INTERNATIONAL LAWYERS NETWORK

September 22, 2011 by Epstein Becker & Green

Labor Board Takes Another Step into Management Decision Making

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On August 23, 2011, the National Labor Relations Board ("Board") ruled that a hospital whose nurses are represented by a union does not have the authority to unilaterally implement an employee flu vaccination program because, in the Board's view, ensuring patient safety is not a core purpose of the enterprise. *Virginia Mason Hospital*, 357 N.L.R.B. No. 53 (August 23, 2011). Specifically, the Board rejected the employer's reliance on what is known as the "*Peerless* defense," and held that the National Labor Relations Act ("NLRA") prohibits a hospital from implementing public safety programs without first bargaining over the proposal with a union that represents its employees.

As a general rule, the NLRA requires employers to bargain with union representatives over employee wages, hours and other terms and conditions of employment. In *Peerless Publications* the Board established a three-part test under which an employer can act unilaterally when the proposed change goes to the protection of the core purpose of the enterprise. Virginia Mason Hospital argued, and the Administrative Law Judge ("ALJ") agreed, that it did not have to bargain with the union over the implementation of the flu prevention program because, under *Peerless*, the program is fundamental to a healthcare provider's core purpose of preventing sickness. The Board, however, with little explanation, overturned the ALJ and held that the prevention of sickness is not a hospital's core purpose under the *Peerless* analysis, and that "*Peerless* was… essentially limited to its facts."

In addition to creating ambiguity around what qualifies as a "core purpose" of the enterprise, the *Virginia Mason Hospital* decision complicates compliance with other federal employment statutes. For example, the Occupational Safety and Health Act's ("OSHA") General Duty Clause requires employers to provide a workplace free from serious "recognized hazards." This means that if an employer or an employer's industry recognizes a certain condition as hazardous, the employer is required under OSHA to take measures to protect employees from that hazard. If those measures are now mandatory subjects of bargaining, the employer faces a conundrum: implement the safety measures to protect against fines from OSHA but risk consequences from the Board, or bargain over the safety measures and risk a serious penalty from OSHA (or worse, a serious injury or illness to an employee or others).

In light of the *Virginia Mason Hospital* decision, employers with unionized workforces should

- Understand that the unilateral implementation of policies or procedures affecting employees can in some cases draw an unfair labor practice charge from the union and litigation with the NLRB.
- Document the "core business necessity" for any required unilateral changes in advance of anticipated union information requests.
- Implement changes as needed to protect core business values.
- Put the burden of requesting negotiations on the union by providing it with notice of any unilaterally implemented changes.
- Consult your legal counsel before unilaterally implementing changes in the workplace that you believe might affect unionized employees' working conditions, as the law in this area is rapidly changing.

For more information about the specifics of the flu prevention program at issue in the case and the decision's potential impact on other federal employment statutes see Epstein, Becker & Green's September 7, 2011 Act Now Client Advisory.