Inside...

ORGANIZING HEALTH CARE EMPLOYEES
Connecticut Nursing Homes Battle Union and Avoid Patient Care Disruption
Nurses’ Union Close To Affiliation With AFL-CIO
AFL-CIO Plans to Continue Aggressive Organizing Agenda in 2001
Labor Board to Issue Guidelines on Objections to Use of Union Dues
WORKPLACE HEALTH AND SAFETY
Ergonomics Standard
OSHA Is Asked to Limit Hours for Medical Interns and Residents
Needlestick Protections Go into Effect
SUPREME COURT
Supreme Court on Supervisory Status of Charge Nurses
Supreme Court Upholds Private Arbitration of Employment Disputes
What Employers Should Do Now
DEPARTMENT OF LABOR AUDITS
Department of Labor Targeted Compliance Inspections Continue in 2001
JACKSON LEWIS NEWS
Edwin Foulke, Partner in Washington, D.C., Participates on Bush Transition Team
New DC Address

The Health Care Employer

An update on current labor, employment and benefits issues concerning the health care industry

Offices in: Atlanta; Boston; Chicago; Dallas; Greenville, SC; Hartford, CT; Long Island; Los Angeles; Miami; Minneapolis, MN; Morristown, NJ; New York City; Orlando; Pittsburgh; Sacramento; San Francisco; Seattle, WA; Stamford, CT; Washington, DC; and White Plains, NY.

ORGANIZING HEALTH CARE EMPLOYEES
Connecticut Nursing Homes Battle Union and Avoid Patient Care Disruption

A statewide nursing home strike that has plagued Connecticut off and on since March may be reaching an end. As we go to press, a large nursing home chain with seven facilities has reached an agreement with the New England Health Care Employees Local 1199 representing thousands of striking employees. The agreement is expected to lay the groundwork for reaching agreements with other affected facilities.

The latest strike affected 39 homes as 4,500 certified nurse’s aides, licensed practical nurses, registered nurses, and laundry, dietary, and housekeeping employees walked off their jobs for a three-week period in May. Replacement workers were hired to provide care for the residents, and following the union’s call to end the strike, many facility owners had initially said they would permanently replace the strikers. The settlement reached by the large chain of facilities reportedly allows the strikers to return to their jobs, and while it provides for modest wage increases, it does not increase staffing levels, which was the union’s major demand in the dispute.

The strike has received national attention, as state officials concerned with the health and safety of affected nursing home residents stepped in to help cover the millions of dollars to hire replacement workers and provide the necessary care. Reportedly, the state has been paying as much as $1.2 million a day for replacement workers and other strike-related expenses. The union was denied a temporary injunction to prevent the state from reimbursing the facilities for their expenses in hiring replacement workers.

A spokesperson for Connecticut Governor John Rowland estimated that the union’s demands to increase nursing staff levels would cost the state an additional $150 to $250 million in Medicaid reimbursements, which account for as much as 80 to 100 percent of facility revenues. According to the spokesperson, Governor Rowland has proposed $775 million of new state funding for nursing home care since 1999 and called the strike “completely unnecessary.”

The May strikes followed a one-day strike in March by more than 4,500 Connecticut health care workers. Contracts between the union and the nursing homes expired on March 15, and negotiations deadlocked when the facilities sought assurance they would be reimbursed from the state for the costs of adding more staff. The union had argued that increased staff-to-patient ratios are necessary to provide adequate levels of care. While the owners of each nursing home are negotiating individually, the Connecticut Association of Health Care Facilities is helping to coordinate the collective bargaining activities.

Strike-related Legal Action

Following the first strike in March, the union filed suit in U.S. District Court for the District of Connecticut, charging that the governor’s decision to allocate funding to affected nursing
home owners violated the National Labor Relations Act. The union alleged the NLRA requires the government to take a neutral position in private sector labor relations. [New England Health Care Employees Union v. Rowland D. Conn. filed 3/22/01.)]

In the first round of legal decisions, U. S. District Court Judge Janet Hall denied the union’s request for an injunction to bar the state from reimbursing nursing home owners for strike related expenses. The ruling cleared the way for the state to continue providing expedited payments and other support services to nursing homes faced with the threat of more walkouts.

The union argued that the state’s actions violated federal labor law by interfering in a private labor dispute, however, state officials said they were acting to protect the health and safety of nursing home residents by assuring caregivers for the affected homes.

Judge Hall sided with the state on two major points: 1) the state’s role did not substantially interfere with the negotiations between the union and the owners, and 2) the state has the legal authority to take steps designed to protect the health and safety of nursing home residents. In denying the motion for an injunction, Judge Hall concluded the union had not shown it was likely to succeed on the merits of its case. "Although there are questions about whether the state action was disproportionate to the threat faced, the court cannot conclude on the record before it that District 1199 is likely to be able to establish the lack of a reasonable connection between the state’s actions and its purported concern for health and safety," she said.

The ruling on the union’s request for a preliminary injunction does not end the legal action; a trial on the lawsuit itself is expected before the end of 2001.

Editor’s Note: Jackson Lewis is actively involved in providing legal counsel to the Connecticut Association of Healthcare Facilities and many of its members affected by the strike. For more information, please contact attorney Margaret R. Bryant, at 914-328-0404.

Nurses’ Union Close to Affiliation with AFL-CIO

AFL-CIO President John Sweeney has been given the green light to issue a charter to the United American Nurses, the labor arm of the American Nurses Association. The affiliation will be voted on by delegates to the UAN’s National Labor Assembly during its meeting in Washington at the end of June.

The UAN was created in June 1999 because of tension within the ANA between nurses who engage in collective bargaining and those who hold only professional membership. The UAN represents more than 100,000 nurses for collective bargaining and would continue to pay full dues to ANA as well as per capita payments to the AFL-CIO.

The AFL-CIO’s approval of the UAN charter issue took place just days after the Massachusetts Nurses Association, the second largest ANA affiliate, and the Maine State Nurses Association both voted to disaffiliate from the ANA. Both the MNA and the MSNA have voiced interest in joining forces with other spinoff state associations seeking to be more aggressive in organizing activities. Other unions representing health care employees publicly have supported the UAN charter grant, including the Service Employees International Union, the AFL-CIO’s largest health care union.

AFL-CIO Plans to Continue Aggressive Organizing Agenda in 2001

Health care employers are likely to continue to feel the heat of an aggressive organizing agenda under the mandate of the AFL-CIO to union affiliates to pull out the stops on building the membership ranks. According to Mark Splain, AFL-CIO Director of Organizing, the AFL-CIO added only 350,000 members in 2000, compared with 600,000 the year before. "The numbers are not where they should be," he concluded. President John J. Sweeney said member unions will work to add 700,000 new members this year and a million a year starting in 2002.

To reach this goal, the AFL-CIO plans to help affiliates make structural changes needed to support more, better and faster organizing; to provide research to aid affiliates with industry and regional targeting and direct assistance in strategically important campaigns; and to help affiliates recruit and train effective organizers. Organizing will focus on a few key strategies, some of which have demonstrated success in the past, such as the "Voice at Work" campaign, which highlights and publicizes employer interference in organ-
nizing campaigns and involves community activists, religious leaders and elected officials. A geographic organizing focus for the AFL-CIO will be the southern states, such as Florida, Georgia, Louisiana, Texas and Kentucky, where President Sweeney has allocated approximately $1 million for 2001 start-up campaigns. The Federation also plans to expand its Union Summer and Seminary Summer programs, where college and seminary students are paid a weekly stipend to assist with organizing drives. New for 2001 will be a “Law Student Union Summer” program to assist with campaigns where there is “massive litigation.” In past years, the Union Summer program has targeted nursing homes for surprise organizing blitzes.

Recent union successes in organizing health care workers include wins among several hundred employees at mental health agencies in Illinois and Ohio (AFSCME). In Massachusetts, nurses, counselors, nutritionists and other community health workers at a health care system voted in favor of the SEIU and won a pledge of neutrality with the assistance of the mayor and a key facility benefactor. Nearly 600 physicians at two New York City hospitals joined SEIU Local 1957/Committee of Interns and Residents; 43 registered nurses in Arizona voted to join AFSCME’s Federation of Physicians & Dentists/NUHHCE; and 40 home health nurses in San Diego voted to join the United Nurses Association of California/AFSCME.

This is just a sampling of the organizing results among health care employees within the past several months. To remain union-free, health care employers must be prepared to respond to the early warning signs of organizing with management staff trained to spot and respond quickly, lawfully and effectively. Early action is critical; once union activity has begun, it already may be too late. For more information about responding to organizing activity, please contact the Jackson Lewis attorney with whom you regularly work, or Roger Gilson, at 203-961-0404.

**President’s Order Prompts Labor Board to Issue Guidelines on Objections to Use of Union Dues**

An Executive Order signed by President George W. Bush on February 17 has prompted the National Labor Relations Board to issue guidelines about employee rights to object to the use of union dues for political and other non-representational purposes. Among other things, the Executive Order directs federal contractors and their subcontractors to post a workplace notice informing employees who are covered by a union security clause about their rights under federal labor law to object to certain uses of union dues. Employees covered by union security clauses who have chosen not to become union members may object to the use of their union dues for activities unrelated “collective bargaining, contract administration, or grievance adjustments.” In the notice, employees are instructed to contact the Labor Board for more information.

The guidelines cite the U. S. Supreme Court’s ruling in *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), that a union is obligated to “provide notice to non-member employees of their *Beck* rights; to refrain from charging objectors for non-representational expenses; to provide objectors with a financial disclosure; and to establish procedures for objectors to challenge the accuracy of the union’s disclosure.” Included in the guidelines is a series of typical questions and answers which Board agents may be asked by individuals inquiring about their *Beck* rights. For a copy of the NLRB guidelines and the Executive Order, visit the NLRB’s web site, at [http://www.nlrb.gov/gcmemo/gc01-04.html](http://www.nlrb.gov/gcmemo/gc01-04.html).

**WORKPLACE HEALTH AND SAFETY**

**Ergonomics Standard Repeal Does Not Eliminate Need for Proactive Measures to Reduce Likelihood of OSHA Audit**

In March, the Occupational Safety and Health Administration’s newly issued ergonomics program standard was rescinded by congressional vote and President Bush’s signature. As reported in the *Health Care Employer*, the ergonomics standard had gone into effect in January, 2001, after intense debate among representatives of the business community, organized labor, and employee interest groups.

Even without the standard, OSHA has the authority to police worksites and to cite employers for ergonomic hazards, which run afoul of the Occupational Safety and Health Act’s General Duty clause. Health care facilities, and in particular nursing homes, have
been targeted by OSHA for inspections and citations resulting from the high incidence of repetitive motion injuries reported among health care workers. Organized labor has been extremely vocal in supporting an ergonomics standard, and health care employers now can expect workers to initiate more complaints to OSHA and for unions to make ergonomics more prominent in their organizing efforts and at the bargaining table.

What Employers Should Do Now

Congressional repeal of the OSHA standard does not remove the ergonomics issue from the workplace. Unions are likely to keep pressure on the Bush Administration to adopt an ergonomics standard. Also, Secretary of Labor Chao stated during the Senate debate that she will pursue a comprehensive approach to ergonomics. Meanwhile, health care employers should take a proactive approach and use this time to establish programs to eliminate ergonomics hazards and to spread the costs of program implementation over a longer period.

The OSHA Practice Group at Jackson Lewis is prepared to advise employers on their response to this new development and to assist in establishing effective workplace health and safety programs. For more information, please contact our OSHA Practice Group: Edwin G. Foulke, Jr., 864-232-7000; foulkee@jacksonlewis.com; Roger S. Kaplan, 516-364-0404; kaplanr@jacksonlewis.com.

OSHA Is Asked to Impose Limits on Work Hours for Medical Interns and Residents

A petition filed by the Committee of Interns and Residents, an affiliate of the Service Employees International Union that represents more than 11,000 interns and residents, and the American Medical Student Association, which represents more than 30,000 physicians in-training has asked the Occupational Safety and Health Administration to impose a limit on the number of hours medical residents must work. They allege, among other things, that there is no national work-hour limit for medical residents. Currently, New York is the only state that has regulations limiting the hours of work for interns and residents.

Since physicians-in-training sometimes are required to work from 60 to 130 hours a week with only one day off, the petition claims they are at increased risk of automobile accidents, depression, and pregnancy complications. Moreover, the petition claims the long hours pose a risk for the patients the residents are treating.

The petition seeks standards similar in some respects to those in place in New York, including limiting the number of hours worked in a week to 80, limiting the number of hours worked in one shift to 24, limiting on-call shifts to every third night, requiring a minimum of 10 hours off between shifts, requiring at least one 24-hour period of off-duty time per week, and limiting the consecutive on-duty hours for emergency medicine residents to 12. The petition asks for frequent unannounced OSHA inspections, public inspection of resident schedules, and a whistleblower procedure for reporting violations, as well as fines for violators.

Invoking the processes of a government agency like OSHA is a tactic unions have been using to avoid the rigors and uncertainties of representation petitions and collective bargaining. The health care industry can expect to continue to see unions circumventing the traditional Labor Board routes to gain access to employees and to put pressure on employers. Another similar tactic is to file a complaint with the Department of Labor Wage and Hour Administration for allegations concerning pay practices, or a complaint to OSHA that the facility is in violation of other safety standards, such as blood borne pathogens (see article on needlestick protection).

For more information or to discuss a specific situation, please contact the Jackson Lewis attorney with whom you regularly work, or Roger Gilson, at 203-961-0404; gilsonr@jacksonlewis.com.
Bloodborne Pathogens Standard Coverage for Needlestick Injury Prevention Becomes Effective

As reported in the January/February 2001 issue of The Health Care Employer, changes in the OSHA bloodborne pathogens standard intended to reduce needlestick injuries among healthcare workers and others who handle medical sharps became effective April 18. Mandated by the Needlestick Safety and Prevention Act, the changes were officially published on January 18, 2001. The revisions require employers to select safer needle devices as they become available and to involve employees in identifying and choosing the devices. The revised standard also requires employers with 11 or more employees to maintain a log of injuries from contaminated sharps. Under the standard, a number of industries classified as low-hazard-retail, service, finance, insurance and real estate sectors are exempt from most requirements of recordkeeping; those same industries are exempt from maintaining a sharps injury log.

The excerpts below are from the OSHA statement issued just prior to the standard becoming effective:

Specifically, the revised OSHA bloodborne pathogens standard obligates employers to consider safer needle devices when they conduct their annual review of their exposure control plan. Safer sharps are considered appropriate engineering controls, the best strategy for worker protection. Involving frontline employees in selecting safer devices will help ensure that workers who are using the equipment have the opportunity for input into purchasing decisions.

The new needlestick log will help both employees and employers track all needlesticks to help identify problem areas or operations. The updated standard also includes provisions designed to maintain the privacy of employees who have experienced needlesticks.

The Occupational Safety and Health Administration is reaching out to educate employers, health care workers and the general public on the revised needlestick portions of the bloodborne pathogens standard. OSHA’s education effort includes a collection of written materials designed to explain specific aspects of the standard. Materials are available on OSHA’s web site at www.osha.gov.

During the outreach period, OSHA will not enforce the new provisions of the standard that require employers to maintain a sharps injury log and involve non-managerial employees in selecting safer medical devices. Enforcement of these new provisions will begin on July 17, 2001. Meanwhile, enforcement will continue for requirements that employers select safer needle devices as they become available (these have been required since the bloodborne pathogens standard was effective in 1992).

Publications and curriculum recommendations will be used to help educate employers and workers in health care settings. For example, OSHA is drawing upon its existing partnerships with public sector and professional organizations in this effort. OSHA is also making available a presentation package through its education centers that offer training courses for the private and public sectors.

Editor’s Note: OSHA reports that it is extending its “partnership efforts with other agencies, associations and labor organizations” for purposes of educating health care workers about the needlestick requirements. The Service Employees International Union and other health care unions have been vocal advocates for the needlestick prevention requirements, stressing their importance through lobbying efforts and in organizing health care workers.

OSHA’s announcement that it will enlist the assistance of labor unions in its education and outreach programs should put health care employers on notice of an even greater opportunity for the SEIU and others to have access to employees. Health care employers should consider pre-empting the unions and implementing their own needlestick prevention education and training programs. For more information on the bloodborne pathogens standard or other workplace health and safety matters, including the development and implementation of health and safety programs, please contact the Jackson Lewis attorney with whom you regularly work, or Roger Gilson, at 203-961-0404; gilsonr@jackson-lewis.com.
SUPREME COURT

Supreme Court to Rule Again on Supervisory Status of Charge Nurses

The U. S. Supreme Court has agreed to review a case involving whether registered nurses at a residential mental health facility are eligible to be members of a collective bargaining unit with licensed practical nurses and rehabilitation counselors and assistants. The National Labor Relations Board had determined that the six registered nurses are not "supervisors" within the meaning of the National Labor Relations Act and are eligible for inclusion in the bargaining unit.

On review, the U. S. Court of Appeals for the Sixth Circuit overturned the Board’s ruling, as it has in earlier decisions on the same issue. Rulings by five of the federal appeals courts generally defer to the Board’s expertise on the supervisory status of nurses, but four others, including the Sixth Circuit, have rejected the Board’s rulings.

The Supreme Court last addressed the supervisory status of nurses in the 1994 case, NLRB v. Health Care & Retirement Corp., 511 U.S. 571. There, the Court rejected the Labor Board’s position that the direction of less-skilled workers is not authority exercised "in the interest of the employer" since it involves the exercise of professional judgment incidental to the treatment of patients. However, the other elements of supervisory status described in the phrases "use of independent judgment" and "responsibly to direct" are ambiguous, the Court said, and "the Board needs to be given ample room to apply them to different categories of employees."

In several subsequent decisions, the Board developed a revised approach for determining the supervisory status of nurses, including whether the nurse exercises independent judgment in connection with one or more of the functions listed in the NLRA’s definition of "supervisor," that is, "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." In a number of decisions, the Board has ruled that certain nurses were using their professional training, not independent judgment, to assign tasks to other workers.

The Supreme Court heard oral argument in the case on Feb. 21. [NLRB v. Kentucky River Community Care Inc., (No. 99-1815).]

Supreme Court Upholds Private Arbitration of Employment Disputes: Employers Can Opt to Keep Employees Out of Court

The U. S. Supreme Court has made it easier for employers to resolve workplace disputes through the use of arbitration procedures rather than the courts. In ruling on March 21st that employment agreements containing arbitration provisions are enforceable under federal law, the Supreme Court settled conflicting opinions among the lower courts as to whether employers could require employees to submit disputes to arbitration rather than file lawsuits. The decision gives broad protection to arbitration agreements under the Federal Arbitration Act and provides employers with good reasons to consider instituting mandatory arbitration programs. Employers now have a reliable alternative to courtroom litigation as a means to redress employee complaints. [Circuit City Stores, Inc. v. Adams, 532 U.S. ____ (2001).]

On behalf of the Society for Human Resource Management, Jackson Lewis filed one of the "friend of the court" briefs, which helped convince a majority of the justices to rule in favor of arbitration. In an unusual gesture, the Court specifically referred to these briefs in its decision.

The Facts Before the Court

The plaintiff worked as a sales counselor for the employer in one of its California retail stores. When hired, he was required to sign an employment application that contained the following provision:

I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment and/or cessation of employment with Circuit City exclusively

The plaintiff argued that the provision was unenforceable because it violated the California Fair Employment and Housing Act, which prohibits employers from requiring employees to sign agreements that restrict their ability to file a complaint with the state’s department of fair employment and housing.
by final and binding arbitration before a neutral Arbitrator. . . .

Two years after he was hired, the plaintiff filed a civil complaint in California state court against the employer alleging discrimination under the California Fair Employment and Housing Act, among other claims. In response, the employer sought to enforce the arbitration agreement in a California federal court under the Federal Arbitration Act. While the federal trial court ordered arbitration, the U. S. Court of Appeals for the Ninth Circuit reversed the lower court’s decision and found the FAA did not apply to employment contracts. The employer then appealed to the U. S. Supreme Court.

The Supreme Court decided the FAA indeed applies to all employment contracts, except those relating to employees working in interstate transportation, such as seamen and railroad employees. Since the plaintiff was not involved in transportation, the Court ruled the FAA applied and the arbitration agreement he entered into was valid and enforceable.

The Effect of the Supreme Court’s Decision

While the Supreme Court left open many questions about mandatory arbitration of workplace disputes, the Circuit City case certainly enhances the enforceability of agreements to arbitrate between employers and employees. Under the FAA, enforcement of agreements is streamlined and awards are confirmed. Additionally, the FAA authorizes a court to suspend a lawsuit when an issue in the case is subject to arbitration. Finally, and perhaps most importantly, the FAA preempts state laws aimed at limiting or restricting arbitration agreements. For example, the Supreme Court previously has ruled that the FAA preempted a Montana law requiring arbitration clauses in contracts to appear on the first page of the agreement and in underlined capital letters.

The Circuit City decision does not guarantee the enforceability of all pre-dispute arbitration agreements. Until there is further clarification of the decision, there is room for exceptions depending upon the way the arbitration agreement is drafted and the process is handled. Furthermore, in states under the jurisdiction of the Ninth Circuit, discrimination claims under Title VII of the Civil Rights Act of 1964 still may be exempt. Also, the FAA expressly provides that arbitration agreements must be subject to the same defenses as other contracts and may be voided based on unconscionability, fraud, and duress.

What Employers Should Do Now

"Employers now should be evaluating the pros and cons of arbitration to decide whether it is right for their workplace," says David Block, the Jackson Lewis partner who drafted the SHRM amicus brief. Mr. Block lists among the points favoring arbitration over courtroom litigation:

- disputes may be resolved more quickly and efficiently
- proceeding through arbitration is generally less costly
- arbitrators are believed to be "expert" decision-makers bringing specific knowledge and experience to the table, as opposed to lay jurors
- arbitration may provide a "user friendly" vehicle for both employee and employer
- arbitration may provide a system that insures fairness and due process.

Among the concerns an employer may have about arbitration, Mr. Block lists:

- a fear of proliferation of employee disputes
- the difficulty of overturning an arbitrator’s unfavorable decision
- a tendency among arbitrators to "split the baby" to resolve the dispute
- inclusion of evidence that normally would be excluded from a court proceeding

Although the Supreme Court now has said arbitration agreements are enforceable, it did not address the practical issues regarding implementation. Mr. Block cautions that employers must make certain their arbitration provisions are carefully drafted.

"That's going to be the next issue," Mr. Block told the New York Times in a March 22 article on the case. "Employers wishing to construct these agreements must be very careful in how they draft them, because the lower courts have been deeply troubled by arbitration processes that are one-sided. The Supreme Court didn't address the details."
Editor's Note: Jackson Lewis was among the first law firms to advise clients on arbitration and other alternative dispute resolution mechanisms as a means of resolving workplace disputes. If you would like more information on the Supreme Court's decision or if you have questions about implementing arbitration or other forms of alternative dispute resolution in your workplace, please contact the attorney with whom you regularly work, or David Block, at 305-577-7600; blockd@jacksonlewis.com.

DEPARTMENT OF LABOR AUDITS
Department of Labor Targeted Compliance Inspections Continue in 2001

The U.S. Department of Labor’s initiative begun in 1997 to audit nursing homes for compliance with various labor laws is continuing in 2001, according to announcements by the DOL’s Wage and Hour Division. Notices of scheduled inspections were mailed to nursing homes in several Texas counties during the month of January. As reported in The Wall Street Journal on May 22, 2001, investigators will be targeting as many as 500 nursing homes that have prior violations or have records of unlawful activities by facility owners.

Conducted in 1997 and 2000, the Wage and Hour Division inspections have focused on compliance with the minimum wage and overtime provisions, as well as child labor laws. As we reported in the January/February 2001 and May/June 1998 issues of The Health Care Employer, compliance levels were found to have declined. In 1997, 70% of the 288 homes audited were found to be in compliance, as compared with a 40% compliance level of the 136 facilities audited during 2000.

Long term care facilities, especially those which have been investigated in the past, should be prepared for a DOL inspection of payroll records, pay practices, time records, and other personnel records. Jackson Lewis attorneys are available to assist health care employers conduct their own internal audit to assess compliance and correct deficiencies prior to a government agency inspection. For more information, please contact the Jackson Lewis attorney with whom you regularly work, or Margaret Bryant, at 914-328-0404.

JACKSON LEWIS NEWS
Edwin Foulke, Partner in D.C. Office, Participates on Bush Transition Team for Department of Labor

Jackson Lewis partner Edwin G. Foulke, Jr., resident in the firm’s Washington D. C. and Greenville, South Carolina offices, is serving as an advisor to the U. S. Department of Labor’s Transition Policy Group under the new Bush Administration. The Transition Policy Group is the point of contact for all policy matters related to the DOL’s transition under the new Administration.

Mr. Foulke heads the firm’s workplace health and safety practice group and has specialized in all matters related to labor and employment law for over 20 years. From 1990 to 1995, he served as chairman of the Occupational Safety and Health Review Commission under former President Bush.

New Location
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