

NLRB Office of the General Counsel Clarifies Position On Employers' Duty to Bargain New OSHA ETS

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In its memorandum, the Office addresses whether and what kind of bargaining obligations may arise from the ETS. Subject to the caveat that each case stands on its own facts (and the memorandum does not constitute an advisory opinion), the Office makes clear 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.”

The Office further makes clear that—even “[t]o the extent [that] elements of the ETS do not give covered employers discretion”—“the employer is nonetheless obligated to bargain about the effects of the decision.”

To stress this duty, the Office cites a 1995 case—*Blue Circle Cement*—which involved an employer unilaterally deciding to prohibit its employees from eating lunch in the electricians’ shop because federal regulation prohibited the consumption of food in areas where chemicals were present. In that case, the employer was found to have nonetheless violated the National Labor Relations Act (“NLRA”)—in particular, Section 8(a)5—because it failed to bargain regarding the effects of this decision.

The memorandum ends with the caveat, again, that “[w]hether 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.”

The takeaway of this memorandum is that employers should take into consideration the effects of the policies it decides to implement to comply with the new ETS and recognize that the NLRB will hold them to a duty to bargain regarding the effects of the same, even if the ETS mandates its policy decision.