In a flurry of competing announcements and shifting alliances, the Change to Win’s SEIU and a number of AFL-CIO affiliates are attempting to reach the two million nonunion nurses while the possibility of an unfavorable National Labor Relations Board decision hangs overhead. The unions are predicting the Labor Board will rule in another major case on the legal definition of “supervisor” under the National Labor Relations Act, an issue crucial to organizing efforts since employees whose duties are “supervisory” do not have the right to unionize.

Noting that in recent years the Labor Board has handed down several decisions limiting who is covered by the NLRA, former NLRB General Counsel Fred Feinstein told delegates to a health care union conference they should be concerned that a pending decision by the NLRB will limit the right of nurses to organize and engage in collective bargaining. Addressing the professional issues conference of AFT Healthcare, the health care division of the American Federation of Teachers, Feinstein—a visiting professor in the School of Public Policy at the University of Maryland—said that he expects the NLRB sometime this year to decide what is the standard for determining whether a nursing employee is a supervisor not covered by the NLRA. Three pending cases revolve around whether certain employees, including charge nurses, are supervisors exempt from the protections of the NLRA.

Recent Labor Board decisions involving who are supervisors have cut back on NLRA coverage for graduate student teaching assistants in Brown University, 342 N.L.R.B. No. 42, 175 LRRM 1089 (2004); for severely disabled individuals performing janitorial work through a nonprofit center in Brevard Achievement Ctr. Inc., 342 N.L.R.B. No. 101, 175 LRRM 1329 (2004), and for temporary workers supplied by staffing firms in M.B. Sturgis, 331 N.L.R.B. 1298, 165 LRRM. 1017 (2000). This trend to limit NLRA coverage may indicate the Labor Board will define supervisory duties in the consolidated cases under review to include those performed by nurses and exclude them from the protection extended to “employees.”

For about thirty years, the NLRB has struggled with the definition of “supervisor” as it applies to nurses in health care institutions. Critics say the Board’s interpretation of the law has constantly shifted to assure nurses are found to be “employees,” not “supervisors.” Several courts, including the Supreme Court, have noted the NLRB has tended to apply the definition differently to nurses than to employees in other industries.

To be a “supervisor” under the law, an employee must possess the authority to engage in one or more stated “supervisory” duties. The supervisory quality which most often applies to nurses is the responsible direction of subordinates through the use of independent judgment. Unfortunately, the NLRA does not specifically define responsible direction or independent judgment. To a large degree, these are the terms the Board has so often manipulated in health care cases.
In 2003, after the Supreme Court rejected the Labor Board’s test for supervisory status in *Kentucky River Community Care Inc.* (2001), the NLRB determined it would address the endless cycle of litigation over these terms. The Board then consolidated several supervisory status cases (*Oakwood Healthcare Inc.*, No. 7-RC-22141; *Golden Crest Healthcare Center*, No. 18-RC-16415; and *Croft Metals Inc.*, No. 15-RC-8393), and took the unusual step of requesting that interested parties provide advice in defining the troublesome terms. In response, Jackson Lewis partner Tom Walsh and associate Mike Hekle filed a “friend of the court” brief on behalf of the American Health Care Association and other industry groups.

Often, the five-member Board delegates authority to rule on cases to a three-member panel. This allows more cases to be decided in less time. However, the Board prefers to reserve the most significant cases (such as these) for decision by all five members. Since 2003, the Board has not been at full capacity, however, several recent recess appointments have filled all positions. Now, with five voting members, the Board has acknowledged that a decision on this important issue can be expected in the coming months.

Unions see that the current NLRB, dominated by Bush appointees, is likely to end the favorable tilt in their direction on this issue. This is a major concern for labor, not only because a decision favorable to management’s interpretation of the law would significantly limit the ability of nurses to unionize, but because in some circumstances, it could also result in the termination of bargaining obligations for existing nurse units.

**Health Care Setting Presents Special Challenges**

The Service Employees International Union, affiliated with the Change to Win Federation, represents more nurses than any other single union; however, various AFL-CIO unions together represent over 200,000 nurses. As many commentators have noted, the AFL-CIO and Change to Win unions are now competing to organize the most employees.

The pending Labor Board’s decisions have added fuel to the organizing fire.

In February, eight AFL-CIO unions created a trans-union industry coordinating committee, or ICC, called “RNs Working Together,” for the purpose of organizing the two million remaining non-union RNs. The prospect of nurses being considered “supervisory” greatly alarms the union, and according to a leader of the alliance, RNs Working Together will not accept an unfavorable decision. The ICC “will not let that right be taken away without a fight. All the unions are prepared to stand together,” said Ann Twomey, president of an affiliate of the American Federation of Teachers, one of the ICC’s members. “It is the alliance’s intent to go to legislatures, communities, and stand up in workplaces. We will reach out to legislatures and the public and make sure a bad ruling gets reversed,” she added.

Meanwhile, the SEIU, now a member of Change to Win, has announced two programs for the same purpose of reaching the unorganized in health care, including nurses. In January, the SEIU and the United American Nurses Association, an AFL-CIO affiliate, announced an agreement to work together on organizing, collective bargaining, and advocating for changes in the health care system. The two unions said that they represent the majority of organized registered nurses and other health care workers in the United States, including 84,000 SEIU members and 100,000 UAN members. The agreement calls for joint organizing drives, mutually identified strategies and targets, projected budgets, staffing needs and timelines, and a pact not to raid or undermine each others’ established collective bargaining relationships.

Then, in March, the SEIU announced that it is forming a new organization of its 84,000 registered nurse members to focus on increased staffing levels, higher wages, recruitment efforts, and patient care issues. The “Nurse Alliance of SEIU” will address increasing medical costs and consolidations among hospitals and other providers, according to President Andrew Stern. The group will remain a part of the SEIU, with a first-year budget of $6 million and a dedicated staff. According to an SEIU spokesperson, current collective bargaining unit members will be affiliated with the new group, and RNs who wish to join but are not covered by a union contract will become members of the alliance. The union hopes the formation of this alliance between union and nonunion nurses eventually will lead the nonunion members to elect the SEIU to represent them.
Reason for Optimism for Health Care Employers

While it remains to be seen how the Board will rule in the three consolidated cases on supervisory status, there is reason to be optimistic that the rulings will be consistent with the law and realistically reflect the health care workplace. If this happens, employers will have opportunities to avoid nurse unionization and possibly to remove nurses from existing bargaining units.

Nonetheless, we anticipate the unions will appeal any adverse decision, and in addition will:

- Seek legislation on the state level to prohibit nurses from engaging in duties which would be considered “supervisory”
- Seek to amend the NLRA to carve out nurses from the definition of “supervisor”
- Assert pressure on employers through media campaigns, demonstrations, and at the bargaining table to refrain from withdrawing recognition of nurse units.

Indeed, 2006 may be the turning point for this very important issue. Health care employers should stay current and be prepared to take action, where appropriate. We will continue to cover these developments in The Health Care Employer. In the meantime, if you would like additional information or have questions, please contact the Jackson Lewis attorney with whom you regularly work, or attorneys Thomas V. Walsh, WalshT@jacksonlewis.com, or Michael R. Hekle, HekleM@jacksonlewis.com, in our White Plains, New York office: (914) 328-0404.

Union’s Mock Funeral Outside of Hospital Using Nonunion Labor Violates NLRA

Protesting a hospital’s use of a nonunion contractor, a union violated federal labor law when it staged a mock funeral procession in front of the facility. Affirming a federal district court decision to issue an injunction against the union, the U. S. Court of Appeals for the Eleventh Circuit found the mock funeral constituted illegal secondary boycott activity.

A Sheet Metal Workers local had a labor dispute with a nonunion sheet metal contractor and a temporary staffing agency used to recruit workers for a construction project at the Florida hospital. For about two hours, members of the local paraded back and forth on the sidewalk about 100 feet from the hospital entrance. Four union representatives carried a coffin shaped object, and one wore an oversized grim reaper costume and carried a large sickle. Four others distributed handbills to people entering and leaving the hospital, using the headline “Going to ____ Should Not Be a Grave Decision.” The handbill described the allegations in four lawsuits against the hospital related to recent patient deaths.

After the hospital filed an unfair labor practice charge against the union, the National Labor Relations Board regional director filed a petition in federal district court seeking an interim injunction under National Labor Relations Act Section 10(l). Finding the mock funeral parade was the functional equivalent of picketing, the Eleventh Circuit affirmed the decision of the district court to issue the injunction. [Kentov v. Sheet Metal Workers’ Int’l Ass’n Local 15, 418 F.3d 1259 (11 Cir., 2005).

Picketing Neutral Employer Is Illegal

The appeals court found that picketing directed at an employer with whom a union has a primary labor dispute is legal. However, NLRA Section 8(b)(4)(ii)(B) prohibits such activity when it is intended to coerce a neutral secondary employer, such as the hospital in this case, from doing business with the primary employer. The court found that the interim injunctive relief, sought pursuant to Section 10(l), was “just and proper to prevent the potential adverse impact of secondary boycotts at the hospital and to preserve the status quo” pending the Labor Board’s decision on the unfair labor practices allegations. The union had indicated its intention to continue the activity at the hospital and had a history of engaging in other secondary activity there, the court noted.

Among other things, the injunction prevented the union from “staging street theater, processions, picketing, patrolling and/or any manner of conduct calculated to induce individuals not to patronize the hospital” if the object of such activity was to force or require the hospital to cease dealing with the primary employers in the dispute.

Injunctive Relief Is Appropriate Remedy

NLRA Section 10(l) “authorizes district courts to grant temporary injunctive relief pending the Board’s resolution of certain unfair labor practice charges, such as secondary boycotts, which are likely to have
a disruptive effect upon the flow of commerce,” the court explained. Beyond issuing the temporary order restraining potentially unlawful and disruptive activity, the court said that “the ultimate determination of the merits of the unfair labor practice case is reserved for the Board.”

In its defense, the union argued that its conduct was free speech protected by the First Amendment. However, the appeals court found that the legal standard cited by the union as protection for its actions only involved handbilling and not picketing. In a 1998 ruling, the U. S. Supreme Court had found peaceful handbilling to be lawful, but the Court had distinguished that activity from picketing and patrolling, which are more likely to be found coercive under the NLRA. Also, there is long-standing legal precedent establishing that the Labor Board can regulate secondary picketing without implicating the First Amendment.

Want to Learn More About the New Labor Activism Impacting Health Care Employers?

As these articles demonstrate, labor unions from both the AFL-CIO and Change to Win are turning up the pressure on the health care industry as one of the major targets for organizing and recruitment of new members. It is critical for health care employers wanting to remain unionfree to know what tactics and strategies the unions are using and to be prepared to respond.

Jackson Lewis is conducting a series of programs on these and other major developments in organized labor around the country. For nearly 50 years, Jackson Lewis has been the leader in aggressive and innovative representation of employers in health care and other industries for labor relations matters involving union organizing, campaigns, election petitions, collective bargaining, grievance and arbitration, strikes, and other labor disputes. Pioneering the concept of prevention of workplace issues and positive employee relations, Jackson Lewis has counseled health care employers in thousands of matters nationwide. We bring this expertise and experience to program participants who are interested in discussing the latest strategies, targets, techniques, successes and failures of the reinvigorated AFL-CIO and the new Change to Win Federation. For more information on “How to Stay Union Free,” please see page 7, or visit our website: www.jacksonlewis.com.

Wage and Hour
Supreme Court Sends High Stakes Home Companion Overtime Claim Back to Appeals Court for Second Look

In a case with the potential for significant financial ramifications for New York providers of home care companion services, the U. S. Supreme Court has told the federal appeals court to take another look. In January, the Supreme Court issued a brief opinion in the matter involving whether home care companions employed by third parties are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act. Remanding the case to the U. S. Court of Appeals for the Second Circuit, the Supreme Court said in a brief opinion that the case should get another look, particularly in light of a December 2005 Advisory Memorandum from the Department of Labor reaffirming its position that home care companions employed by a third party agency are exempt from overtime under the federal law.

In a 2004 decision, the New York federal appeals court had turned the DOL’s long-standing position on its head. In that case, the court reversed the decision of a trial court to dismiss a claim for overtime pay under the FLSA by a home care companion employed by a staffing agency. Now, the appeals court must reconsider its decision to disregard the position long held by the DOL which has the express statutory authority to promulgate the rule at issue.

Union Represents Home Care Companion Pursuing Overtime Claim

The plaintiff in the case, Coke v. Long Island Care at Home, Ltd., is being assisted by the Service Employees International Union. This is because a favorable outcome would require home care providers to increase the pay for companions placed in homes by third party agencies, including the state. Such a victory would provide the SEIU with a strong argument in favor of its effectiveness as a representative for the workers.
The plaintiff is claiming she is entitled to overtime because the FLSA “home care” exemption does not apply to individuals not employed by the client-patient or family, a position contrary to the DOL rule. The U.S. District Court for the Eastern District of New York dismissed the claim, holding that companions placed in the home by third party agencies are not entitled to overtime pay under the FLSA (and, as such, under New York law). The court’s decision was consistent with the U.S. Department of Labor’s regulations that define the scope of the companionship exemption to include employees of home care agencies, as well as companions employed directly by the person receiving the care (or his or her family).

To the surprise of many, the Second Circuit reversed that decision and invalidated the regulation extending the exemption to agency-paid companions. The Second Circuit’s ruling placed home care agencies at risk of liability for overtime wages at the rate of time and one-half of the regular rate of pay (not, for example, time and one-half of the minimum wage as required by the applicable New York wage law). Thus, a companion earning $10 per hour would be entitled to overtime at the rate of $15/hour ($10 x 1-1/2), rather than time and one-half of the minimum wage ($6.75 x 1-1/2) for overtime hours, which would be due under New York law.

Although the appeals court found that the regulation had failed to note the type of employer covered by the companion exemption, the DOL in its Memorandum said this ignores Congressional intent. “Presumably, if Congress had wanted to limit the companionship exemption to employees of a particular employer, it would have said so expressly, as it has done with other FLSA exemptions.”

Despite the Supreme Court’s unmistakable suggestion that the DOL Advisory Memorandum be its guide, the Second Circuit is free to disregard the DOL’s position, as the court did in its first ruling. While the Department of Labor makes strong arguments in favor of the exemption, the Second Circuit already has rejected many of them. In the meantime, home care agencies should evaluate their pay practices and procedures and prepare for the possibility that the court again will rule that home care companions must be paid overtime at the time and one-half rate applicable under the FLSA.

Jackson Lewis attorneys are available to assist health care employers with pay practices that fully comply with the complex scheme of federal and state regulation. Please contact the Jackson Lewis attorney with whom you regularly work, or Wage and Hour Practice Area coordinator Paul J. Siegel, (631) 247-4605; SiegelP@jacksonlewis.com.

Supreme Court Directs Reconsideration by Second Circuit

The U.S. Supreme Court now has vacated that ruling and directed the appeals court to reconsider its decision. In doing so, the Second Circuit has been directed specifically to analyze the case in light of the DOL’s official position, reiterated in the 2005 Advisory Memorandum and a 2004 opinion letter. The DOL has long held that the companionship exemption does apply to home care companions employed by third parties. In the opinion letter, the DOL Deputy Administrator wrote in pertinent part:

“The Division has not changed this regulation or its interpretation thereof as a result of the circuit court’s opinion in Coke v. Long Island Care at Home, 376 F.3d 118 (2nd Cir. 2004). Therefore, it is still our opinion that employees engaged in companionship services, as defined in 29 CFR 552.6, who are employed by a third party are exempt from the minimum wage and overtime requirements of the FLSA, and you may continue to rely on the August 16, 2002 Opinion Letter signed by former Administrator Tammy McCutchen (copy enclosed) for practices outside states within the jurisdiction of the Second Circuit.”
### Management Education Opportunities

**Still Time to Register for Jackson Lewis Corporate Counsel Conference**

Please join us May 10 – 12 in Scottsdale, Arizona for the Jackson Lewis 17th Annual Corporate Counsel Conference, “Master the Skills for Managing Employment Law Issues.” The Conference is designed for corporate counsel with employment, labor, benefits and immigration law responsibilities. It is an ideal opportunity to interact with fellow in-house attorneys and specialists in workplace law and to earn 13 hours of CLE and 12 hours of HRCI credits.

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<td>• The Emerging Debate on Workplace Wellness Programs</td>
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<td>• Blogging, Instant Messaging, and Other Employee Communication Inside the Workplace and Beyond</td>
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<td>• Breaking Through Stereotypes to Reduce Discrimination Claims</td>
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This year’s Conference will be held at the Hyatt Regency Scottsdale Resort and Spa at Gainey Ranch. The $395 registration fee includes resource materials, meals and activities. For more information and registration: Laura Senenko, (914) 314-6063; fax: (914) 328-0613; email: senenkol@jacksonlewis.com. Or to register online, visit www.jacksonlewis.com.
Maintaining positive employee relations is no longer enough. Unions are applying bold new techniques that rely on external pressures rather than seeking out disgruntled employees. Aggressive tactics, such as "neutrality" agreements... card checks without elections... employer gag agreements... political, civic, judicial and regulatory activism... new media... and cooperation between multiple unions, are just part of the new landscape.

In this engaging and interactive day-and-a-half program, Jackson Lewis attorneys will explore the knowledge and skills you need to help your health care organization survive in an era of radical union organizing:

- How competing unions are a new threat to you and your organization
- The Change to Win Federation and its radical new approach
- Andy Stern, Jimmy Hoffa, Jr., Joe Hanson, Bruce Raynor, and John Wilhelm – the most successful labor leaders of the last decade
- New targets: healthcare, retail, building services, hospitality, casinos, food service, trucking, warehousing, laundry, insurance, finance, and call centers
- New issues: health benefits, outsourcing, work/life balance, pensions and more
- The AFL-CIO’s response – and what this unprecedented competition means to you
- What you need to know about "paperless" organizing – digital union cards, websites, blogs, and more
- How to help your employees understand the new and greater significance of union cards
- How you can make unions irrelevant to your employees – before the organizing starts
- How to fight new organizing techniques including neutrality agreements, voluntary recognition, and corporate campaigns
- How unions organize outside the traditional NLRB election process – and how these new techniques won them twice as many members last year
- How unions are targeting entire health care systems – the Change to Win domino theory
- Why defining “supervisor” is critical to union avoidance
- How to turn your supervisors into a powerful communications team
- How to educate supervisors on their right to free speech
- How to establish an issue-free environment and become an employer of choice
- How to ensure the most favorable configuration for potential voting units
- The importance of educating your employees from day one
- Defining the five major stakeholders – and getting them on your side
- How to empower your supervisors to exercise their union-free rights under the law
- How to minimize concern over unfair labor practices and encourage your supervisors to lawfully manage and control the workplace
- How to protect your facility’s property rights when confronted with organizing
- What you can do to control organizing activity on the job
- Why you must define lawful solicitation and distribution rules now
- How you can prevent your own computer system from becoming the union’s most effective organizing tool
- How to develop a comprehensive plan that starts working long before the union shows up
- Cataloging your assets – the information and people who can help you render a corporate campaign ineffective
- Ways you can build a grass roots base of your own in the community
- Preparing your key communicators – they may not be who you think
- Defining your target audiences and understanding the wide variety of approaches required to reach them all
- Understanding the available media, new and old
- Finding the compelling key messages that will help you break through
- The best and worst of managing press and PR
- How to define the communications agenda and put the union on the defensive
- How to communicate first and communicate best
- Overcoming internal resistance to telling your side of the story
- Communications judo – allowing the union to become its own worst enemy
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