to make vaccines mandatory. While there appear to be no cases where mandating a vaccine is analyzed by the NLRB, it seems clear that anytime an employer wishes to stick a needle into an employee's arm for any reason, it is considered a mandatory subject of bargaining. For example, the NLRB has found that the requirement of employees to take drug tests of any kind is a mandatory subject of bargaining. *Johnson-Bateman, Co*., 295 NLRB 180, 193 (1989) ("drug/alcohol testing constitutes an extraordinary incursion into highly sensitive matters which could directly affect the employees' continued employment"). *See also Medicenter, Mid-South Hospital*, 221 NLRB 670, 676 (1975) (polygraph testing of employees a mandatory subject of bargaining). This bargaining obligation would require the employer to bargain in good faith to agreement or impasse. *Milwaukee Spring*, 268 NLRB 601, 601 (1984), *enforced sub nom. Autoworkers Local 547 v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985) (commonly referred to as *Milwaukee Spring II*).[1] An exception to this obligation would be if the relevant collective bargaining agreement authorizes the employer's unilateral action (which would be a rare case). Conversely, bargaining could only proceed provided the collective bargaining agreement does not prohibit mid-term bargaining over new issues in the form of a broad zipper or wrap-up provision.

**Question:** Can the employer make the vaccine available to the unionized workforce but not require it?

**Answer:** Provision of the vaccine to the unionized workforce would require bargaining if it constitutes a new benefit to employees. *See Keeler Brass Co.*, 327 NLRB 585, 589 (1999) (employer-paid flu immunization "is certainly a mandatory subject of bargaining"). For example, if the employer's healthcare plan normally provides vaccines for the flu and other viruses, then no bargaining would be required because it would be part of the negotiated health care structure. If the employer wishes to speed up the return to work by providing access to and paying for the vaccine, then bargaining would be required. Issues to be resolved in bargaining include: (a) the priority of who gets the vaccine (seniority and other provisions of the collective bargaining agreement may be implicated); (b) the term of the benefit (one year or multiple years) because taking away the benefit later also would require bargaining; (c) the payment for the vaccine; (d) how the vaccine is administered; and (e) compensation for time spent getting the vaccine, whether on-site at the employer's premises or at another location.

**Question:** What if the employer wants to require employees who do not get the vaccine to comply with additional measures, such as wearing a mask at work?

**Answer:** Such new working conditions for a portion of the workforce would require bargaining. *Virginia Mason Hospital*, 356 NLRB 564, 566 (2011)[2] (hospital employer's requirement that employees who did not get flu vaccine must wear masks in patient areas at all times a mandatory subject of bargaining). This is because some employees but not all would be required to wear a mask. Of course, in the current crisis, face masks are often required for all employees. If face coverings in the workplace are mandated by federal, state or local authorities for *all* employees, then there probably is no obligation to bargain. Compliance with a government directive which does not leave employer discretion carries no obligation to bargain. *See, e.g., Standard Candy Co.*, 147 NLRB 1070, 1073 (1964).

**Question:** Can the employer provide the vaccine to the non-union workforce but not the union-represented employees?

**Answer:** Generally, yes. It has long been the law that the employer has the right to treat represented and unrepresented employees differently for purposes of wages and benefits, so long as the treatment is not discriminatorily motivated. *Merck, Sharp and Dohme*, 367 NLRB No. 122 (2019), slip op. at 3 (*citing Shell Oil Co.,* 77 NLRB 1306, 1310 (1948)). Such unlawful discrimination could occur if the employer's motivation in removing a benefit (or failing to give it) is based on union animus. *Keeler Brass Co*., 327 NLRB at 588-89 (Section 8(a)(3) violation occurred when employer stopped providing flu vaccine to union-represented employees only where there was evidence employer was trying to demonstrate to employees who were organizing the differences between union and non-union benefits at the company).

**Question**: Is there a bargaining obligation if a customer mandates that all visitors to its worksites be vaccinated?

**Answer**: A customer requirement normally would not be an issue requiring bargaining. The union represents the bargaining unit with respect to its terms or conditions of employment, not the conditions mandated by a third party. *See, e.g., Pleasantview Nursing Home, Inc*., 335 NLRB 961, 963-964 (2001) (initiation fee imposed by union on bargaining unit employees a non-mandatory subject of bargaining). The employer may have an obligation to bargain over the effects of being unable to send an employee to a customer's worksite.

[1] Reaching lawful impasse normally allows the employer to implement its final proposal. How this would work if the union (and by extension) employees maintain refusal to receive the vaccine is unclear and would require an in-depth analysis of practical and legal obstacles.

[2] This finding against the employer was later overturned due to the Board's finding that the union had waived bargaining over its influenza policy by agreeing to a broad management rights clause. *See Virginia Mason Hospital*, 358 NLRB 531 (2012). This holding is case specific and related to the language of the parties' collective bargaining agreement.

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