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Ohio State Employment Relations Board Dismisses Unfair Labor Practice Charge Related to COVID-19 Policy

Frost Brown Todd attorneys successfully defended the city of Dayton in a charge alleging that the unilateral imposition of a mask, vaccination, and testing policy constituted an unfair labor practice.

In response to the ongoing COVID-19 health crisis, the city adopted an emergency order on Aug. 9, 2021, which required:

- all persons in public spaces of city buildings to wear facial coverings;
- all city employees to wear facial coverings while riding in a vehicle with more than one occupant; and
- any city employee who is not fully vaccinated to submit to weekly COVID-19 testing in accordance with the city's Coronavirus mask, vaccination, and testing policy.

After the policy was presented to the city's unions, the parties engaged in discussions regarding the efficacy and implementation of the policy. Following these discussions, the city prepared a revised policy that included several substantive revisions based on feedback from the unions. The most relevant changes to the policy allowed the employees to complete COVID-19 testing at their worksite, the city was to pay for all on-duty COVID-19 testing, and employees who tested positive were not required to take weekly tests for three months from the date of the positive test in accordance with guidelines from the Center for Disease Control. The city implemented the new policy on Aug. 27, 2021.

On Sept. 7, the union filed an unfair labor practice charge with the Ohio State Employment Relations Board (the "Board") alleging that by adopting the policy, the city unilaterally changed the terms and conditions of employment, and the matter was the mandatory subject of bargaining. On Nov. 18, the Board dismissed the charge,

finding that although some of the provisions of the original policy may have had an effect on the wages, hours and terms and conditions of employment (i.e. employee payment for COVID-19 tests), the revised policy removed any monetary requirements for any city employee, and permitted all city employees to test for COVID-19 during work hours. The Board further found that the city followed the guidance of the CDC and County Department of Public Health with respect to the COVID-19 pandemic. Finally, the meetings between the parties, which resulted in the revised policy, constituted an appropriate mediatory influence of bargaining for the subject matter. As such, the Board found that the union did not provide sufficient evidence to support the unfair labor practice charge and dismissed with prejudice.

The Board's decision is significant because it confirms that employers are under no obligation to bargain with unions before the implementation of similar COVID-19 policies. Employers maintain management rights to issue necessary policies to protect employees and the public from the continued threat posed by COVID-19.

For more information or questions relating to this subject, please contact [Joe Scholler](#), [Alex Ewing](#), [Jack Hemenway](#), or any attorney in Frost Brown Todd's [Government Services Practice Group](#).

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