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ON THE LABOR FRONT—Requiring employees in a unionized workplace to be vaccinated

By Michael J. Soltis

While government rolls out the much-anticipated *voluntary* COVID-19 vaccination program, many employers are considering *mandatory* vaccination programs for their employees. Given the acute focus on minimizing risk of getting infected with the novel coronavirus, isn't a workplace where every employee is vaccinated the safest environment to protect employees, customers, and other visitors from that risk?

Implementing mandatory vaccinations

The EEOC recent guidance marked a trail for employers interested in mandatory vaccination programs to follow, with a couple of hurdles to clear and exceptions to make, of course.¹

Following that trail may provide sufficient comfort to most private-sector employers to go forward. However, for employers whose employees are represented by a union, following that trail is not the end of inquiry. Those employers must also consider their obligations arising from the National Labor Relations Act (NLRA) and their collective bargaining agreement.

Good faith bargaining. Section 8(d) of the NLRA requires an employer to bargain in good faith with the union representing its employees concerning “wages, hours, and other terms and conditions of employment ...” Requiring employees to be vaccinated is very likely to be considered a condition of employment. An employer who fails to fulfill its §8(d) obligation violates §8(a)(5), which makes failure to bargain in good faith an unfair labor practice.

If the parties are now in or about to begin negotiations for a new labor agreement, the employer can propose a mandatory program, and the parties can negotiate about it. But what if the parties are mid-contract, with the expiration months or years away? To assess its ability to require its employees to be vaccinated, an employer might want to start by considering the following questions.

1. Does the labor contract address the issue of mandatory vaccinations?

In the many, many labor contracts I have read, I have never seen a clause that addresses an employer's right to require an employee to get vaccinated other than one requiring an annual flu shot for health care workers. It is possible that a contract negotiated post-March 2020 addresses this issue. Also, perhaps in response to the 2009 H1N1 or 2014 Ebola virus outbreaks, a union and employer had the foresight to address workplace issues arising from future pandemics, but I suspect a contract that addresses an employer's right to require its employees to be vaccinated for COVID-19 is a rarity.

2. Has the union waived its right to bargain about the employer's requiring its employees to be vaccinated?

In interpreting an employer's obligation to bargain in good faith, the Supreme Court of the United States has held that an employer cannot unilaterally change conditions of employment because it undermines the union's role as the bargaining representative. However, an employer's unilateral change does not violate the NLRA if it has negotiated the right to make that particular change. An employer's claim it has the right to make a particular change leads ineluctably to a review of the labor contract to determine whether the union has waived its right to bargain about that change.

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For example, on the "very general" end of the continuum, a contract may in the Management's Rights clause give the employer the right or responsibility to provide for the health and safety of its employees. Or, the contract may be silent about health and safety but state that management reserves whatever rights it has not given away in the agreement. There may also be a zipper clause—often called a "Complete Agreement" clause—with a broad waiver by the union of its right to bargain during the term of the agreement. On the "more specific" end of the continuum might be a separate article on health and safety, perhaps establishing a joint committee consisting of management, employees, and union representative.

MV Transportation. Reviewing a labor contract to assess an employer's right to unilaterally adopt a mandatory vaccination program requires considering the incoming Biden-Harris Administration's labor agenda. As noted in a recent [On the Labor Front article](#) on that topic, the incoming Administration's agenda at the Biden NLRB will be to reverse many decisions of the Trump NLRB and to restore the law to the way it was under the Obama Board. One of the

Trump NLRB's decisions that likely will be in the crosshairs is [*MV Transportation, Inc.*](#)² a September 2019 decision in which the NLRB reversed the standard for determining whether contract language waives the union's right to bargain about a particular issue.

For 70 years prior to the *MV Transportation* decision, the NLRB held that a union's waiver of its right to bargain about an issue must be in "clear and unmistakable" language. Reviewing those decisions on appeal, some courts of appeals denied enforcement of NLRB orders based on that standard. The Court of Appeals for the D.C. Circuit was one of the courts that regularly rejected that standard. Its view was particularly significant since an employer appealing an NLRB decision *always* has the option to file the appeal in that Circuit Court. The D.C. Circuit's repeated rejection of the "clear and unmistakable" standard did not deter the NLRB from continuing to apply it until the *MV Transportation* decision 15 months ago.

Contract coverage test. In that decision, the Trump NLRB specifically rejected the "clear and unmistakable" standard and replaced it with the "contract coverage" test. With this new analysis, the NLRB will apply "ordinary principles of contract language" and "examine the plain language of the 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." If the language "covers" the employer's action, the employer will not have acted unilaterally in violation of §8(a)(5).

Democratic majority on NLRB? The Republicans now have a 3-1 majority of the five-person NLRB. There is one vacancy. The Senate must confirm presidential nominees for a seat on the NLRB. Due to the term expirations of current NLRB members and the uncertainty surrounding how long it would take for the Senate to confirm a nominee, the Democrats will not have a majority on the NLRB until at least August 2021. Since the NLRB is not a self-initiating agency, to revisit a prior decision, it must wait for an issue concerning that decision to come before it.

If and when presented with the opportunity, the Biden NLRB is very likely to send the "contract coverage" standard to its demise with dispatch and revive the "clear and unmistakable standard" to assess whether the union has waived its right to bargain. The dissent in *MV Transportation* by the lone Democratic NLRB Member at that time will become the majority opinion for the Biden NLRB.

Due to the upcoming political changeover, an employer's confidence it can meet the "contract coverage" test today will not provide much comfort if, by time the case gets to the NLRB months or years from now, the Biden NLRB has reverted to the more demanding "clear and unmistakable" standard.

3. Will the union agree to a mandatory vaccination program?

While employers and unions are often on opposite sides of an issue, when it comes to health and safety, their interests are closely aligned. Many employers and unions have reached agreements this year concerning COVID-19 safety protocols and their impact on employees. Unions and the employees they represent may be as interested in having all employees vaccinated as the

employer. If all parties support a mandatory vaccination program, the employer and union can negotiate an agreement recognizing that requirement.

Such an agreement might include, at a minimum, the deadline by which an employee must be vaccinated, acceptable forms of proof of vaccination, the consequences of refusing to be vaccinated and any exemptions from the requirement. The EEOC's guidance states if an employee refuses to get vaccinated due to a disability or religious objection, an employer must attempt to reasonably accommodate that individual. These are typical exemptions to the mandatory flu vaccination programs in healthcare.

4. Is the vaccination requirement an exigent circumstance?

In very limited circumstances, the NLRB has held that the employer made a unilateral change, was unable to rely on the contract coverage defense but was nonetheless found to have acted lawfully due to exigent circumstances. To what extent might this defense justify an employer's unilateral implementation of a mandatory vaccination policy?

In cases dealing with unilateral action relating to public emergencies such as hurricanes, ice storms, and 9/11, the NLRB has said an employer may act unilaterally where it can establish that "economic exigency compelled prompt action" and that this defense is limited to "extraordinary events which are an unforeseen occurrence having a major economic effect requiring the company to take immediate action" (citations omitted). A condition of being able to rely on this defense is that the employer negotiate with the union within a reasonable time after taking the unilateral action. Thus, this defense does not avoid the bargaining obligation but sanctions an employer's acting first and negotiating soon after.

It is not clear who would be making the decision—the Trump NLRB holdovers or the Biden NLRB.

Recent advice memos. Last summer, the NLRB's Division of Advice concluded an employer's otherwise unlawful unilateral action did not violate the NLRA based on this exigent circumstance defense where the employer (1) adopted various COVID-related policies relating to personal protective equipment, visitor restrictions, paid leave and time away from work, social distancing, incident reporting and assignments/safety protocols³ and (2) changed its work-from-home and attendance policies. Both employers met the post-unilateral implementation requirement of bargaining within a reasonable time after making the changes.⁴

I suspect many business owners—employers in the hospitality industry come to mind—would argue vigorously that the pandemic is an extraordinary, unforeseen event which has had a major economic effect on its business. I suspect the issue would lie with resolving whether the availability of the vaccine was exigent enough to require the employer to take immediate action by implementing a mandatory program and negotiating about it post-implementation. The

uncertainty surrounding the outcome of that issue is that it is not clear who would be making the decision—the Trump NLRB holdovers or the Biden NLRB.

5. Are the employer and union willing to deal with the practical issues of implementing a mandatory program?

While reaching an agreement without worrying about the waiver standard or whether the circumstances are exigent enough sounds like a much-preferred route, the practical challenges need to be anticipated and considered.

Among these challenges is that some employees may refuse to be vaccinated—regardless of the employer-union agreement that they must. Numerous surveys report that many in this country will decline the vaccination. As noted above, a mandatory vaccination program should address the consequences to an employee who refuses to comply. While there may be some interim consequences short of termination, if an employer ultimately allows an employee who is unwilling to be vaccinated and is not otherwise exempt from the program to remain employed, the employer really does not have a mandatory vaccination program. Is an employer willing to terminate employees who decline to be vaccinated?

A mandatory vaccination program should address the consequences to an employee who refuses to comply.

A union must also anticipate some of its members will decline to be vaccinated. How will the union deal with the dissension among its membership between those who support the vaccination mandate and those who oppose it? Will “majority rules” carry the day even if a significant number of members oppose being vaccinated when it is evident that these individuals will either need to change their view or are likely to be terminated?

As part of the preparation for the possibility of employee dissent, both the employer and union might want to review the “no-strike” provisions of their labor contract. It is prudent to anticipate that the group of employees who refuse to be vaccinated (again, those who do not qualify for an exemption) may engage in a job action, whether it be a strike or picketing, or some other type of protest without the union’s authorization. The “no-strike” clause typically defines the parties’ rights and obligations during such a situation.

The novel coronavirus virus has created many novel labor relations issues. An employer and union dealing with a vaccination plan for a workforce is among the most challenging. I anticipate the initial effort will be to educate, urge, cajole and maybe even attempt to incentivize employees to be vaccinated. If that strategy succeeds, the employer and union will have avoided the most

challenging issue—whether to require the unvaccinated to choose between being vaccinated and their job. Since the vaccine is not broadly available today, that issue is not yet in the forefront. Soon, it will be.

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¹ [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws](#); Part K. Vaccinations (December 16, 2020), found at eeoc.gov

² [368 NLRB No. 66](#) (Sept.10, 2019).

³ Mercy Health Partners, [07-CA-258220](#) (August 11, 2020).

⁴ Mercy Health General Campus, [07-CA-258425](#) (June 10, 2020).