February 2022

ACCNJ LEGAL & INSURANCE UPDATE

Update on Vaccine Mandates

1. OSHA ETS (for Employers with 100+ Employees)
STATUS: *Officially withdrawn by OSHA as of January 25, 2022.*

On January 13, the **U.S. Supreme Court reinstated a stay** on OSHA's Emergency Temporary Standard ("ETS") for employers with 100 or more employees. The Supreme Court's ruling did not decide the substantive issue of whether the ETS was legally permissible. Instead, the Court determined a stay (i.e., temporary pause) was appropriate because the challengers were "likely" to succeed on the merits of their case. Despite being procedural in nature, the Supreme Court's ruling signaled the end for the ETS. Facing likely defeat, **OSHA officially withdrew** its ETS on January 25. The agency is not expected to pursue a permanent standard broadly applicable to private businesses. The ETS ruling did not impact mandates being imposed on government contractors. Separate challenges will decide the fate of those mandates.

2. Federal Contractor Mandate
STATUS: *Currently suspended nationwide pending the outcome of continued litigation.*

The Federal Contractor Mandate, which was issued by President Biden via an executive order, is currently being litigated in several federal courts throughout the country. The most notable challenge is in front of the Eleventh Circuit Court of Appeals, which based on a prior ruling by a lower federal court in Georgia, suspended the mandate nationwide. The Eleventh Circuit will decide whether that nationwide injunction should continue. Currently, oral arguments are set for mid-April, which means the injunction is likely to continue throughout

most of the Spring. In the meantime, the **federal task force** charged with enforcing the mandate has said the government will take no action to enforce the mandate while court orders prohibit its application.

3. New Jersey Contractor Mandate
STATUS: *Active. The requirements could appear in new state contracts and solicitations, as well as extensions, renewals, and/or exercised options of an existing state contract.*

Not much has changed with respect to the New Jersey Contractor Mandate, which was issued by Governor Murphy in **Executive Order 271** (EO 271). The new requirements can still be part of state contracts and are unaffected by the litigation surrounding the OSHA ETS and Federal Contractor Mandate.
On January 20, New Jersey updated its **COVID-19 guidance page** to address questions surrounding vaccination and testing requirements. The guidance says the following:

> "In addition, all new state contracts, solicitations for a state contract, extensions or renewals of an existing state contract, and exercise of an option on an existing state contract to include a clause requiring workers employed through those contracts that enter, work at, or provide services **in any state agency location** to show they are fully vaccinated, or they will be required to undergo weekly testing."

Interestingly, this passage seems slightly more limited than what was expressed in EO 271. The guidance describes the mandate as applying to workers providing services "in any state agency location," while EO 271 broadly applied the requirement to any "site … within an … agency's jurisdiction, custody, or control." Ultimately, members will know if the mandate applies to a particular project because it will be included in the contractual documents. Members who see mandates included in their state contracts (whether new or existing) are encouraged to contact the Association. This information will help us keep tabs on how and where the State plans to roll out its vaccine and testing requirements.

NLRB Case Could Make Unilateral Action More Difficult for Employers

As we know, not all employment and management decisions are explicitly addressed by a collective bargaining agreement (CBA). If that were so, the length of your typical CBA would deforest the Amazon. The reality is, CBAs seek to cover the essential terms and conditions of employment, but many managerial decisions are left out of the final product or fall somewhere in between the express contractual language. When this occurs, employers are faced with two options: (1) if the law and CBA permit it, take unilateral action, or (2) bargain with the union.

"If the law and CBA permit it" is a loaded phrase. There are several rules and legal standards that govern when unilateral action is permitted. Oftentimes the "standard" or "test" for determining legality can change based on the makeup of the NLRB and those in

charge. This may be happening again. Currently, the NLRB is hearing arguments that could shape the standard for when unilateral action is permitted by an employer.

In ***County Concrete Corp., case number 22-CA-238625***, a concrete company was accused of failing to bargain over a change to a Teamsters local's health plan. The employer felt existing language in the CBA gave the employer the ability to change insurance providers. The issue became a matter of contractual interpretation and whether the employer's interpretation was legally acceptable.

Historically (i.e., since 2005), the NLRB applies what is known as the "*sound and arguable basis*" standard when faced with contractual interpretation cases. Where the issue is within the "scope" or "compass" of existing contractual language, and the employer has a "sound and arguable basis for its interpretation," no unfair labor practice will exist. This standard is easier to meet than its predecessor, which was the "*clear and unmistakable waiver*" standard. Under that standard, an employer's right to act unilaterally requires bargaining partners to "*unequivocally and specifically express their mutual intention to permit unilateral employer action*." The clear and unmistakable waiver standard oftentimes led to an unfair labor practice charge because it imposed an artificially high burden on the employer.

In *County Concrete,* the administrative law judge (ALJ) applied the sound and arguable basis standard, which is consistent with NLRB precedent. The ALJ's decision is under review by the NLRB. Unfortunately, the NLRB's general counsel has decided to use the case as an opportunity to reinstate the clear and unmistakable waiver standard. Specifically, the general counsel has asked the board to overturn *Bath Iron Works* (2005) and *MV Transportation* (2019) – two NLRB decisions that established the "sound and arguable basis" standard and its application to contractual interpretation disputes.

Such a departure from long-standing precedent would hurt employers and blur the line for permissible unilateral action and contract interpretation cases. The "clear and unmistakable waiver" standard was unmistakably rejected in *MV Transportation* and by several federal appellate courts because of the artificially high standard it imposed on employers. The Association is hopeful the NLRB will recognize why the general counsel's request is without merit and ill-advised.

County Concrete is represented by Associate Member, Susanin, Widman, and Brennan P.C.

The full NLRB Docket can be accessed **HERE**.

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