Health Care is the single largest U.S. industry, providing more than 13.5 million jobs. According to the U.S. Equal Employment Opportunity Commission, the industry has a high incidence of occupational injury and illness, and health care workers “confront perhaps a greater range of significant workplace hazards than workers in any other sector.” New EEOC guidance on health care workers and the Americans with Disabilities Act suggests increased scrutiny of employment practices in health care.

The Equal Employment Opportunity Commission (EEOC) released guidelines on the protections and accommodations afforded health care workers under the Americans with Disabilities Act (ADA). Although the ADA covers employment by all private and state and local government employers with 15 or more employees, the EEOC singled out health care workers in these guidelines. While most of the information included is contained in existing EEOC guidance, there are some surprises for health care employers.

Job Requirements
Is a health care worker “qualified” to perform a job within the meaning of the ADA? The ADA mandates that a job requirement be job-related and consistent with business necessity. The new guidance warns that employers may need to “consider” whether a job requirement that excludes a disabled individual from employment accurately predicts the individual’s ability to perform the job’s essential functions.

Example. A certified nursing assistant with an intellectual disability (mental retardation) who has a full scale I.Q. of 66 has been performing her job at a nursing home successfully for five years. The employer decides to impose a high school education or G.E.D. requirement for the job. The employee didn’t finish high school due to her disability and has several times tried unsuccessfully to obtain her G.E.D. This requirement is not job-related and consistent with business necessity as to this employee. The fact that she has done the job successfully without meeting the requirement shows that it does not accurately predict her ability to perform the job’s essential functions.

Taken a step further, although not stated in the guidelines, the fact that one person without a high school degree or equivalent is performing the job successfully suggests that it may not be a bona fide requirement for the position.

An employer’s judgment and a written job description, prepared before advertising or interviewing for a job, will be considered as evidence of essential functions, but they are not always dispositive.

Example. A hospital’s job description for a registered nurse position states that lifting patients is a duty of the job. However, lifting patients will not be considered an essential function of the position by the EEOC if an RN in that hospital typically spends only minutes per day repositioning patients in their beds or if transferring patients is customarily accomplished with the help of others or equipment.

Continued on next page
It is important for employers to recognize that the EEOC will pay close attention not just to what the job description says are the job’s essential functions, but also to what current employees actually do on the job.

**Requested Accommodations**

An employer is not required to provide an accommodation that would impose an undue hardship—meaning the accommodation would require significant difficulty or expense, or would be unduly disruptive to the business’s operation. Factors to be considered in making the determination include the cost of the accommodation, the employer’s size and financial resources, and the nature and structure of its operation, among others.

**Example.** A nursing assistant at a large hospital injures her back and, as a result, works with a permanent 10-pound lifting restriction. She informs her supervisor that she can nevertheless perform all of her duties except for lifting patients, which is an essential function of her position. She requests that the hospital purchase a $1,500 portable mechanical patient lifting device as an accommodation. Purchase of the device and the cost of the associated training would not be considered by the EEOC to pose an undue hardship. (OSHA strongly favors the use of mechanical patient lifting devices to eliminate or reduce musculoskeletal disorders.)

**Medical Information**

An employer may ask a current employee a disability-related question or require the worker to take a medical exam only if the employer reasonably believes, or has a reasonable basis for believing, that the employee may be unable to perform the essential functions of the job or may pose a direct threat due to a medical condition. The EEOC considers a reasonable basis for belief to include such things as evidence of current performance problems, observable evidence, or individualized medical information.

**Example.** A hospital administrator learns that an anesthesiologist with a good performance record has diabetes and uses an insulin pump. To ensure that he does not pose any safety risk in the operating room, the administrator wants to send the anesthesiologist for a fitness-for-duty exam. This would violate the ADA because the employer does not have objective evidence that the anesthesiologist will be unable to perform his job or will pose a direct threat due to his diabetes and use of insulin.

**Don’t Take Chances!**

This new guidance points out potential pitfalls for the health care employer when navigating through the complexities of the ADA. Employers need to ensure that job descriptions, employment ads, and interview questions will pass EEOC scrutiny. For more information about the ADA, please contact an attorney in our Disability, Leave and Health Management Practice Group, http://www.jacksonlewis.com/pa/pa.cfm?paid=2.
Many health care employers assume automatically that shift or weekend supervisors are “management” because they are in charge of “the House,” or a significant department or division, for a shift. It is the job duties, not the job title, the courts will consider if supervisory status is challenged.

A recent case underscores this point.

The Case: A registered nurse was fired from her job at a long-term care facility, where she served as a weekend supervisor, for circulating a petition protesting a change in working conditions. She filed an unfair labor practice against the residence, alleging that she was discharged for engaging in “union” or so-called “protected concerted activities.” She further claimed that she was an employee, not a supervisor, and was entitled to protection under federal labor law. The case first went to the National Labor Relations Board (NLRB).

The NLRB Decision: The NLRB decided that the facility had the right to fire the weekend supervisor for union activity because she was a supervisor under federal labor law, and therefore unprotected by federal labor laws. They found that she:

• Completed written reports of employee misconduct;
• Sent two employees home for misconduct as directed by management;
• Let two employees leave work for family emergencies; and
• Completed part of one probationary employee’s evaluation.

Appellate Court Says: Not a “Supervisor”: In March, the United States Court of Appeals in Lisa Jochims v. National Labor Relations Board overturned the NLRB’s decision because the weekend supervisor did not have the requisite authority or independence to fit the legal definition of a supervisor. The Court found that:

• Her written reports of employee misconduct alone did not directly result in discipline. She simply reported the facts and did not make the decision;
• Her “decision to send employees home” for gross misconduct, such as drunkenness or failure to respond to patient call lights, did not require independent judgment because it was common knowledge that an employee cannot be permitted to work under such circumstances;
• Allowing employees to leave early due to family emergencies was not enough to prove true independent supervisory authority; and
• Her input on the written performance evaluation did not independently or directly affect the employee’s status or pay.

In overturning the NLRB decision, the Court observed that the Board did not adhere to its precedent that required a greater degree of authority and independence to establish supervisory status.

What This Means to You: This case is significant for several reasons:

• Health care employers should not assume all weekend and shift supervisors are part of management. The fact is, many of these employees work so few shifts or are so transient they rarely are invested with independent authority to make significant decisions when it comes to employees.
• Many health care employers have rightly focused on revising charge nurse job descriptions to help ensure their supervisory status. However, they have not paid equal attention to proving and documenting the supervisory status of weekend or shift supervisors, who may be in charge when the administrators and directors are gone for the day.
• In spite of recent cases in which the federal courts have supported NLRB rulings on supervisory issues, they will not hesitate to overturn the Board’s finding of supervisory status when it is not firmly grounded.

Next Steps: Mischaracterizing employees as supervisors can cause serious labor law difficulties. Because they are often 24/7 operations, health care employers face particular challenges when it comes to people with similar job titles who work different shifts. Review your job descriptions and employee duties to ensure your designation of employees as supervisors will survive a challenge.
Wage and Hour
Wage and Hour Lawsuits Are Growing—and Plaintiffs Are Winning

Wage and hour lawsuits are fast becoming class actions of choice in the country. When employers lose, it can cost them dearly.

As the caseload for the Department of Labor’s Wage and Hour Division (WHD) decreases, federal and state court dockets are getting more crowded with wage and hour suits. And while WHD collected almost $172 million in back pay owed to employees in fiscal year 2006, the judgments in just two of the numerous class actions decided in 2006 easily beat that number. Obviously, plaintiff lawyers have discovered that winning a class action wage and hour lawsuit is very lucrative.

Whether you are a large employer paying out tens of millions of dollars in back pay or a smaller one paying tens of thousands, the results can be very painful.

The checklist that follows reflects some of the most frequent problem areas for health care employers. You should be able to answer Yes to every question that applies to the type of work done in your facility.

- We have correctly categorized our employees as exempt or nonexempt under the FLSA.
- We pay all nonexempt employees at least the applicable minimum wage.
- We pay overtime to nonexempt, salaried employees such as clerical staff, cooks, and activities directors.
- We pay employees for all work performed before and after their scheduled shift.
- We pay employees as required when they work during their scheduled meal period.
- We pay employees while attending staff meetings and compensable training sessions.
- We avoid making deductions or demanding reimbursement for the cost of required uniforms or equipment, where this may cause employees to fall below the minimum wage rate, or violates other applicable law.
- We pay minimum wage and overtime to all individuals, including residents, who perform work of any consequential economic benefit to our facility.
- We pay overtime after 8 hours of work in a day for full-time and part-time workers who are under the “8 and 80” system.
- We pay overtime after 80 hours worked during a biweekly period rather than after 40 hours in a workweek to employees under the “8 and 80” system.
- We combine hours worked in more than one department or at more than one of our facilities when determining the total overtime hours worked.
- We include the time spent or hours worked while performing on-call assignments when determining the total overtime hours worked.
- We include shift differential, bonuses, and on-call fees when calculating an employee’s regular rate.
- We pay minimum wage and overtime to employees who are home health companions to aged individuals with physical infirmities and who spend more than 20% of their time doing general household work.
- We include travel time as hours worked for employees who travel between job sites during the work day.
- We know and follow the rules for employing workers under the age of 16.
- We provide required employee uniforms and do not deduct the cost of the uniforms from employees’ wages.
- We keep records of all actual hours worked.
- We train our supervisors in wage and hour laws applicable to our health care facility or service.
- We know and follow all applicable state wage and hour laws.
- We conduct annual wage and hour compliance audits.

Treat any No answers as a red flag that you may not be in compliance with the law. For more information, contact your Jackson Lewis attorney or Paul Siegel at SiegelP@jacksonlewis.com.
Senior Living

Unions Getting Aggressive with Senior Living Companies

Senior living facilities and their nonunion workers are ripe fruit for unions starving for new members. You can be prepared if unions focus on your facility by identifying your vulnerable areas and strengthening your position.

Your facility or facilities may be the target of union organizers—and you may not even realize it. The fact is, union organizers have become very savvy in how they approach a campaign against a particular group or company. Most unions secretly conduct a vulnerability assessment of the targeted company a year or two before they go public with a corporate campaign. They find out where you are weak—and then they exploit your vulnerabilities.

The best way to combat a union corporate or organizing campaign is to preempt it. This can only be accomplished by commissioning your own vulnerability assessment in advance of union activity. Here's where to start:

- **Analyze the power structure of your organization.** Evaluate any internal and external areas subject to union attack or pressure. This should include consideration of possible pressure upon the board of directors and individual directors, or the owners and key executives.

- **Consider corporate governance issues,** including all of the legal and governance issues for publicly held businesses under Sarbanes-Oxley, and related requirements for privately held businesses.

- **Identify stakeholder pressure points,** including pressure that could be applied to them by union organizers. Consider such stakeholders as union institutional investors, business partners, vendors, and contractors.

- **Assess the vulnerability of your funding sources,** including union interference with lending institutions, private investors, and bond issuers. Consider the likelihood of Medicare and Medicaid fraud claims, or challenges to your nonprofit status or tax breaks, if applicable.

- **Evaluate your vulnerability to union instigated regulatory interference.** There are many ways a union can cause trouble through state health departments, social services, state “certificate of need” or health care access applications, zoning entitlements, and environmental issues in connection with site development and construction.

- **Consider the entire range of legal vulnerabilities that could be used to harass or embarrass your company,** including pending legal actions; prior or closed cases that may be subject to disclosure; unasserted but possible claims; outdated or noncompliant employment policies and practices; poor administration of pay practices; lax time-keeping procedures; and possible wage-hour and child labor violations.

- **Examine potential diversity,** immigration and fair employment issues, and evaluate all personnel policies and procedures for compliance with workplace laws.

**Survival Strategies.** Once you have identified vulnerabilities, get to work on correcting problems, eliminating trouble spots, and developing communication and other strategies to make the company an unattractive target. You need to be as coldly objective at finding and fixing your weak spots as union organizers will be when attempting to exploit them if you become a target.
Union Organizing Update

East and West: SEIU Organizing Efforts

The SEIU is focused on achieving nationwide unionization of health care facilities. Recent events on both coasts illustrate their increasingly sophisticated tactics.

Service Employees International Union United Healthcare Workers West (SEIU UHW West) has organized many nonunion health care facilities by entering into neutrality agreements with employers (called “Alliance” employers). By signing a neutrality agreement, Alliance employers waive certain rights under the National Labor Relations Act (NLRA), including the right to freely communicate with employees about the disadvantages of unionization and the right to insist upon a secret ballot election before recognizing a union as the exclusive bargaining agent of employees. Some neutrality agreements require employers to provide the union with the names, home addresses, and phone numbers of nonunion employees. Some even let union organizers conduct meetings with workers on company premises during meal times.

Neutrality agreements are a great deal for the union—and not so great for the employer. (Employers will sign neutrality agreements, however, in order to avoid the disruptions caused by protracted union organizing efforts and/or corporate campaigns.) Nonetheless, in a recent report, SEIU UHW refers to its prior deals as being too employer friendly! West will be changing its negotiation strategy so that new agreements will do the following:

- Lead to 100% density of all Alliance nursing homes during the term of the agreement. To date, Alliance employers were able to choose which facilities would be handed over to the union.
- Improve quality of care. With uncharacteristic candor, SEIU UHW West acknowledges that its facilities did not have adequate staffing and had not achieved quality care.
- Foster unionization throughout the entire nursing home industry in California. The union plans to expand participation in the Alliance with more neutrality signers and adopt a regional market strategy to organize non-Alliance homes.
- Establish wage and benefits standards that are comparable to those of California hospitals.

On the opposite coast, the SEIU and politicians are pressuring a Maryland life care community with an ongoing corporate campaign. Since the union won an election in January 2006, a not-for-profit life care community has been locked in a struggle with the SEIU and its allies. The ultimate goal of the union’s coordinated pressure campaign is to force employees to pay union dues. The community has faced tactics that include:

- Picketing of community property by busloads of outsiders
- Extensive news coverage
- Outspoken opposition by local politicians
- Union attempts to enlist church leaders to pressure the community

While corporate campaigns are not new, the union’s savvy wooing of political allies is—and it is paying off. Last year, SEIU UHW East’s Maryland/D.C. Division sought to build its power base by supporting—through donations of money and labor—the campaigns of D.C. Mayor Fenty, members of the D.C. City Council, and the Governor of Maryland. As a result, the union’s attacks on the life care community have been joined by local politicians, many of whom are outspoken supporters of the union. The success of this tactic is likely to spread markedly in the upcoming election year.

Be Politically Savvy

Make sure that local and state politicians know your positions. Use the power of your industry organizations to get the word out on the challenges you face. Take stock of your vulnerabilities (see the Senior Living column in this issue) and immunize your organization before a corporate campaign targets your facility.
Court Watch

Court Warns Employers that Massive Recordkeeping Penalties Are Legal

A recent court ruling overturning a decision of the OSH Review Commission sets an expensive precedent for employers who willfully disregard recordkeeping rules.

Widespread Occupational Safety and Health Administration (OSHA) recordkeeping mistakes can prove very costly, a federal appeals court in New Orleans recently reminded employers. And the Occupational Safety and Health Review Commission cannot save you from huge penalties in cases involving certain willful violations. The U.S. Court of Appeals for the Fifth Circuit has upheld the issuance of penalties for each of 141 instance-by-instance willful recordkeeping citations against two related companies for knowingly and intentionally failing to record certain work-related injuries or illnesses.

OSHA had proposed penalties against the two companies totaling $1.21 million. The first was cited for 82 willful violations with proposed penalties of $9,000 per violation, while the second received citations for 59 willful violations, with proposed penalties of $8,000 per violation. After they received the numerous per-instance citations, the companies contested OSHA’s findings and penalties before the Review Commission. A Commission administrative law judge (ALJ) upheld the findings of willfulness, but granted the companies relief on the penalties. He grouped all the penalties for each company and assessed a penalty of $70,000 for each employer—the maximum allowed by the Occupational Safety and Health (OSH) Act for a single willful violation.

The court, however, found that the ALJ had no authority to group the willful penalties proposed by OSHA. Although the Review Commission could vacate citations, reclassify them if it found they were improperly classified by OSHA, and determine the appropriate penalty for each violation alleged and proven, it could not group per-instance penalties once the violations were established. In addition, the Review Commission was not free to ignore the statutory penalty range for violations which were established.

Recordkeeping violations often are cited by OSHA as “other-than-serious” since they do not directly affect employee safety and health. Under the OSH Act, OSHA may propose penalties of up to $7,000 for other-than-serious violations, but is not required to seek any penalty for them—and often does not. However, where OSHA concludes there is a knowing, deliberate, and intentional effort to avoid recording occupational injuries and illnesses, it may cite the employer for a willful violation. And if, as in this case, OSHA cites each incident individually, fines increase dramatically.

Action Items: Review your recordkeeping procedures to make sure all recordable injuries and illnesses are being entered properly on your OSHA 300 logs:

- Check entries against other personnel and medical records, such as workers’ compensation reports of injuries, for consistency.
- Check that logs are complete and all required information has been included.

Consult with your attorney in the event of an OSHA investigation. If citations are thought to be likely, you will want to be proactive in persuading OSHA that any recordkeeping errors or omissions are unintentional. If willful recordkeeping citations have been issued, your attorney will work to resolve the matter quickly on satisfactory terms, if possible. Attorneys in Jackson Lewis’s Workplace Safety group have experience at the national and regional levels to assess and counsel employers on OSHA citations; contest citations before the Occupational Safety and Health Review Commission, state safety and health commissions, and in federal and state court review proceedings; and, where appropriate, negotiate settlement agreements with OSHA or the Solicitor of Labor.

But why take any chances? Audit your OSHA recordkeeping practices now to be sure that you are in compliance. Contact your regular Jackson Lewis attorney with whom you regularly work or Attorney Roger Kaplan at (631) 247-4611, kaplanr@jacksonlewis.com.
How to Stay Union Free

Today’s unions have “changed to win.” Have you? Join Jackson Lewis attorneys for an engaging and interactive day-and-a-half program to get the knowledge and skills you need to survive in an era of aggressive union organizing.

Locations & Dates:

Cleveland – September 19-20
Nashville – October 3-4

Las Vegas – October 31-November 1
Chicago – November 7-8

Attend and learn how to:

• Fight new organizing techniques, including corporate campaigns, neutrality agreements, and card checks.
• Make unions irrelevant to your employees—before the organizing starts.
• Develop a comprehensive plan that starts working long before the union shows up.
• Empower your supervisors to exercise their union-free rights under the law.
• Protect your company’s property rights when confronted with organizing.
• Define the communications agenda and put the union on the defensive.

To Register: Please contact Laura Senenko, 703-821-4337, senenkol@jacksonlewis.com, or register online at http://www.jacksonlewis.com

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