The National Labor Relations Board has taken a major step forward in defining who is a “supervisor” under the law. The Board’s new test creates unprecedented opportunities for both unionized and non-union health care providers.

The subject is of vital importance to both labor and management. Federal labor law does not provide “supervisors” with the right to unionize. Determining who is a “supervisor” has understandably become the source of a great deal of labor litigation. Most commonly at issue in the health care industry has been the status of nurses. Many commentators have observed that the NLRB has historically interpreted (and re-interpreted) the law seemingly to avoid finding nurses to be supervisors. Many courts, including the U.S. Supreme Court, have criticized the Board for its past interpretations of the definition.

In 2003, the Labor Board took the extraordinary step of not only declaring its intention to clearly define the most troublesome aspects of the definition of “supervisor,” but to ask interested parties to offer their advice. Jackson Lewis participated, filing a “friend of the court” brief on behalf of a number of regional and national employers and industry associations.

The National Labor Relations Act defines “supervisors” as individuals who possess authority over subordinates in one or more of twelve categories: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly to direct, or adjust grievances, provided that the would-be supervisor uses independent judgment in exercising that authority. Most of these categories are easily understood. Two which are very common, but which the NLRB has never clearly defined, are assign and responsibly to direct. Also difficult to interpret is independent judgment. These have been the topics of most of the litigation surrounding supervisory status - and they were specifically the subjects the Board set out to define in the Kentucky River trilogy.

Three years later, amid rumors that a decision was imminent, labor groups staged rallies in several cities to voice their fears that the Republican-dominated NLRB would issue a decision that would decimate union ranks. After the decisions were issued, the same groups decried what they considered to be disastrous mistakes calculated to undercut an already weakened union movement.

All the furor notwithstanding, the NLRB issued a trilogy of decisions, which are legally sound and sensible. While the new interpretation does enhance the probability that an increased number of nurses will be considered “supervisors,” it will not drastically change the dynamics of the health care workplace. Nonetheless, the decisions are good news for health care employers.

The cases at issue are Oakwood Healthcare, Inc., Golden Crest Healthcare Center, and Croft Metals, Inc.; Oakwood is the case in which the new standards are articulated. Because these cases respond to a Supreme Court decision known as Kentucky River (in which the Court rejected the Board’s last interpretation of “supervisor”), the three cases have become known as the Kentucky River trilogy.

How the “Kentucky River” Decisions Clarify the Law

The National Labor Relations Act defines “supervisors” as individuals who possess authority over subordinates in one or more of twelve categories: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly to direct, or adjust grievances, provided that the would-be supervisor uses independent judgment in exercising that authority. Most of these categories are easily understood. Two which are very common, but which the NLRB has never clearly defined, are assign and responsibly to direct. Also difficult to interpret is independent judgment. These have been the topics of most of the litigation surrounding supervisory status - and they were specifically the subjects the Board set out to define in the Kentucky River trilogy.

These terms are now more clearly defined by the Board.

Assign
For decades, the NLRB routinely held that whatever responsibility nurses had for assigning work, it was not adequate to reach the threshold of “supervisor.” Today, the Board recasts “assign” to mean the act of designating an
employee to a work location, a work time, or allocating significant overall duties to an employee. These are all part of an employee's terms and conditions of employment. Specifically, in the health care setting, the term “assign” would include nurses’ responsibility to assign nurses and aides to particular patients.

Responsibly to Direct

Direction is the assignment of particular tasks. Commonly, “lead” employees may have the ability to direct co-workers to perform particular tasks, yet not be deemed by anyone to be true supervisors. The Board explained that the law marks the difference between such lead persons and supervisors by use of the term “responsibly.” The Board now explains that for direction to be responsible, the would-be supervisor must be held accountable for the subordinate’s performance of the task. It must be shown that the employer delegated the supervisor authority to direct the work and the authority to take corrective action. Also, it must be shown that the supervisor is held accountable (i.e., adverse consequences will result) if he or she does not take these steps.

Independent Judgment

Supposed supervisors must exercise their authority utilizing independent judgment. In prior years, the NLRB frequently held that any judgment exercised by nurses was not “independent”, yet it never actually defined the term. Now for the first time the Board explains that a supervisor’s judgment is independent if it is not dictated or controlled by detailed instructions from the employer or in a collective bargaining agreement. However, if those instructions call for the exercise of discretion, the exercise may still be independent if it calls for the application of the supervisor’s judgment. For example, when a nurse weighs the individualized needs of a patient against the skills or special training of available nursing personnel for assignment, the nurse’s assignment involves the exercise of independent judgment.

Common Sense and Plain Meanings Prevail

Non-lawyers may well wonder how these simple common-sense explanations can be considered landmark legal holdings. The Kentucky River trilogy cases are well-written, based in sound legal concepts, and consistent with both the plain words of the statute and the intent of Congress in passing the law. And that is precisely why they are so important. Defining supervisory status has been a political football for the NLRB for over 30 years. This has now ended, and these decisions provide employees, employers, and unions with the needed guidance on who is and is not a supervisor.

What the Change in Supervisory Status Will Mean in the Health Care Setting

In a nutshell, the Kentucky River trilogy means that health care employers now have reliable guidance for establishing their supervisory hierarchies. It does not mean that all nurses are now supervisors. The somewhat overheated dissent in Oakwood implies that 34 million employees will be denied the right to unionize. The grossness of this exaggeration is shown by the fact that the Oakwood decision resulted in supervisory status for only 12 nurses of 181 employed at the facility. Moreover, none of the putative supervisors in either the Craft Metals or Golden Crest Healthcare Center cases met the new statutory test.

Traditionally, a job description has been used to articulate supervisory authority. Although the job description remains an important piece of the supervisory puzzle, health care employers must actually delegate such authority and require supervisory nurses to use it. The Kentucky River trilogy mandates that supervisory nurses be held accountable for their supervisory duties, and these cases afford employers an unparalleled opportunity to assess and maximize the supervisory requirements now clarified by the Labor Board. At a minimum, health care employers should scrutinize the job descriptions for nurses and supervisors, and assess the actual work performed by their charge nurses to determine if they meet the Board’s criteria on both counts.

Health care employers with ill-defined or no job descriptions can revise or develop them to clearly delineate the supervisory authority of the charge nurses. Moreover, employers should advise nurses meeting the criteria of their supervisory status. Additionally, most health care employers will likely need to strengthen managerial oversight of supervisory nurses to ensure compliance. Ensuring that supervisory nurses actually exercise the authority they are delegated may mean coaching, counseling, and/or disciplining supervisory nurses for failing properly to exercise their supervisory authority. While employers also can base performance evaluations in part on how well nurses are exercising their supervisory authority, this alone will not suffice to meet the standards set out in the Oakwood decision.

Efforts by health care employers to buttress the supervisory status of nurses may meet resistance from both the nurses and other personnel who will not want to lose these nurses as part of the employee staff. In addition, some nurses may not want to be distinguished from or put at odds with their peers. Thus, it may be necessary for health care employers...
to provide enhancements and training in order to motivate nurses to assume any additional supervisory duties.

In unionized health care facilities that currently include nurses in their bargaining units, employers may consider filing a Unit Clarification petition with the NLRB, requesting that the Board clarify the status of the nurses and declare them supervisors based on the Oakwood decision. While the NLRB will not generally entertain a UC petition midway through the term of a union contract, it will entertain such petitions toward the end of the contract. A UC petition also may be successful if the parties are unable to reach agreement as to the status of the charge nurses during contract negotiations.

Employers whose nurses are unionized may encounter efforts by those nurses to avoid engaging in acts now deemed supervisory. Unions have already begun negotiating contract terms, which bar employers from assigning supervisory responsibilities to nurses. This is especially true at facilities in which aides or nursing assistants are unionized but nurses are not. At many of these homes, unions have sought an agreement by the employer to refrain from taking any steps, which may render nurses “supervisory.”

**Applying the New Ruling to Determine Supervisory Status**

To help determine whether charge nurses would be considered supervisors, health care employers should ask the following questions:

- To what extent does the nurse’s function involve providing oversight and guidance for a small number of lower skilled, less educated employees performing routine health care tasks?
- Do the charge nurses have the authority to call in additional nurses or aides or to authorize overtime for nurses or aides?
- Do charge nurses make assignments to other staff personnel?
- Has the employer authorized the charge nurses to discipline employees? Or to make recommendations that will be given effective weight?
- Are charge nurses authorized to evaluate employees?
- What authority does the nurse have to resolve disputes between employees or gripes about the employer’s treatment of employees?

While the Kentucky River trilogy opens the door to supervisory status, such conclusions are not automatic. As always, it will turn on the facts of the individual workplace. However, the probability of a fair reading of those facts has never been greater than today. Employers should consult with experienced labor counsel to review their options and opportunities. For more information, please contact the Jackson Lewis attorney with whom you regularly work, or partners Thomas Walsh, WalshT@jacksonlewis.com, or Michael Flaherty, FlahertM@jacksonlewis.com.

**Deficit Reduction Act Carries New Year’s Deadline for Compliance by Health Care Employers**

A new federal law requires health care employers that receive a minimum amount of funding from Medicaid reimbursements to encourage the disclosure of fraudulent claims by whistleblowing employees. Health care industry employers receiving at least $5 million annually in Medicaid reimbursement must draft and implement written policies and employee handbook provisions designed to encourage and protect whistleblowing about the submission of fraudulent Medicaid claims to the federal government. Pursuant to the Deficit Reduction Act of 2005, which became law in 2006, covered health care employers should be developing “detailed” and “specific” policies, handbook sections, and informational materials, which also apply to management contractors and agents, to meet a January 1, 2007 deadline.

These documents should include the following:

1. Detailed information about the federal False Claims Act, federal remedies for false claims and statements, and similar state statutes prohibiting Medicaid fraud, and the whistleblower protection features of those laws. Employer policies also must advise employees about the role such laws have played in uncovering fraud, waste, and abuse in federal health care programs.
Workplace security breaches in the form of stolen laptops and PDAs, unauthorized entries into electronic data bases, and other invasions of personal data gathered and maintained for employer use are becoming more frequent and affecting more individuals. Over the past few years there has been a significant increase in legislative and regulatory activity seeking to protect the privacy and security of personal information, including a person’s medical information, in whatever form. The driving force behind these efforts have come from two key sources - (i) the explosion in the number of cases of identity theft and (ii) the belief that health care costs, in particular the cost of Medicare, can be reduced in part by streamlining the claims process.

Most health care providers also have had to deal with the privacy and security regulations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) which codifies congressional intent to, among other things, curb the growing cost of health care through administrative simplification. However, the privacy and security regulations under HIPAA also apply to health plans and thus affect health care employers on two fronts - as health care providers and as plan sponsors.

The overall result - because of the nature of the information maintained -- is a complicated set of compliance requirements for health care employers, first as providers, then as employers, and finally as health plan sponsors.

Health Care Employers Wear Multiple Hats When Complying with Privacy Protection Measures

2. A complete description of the employer’s internal policies and procedures for detecting and preventing fraud, waste, and abuse in federal healthcare programs.

3. Handbook provisions telling employees about the rights and protections given whistleblowers, and restating employer policies regarding federal and state false claims statutes and the employer’s internal process for preventing fraud, waste, and abuse.

The DRA Congressional Conference Report encourages employers to provide training or communication to employees when these policies and procedures are rolled out. Newsletters, websites, and e-mails may be used for this purpose, among other means. It also encourages states to pass their own laws of a similar nature by offering a share of the proceeds of any recovery. A number of states already have done so, and more are likely to follow.

Federal penalties under the federal False Claims Act alone (originally passed to combat fraudulent profiteering during the Civil War) can be stiff. The perpetrator (whether a business or individual) may be liable for treble damages, a civil fine for each false claim, and the attorney’s fees of the whistleblower (referred to as a “relator” in such actions). An employer also may be liable for causing another person or business to submit a false claim.

Some of the forms of false claims include overcharging for a product, failing to perform a service, providing fewer goods or services than promised, and charging for a more expensive item but delivering a less expensive one. In the health care field, these may include billing for services not provided or documented, submitting cost reports with inappropriate entities, assigning incorrect codes to obtain greater reimbursement, recording services or costs that are not covered in a manner that is covered to obtain reimbursement, billing for medically unnecessary procedures, and many others.

While sanctions under the federal and state false claims laws may be onerous, non-compliance with the Deficit Reduction Act is not an option. The DRA makes compliance with its whistleblower information publicity requirements a condition of receiving Medicaid payments, which also can be denied during the period of non compliance. Further, it has been suggested that knowing non-compliance may result in an assertion that all Medicaid claims should be deemed “false” and subject to appropriate sanctions.

While regulations are anticipated under the federal Deficit Reduction Act, as well as under analogous state laws, health care industry employers should make sure they are prepared to meet their obligations under the law by January 1, 2007, and that they can demonstrate implementation of their policies and handbook provisions.

Jackson Lewis attorneys are available to assist employers in these efforts. If you have any questions, please call the Jackson Lewis attorney with whom you regularly work, or partner Roger Kaplan, (631) 247-0404; KaplanR@jacksonlewis.com.
**Identity Theft Measures**

While Congress and the states have passed laws seeking to deter persons from committing identity theft by imposing stiff civil penalties and criminal sanctions, they also have passed laws intending to limit the opportunity for the crime to be committed in the first place.

One approach taken by more than 30 states requires businesses to provide a notice when there has been an unauthorized breach of a company's personal records - “security breach notification laws.” Some states also have mandated that businesses maintaining personal information take reasonable measures to protect that information from unauthorized access or disclosure. Still other states have passed laws that specifically protect Social Security numbers. While these laws are good for affected individuals, the enforcement provisions significantly increase employer exposure to civil actions by individuals and/or the state Attorney General with regard to the privacy and security of business and employment records. For businesses with large numbers of employees and operations in more than one state, the risk of liability compounds.

These laws generally apply to any company doing business in that state, including health care providers. However, while some states exempt entities that are subject to the privacy and security regulations under HIPAA, employers generally are not subject to those regulations. For example, it is the employer-sponsored health plan that is subject to the HIPAA requirements, but not the medical leave program or disability policy. Accordingly, the exemption under these state laws would apply to the covered entities under HIPAA (e.g., health plans), and not other arrangements sponsored by an employer with respect to which personal information is maintained.

In addition, the laws extend to all residents and protect “personal information,” typically defined as the first name or first initial and last name of an individual in combination with the individual’s (i) Social Security number, (ii) driver’s license number, (iii) state identification number, or (iv) financial account, debit or credit card number in combination with any required security code, access code, or password that would permit access to an individual’s account. If a notice obligation is triggered under a security breach notification law, notice generally must be provided to the affected residents of the state as soon as possible and without unreasonable delay.

These are relatively new laws about which many employers are simply unaware and with respect to which many have not taken any compliance measures.

**HIPAA**

Most health care providers likely are already fully compliant with HIPAA as it relates to providing health care. Many such entities, however, became so encumbered with the application of HIPAA to their health care functions, they missed its application to the health plans they sponsor for employees. Although the compliance dates have passed, all non-compliant health plan sponsors should take steps as soon as possible to bring their covered plans into compliance with the privacy and security regulations under HIPAA.

In general, the HIPAA privacy and security regulations contain a number of administrative, physical and technological standards that apply to protected health information maintained by the plan. The first step in complying with these regulations, of course, is for the plan to determine whether it maintains protected health information and, if so, how it moves through the organization. Absent such a determination, it will be difficult to prepare policies and procedures that will adequately protect the information. For example, a health care provider-employer may desire to look to an employee-patient’s treatment records with regard to a claim for benefits under its health plan. While such a use of protected health information may be permissible under certain circumstances, health care providers need to be aware that this kind of transmission occurs so that it can develop policies and procedures that protect the privacy and security of the information before, during and after the transmission.

Note also that there are some differences in the compliance requirements under HIPAA for health plans, as compared to health care providers. For example, if the health plan will be making certain disclosures to its plan sponsor, the plan will need to be amended. Also, covered health care providers are required to take reasonable efforts to obtain an acknowledgement of receipt of a notice of privacy practices from a patient. Covered health plans do not have this obligation.

The Office of Civil Rights (OCR) of the Department of Health and Human Services is charged with enforcing the HIPAA privacy and security regulations. OCR has said that while it continues to take informal measures to assist covered entities with becoming compliant with the privacy and security regulations, that posture towards enforcement will not last forever. Thus, entities that have not yet complied should take steps to do so as soon as possible.
Preventive Strategies for Compliance and Minimizing Risk of Liability

1. Perform an internal audit designed to (i) identify information subject to HIPAA and state and federal identity theft laws, such as state breach notification laws; (ii) map the flow of that information throughout the organization; and (iii) assess the risks of unauthorized access and disclosure. This should include information maintained by third parties on behalf of the organization.

2. Determine whether it is possible to collect, reformat and/or maintain the information in a way that would not be subject to such laws, or to discard it altogether.

3. Consider encrypting personal information to avoid notification requirements for breaches of encrypted information where the key to the encryption has not also been breached.

4. If such information must be maintained, adopt policies and procedures to strengthen the privacy and security of that information as required under applicable law.

5. For state breach notification laws, develop protocols for when an organization learns of a breach of personal information - identify who is in charge of determining whether there has been a breach, whether notification is required, how notice will be provided, what the content of the notice will be, communicating with law enforcement if applicable, etc.

6. For employers in multiple jurisdictions, consider formulating one common policy that will satisfy all applicable state requirements.

7. Train employees accordingly.

8. Develop a record retention policy; maintain records no longer than is necessary; destroy information no longer needed.

9. Obtain written assurances from third parties that receive or maintain personal information on your behalf that they are aware of and prepared to comply with these and similar laws. In regard to HIPAA, these assurances must be maintained in business associate agreements.

10. Monitor legal developments. Efforts to protect private information show no sign of slowing. This is especially significant for health care employers, which maintain personal information for patients and employees subject to privacy and data security laws at the federal, state and local levels. Health care employers, therefore, need to develop a comprehensive strategy for protecting information, one that avoids a silo approach but instead encourages the collaboration of health care and human resources professionals inside the organization to deal with this growing need to protect personal information.

The Jackson Lewis HIPAA and Workplace Privacy practice group is available to assist health care employers to develop strategies and implement procedures that facilitate compliance with existing state and federal laws and regulations. Jackson Lewis also constantly monitors developments in the field and will continue to report on new requirements and suggest strategies for compliance. For further assistance, please contact the Jackson Lewis attorney with whom you regularly work, or Joseph P. Lazzarotti, (914) 328-0404; LazzaroJ@jacksonlewis.com.
Jackson Lewis News

Jackson Lewis is pleased to announce new partners for 2007:

Brett Anders, Morristown, NJ
JoAnna Brooks, San Francisco, CA
Cynthia Filla, Los Angeles, CA
Donna Geary, Pittsburgh, PA
Joel Kelly, Los Angeles, CA
Jonathan Kozak, White Plains, NY
Karen Kruse, Seattle, WA
Robert Morsilli, Boston, MA
Scott Oborne, Portland, OR
Cary Palmer, Sacramento, CA
John Remy, Washington DC Region
James Shea, Morristown, NJ
Robert Vogel, Los Angeles, CA
Julie Waas, Miami, FL

Congratulations to all!

Jackson Lewis Announces Opening of New Houston Office and Expansion of Cleveland Office

In response to economic growth in the region and client demands for a local presence, Jackson Lewis has opened its 27th office in Houston, Texas. Joseph G. (Chip) Galagaza, a long-time Houston resident and highly regarded labor and employment law attorney, is the resident partner. Mr. Galagaza will be supported by Dallas Managing Partner Christopher C. Antone, who also will be managing the Houston office, and by Dallas partner Paul Hash, who manages litigation for the Texas offices.

The new Houston office is in response to client demands due to an increase in employers in the region and increasing challenges in two major areas: wage and hour matters and a rise in labor union activity. “Our clients have asked us for a greater presence in the city,” said Antone. “This will help us serve our clients more efficiently throughout the Gulf Coast and South Texas.”

After practicing labor and employment law in Houston for the past 25 years, Galagaza possesses extensive knowledge and familiarity with Houston’s legal and human resources community, is well versed in the complexity of the labor and employment laws of the state and city, and enjoys an “impeccable reputation,” according to Antone. His labor law experience ranges from litigation to preventive measures.

The Jackson Lewis Houston office is located at 500 Jefferson Street, Suite 2000, Houston, TX 77002-7371: Phone (713) 650-0404.

The expansion of the firm’s Cleveland office is spearheaded by the addition of four of the region’s leading employment law attorneys. Joining the firm are Partners James M. Stone, who is the Cleveland Resident Manager, and Jeffrey B. Keiper. Also joining the firm are David E. Weisblatt, Of Counsel, and Associate Nicole M. Monachino. Senior Benefits Counsel Kurt Smidansky has been resident in the Cleveland office since its opening in 2006.

Together with Mr. Smidansky, who has more than 20 years experience practicing employee benefits law in Ohio, all will continue to concentrate their practice on workplace law and related issues on behalf of management.

Mr. Stone and Mr. Keiper were partners together at their former firm, McDonald Hopkins Co., LPA, where Mr. Stone served for over 12 years as leader of the labor and employment practice group. With over 20 years of experience in labor and employment law, Mr. Stone has extensive experience in union negotiations, arbitrations, unfair labor practice charges, and wage and hour claims, and employment litigation. He is particularly knowledgeable about the health care, manufacturing, transportation, automotive, and steel industries. Mr. Keiper, who has successfully defended complex employment litigation for large manufacturing and service companies, will serve as the principal litigation attorney for the Cleveland office, as well as counseling employers in labor relations and other employment matters.

Mr. Weisblatt and Ms. Monachino come to Jackson Lewis from the same former firm. Mr. Weisblatt has extensive experience in National Labor Relations Board law, employment counseling, labor negotiations and union-free workplace campaigns. He is experienced in public sector labor law, technology issues, and other employment matters. Ms. Monachino has experience counseling employers in wage and hour, employee leaves, employment discrimination, and affirmative action matters, in addition to employment policies and practices.

Working in conjunction with the firm’s Pittsburgh office headed by Managing Partner Lynn C. Outwater, the attorneys and staff of the Cleveland office are located at 29225 Chagrin Boulevard, Suite 275, Cleveland, OH 44122; telephone (216) 591-0404; fax (216) 591-1472.

We extend a warm welcome and congratulations to the Houston and Cleveland offices!
Management Education Events

How to Stay Union Free in the Health Care Industry

Perhaps no other single industry is the focus of more targeted union pressure than health care. The split into two international labor federations has served to intensify, rather than dilute, the organizing activity aimed at both nonunion and partially unionized health care employers. At the top of the union wish list are neutrality agreements and card check recognition, often powered by the sweep of a corporate campaign machine. The bottom line is today's unions have "changed to win." The questions is, has your organization prepared to defend its rights to manage through a program of positive employee relations that addresses issues and resolves disputes without the intervention of third parties? It's a whole new game and employers need to know the new rules and strategies being used in organizing campaigns, at the bargaining table, and in courtrooms and corporate board rooms across the country.

Please join Jackson Lewis labor attorneys for a candid discussion of today's labor relations issues and answers. In its third program season, "How to Stay Union Free" offers facility representatives the opportunity to understand the game, learn the rules, and develop strategies designed to enhance facility goals and objectives for successful human resources management. Space is still available for these important educational sessions:

**Dates & Locations**

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<td>Atlanta</td>
<td>February 27-28</td>
<td>Doubletree Hotel - Atlanta Buckhead</td>
<td>800-222-8733*</td>
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<td>Chicago</td>
<td>March 29-30</td>
<td>Hilton Suites</td>
<td>800-445-8667*</td>
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<td>Houston</td>
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<td>Las Vegas</td>
<td>May 15-16</td>
<td>Tuscany Suites &amp; Casino</td>
<td>877-887-2261*</td>
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* use code "JAC"

For more information, please visit www.jacksonlewis.com. To Register, please contact Laura Senenko, (703) 821-4337; senenkol@jacksonlewis.com

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