# No Bargaining Required Over Hospital's Flu-Prevention Policy

Insights
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Recently, an administrative law judge (ALJ) found that Virginia Mason Hospital, which has a collective bargaining agreement with the Washington State Nurses Association, did *not* violate the National Labor Relations Act (NLRA) when – without bargaining with the union – it implemented a flu-prevention policy. The unilaterally-implemented flu-prevention policy required non-immunized nurses to take antiviral medication or to wear facemasks when in contact with patients, visitors and the public.

The ALJ found that because the parties' agreement contained a broadly-worded management rights clause, the union had waived the right to bargain over the issue. If affirmed by the National Labor Relations Board, the ALJ's decision will give hospitals with appropriately-worded management rights clauses in their union contracts leeway to unilaterally implement similar flu-prevention policies.

**Background**
Virginia Mason Hospital operates an acute-care hospital in Seattle, Washington, where it employs approximately 600 nurses who are represented by a union. The hospital announced that it was amending its "Fitness for Duty" policy to require its entire work force to be immunized against the flu. The union filed a grievance and an arbitrator issued an award in favor of the union. As a result, the hospital did not require the nurses to be immunized.

Thereafter, the hospital informed the union that it was considering a policy requiring non-immunized nurses to wear a protective facemask or to take antiviral medication. The hospital made clear that these measures were intended to protect patients, employees and visitors from contracting influenza. But no bargaining was conducted with the union over the proposal before the hospital implemented the policy. Once implemented, the union filed an unfair labor practice charge contending that the hospital was required to bargain regarding the policy.

**The ALJ's Decision**
The ALJ stated that it was undisputed that the hospital implemented its flu-prevention policy without the give and take of bargaining and, therefore, unless the hospital could demonstrate a legitimate defense, its failure to bargain was an unfair labor practice.

First, the ALJ rejected the hospital's defense that the flu-prevention policy was required by state or federal law, stating that the hospital could not point to a single such law or regulation. Second, the

ALJ found that the policy was amenable to resolution through the bargaining process.

Finally, the ALJ addressed the hospital's contention that the union waived bargaining over the policy when it agreed to a management rights clause in the CBA. While the management rights clause in the parties' CBA did not specifically mention the wearing of facemasks, it did allow the hospital to unilaterally "direct the nurses" and "to determine the materials and equipment to be used; [and] to implement improved operational methods and procedures."

The ALJ found that a facemask is "equipment" and that requiring nurses who have not been immunized and who refused to take antiviral medication to wear a facemask was simply an extension of infection control guidelines already in effect at the hospital and was permitted under the management rights clause of the CBA. Thus, the ALJ concluded that the union waived the right to bargain over the wearing of facemasks when it agreed to the management rights clause in the CBA.

**What It Means**

The decision, if affirmed, facilitates the efforts of the hospital to deliver quality health care to its patients and prevent the spread of illness. The decision highlights the importance of an employer including a strong and appropriately-worded management rights clause in its collective bargaining agreement. Absent such a management rights clause, the hospital's action in this case would have been found unlawful.

Even with a management rights clause, you should nonetheless provide notice of any proposed changes to the union (placing the burden of requesting bargaining on the union) and consult with counsel before implementing any such changes, as Board law continues to evolve.

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*The author may be reached at GBallew@fisherphillips.com or 816. 842.8770.*

## *Related People*

**Gregory D. Ballew**
Partner
816.842.8770
Email