

## PERB Holds that Employers Have a Duty to Negotiate in Good Faith Regarding the Effects of Mandatory Vaccination Policies Prior to Implementation

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On July 26, 2021, the Public Employment Relations Board (PERB) issued a decision finding that while the decision to adopt a mandatory influenza vaccination policy implemented by the Regents of the University of California (University) was outside the scope of representation, the University's failure to meet and confer in good faith over the effects of the policy, prior to implementation, constituted an unlawful unilateral change in violation of the Higher Education Employer-Employee Relations Act (HEERA). (*Regents of the University of California* (2021) PERB Decision No. 2783-H.)

### Background

On July 31, 2020, the University issued an Executive Order requiring "all students, faculty, and staff living, learning, or working" on University premises to receive an influenza vaccination by November 1, 2020. Prior to July 31, 2020, all five of the University's medical centers had policies regarding mandatory influenza vaccinations for medical center employees, with varying compliance dates, but no blanket policy that applied to all students, faculty, and staff was in place.

Although the Executive Order was issued on July 31, the University's unions were not notified of the change until August 7, 2020. Upon notification, three unions sent written demands to bargain over the decision and its effects. However, during negotiations, the University refused to entertain proposals about alternatives to discipline or leave without pay for the failure to comply with the vaccination policy. After being unable to agree on all proposed topics, the unions filed unfair practice charges challenging the Executive Order.

In determining whether the University's decision to mandate that all employees working on University premises receive an influenza vaccination was within the scope of representation, PERB concluded that the Executive Order constituted a change in policy. Among other changes, PERB found that the Executive Order changed the date by which employees who were subject to the previous policy were required to provide proof of vaccination and expanded the requirement to receive an influenza vaccine from only employees at medical centers to "all students, faculty, and staff living, learning or working" on University premises. However, PERB determined that a general public health policy protecting the public, such as this one, likely would not fall within the statutorily enumerated subjects of bargaining. Additionally, in determining whether

the policy, when considered to be a general health policy, was still negotiable under the “*Anaheim Test*,” PERB found that the unprecedented circumstances of a potential confluence of the COVID-19 and influenza viruses and the need to protect public health outweighed the benefits of bargaining the decision to create a policy. Accordingly, PERB concluded that the University’s decision to adopt a mandatory influenza vaccination policy was outside HEERA’s scope of representation.

PERB made it clear that before implementing a non-negotiable change in policy, the University was required to negotiate over aspects of the change that impact matters within the scope of representation. PERB recognized that under *Compton Community College District* (1989) PERB Decision No. 720, there are limited circumstances under which an employer may implement a decision on a non-mandatory subject prior to exhausting its effects bargaining obligation, including when the employer negotiates in good faith prior to implementation and continues to negotiate afterwards as to the subjects that were not resolved by virtue of implementation.

Here, the University contended that it sufficiently satisfied this bargaining obligation because it met and conferred with the unions regarding the effects of the policy. PERB rejected this argument because the University clearly did not negotiate in good faith prior to implementing the Executive Order, as it was issued on July 31, 2020, and the unions were not notified of the change until August 7, 2020. Additionally, after implementation, the University did not continue to negotiate the subjects that were not resolved by virtue of implementation, as there was evidence that the University outright refused to bargain over alternative consequences for not getting vaccinated. Specifically, during negotiations, the University indicated that non-compliant employees could be disciplined or put on unpaid leave and refused to entertain alternatives.

PERB relied on well-established precedent that implementation of policies that include the potential for disciplinary action may have a direct impact on wages, health and welfare benefits, and other terms and conditions of employment since such action may reduce or eliminate entitlement to those items. Accordingly, when a non-negotiable decision has foreseeable effects on discipline, those effects are negotiable. PERB also reasoned that placing an employee on unpaid leave undoubtedly has a direct effect on wages. Thus, given that an employee could be disciplined or placed on unpaid leave for failure to comply with the vaccination policy, the University had a duty to negotiate the effects the policy may have on discipline and wages. Additionally, based on the University’s outright refusal to bargain over the effects, PERB concluded that the University did not meet and confer in good faith over negotiable effects of the decision to mandate influenza vaccinations. Accordingly, PERB concluded that the University did not satisfy the requirements under *Compton* because it implemented the influenza vaccination policy prior to completing effects bargaining with the unions, in violation of HEERA.

## Takeaways

While the decision to adopt a mandatory influenza vaccination policy as a general public health policy may not be negotiable under HEERA, employers are still obligated to negotiate the aspects of a policy that impacts matters within the scope of representation, prior to implementation. Accordingly, employers should give notice to all bargaining units prior to implementation of such a policy and negotiate in good faith regarding *all* negotiable subjects that the policy may impact, including discipline for non-compliance and the potential wage impacts of placing non-compliant employees on unpaid leave. Additionally, while this PERB decision currently extends only to entities governed under HEERA, entities governed under the Educational

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Employment Relations Act (EERA) or other bargaining statutes must comply with any similar duty to bargain impacts prior to implementation of a non-negotiable decision. If bargaining cannot be completed, entities should consult legal counsel to determine if implementation is appropriate under applicable law.

If you have any questions about this decision or vaccination policies in general, please contact the author of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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