

# How Labor Law May Affect Your COVID Vaccine Mandate

By **Daniel Johns** (October 29, 2021)

When and under what circumstances should an employer mandate that its employees be vaccinated against COVID-19? It seems this topic has dominated the news and social media for many months.

Much has been written and argued about whether such mandates are lawful, when and under what circumstances employers should grant employee religious and medical exemptions to a mandate, and how such mandates can practically be implemented in the workplace.



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Much less has been written, however, about the labor law implications for an employer's adoption of vaccine mandates in a unionized workplace. And even less has been written about the issue of an employee's right to engage in concerted protected activity to protest such mandates.

This article will attempt to fill those gaps by outlining some of the labor law considerations surrounding vaccine mandates in the workplace.

For an employer with a unionized workforce, the most basic consideration is whether that employer has a duty to bargain over the decision to implement a mandate. That is, does the employer essentially need to secure an agreement with a union on the issue before a mandate goes into place?

Like many legal questions, the answer is a decided "it depends."

If there is an external legal requirement to put a mandate into place — such as the proposed Occupational Safety and Health Administration emergency temporary standard for employers with more than 100 employees, or the presidential executive order related to federal contractors — then there likely is not a duty to bargain with a union over the imposition of the mandate.

Said differently, an employer must comply with the law regardless of whether a union agrees with what the law requires.

In the absence of a legal requirement, given the potential impact on a unionized workforce, employers likely have a duty to bargain over the decision to implement mandates. However, an employer may have some potential ways around that duty to bargain.

First, under *MV Transportation Inc.*,<sup>[1]</sup> decided by the National Labor Relations Board in 2019, an employer may have the right to unilaterally impose a vaccine mandate if such implementation falls within the scope of a contractual provision allowing that employer to act unilaterally during the term of the collective bargaining agreement.

So, employers should review the management rights clauses in their labor contracts, as well as any other contractual provisions related to health and safety programs, in order to ascertain if there is an argument that the employer has already negotiated the right to implement a vaccine mandate.

Under *MV Transportation*, if a company has a sound arguable contractual basis for the

imposition of a vaccine mandate, and there is no evidence of anti-union animus or bad faith related to the decision, an employer may have the right to implement a mandate unilaterally.

It is worth noting, however, that the MV Transportation decision was issued by an NLRB dominated by appointees of former President Donald Trump. It is quite likely that a board dominated by appointees of President Joe Biden could view the issue very differently.

The second argument against a duty to bargain over an employer's adoption of a vaccine mandate relates to the very reason the vaccines have been created in the first place: the COVID-19 pandemic. That is, does the existence of the pandemic create an exigent circumstance, such that the duty to bargain over safety measures related to the pandemic may be suspended?

This is not a hypothetical consideration. In March 2020, in the early days of the pandemic, then-NLRB General Counsel Peter Robb issued a memorandum highlighting the fact that, in some circumstances, an emergency may suspend an employer's duty to bargain.[2] This is not a new legal concept.

As Robb noted in that memo:

Regardless of the reason for any given response to the spread of the virus, many parties are considering the impact on the duty to bargain. Although we are in an unprecedented situation, I wish to make the public aware of several cases in which the Board considered the duty to bargain during emergencies.

Again, it must be noted that this memo was issued under a former general counsel and not the current general counsel of the NLRB, Jennifer Abruzzo, who is likely to be significantly more skeptical of the suspension of an employer's duty to bargain.

Additionally, that memorandum was issued at the height of the pandemic, when the world appeared significantly bleaker than it does today with respect to the spread of the virus. Nonetheless, the argument is still there.

In some circumstances, an employer's duty to bargain may be suspended as the result of an emergency situation.

Even absent a duty to bargain related to the decision to implement a vaccine mandate, an employer likely may have a duty to bargain over the effects of that decision. Unions often raise a multitude of issues related to how a mandate affects their members during effects bargaining.

Some common bargaining issues include the amount of lead time before a mandate becomes effective, the process for handling employee requests for religious and medical exemptions, and the effects on an employee who fails to comply with a mandate.

In particular, many unions have sought to expand the reasons for which an employee may be exempted to include a deeply held personal belief against vaccination.

Another labor law issue surrounding vaccine mandates that has arisen lately is employee protest activities pertaining to the mandates. Several large employers have seen employee demonstrations over the issue. Some commentators on Twitter have even dubbed such protest activity as the #FreedomFlu.

Even outside the unionized context, employers that experience such an employee demonstration must remember that employees have the right to engage in concerted activity for other mutual aid or protection under the National Labor Relations Act.[3]

An employee demonstration related to a vaccine mandate could fit the definition of protected activity under the NLRA, although the precise circumstances of the demonstration — who demonstrated, when, where, whether the participating employees were on paid work time or not, and ultimately what happened at the protest — will ultimately determine whether the employee action is protected or not.

In the unionized context, such a demonstration might violate the terms of a no-strike clause in a collective bargaining agreement. Again, employers should review their agreements to see if unions have waived employees' rights to engage in such activity.

Vaccine mandates are at the top of every human resources manager's list of contentious issues right now. Any employer thinking about the impact and evaluating the legality of any such mandates would be wise not to ignore the requirements of the NLRA.

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[1] MV Transportation, Inc., 368 N.L.R.B. No. 66 (2019).

[2] See GC Memorandum 20-04 (2020).

[3] 29 U.S.C. Sec. 151 et seq.