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Plan of Attack: Evaluating and Litigating Noncompete Cases

By John W. Simmons

Your client calls and says the star of the business who has the relationships with the most valuable customers has just jumped ship. The customers are now all using the former employee and his or her new employer. The former employee is hiring away your client's other employees, too. It all happened so fast and with such a smooth transition that the client suspects this was planned before the employee departed. The client called the former employee and demanded he or she comply with the noncompete agreement, but the former employee said it was not enforceable and that he or she did not intend to stop. What do you do? This article provides observations of what to look for in deciding what to do to assert your client's rights under a noncompete agreement.

Is there an agreement and what are the chances of enforcement?

The first step is to find the agreement containing the noncompete. It is not always easy to find the agreement, and the passage of time from the time of execution increases the possibility that the agreement will be difficult to obtain. If we find the agreement, then what does it say? Does the noncompete language match the job the employee is or was doing? Old agreements often do not fit the job the employee was performing at the time he or she left. The terms of the restrictive covenant may not provide the protections needed. For instance, the client may need protection from the solicitation of certain customers and the use of confidential information related to those customers, but the restrictions may only address competition in a geographic area, often not the area where

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Kentucky River Trilogy Challenges Big Labor's Organizing Strategy

By Todd P. Photopulos

In the fall of 2006, the National Labor Relations Board (NLRB) issued three decisions clarifying the definition of "supervisor" under the National Labor Relations Act (NLRA). These decisions, collectively referred to as the *Kentucky River* Trilogy, will have a profound impact on labor's organizing strategy, especially in the healthcare sector, as these cases call into question one of the cornerstones of organized labor's campaign strategies: using frontline workplace leaders to organize a facility.

The Impact of the *Kentucky River* Trilogy on Organizing Strategy

The *Kentucky River* Trilogy significantly expanded who could be considered a supervisor under the act. Individuals considered supervisors under the NLRA do not have the right to join, form, or assist unions; cannot vote in NLRB elections; and cannot engage in strikes. More significantly, the NLRA allows employers to demand the loyalty of statutory supervisors, including the requirement that such individuals participate and assist in the employer's policy of remaining union-free during an organizing campaign.

In the healthcare industry, unions have enjoyed significant organizing

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success through enlisting charge nurses to organize from within a facility. Charge nurses are, in many respects, akin to lead persons in the manufacturing industry. Charge nurses are frequently responsible for directing other nurses and healthcare staff by assigning staff to patients, making schedules, "floating" nurses from a not-so-busy department to another department, and taking other actions to assist in the flow of patient care. Unions have long recognized that, in doing so, charge nurses wield significant control over the day-to-day working lives of other nurses and staff, making them leaders on the patient care floor. This is especially true on weekend and evening shifts, when there are frequently no department managers or supervisors physically present at the work site.

Because of this leadership role, most unions start an organizing campaign by first securing the support of a facility's charge nurses. These charge nurses are then trained to use their relative positions of authority and power to organize the rank and file nurses at the facility. This process may go on for months before the hospital is even aware that active organizing is taking place. Although this issue has often been litigated, for years the NLRB took the position that charge nurses were not statutory supervisors under the NLRA because the board viewed the assignments and directions given to other staff as merely reflective of the nurse's professional training. Thus, the board reasoned that the charge nurses lacked the required "independent judgment" necessary for establishing their supervisory status under the act.

This result changed in 2001 with the U.S. Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.*[1] The Court's decision rejected the board's interpretation of the NLRA's definition of supervisor, holding that the registered nurses who assigned and directed other employees at the employer's facility were supervisors under the act. The Court found the fact that the nurses' judgment was based on superior skill or professional training was irrelevant to analyzing whether the nurses were indeed statutory supervisors under the NLRA. The Court held that under Section 2(11) of the NLRA, an employee is a supervisor if the following criteria are met:

- He or she has the authority to engage in one of the twelve indicia of supervisory activities listed in Section 2(11) of the NLRA;
- the employee exercises such authority in the interest of the employer; and
- the employee's exercising of this authority is not routine or clerical in nature, but rather involves the use of independent judgment.

The Trilogy: *Oakwood Healthcare, Golden Crest Healthcare, and Croft Metal*

Following the Supreme Court's *Kentucky River* opinion, the NLRB issued three long-awaited decisions clarifying the definition of supervisor on September 29, 2006. These decisions lowered the bar for who would be considered a supervisor under the act. In *Oakwood Healthcare, Inc.*,[2] the board found the employer's permanently assigned charge nurses to be statutory supervisors because they assigned nursing personnel to specific patients for whom they would care during their shift. The board, however, found that the employer failed to establish that the rotating charge nurses who only worked in a charge nurse capacity on occasion were statutory supervisors because they were not exercising supervisory authority for a substantial part of their work time.

Applying the definitions established by its *Oakwood Healthcare* decision, the board issued a decision in *Golden Crest Healthcare Center*, holding that the employer failed to establish that charge

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