

LINDABURY, McCORMICK, ESTABROOK & COOPER, P.C.
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
53 CARDINAL DRIVE
P.O. BOX 2369
WESTFIELD, NJ 07091-2369
TEL. NO. (908) 233-6800
FAX NO. (908) 233-5078

MEMORANDUM

To: Mechanical Contractors Association of New York, Inc.
From: James K. Estabrook, Esq. and Lisa M. Gingeleskie, Esq.
Date: June 28, 2021
Subject: Mandate of COVID-19 Vaccinations

This memorandum addresses the following issues: a) whether the owner of a property, who is not a party to the Collective Bargaining Agreement (“CBA”), may require the contractor’s collectively-bargained employees to submit proof of vaccination prior to allowing those employees into their New York facilities; and b) whether the contractor may issue its own vaccination mandate for collectively bargained employees. As set forth more fully below, it is within the legal rights of the owner to issue this mandate, but a similar mandate issued by a contractor would be deemed a mandatory subject of bargaining.

Please let us know if you have any questions or require additional information. Thank you.

Owner Mandated COVID-19 Vaccinations and Requiring Proof of Vaccinations

Pursuant to EEOC guidance, dated December 16, 2020, mandating the vaccine, in a non-union environment, is generally permissible provided exceptions are made for medical and/or religious objections. The EEOC also clarified that requiring proof of an employee’s vaccination status is allowable without implicating the ADA’s restrictions on “medical-related inquires.” This is so because merely asking employees if they have been vaccinated is not likely to elicit medical information. However, the EEOC cautions that asking follow-up inquiries, like *why* the employee is not vaccinated, may elicit such medical information and therefore trigger the ADA’s standard that any such medical inquiry be job-related and consistent with business necessity.

If an owner is requiring that the contractor’s collectively-bargained employees get the COVID-19 vaccine and submit proof of vaccination status prior to allowing those employees into their New York facilities, such requirement would not normally be an issue that requires bargaining. This is so because 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 (2001). And the owner, as an independent third party, my set forth that mandate.

Additionally, the contractor, in order to comply with the owner’s vaccination mandate, may ask its employees for proof of vaccination status without running afoul of state or federal law provided the contractor does not engage in follow-up inquiries concerning the reasons why an employee may not have received the vaccine.

Employer/Contractor Mandated COVID-19 Vaccinations

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. “[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”).

While our research did not reveal any case law that specifically addressed the issue of mandating the COVID-19 vaccination of employees by employer/contractors, existing case law indicates that this requirement would be 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”). The NLRB has also found that the implementation of a flu prevention policy is likewise a mandatory subject of bargaining. Virginia Mason Hospital, 358 NLRB No. 64 (2012)(hospital employer’s requirement that employees who did not get flu vaccine must wear masks in patient areas at all times found to be a mandatory subject of bargaining)¹. See also Praxair, Inc., 317 NLRB 435 (1995)(where the Board found that the hospital’s decision to require nonimmunized nurses who declined to take antiviral medication to wear a facemask plainly affected their working conditions and were mandatory subjects of bargaining); and Medicenter, Mid-South Hospital, 221 NLRB 670, 676 (1975) (polygraph testing of employees a mandatory subject of bargaining). Even making the vaccine available to the unionized workforce, but not requiring it, would likely require bargaining if it constitutes a new benefit to employees. See

¹ 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.

Keeler Brass Co., 327 NLRB 585, 589 (1999) (employer-paid flu immunization “is certainly a mandatory subject of bargaining”).

While the mandate of the COVID-19 vaccination by employer/contractors would likely be deemed a mandatory subject of bargaining, this right may be waived by the union pursuant to a management rights clause in the CBA provided the clause specifically authorizes management to make these types of medical decisions unilaterally. See C&C Plywood, 148 NLRB 414 (1964)(finding that a party may contractually waive its right to bargain a mandatory subject provided unilateral conduct by management is explicitly authorized in the CBA); Quebecor World Mt. Morris II, 353 NLRB 1 (2008)(where the Board found that contract “plainly authorized” the employer to unilaterally implement a new performance improvement plan); and Virginia Mason Hospital, 358 NLRB No. 64(2012)(Board’s finding that the union had waived bargaining over its influenza policy requiring nonimmunized nurses who were not taking antiviral medications to wear facemasks by agreeing to a broad management rights clause). Thus, contractors must review any managements rights clauses within the governing CBA to determine if there is an authorization of the contractor’s unilateral action on the implementation of vaccines. If there is no such specific authorization, a vaccine requirement would be subject to mandatory bargaining.

Conclusion

It is clear that absent state or federal law to the contrary, owners may require those entering their properties to be vaccinated and contractors may request proof of their employees’ COVID-19 vaccination status (in order to comply with the owner’s vaccination mandate) in order to determine which employees to send to the worksite. While there appears to be no case directly on point concerning the mandate of the COVID-19 vaccine by contractors of union workers, absent a management rights clause specifically authorizing this unilateral mandate, the NLRB provides sufficient guidance to conclude that bargaining of such mandate would be required.