Healthcare Labor Unions—Still on the Move

With the demise of the Employee Free Choice Act (EFCA), unions have fallen off the radar screen for many employers. But, at least those in the healthcare industry, unions remain active. Examples from the past 12 months include:

• Union membership generally declined during the recession, but not in healthcare. Union membership increased especially among healthcare professionals. Now, more than 15% of healthcare professionals are unionized.

• On December 9, 2009, National Nurses United (NNU) was formed from the merger of the United American Nurses, the Massachusetts Nurses Association and the California Nurses Associations and its affiliates, creating the largest nurses union in the U.S., with 150,000 members.

• On March 31, 2010, the Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP), an NNU affiliate, staged a five-week strike against Temple University Medical Center in Philadelphia. The union failed to win its staffing demands, but was able to preserve some benefits that were at stake. It also won unemployment benefits for most of the strikers.

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• On May 11, 2010, NNU announced a national bargaining strategy in which local affiliates could not agree to concessionary contracts and had to seek contract gains in staffing ratios, defined benefit pensions and retiree medical insurance.

• On June 10, 2010, the Minnesota Nurse Association (an NNU affiliate) staged the largest ever nurses' strike in the U.S. at a number of the Twin Cities' hospitals. Estimates are that the strike cost the hospitals a combined $24 million.

• Effective July 1, 2010, SEIU Healthcare Florida merged with New York City-based 1199SEIU. The merger extends 1199SEIU's jurisdiction from Maine to Miami. As part of the merger, 1199SEIU agreed to fund increased organizing, especially among Florida's acute care hospitals.

• In October 2010, the National Labor Relations Board (NLRB) announced that the employees of Kaiser Permanente in California have voted to stay with their long-time union, SEIU's United Healthcare Workers rather than switch to a rival union (National Union of Healthcare Workers) that had petitioned to represent them. In the largest mail ballot election the agency has conducted in its history, a total of 30,295 mailed ballots, from among 43,000 eligible voters, were received by the regional office in Oakland, California. The results were: SEIU's United Healthcare Workers received 18,290 votes; National Union of Healthcare Workers, 11,364 votes; no union, 365 votes; with 1,222 void ballots and 276 challenged ballots. The National Union of Healthcare Workers has filed objections to the election with the NLRB.
FLSA “Companionship Exemption” Inapplicable Where Congregate Living Residents Had to Employ Agency’s In-Home Aides

Under the “companionship exemption” of the Fair Labor Standards Act, in-home aides employed by elderly or infirm clients in a “private home” are deemed to be exempt from FLSA minimum wage and overtime requirements. A federal court has decided in Solis v. FirstCall Staffing that the exemption should not apply where developmentally disabled clients lived in apartments leased from a home care agency that employed the home care aides. 2009 U.S. Dist. 107543 (W.D. Mo. Nov. 18, 2009).

In this case, FirstCall Staffing Solutions owned and operated an apartment building for the purpose of housing developmentally disabled persons. While FirstCall had a measure of control over the building, each client signed a lease and held his or her individual apartment as a private home. However, as a condition to holding the leased apartment, each client was required to contract for in-home companion services.

The Department of Labor, through Labor Secretary Hilda Solis, sued FirstCall for unpaid overtime, claiming that the companionship exemption did not apply and the home care aides are entitled to overtime pay. The DOL argued that the home care agency exercised too much control over the residents’ living situation for their apartments to be considered “private homes.” The Court agreed.

The Court ruled that the “key inquiries are who has ultimate management control of the living unit and whether the living unit is maintained primarily to facilitate the provision of assistive services.” Based on its analysis, the Court found that the developmentally disabled individuals did not have enough control over the apartments for the apartments to qualify as “private homes.” Consequently, it enjoined the employer from withholding overtime in the future and ordered it to pay back wages with interest.

If you have questions concerning this case or the “companionship exemption,” please do not hesitate to our Wage and Hour Compliance Coordinator Paul DeCamp, DeCampP@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.

NLRB Refuses to Reconsider Determination that Medical Residents are Employees

The National Labor Relations Board has decided 2-1 to deny review of the decision of the Regional Director in New York directing an election among the medical residents, interns and fellows at St. Barnabus Hospital in the Bronx, N.Y., on the grounds they were “employees” within the meaning of the National Labor Relations Act. See St. Barnabus Hospital, 355 NLRB No. 39 (June 3, 2010). The Hospital requested review of the decision, arguing that the Board’s 2004 Brown University decision suggested the need to reconsider the issue of whether medical residents should be deemed “employees” with the right to organize and strike.

In Brown University, the Bush-era NLRB held that university teaching assistants (TAs) and research assistants (RAs) were primarily students, not “employees” entitled to union representation and the right to bargain collectively with the University. The Board rejected the Hospitals’ request for review, maintaining that TAs and RAs are very different from the “house staff” in Brown University. According to the Board, Brown University expressly declined to extend its reasoning to “house staff.” As a result, the NLRB conducted an election and the Hospital’s medical residents voted in favor of representation by the Committee of Interns and Residents (an SEIU affiliate). St. Barnabus Hospital was one of the first healthcare labor cases to be considered by two members of the new Obama NLRB: Wilma Liebman, the current Chairman, and Craig Becker, who received a “recess appointment” to the Board after serving for several years as Associate General Counsel to the SEIU. Mr.
Becker has refused to recuse himself from cases involving SEIU locals, such as that in the St. Barnabus case. Member Peter Schaumber, who has since left the NLRB, was the lone dissent in that case.

The Labor Board first considered the issue of whether medical interns, whose residency is part of an academic program, should be deemed “employees” in 1976. In Cedars-Sinai Medical Center, 223 NLRB 251 (1976), the Board concluded that medical residents were “primarily students” and not “employees” under the Act. Among other reasons, the NLRB believed collective bargaining would unduly infringe upon traditional academic freedoms in the context of medical education.

In its 1999 decision in Boston Medical Center, 330 NLRB 152, the NLRB overturned this precedent, deciding that house staff were employees. Of course, any hope of the Board’s overturning Boston Medical has been soundly quashed by Wilma Liebman and Craig Becker in St. Barnabus. This likely ends any further litigation over the status of medical residents as students, rather than employees.

Jackson Lewis’ attorneys represented one of the largest private teaching hospitals in defending a petition by SEIU to represent 1,600 physicians, fellows, and medical residents in 2004. The firm litigated the residents’ status in a nine-month representation hearing, which culminated in the SEIU’s withdrawal from the case. Some speculated that SEIU withdrew because it feared that the NLRB would overturn Boston Medical and end the union’s hopes to organize medical residents.

If you have any questions regarding St. Barnabus or other healthcare labor decisions, please contact Roger P. Gilson, GilsonR@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.

The Administration has launched a two-pronged attack on the misclassification of employees as “non-exempt employees” or independent contractors. This may prove challenging for many health care organizations that employ hundreds of exempt professionals and consultants.

In its proposed budget for fiscal year 2011, the Administration has focused on the misclassification of independent contractors:

As part of the 2011 Budget, the Departments of Labor and Treasury are pursuing a joint proposal that eliminates incentives in law for employers to misclassify their employees; enhances the ability of both agencies to penalize employers who misclassify; and restores protections to employees who have been denied them because of improper classification. This proposal would increase Treasury receipts by more than $7 billion over 10 years. The 2011 Budget for the [Department of Labor] includes an additional $25 million to target misclassification with 100 additional enforcement personnel and competitive grants to boost States’ incentives and capacity to address this problem.

In addition, legislation addressing the employee/independent contractor misclassification issue was introduced in both the Senate and the House of Representatives on April 22, 2010. These bills are in committee, currently being reviewed in each chamber. Among other things, the bill requires that employers keep records reflecting the correct status of each worker as an employee or non-employee, increases penalties for misclassification, and directs states to strengthen their own penalties for misclassification.

The Department of Labor has begun public rulemaking to “update the FLSA [Fair Labor Standards Act] recordkeeping requirements to foster openness and transparency, to increase awareness among workers, and to encourage greater compliance by employers.” To accomplish this, the DOL is considering a rule that would require “employers that seek to exclude workers from the FLSA’s coverage . . . [to] . . . perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give to WHD [Wage and Hour Division] enforcement personnel who might request it.”

Health care institutions are especially vulnerable to the proposed requirements as they employ many professionals, executives and administrative personnel in a myriad of job classifications. FLSA recordkeeping would require health care employers to devote significant administrative and legal resources to classify their employees and to provide a documented justification for each. Moreover, because employees would have access to other employees’ classifications and justifications, it may facilitate potential wage-and-hour class action lawsuits.
In Shin v. University of Maryland Med. Sys. Corp., No. 09-1126 (4th Cir. Mar. 11, 2010), the Fourth Circuit Court of Appeals upheld a lower court decision that a hospital had no duty to accommodate a medical resident who was unable to perform his job.

Frank Shin, a medical resident, prescribed patients the wrong medicine, misdiagnosed patients, could not manage the expected number of patients, and did not document patients appropriately. To assist Shin, the hospital reduced his workload by assigning him less complex patients, fewer admissions, and requesting that moonlighters and dayfloaters assist with his workload. In addition, the hospital provided him additional training, tutoring and mentoring with faculty members and other residents. Despite the hospital’s efforts, Shin’s performance did not reach a satisfactory level.

Doctors had diagnosed Shin with possible Attention Deficit Disorder and noted that his working memory was below expected levels and that he had “significant impairment in visual spatial reasoning and visual memory.” As a result, he requested the following accommodations: fewer patients, additional time to record and synthesize verbal information from the night flow team, and a more compassionate environment. The hospital did not accommodate him, instead it terminated his employment. Shin sued the hospital.

To state a claim of disability discrimination, Shin was required to demonstrate he was an “individual with a disability who, with or without reasonable accommodation, can perform the essential functions” of his job. A “disability” is defined as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual,” “a record of such an impairment,” or “being regarded as having such an impairment.”

The court determined that Shin had sufficiently alleged a claim that the hospital regarded him as disabled, but that he could not demonstrate he was able to perform the essential functions of his job with or without reasonable accommodation.

The court pointed to the requirement that first-year residents admit a minimum of 210 patients per year. Moreover, any further reduction in Shin’s workload would result in additional responsibility for other doctors on his team. The court explained, “[P]atient safety and resident morale would be compromised since others would be required to assume a greater role in managing those cases that Dr. Shin would be routinely expected to manage, diluting or delaying their routine responsibilities.”

Further, the court agreed with the hospital that Shin’s requested accommodation was “not only unreasonable but in direct conflict with the goal of residency education – to build memory strength about patient care disease presentations in order to develop the clinical judgment essential to being a physician.”

If you have questions concerning this case or a health care employer’s obligations to provide reasonable accommodations based on disability, please contact our Disability, Leave and Health Management Coordinator, Francis P. Alvarez, AlvarezF@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.
Jackson Lewis LLP is pleased to announce that 57 of its attorneys were recently selected by their professional peers for inclusion in the 2011 edition of *The Best Lawyers in America*®, the oldest and most respected peer-review publication in the legal profession.

First published in 1983, *Best Lawyers* is based on an exhaustive annual peer-review survey. For the new U.S. edition, more than 50 percent of the lawyers listed in *Best Lawyers* cast more than 3.1 million votes on the legal abilities of other lawyers in the same and related specialties.

Because of the rigorous and transparent methodology used by *Best Lawyers*, inclusion is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers* “the most respected referral list of attorneys in practice.”

Jackson Lewis LLP attorneys selected for Best Lawyers in America® 2011 are:

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- John M. Barr (Richmond)
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The days when program directors ruled residency programs with an iron fist are over. Residents are increasingly likely to challenge non-promotion, non-renewal and termination decisions by filing lawsuits alleging discrimination, retaliation, breach of contract or negligence. Hospitals and program directors should be cognizant of the increasingly litigious nature of the relationship between residents and their residency programs.

Here are five steps hospital administrators and program directors can take to avoid litigation and to be prepared if a lawsuit is filed:

1. **Review the Resident Agreement.** The Resident Agreement itself is a major source of litigation. It should be seen for what it is: a contract obligating both the resident and the residency program. The Resident Agreement should state that the hospital will provide a program accredited by the Accreditation Council for Graduate Medical Education (ACGME). However, it should not state categorically that the program complies. While such statements are common, they conflict with ACGME's substantial-compliance standard for accreditation and can lead to breach of contract claims.

2. **Thoroughly, Accurately and Fairly Evaluate Residents.** Thorough, accurate and fair evaluations serve two purposes: 1) they communicate to the resident the faculty's assessment of the resident's progress; and 2) they provide supporting documentation in the event a resident challenges an adverse decision. Evaluations should be conducted semi-annually and should accurately assess the resident's proficiency with respect to core competencies. While some faculty are loath to criticize a resident's performance in writing, evaluations that may be inaccurate and may hide a resident's deficiencies would increase the program's exposure to unnecessary litigation and the risk of lose.

3. **Review the Staff Manual.** The staff manual should be periodically updated to ensure the program's written policies are consistent with its actual practices. Outdated policies should be removed or revised. The staff manual should emphasize the educational, as opposed to the employment, aspects of the resident's relationship with the residency program. In litigation, residents often argue they are merely employees. Courts, however, generally apply a much more deferential legal standard to educational decisions than to employment decisions.

4. **Provide Required Notice of Decision of Non-promotion or Termination.** Where a resident will not be promoted to the next level of training or where a resident's agreement will not be renewed, the program should provide the resident with written notice at least four months prior to the expiration of the resident’s current agreement. If written notice is not provided within that time, the program director should be able to identify the reason for providing less notice.

5. **Accord Proper Weight to In-Training Examinations.** Programs are often accused of placing undue emphasis on the American Board of Surgery In-Training Examination (ABSITE), the examination of the Council on Resident Education in Obstetrics and Gynecology (CREOG), the Ophthalmic Knowledge Assessment Program (OKAP) and other in-training examination results. Program directors should ensure that when making an adverse decision, they do not rely on such test results as the exclusive measure of a resident's knowledge. While important, in-training examination results should be considered as one factor in measuring a resident's performance, along with faculty evaluations, consensus evaluations and other evaluative tools. In addition, the staff manual should identify the criteria and assessment tools by which residents' performance will be evaluated.

By following these guidelines, program directors can diminish the likelihood of litigation involving their residents and can be better positioned to defend such lawsuits. Jackson Lewis attorneys are always available to review Resident Agreements, provide advice and counseling concerning personnel decisions and otherwise assist hospital administrators and program directors to avoid litigation.

If you have questions concerning avoiding Medical Resident litigation contact James F. Shea, SheaJ@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.
Jackson Lewis Named “Employment Litigation Powerhouse” by BTI Consulting’s “Litigation Outlook 2011 Report”

Deeply honored and humbled” are Chairman Patrick Vaccaro’s words after Jackson Lewis was named “Employment Litigation Powerhouse” by BTI Consulting Group in its first ever Litigation Outlook Report. Jackson Lewis is the only law firm given this distinction. The report is based on over 300 one-on-one interviews with Fortune 1000 in-house litigation counsel and practice leaders responsible for outside legal services. BTI is a leading provider of strategic research to law firms and general counsel.

Vincent Cino, National Director of Litigation said, “This is a wonderful validation for all of the hardworking Jackson Lewis litigators who, on a daily basis, are responsive, creative and passionate about our practice. We are thrilled to receive this recognition.”

Among the reasons Jackson Lewis earned the top spot is the firm’s pioneering, value-oriented approach to meeting corporate clients’ needs for budget certainty through alternative fee arrangements. The firm also “practices what it preaches” by making professional staff diversity an integral part of its business model: 20% of Jackson Lewis offices are managed by women partners, and 25% of its litigation managers and practice area coordinators are women. Jackson Lewis was retained to handle 1,911 new litigation matters in 2009 and currently has over 5,000 open litigations (of which 300 are class actions).

For more information on the report, visit www.bticonsulting.com.

What’s New With Jackson Lewis?

The address is still www.jacksonlewis.com, but we have a fresh, new look. The site offers the rich, informative content you’ve come to expect from Jackson Lewis as well as some exciting new features. These include videos and cutting-edge social media capabilities, such as blogs, LinkedIn, Twitter, an RSS feed, to keep you up-to-date on important developments.

We’re sure this will be a valuable asset for everyone seeking information about the Firm, our services, and our attorneys. Bookmark it today as your first stop for help with all employment, labor, benefits, and immigration law matters!
Looking for help staying on top of workplace law developments? Register for free e-mail delivery of Preventive Strategies Online Workplace Law News to have our legal updates sent to your inbox. Read what our professionals are saying about labor, employment, benefits, and immigration issues and developments. Go to http://www.jacksonlewis.com/sign_up.php and complete the electronic form. (Your information is confidential and will not be shared with a third party.)

Sign Up for Online Workplace Law News

This year Best Lawyers partnered with U.S. News & World Report to produce the first-ever U.S. News – Best Lawyers “Best Law Firm” rankings. Jackson Lewis was ranked Tier 1 nationally, in Employment Law – Management and Labor Law – Management, as well as in 12 of its regional offices: Albany; Baltimore; Boston; Greenville; Portsmouth; Omaha; Orlando; Phoenix; Raleigh; Richmond; Stamford; and White Plains. Fifteen additional Jackson Lewis offices were ranked in Tiers 2-4.