By Notice issued December 22, 2010, the National Labor Relations Board ("the Board" or "NLRB") has solicited amicus curiae ("friend of the court") briefs from interested parties and industry sources seeking advice regarding the Board’s proposed decision concerning the composition of an appropriate bargaining unit at Specialty Healthcare and Rehabilitation Center Mobile, Alabama. The Notice raises serious concerns that the present Board majority intends to profoundly change the manner in which the NLRB determines units for union representation elections, and ultimately, for collective bargaining.

On its surface, Specialty Healthcare concerns the question of whether a unit comprised solely of certified nursing assistants is an appropriate bargaining unit at that facility. However, it is clear from the Notice that the Board majority is considering abandoning its long-recognized presumptively appropriate service and maintenance unit (generally including all non-professional job titles) for multiple units each comprised of single job titles.

The proliferation of numerous bargaining units would be serious enough to raise the concern of the industry. However, the Board majority’s scheme would have an even more profound impact, as they intend to make unit determinations not through case by case adjudication, but by Board fiat.

In the 1980s, the NLRB engaged in the regulatory agency process of formal rulemaking which culminated in the 1989 rule establishing eight presumptively appropriate bargaining units in acute care facilities. (Rule 103.30(g)). At that time, the NLRB determined that it would not propose a formal rule for long term care facilities, but would continue to decide cases “by adjudication.” Citing this precedent, the Board majority today seeks to establish its new unit rule for long term care facilities – however, it proposes to do so without legislation, without formal regulatory rulemaking, but rather by simply announcing this new policy by its ultimate decision in the Specialty Healthcare case.

While the Notice specifically concerns unit determinations in the long term healthcare industry, it notes that the NLRB is considering further extending this concept to other unrelated industries as well.

Jackson Lewis LLP would be pleased to represent the interests of the AHCA/NCAL in responding to the NLRB’s request for advisory briefs. In preparing this response, our firm would draw upon its extensive national resources and broad experience in representing healthcare employers. In advising AHCA/NCAL on this brief and in providing ongoing advice, the firm would use a panel of our most experienced national counsel, including partners Thomas V. Walsh, Bradley W. Kampas, Harold R. Weinrich, Michael J. Lotito, and Roger S. Kaplan (abridged biographies attached). These attorneys each have at least 25 years experience (some over 40) in labor law, and are recognized leaders in the field.

Our approach to this matter would be to provide advice on three levels. Initially, on the
amicus brief itself. Secondly, on the assumption that the current Board majority will ultimately issue a decision adverse to the industry, to provide assistance in representing the interests of the industry with regard to subsequent judicial review of Specialty Healthcare or another facility’s challenge to the Board. Also, and perhaps with even greater impact, our firm can work with the Association in focusing its political and legislative efforts to minimize the effects of the present activist NLRB.

With regard to the amicus brief, we anticipate that a principal legal argument will be to challenge Board’s authority under both the National Labor Relations Act and under the Administrative Procedure Act to unilaterally institute a template for unit determinations.

Moreover, Jackson Lewis is particularly well situated to respond to the specific questions posed to amici by the Board majority. The Board requests input concerning its present unit determination analysis, recurring fact patterns in facilities, and the extent to which current Board policies affect employee rights. Our national experience gives us the depth to provide meaningful input. We anticipate additional data from your membership. In our view, this empirical evidence will decidedly not support the Board’s effort to re-invent the process of unit determinations.

Similarly, with regard to the Board’s questions concerning the appropriate test for unit determinations, we would consult with the Association to argue for a sound decision protecting the rights of employees and the needs of the industry. Certainly, a single job title unit determination, or even a single department determination, should not be presumptively appropriate.

Our firm is very active in addressing the interests of the employer community on labor law matters. We were, and continue to be, active with the U.S. Chamber of Commerce’s initiatives in this field. Jackson Lewis played a leadership role in the Chamber’s drive to defeat the Employee Free Choice Act. In November, we filed an amicus brief for the Chamber of Commerce supporting the Board’s 2007 Dana Corp decision. This week we will file a brief on behalf of the Retail Litigation Center in Roundy’s Inc., a potentially far-reaching Board case concerning access by unions to private property. Jackson Lewis is not new to advocacy on behalf of the healthcare community. We have represented the AHCA as amicus before the U.S. Supreme Court in NLRB v. Kentucky River Community Care (2000) and before the NLRB in Oakwood Healthcare (2003).

Our attorneys are also providing counsel to House and Senate leaders regarding responses to curb the current Board’s activist agenda. We would be pleased to consult with AHCA/NCAL on these issues as well.

The brief in Specialty Healthcare is due on February 22, 2011. If you have any questions, or wish further information, please feel free to call on us at any time.
THOMAS V. WALSH

Thomas V. Walsh is a Partner in the firm’s White Plains, New York office. He received a B.A., summa cum laude, from Long Island University, his Juris Doctor from St. John’s University and has been with Jackson Lewis since 1986. Mr. Walsh has represented dozens of nursing home and healthcare employers throughout the country in matters before the National Labor Relations Board and has argued healthcare cases before the U.S. Circuit Courts of Appeals for the Second, Fourth, Sixth, Eighth, and District of Columbia circuits. Mr. Walsh regularly advises employers regarding NLRB representation cases, unfair labor practice matters, arbitrations, and in collective bargaining. He has repeatedly represented the American Health Care Association in amicus curiae briefs before the U.S. Supreme Court in NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001) and before the NLRB in Oakwood Healthcare, 346 NLRB 686 (2006). He also advised AHCA/NCAL staff in 2008 and 2009 regarding the then-pending Employee Free Choice Act. Mr. Walsh frequently speaks on labor law subjects to various industry groups. He has been named numerous times to the Labor Relations Institute’s list of Top 100 Labor Lawyers, and has won recognition in The Legal 500, 2010 Edition. He is a member of the New York State (Labor and Employment Law Section) and the American Bar Association.

HAROLD R. WEINRICH

Harold R. Weinrich is a Partner in the firm’s Washington, D.C. Region Office. In 2011 Mr. Weinrich will celebrate his fortieth anniversary as a labor lawyer. He has been associated with Jackson Lewis for nearly thirty five years. Mr. Weinrich managed the firm’s Washington, D.C. office between 1981 and 1995. Mr. Weinrich has represented employers in a wide range of industries from health care to telecommunications. Most recently his efforts have been concentrated in the long term healthcare, assisted living and hospitality industries. He has extensive experience representing employers in union organizing, representation cases and unfair labor practice cases before the National Labor Relations Board (NLRB). He is among the firm’s most experienced National Labor Relations Act litigators. He often appears before the NLRB and also appears before state and federal courts in strike, arbitration and unfair labor practice related injunction and appellate litigation. He has argued labor cases before the United States Court of Appeals for the District of Columbia and Second Circuits. Mr. Weinrich also represents employers in all aspects of representation cases. He has counseled employers in numerous pre-election campaigns involving both initial representation elections and decertification elections. He has an extensive collective bargaining and related arbitration practice. He has most recently served as chief spokesperson for employers in the retail, distribution, manufacturing and fabrication, hospitality and healthcare industries. He is an active member of the U.S. Chamber of Commerce Labor Law Committee and was the principal contributor to the Chamber’s major EFCA publication.
ROGER S. KAPLAN

Roger Kaplan is a Partner in the firm’s Long Island office. Mr. Kaplan has represented clients, including health care institutions, and appeared before executive departments and administrative agencies, such as the United States Department of Labor (Occupational Safety and Health Administration), the Occupational Safety and Health Review Commission, the National Labor Relations Board, and the Equal Employment Opportunity Commission. He also has submitted briefs to and appeared before many federal and state courts, including the United States Supreme Court.

He is one of the leaders of the Firm’s substance abuse testing practice group, and formerly headed the Firm’s OSHA practice. He edits the Firm’s website and is an editor of Matthew Bender/Lexis Nexis OSHA treatise. He has been a member of the editorial advisory board of the OSHA Guide for Healthcare Facilities. He has addressed many trade and business organizations on variety of labor and employment law subjects. Together with other partners of the Firm, he is about to file a brief amicus curiae with the NLRB on behalf of a major retail employer organization in a case involving union access to private property.

BRADLEY W. KAMPAS

Bradley W. Kampas is a Partner in the firm’s San Francisco office. He has practiced labor and employment law exclusively for management for over 25 years. Mr. Kampas has represented numerous health care employers with respect to labor and employment law matters, and has significant experience in the areas of union relations, contract negotiations, grievance arbitration, union avoidance, and day-to-day and strategic advice.

Mr. Kampas is a member of the legal subcommittee and serves as volunteer labor counsel to the California Association of Health Facilities (“CAHF”). Through this relationship, Mr. Kampas represented CAHF, the U.S. Chamber of Commerce, and other employer associations in the recently successful federal labor law preemption challenge to a California statute (AB 1889), which effectively prohibited employers who receive state funds from engaging in union avoidance activities, Chamber of Commerce of U.S. v. Brown, 128 S. Ct. 2408 (2008).

Mr. Kampas has been recognized as one of the Northern California Super Lawyers for 2010 and 2009. Mr. Kampas has also been recognized by the Labor Relations Institute, Inc. as one of the Top One Hundred Labor Attorneys in the United States and was singled out by clients for recognition in The Legal 500 United States, 2008 Edition.

Mr. Kampas received his law degree from the University of Illinois (J.D., cum laude, 1983). He also has a Masters degree in Labor and Industrial Relations (M.A., 1983). He is a member of the state bars of California (admission 1983), Washington (1995, retired) and Illinois (1983, retired).
MICHAEL J. LOTITO

Michael J. Lotito is a Member of Jackson Lewis’ Management Committee and a Partner who travels nationwide for the firm. Mr. Lotito received both his B.S. in Political Science and his J.D. from Villanova University in 1970 and 1974 respectively. Villanova University’s Graduate Program in Human Resources named him the Top Human Resources Alumnus of the 20th Century. He practices all aspects of traditional labor relations, including matters arising under the National Labor Relations Act. Mr. Lotito is also one of the nation’s leading authorities on preventive strategies in the workplace. He serves as counsel for some of the country’s largest corporations, helping them develop strategic solutions to labor and employment issues and implement business, legal, and preventive strategies effectively.

A noted speaker and presenter, Mr. Lotito addresses an extensive variety of management groups. He is a frequent commentator in the national news media regarding workplace and labor law issues and events, and is often quoted on such topics in all media outlets. Additionally, Mr. Lotito has spoken about workplace issues throughout the world, including locations such as Germany, Taiwan, South Africa, and virtually every state in the United States before a wide variety of audiences.

Mr. Lotito has been recognized with a lifetime Senior Professional in Human Resources (SPHR) certification. He chaired the 260,000-member Society of Human Resource Management (SHRM), served as chairman of SHRM’s National Legislative Affairs Committee, and was a member of its Employee and Labor Relations Committee. He is a member of the Labor and Employment Case Selection Committee of the National Chamber Litigation Center. Mr. Lotito is also a member of the 2009 Employment Law 360 editorial advisory board.

Mr. Lotito co-authored four books on the Americans with Disabilities Act, and one regarding workplace privacy. He frequently writes articles on workplace law topics, including a monthly column entitled “The Employment Law Revolution” for Entrepreneur.com.

Mr. Lotito, AV-rated by Martindale-Hubbell, is admitted to practice in California and is a member of the California Bar Association. He is an American Bar Foundation Fellow, an honor extended to a small number of ABA members. He has been recognized as one of the Northern California Super Lawyers for 2010.