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NLRB Narrows Union Participation Eligibility by Expanding “Supervisor” Definition

By Marcus Crider, Esq.

In a victory for employers, the National Labor Relations Board has expanded the definition of “supervisor,” a class of employees ineligible for union involvement under the National Labor Relations Act. The immediate impact of the NLRB’s decisions in the “Kentucky River” trilogy of cases -- *Oakwood Healthcare, Golden Crest Healthcare Center, and Croft Metals* -- is a decrease in the number of employees eligible for union membership. This shift not only impacts unionized employers, but those who have been targeted for unionization, such as employers in the healthcare and hospitality industries. Employers can now define job positions and allocate job duties strategically to minimize the risk of future unionization attempts or manage established unions.

To qualify as a supervisor under the NLRA, an employee must (1) have the authority to engage in certain supervisory functions, (2) use independent judgment to exercise this authority, and (3) exercise this authority in the interest of the employer. While the third requirement generally is not controversial, the NLRB’s rulings address the first two requirements. Most significantly, these rulings broaden the definition of two supervisory functions that satisfy the first requirement: the assignment and responsible direction of other employees.

Assigning Other Employees

What constitutes “assigning” other employees under the NLRA is now very broad and includes any authority to designate an “employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks or projects, to an employee.” The NLRB explained, “if a charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an assignment. On the other hand, a charge nurse ordering an LPN immediately to give a sedative to a particular patient does not constitute an ‘assignment.’” Thus, making regular work time, place or duties assignments is one touchstone of supervisory status under the NLRA.

Responsible Direction of Other Employees

The NLRB has flatly rejected the notion that only “department heads” responsibly direct other employees at work. Instead, the NLRB opted for a more practical and fact-sensitive approach, stating, “if a person on the shop floor has ‘men under him,’ and if that person decides

‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’...and carried out with independent judgment.” To be “responsible” direction, the person acting as a supervisor must be accountable for the performance of the employees being directed.

Independent Judgment

In addition to performing supervisory functions, an employee must exercise “independent judgment” to qualify as a supervisor. In assessing independent judgment, the NLRB encourages employers to focus on the *degree* of discretion an employee may exercise, not the *kind* of discretion. According to the NLRB, an employee exercises true independent judgment when acting or recommending action free of the control of others or detailed policies or instructions from a higher authority. Applying that standard, the NLRB concluded that “leadmen” and “load supervisors” in a manufacturing facility performed supervisory functions but were not supervisors because their “routine” direction, in accordance with established practices, did not demonstrate the exercise of independent judgment.

Full-time vs. Rotational Supervisory Duties

The NLRB also ruled that supervisors must spend a “regular and substantial” portion of their work time performing supervisory functions. Although the NLRB has not adopted any firm standard, it did indicate that employees who perform supervisory functions during at least 10 to 15 percent of their total work time may be supervisors. In the hospital context, the NLRB concluded that while full-time charge nurses were supervisors, part-time charge nurses who generally worked as regular RNs were not. Employers must, therefore, determine how much time borderline employees spend performing different job functions in order to make an informed decision.

Practical Impact for Unionized and Non-Unionized Employers

In the wake of these NLRB Rulings, key points for both unionized and non-unionized employers to consider include:

- ☐ Supervisors fall outside of most protections of the NLRA, must be excluded from the bargaining unit, and are not entitled to representation during disciplinary meetings or to other rights and

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Random Thoughts in an Election Year

Deborah K. Woolley ★ President

Bad politicians are sent to Washington by good people who don't vote.

~William E Simon

With election day upon us, all politics becomes personal. While it is an American dream to "have friends in high places," we must be willing to use that friendship to communicate our positions on policy issues. We must not be guilty of choosing friendship over accountability because, in the end, friendship will not help your business comply with bad laws or overcome hurdles imposed by government.

Take the time to seriously consider the issues. Talk them over with your friends, family, coworkers or even complete strangers in the lunch line. Take a stance on the issues. Take a moment to realize the seriousness of voting. It is a powerful right! It is the way you affect your future.

Elections belong to the people. It is their decision. If they decide to turn their back on the fire and burn their behinds, then they will just have to sit on their blisters.

~Abraham Lincoln

I can remember so very clearly last December when the Iraqi citizens were provided the opportunity to vote. Nashville, as many of you know, was one of five sites in the United States where Iraqi citizens living in the United States could travel to cast their ballot. They came, and they came in droves. The cars pulling up to the State Fairgrounds had license plates from across the southeastern United States. I saw one man and woman interviewed that night. With their two pre-teen children, they had driven all day from Dallas. As they proudly held up their blue fingertips, I can still hear what they had to say. The mother, with an arm around each kid and her eyes fastened on her blue fingertip, talked through tears as she explained the 10-hour drive was not an inconvenience but a celebration. It was important, she said, to exercise her right to vote and it was even more important, she added, for her children to learn what freedom would finally mean.

Her husband's comments were even more emotional. He kissed his blue fingertip and then said in a voice that was husky with emotion, "I am 50 years old and I had to flee my country a decade ago to live. Today, I got to vote. It is the first time in my entire life I have ever had that right." He would have, he added driven, twice as far and twice as long to exercise that right.

Then the family piled back in the compact car for their drive back to Dallas. They had been in Nashville less than 5 hours – all standing in line to vote, and they had to get back to Dallas in time to go to work.

A citizen of America will cross the ocean to fight for democracy, but won't cross the street to vote in a national election.

~Bill Vaughan

We need to ask ourselves – and answer honestly – whether we would do what this Iraqi family did. Or do we walk away from the polls when the lines are long, the weather is bad or other interests are calling us.

The right we have to decide who will run our country, our state and our local governments is one we take for granted while others around the world die fighting for it.

Democracy is the only system that persists in asking the powers that be whether they are the powers that ought to be.

~Sydney J. Harris

In business, we hold accountability supreme. In politics, we all too often ignore it.

Before an election, we must define the issues that are important to us and communicate them clearly to those who want to be elected. If they are incumbents, we must look at past voting records and determine whether they reflect our positions. If they are newcomers, they must be questioned and their answers must become a part of their record.

Following an election, we must congratulate them on the victory and remind them why they wonbecause of supporters who believed what they said and who trust their commitment to those beliefs. We must offer our assistance to help them understand how issues and policy will impact job creation, and we must communicate clearly our positions and our needs.

Following a session – from city council to U.S. Congress, we must look at the votes they cast and whether they heeded our words. We must hold them accountable for what they said and what they ultimately did.

And, then, we must go to the polls and determine whether "they are the powers that ought to be."

Bad officials are elected by good citizens who do not vote.

~George Jean Nathan



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The Tennessee Chamber of Commerce & Industry recognized outstanding industry leaders across the state for their commitment to safety, efficiency and stewardship of the environment at the Tennessee Chamber's 24th Annual Environmental Awards Conference held in October at Montgomery Bell State Park.

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benefits arising under a collective bargaining agreement. Thus, some employees may want to give up their "supervisory" status to protect their rights under a collective bargaining agreement.

- ❑ Employers should review the specific functions employees are performing to determine if their duties fit into one of the "supervisory functions" required. Employers should pay special attention to the assignment and responsible direction functions recently expanded by the NLRB. For example, a Room Service Manager may satisfy the assignment function if he or she is responsible for staffing and scheduling the wait staff.
- ❑ More supervisors mean fewer potential bargaining unit employees, reducing the overall number of potential union members. This may make an employer a less attractive target for unions. Given that employees who are performing supervisory roles often align themselves with management and are more likely to vote against a union, however, this ruling may deprive management of favorable votes during representation elections.
- ❑ Employers should consider over which job

positions they want to maintain exclusive control should a union win an election. "Supervisory" positions remain under management control, allowing management to fill them with the employees of its choice; bargaining unit positions typically are filled by seniority or otherwise according to the terms of the collective bargaining agreement.

- ❑ Once an employer determines the job positions it would prefer to fall inside or outside the bargaining unit, it can then allocate job responsibilities accordingly. Supervisors must perform at least one supervisory function (time, place or duties), be accountable for that function, and exercise independent judgment in performing that function. If any of these characteristics is missing, the employee is not a supervisor and remains eligible for inclusion in the bargaining unit.
- ❑ Employers should also consider their job descriptions and policies regarding the functions that employees perform. Job descriptions for employees who perform supervisory functions should reflect this, and employers who expect employees to exercise independent judgment should explain so in their policies

as well. While the NLRB will look behind an employer's stated job descriptions and policies to determine which employees *actually* are supervisors, accurate descriptions and policies allow employers to avoid having the lack of such language used against them.



Marcus Crider is a member of the Chamber's Human Resources Committee and a partner at Waller Lansden Dortch and Davis, PLLC, in Nashville. If you have any questions about

the NLRB's newest cases, please contact Marcus, at 615-850-8067, or any member of Waller Lansden's Labor and Employment practice group.

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A Simple Approach To Limiting Director Liability

By Gary M. Brown, Esquire

Despite all of the pressures on today's directors from a multitude of directions – federal securities laws, federal sentencing guidelines, stock exchange governance requirements, shareholder activism and court decisions – there is no legal reason for directors to be overly concerned about liability. The business judgment rule is alive and well. Indeed, Judge William Chandler, the trial court judge who decided the recent *Disney* case, said as much:

“Fiduciaries who act faithfully and honestly on behalf of [shareholders] are indeed granted wide latitude in their efforts to maximize shareholders' investment. **Times may change, but fiduciary duties do not.** Indeed, other institutions may develop, pronounce and urge adherence to ideals of corporate best practices. But the development of aspirational ideals, however worthy as goals for human behavior, should not work to distort the legal requirements by which human behavior is actually measured.” (emphasis added).

When the Delaware Supreme Court recently affirmed Judge Chandler's ruling in all respects and dismissed the case against the Disney directors, it gave a complete reaffirmation of the business judgment rule: “Our law presumes ‘in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company.’” In other words, there simply has been no revolution in liability law for directors: Despite journalistic headlines to the contrary, “doomsday” for directors simply is not here. Indeed, the Disney decision reflects the fact that courts (at least Delaware) recognize the reality that corporate boardrooms are sometimes not perfect governance laboratories.

The latest revelations about “stock option backdating,” however, undoubtedly will rekindle concerns about directors' liability. But should it? If the director was not involved, received no benefits from the backdating and relied upon reports of executives and others whom the director trusted and had a reason to trust, the director still should have no concerns about liability.

So – is there anything about which directors should have anxiety and what should they do about it?

The answer is yes and the answer to how to respond is simple. First – some background. From the standpoint of a corporate fiduciary, the most significant matter in governance over the last few years is perhaps the U.S. Sentencing Commission's 2004 revision of the federal sentencing guidelines. These revisions came in response to a mandate in the Sarbanes-Oxley Act that the guidelines, first adopted in 1991, be reviewed to determine whether they continued to be effective to deter organizational criminal conduct. To understand why this is important for directors, one has to revisit the 1996 *Caremark* decision. There, the Delaware Chancery Court opined that “by establishing and maintaining an effective compliance program, board members can protect themselves from personal liability suits.” Caremark had pled guilty to mail fraud and to paying kickbacks to physicians for patient referrals, and paid fines of \$250 million. In response, shareholders brought suit alleging Caremark directors bore personal responsibility for failure to supervise. Although the Caremark directors were relieved of personal liability because they had established such a program, the Court noted that the failure to have such a program may “render a director liable for losses caused by non-compliance.”

Compliance programs that met the “seven elements of effectiveness” of the 1991 sentencing guidelines quickly became the norm for compliance programs that also met the Caremark test. After 2004, directors now must be mindful of the sentencing guidelines' requirements as they relate to ethics. The sentencing guidelines require that in order to have an effective ethics and compliance program, an organization must exercise due diligence to prevent and detect criminal conduct and promote a culture that “encourages ethical conduct and a commitment to compliance with the law.” The sentencing guidelines expressly place responsibility for the ethics and compliance program on an organization's “governing authority” (i.e., the board of directors) and its executives. The 2004 sentencing guideline amendments require that the board of directors be knowledgeable about the content and operation of the compliance program and exercise reasonable oversight over the program. There also are requirements for periodic communication and training, including for directors, with respect to the ethics and compliance program.

The sentencing guidelines 2004 elements of what constitutes an “effective” ethics and compliance program will quickly become, if they have not already become, the “gold standard” by which ethics and compliance programs and,

accordingly, the conduct of directors are judged. Directors would be well advised to heed the guidelines and treat them as mandatory regulatory requirements. Indeed, if there is anything “new” about today's corporate and regulatory environment, it is the emphasis on ethics and “tone at the top.”

That having been said, if a director's duty of loyalty is not implicated and if there is no taint of a self-interested transaction, the application of the business judgment rule will allow directors to make mistakes, even large mistakes, without legal consequence other than the risk of non-reelection by shareholders. In terms of how directors should perform their responsibilities, there is no fundamental change. Directors should exercise care in all decisions they are called upon to make, and should be sensitive to anything that could be perceived as a conflict of interest or that could affect their loyalty to the corporation. When in doubt, abstain or refrain from participating in decisions affecting such matters. Business decisions made in compliance with the basic duties of care and loyalty will be protected from second-guessing, and cannot violate any “duty of good faith.” Recent trends, however, reinforce what most directors already know – after *Enron* and Sarbanes-Oxley, it is more important than ever for directors to act diligently, avoid any appearance of conflict of interest, assure themselves that they are fully apprised of all material facts surrounding a proposed decision, ask questions of management, make a record of their involvement, and ensure that they obtain appropriate advice and counsel from independent expert advisors.

So – directors – how do you protect yourself from liability? As Alan G. Hevesi, the New York Controller and lead plaintiff in the *WorldCom* securities case, said “[The settlement] says to directors, ‘You have liability. Do your jobs.’ We believe this settlement empowers directors to do that.” Indeed, the same can be said for Sarbanes-Oxley – that law did not heap liabilities on directors; it actually empowers directors by emphasizing their independence and important corporate roles. With that, I offer the following tips to assist directors in “doing their jobs:”

- **Ensure that the corporation has and maintains a high standard of integrity and ethical conduct.** After *Enron* and the host of other corporate scandals of the past few years, smart directors know that an honest and transparent culture is the best safeguard of shareholder value and, consequently, the best protection for

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directors. This begins with “tone at the top.” The 2004 federal sentencing guidelines’ emphasis on ethics and compliance programs, coupled with the *Caremark* decision, should be additional incentive for this to be a priority.

- ❑ **Succession planning is an important board function.** The events that led to the Disney litigation were precipitated by the unexpected death of Disney’s president and the discovery of the CEO’s heart ailment. The focus on a single candidate as Michael Eisner’s successor underscored the apparent lack of any succession planning at Disney. Planning for the succession of the CEO and other key officers is one of the most critical functions of a board of directors. Instituting and implementing a robust succession planning process can help a board avoid long and contentious litigation, such as that endured by Disney’s directors.
- ❑ **Understand that good corporate governance is more than about “checking the box.”** Process counts – the fact that Disney’s directors spent ten years in litigation underscores the importance of a robust process for approving important business decisions. On “checking the box,” recall that Enron had an award-winning 62 page code of conduct. A copy was auctioned on e-Bay recently with the tag line “never been opened.” Perhaps the valuable copy would have been the copy that was heavily underlined and highlighted – none of those seems to have surfaced. To repeat – process does count and “tone at the top” is important.
- ❑ **Understand that public offerings of securities carry with them liability risks.** This is underscored by the *Enron* and *WorldCom* settlements. The business judgment rule and exculpatory charter provisions do not

apply to shield directors from securities liabilities and indemnification from a bankrupt corporation is not much comfort. Additionally, you can not purchase enough D&O coverage (assuming the coverage remains valid) for the “catastrophic” case. You need to be sure you understand the corporation and its business, carefully review its public disclosures and be sure that the corporation’s advisors (e.g., accountants, attorneys, bankers) are skilled and knowledgeable professionals who understand that their allegiance is to the corporation and the board and *not* to management.

- ❑ **Carefully scrutinize executive compensation.** This is absolutely *the* issue for the moment. Boards and compensation committees want to avoid having that “Dick Grasso moment.” The SEC’s new disclosure rules will require more focus than ever on the processes of the compensation committee. Tally sheets, while once seen as a “best practice,” now are obligatory. The *Disney* case says as much and the SEC’s rules essentially adopt a tally sheet approach to disclosure. If you are a member of a compensation committee, think “audit committee for executive compensation.” Many of the items that have become a part of audit committee practice (*i.e.*, independence of auditors, independence from management, independent advisors) have migrated and will continue to migrate to and become the practices of the compensation committee (*e.g.*, independent compensation consultant).
- ❑ **Carefully scrutinize significant transactions.** If the purpose of the transaction is not obvious, ask a simple question – “Why?” A lesson of the last few years is that too many companies engaged in transactions that were designed solely for manipulation of earnings or tax avoidance.

Be sure that the transaction has a business purpose. Directors should control senior management so that the board’s options are not curtailed with respect to significant matters, should engage in active discussion regarding all important issues, should retain expert advisors when appropriate, and include formal presentations with the relevant minutes to establish their reasonable reliance on such expert advice. Also directors and corporate counsel should have an explicit understanding that counsel will advise them if board or committee action is required or advisable with respect to any matter under consideration.

- ❑ **Pay attention and do your homework.** Subscribe to a trade journal for the industry in which the corporation operates. Obtain and review copies of analyst reports on the corporation. Are they saying the same thing that you are seeing in the materials provided the board by management and that you are hearing at board meetings?
- ❑ **Audit committees should get periodic reports of “whistleblower” calls and significant litigation and claims.** There is a reason that so much of Sarbanes-Oxley is devoted to “whistleblowers” – it required new audit committee procedures, provided protection for whistleblowers and created a new federal crime for interfering with the employment of a whistleblower. Think – Sherron Watkins (Enron) and Cynthia Cooper (WorldCom). Studies show that the overwhelming source for the detection of occupational fraud is whistleblowers.
- ❑ **Ensure that the corporation has “best of class” director protection mechanisms.** The best protection for directors is to “do their jobs” – *i.e.*, to satisfy their fiduciary obligations. That having been said, however, one should ensure that the

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What Are Waters Of The United States? Supreme Court Response is as Clear as Wetlands Mud

By William L. Penney

In June of this year, the United States Supreme Court handed down its opinion in the long awaited case of *Rapanos v. United States*. The Court was expected to clarify the federal government's jurisdiction over wetlands. The Court did not provide a clear ruling, however, and the conflicting opinions in the case have set in motion several different competing theories of what constitutes "waters of the United States."

As a result, one can argue with some authority that waters of the United States must be physically adjacent to legally navigable waters, or that there must be a significant nexus to navigable waters, or that the waters are jurisdiction if there is any hydrologic connection to navigable waters. All of these opinions are expressed in the opinion that had no majority for any of the positions.

The federal Clean Water Act does not expressly regulate wetlands, tributaries, ephemeral streams, or any waters other than "navigable waters." The only definition for navigable waters in the Clean Water Act is "Waters of the United States and territorial seas." In 1985, wetlands adjacent to navigable waters were considered to be included within the definition of waters of the United States. (See *Riverside v. Bayview Homes*, 474 U.S. 121, 1985.) Arguably the wetlands discussed in *Riverside* addressed only "physically" adjacent wetlands. Through the years the United States Army of Corps of Engineers and

the Courts have interpreted "adjacent" in ways other than physically adjacent.

In *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, 531 U.S. 159, 51 ERC 1833 (2001), the United States Supreme Court ruled that asserting jurisdiction over wetlands only because migratory birds used them was not a significant nexus for jurisdiction. After attempting to promulgate rules better defining jurisdictional waters, the Corps of Engineers simply gave up and stated that the SWANCC decision was limited only to wetlands made jurisdictional solely because of migratory birds. As a result, federal jurisdiction over what constituted waters of the United States became almost unlimited. Many courts, including the Sixth Circuit upheld the Corps of Engineers determination that "any hydrological connection" to navigable waters passed the *Riverside* test. Many "wet fields," as Justice Scalia remarked, were included as jurisdictional waters.

Ever since Congress passed the Clean Water Act in 1972 over the veto of President Nixon, wetlands and small intermittent and ephemeral streams have created challenges for developers. Costs to avoid wetlands and/or to mitigate the impacts reduce the viability or economic realization of a project. Some developers have gone to prison for illegally filling wetlands. The average applicant for an individual United States Army Corps of Engineers permit spends 788 days and

\$271,596 in completing the permit process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation. Still others have been heavily fined by either the state or federal government. Environmental interests on the other hand have largely seen wetland protection as essential to preserving habitat and cleaning up waters. Some have used wetland regulation merely to stop unwanted development.

Many thought that the Supreme Court would clarify the extent to which the federal government can regulate navigable waters in a pair of cases, *Rapanos* and *Carabell v. United States Army Corps of Engineers*. In the Court's opinion, which was announced June 19, 2006, the it reversed the decision of the Sixth Circuit Court of Appeals which had deferred to the Corps' expansive definition of waters of the United States. In so doing, the Court came extremely close to throwing out almost all of the federal government's jurisdiction over wetlands and other waters such as intermittent streams that do not directly abut navigable waters. Justice Scalia writing for a plurality of the Court stated:

'Establishing wetlands under the Clean Water Act requires two findings: First that the adjacent channel contains a water of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters);

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and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water “ ends and the “wetland” begins.”

Thus, if the plurality opinion were adopted by the majority of the Court, ephemeral and intermittent streams as well as isolated wetlands are not waters of the United States under the Clean Water Act (CWA). This interpretation would substantially alter the Corps definition of waters of the United States. Justice Kennedy, who also concurred in the reversal of the Sixth Circuit’s decision, disagreed with the plurality’s opinion, but agreed with the decision to reverse and remand, opined that the Sixth Circuit did not properly apply the “significant nexus” test. Four Justices dissented. In essence, at least five members of the court disagreed with the application of the Sixth Circuit’s “any hydrological connection” test.

This decision is called a “plurality” decision because no opinion was supported by a majority of the court. Four members concurred in Justice Scalia’s opinion and four members dissented, and disagreed that the case should be reversed. Justice Kennedy’s concurring opinion, then, became the deciding vote. He voted to reverse the Sixth Circuit but for different reasons. As a result the Supreme Court’s decision did not establish a precedent leaving the lower courts (or the government) to apply either the plurality opinion or the Kennedy opinion. If the Sixth Circuit applies the Kennedy significant nexus test, Justice Kennedy stated that it was possible that the Court of Appeals would still consider the wetlands in the two cases jurisdictional waters.

The constitutional basis of the CWA is Article I, Section 8 of the United States Constitution which authorizes Congress to regulate commerce among the states. Thus the CWA regulates “navigable waters,” since navigation relates to the Congress’ commerce powers. Navigable waters is defined as Waters of the United States. Battle lines have been drawn for some time between those who believe that Congress cannot regulate waters other than traditionally navigable waters and those that believe that non navigable waters can be regulated no matter where they are located.

The Corps applies a test of adjacency to navigable in fact streams. For non navigable tributaries, the Corps defines a regulated tributary as one that feeds into a traditional navigable water (or tributary thereof) and possesses an ordinary high-water mark, defined as a line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics. 33 CFR 328.3. Therefore, existing Corps rules

provide jurisdiction for wetlands that are adjacent to non navigable waters under the definition of tributary.

The cases before the Supreme Court drew out both sides of the argument of the traditional in fact view versus the more expansive view. Rapanos, a Michigan developer, filled in several plots of lands located 11 to 20 miles away from the nearest navigable water without a permit. One of the sites was connected to a navigable water by a manmade drain which flowed into a creek, which then flowed into a river that emptied into Saginaw Bay. Rapanos argued that the CWA did not envision such a remote nexus to navigable waters and that the CWA’s jurisdiction extended only to waters that were navigable in fact. The Sixth Circuit sided with the government’s position that a direct abutment test was not required, but that jurisdiction was proper if there was a “hydrologic connection” between the wetlands and the navigable waters.

The Carabells sought to fill a triangular piece of property about a mile from Lake St. Clair. A manmade ditch ran alongside the property which was contained by a four-foot impermeable berm. This ditch ran into another ditch or drain and ultimately into the Lake. Therefore, there was no hydrologic connection at all to navigable waters. The Sixth Circuit said that the wetlands on the property were adjacent to tributaries of navigable waters and that was a significant nexus.

The navigable in fact position espoused by Rapanos was largely upheld by the plurality in Rapanos, although Justice Scalia believed that it also applied to wetlands that had a physical surface connection to relatively permanent water. Therefore, if the wetlands were adjacent to or flowed into intermittent or ephemeral streams, neither they nor the intermittent or ephemeral streams were regulated. The dissent took the more expansive view and according to Justice Kennedy, seemed to read out the word “navigable” in the definition under the CWA.

Justice Kennedy felt that both sides missed the point entirely. Quoting from the Supreme Court’s 2001 decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 121 S.Ct. 675, 148 L.Ed.2d 576 (2002) (SW-ANCC), he noted that the Court found that “to constitute “navigable waters” under the CWA, the water or wetland must possess a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made.” He noted that the Sixth Circuit recognized the significant nexus test but did not apply the criteria.

Justice Kennedy’s interpretation of significant nexus addressed not the location of the waters

but the function of the water.

Accordingly, wetlands possess the requisite nexus, and thus become within the statutory phrase “navigable waters,” if the wetlands either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” When in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term “navigable waters.”

Thus, under the Kennedy significant nexus test there is no bright line for determining a wetland; rather, each is a case by case determination of the impact on navigable waters. Justice Kennedy suggested that the Corps could identify categories of tributaries that because of their flow volume and proximity are likely in the majority of cases to perform important functions for aquatic systems in navigable waters. He notes that the Corps’ existing standards do not provide for this type of analysis. Until more specific regulations are developed he stated that the significant nexus must be established on a case by case basis.

Though the law was not settled by the decision, this case will have significant impact upon business because some change is likely to occur. The federal permit process is not only time consuming and expensive, the process is also subject to the National Environmental Policy Act (NEPA) and a determination that the project is a major federal action with significant environmental impacts, can lead to years of study and evaluation. No matter how the case is read, at least a majority of the Court was not satisfied with the Corps’ broad interpretation of its definition. Therefore, the Corps together with the United States EPA will begin to decide how they will define wetlands and other waters that feed into waters of the United States. If the government takes the path of least resistance, that is the Scalia approach, then time and expense dealing with negligible wetlands and intermittent streams will be reduced. If the Kennedy opinion is followed, time for processing permits likely will be increased because the federal government will need to make every determination on a case by case basis; however, ultimately, it could result in more available land for development.

Despite what could be a significant positive impact for industry from a federal perspective, the case did not address state interpretations of “waters of the state.” Tennessee’s water quality laws can be and are more



A Simple Approach to Limiting Director Liability

continued from page 5

corporation has an exculpation provision in its charter and the broadest indemnification provisions either in its charter or bylaws. Consideration should be given to indemnification agreements for directors. Finally, a lesson from the *WorldCom* settlement is that like governance in general, a “check the box” approach is not appropriate for determining whether the directors have appropriate D&O liability insurance (they did not).

- ❑ **Ensure that the minutes of board and committee meetings reflect a deliberative process and the appropriate resolution of matters.** “Minimalist” minutes, if they were ever a good practice, certainly are not a good practice today. Among the practices that can help minimize litigation risks for directors with respect to significant mat-

ters are ensuring that minutes of board and committee meetings are taken by a skilled professional and, where appropriate, reflect the amount of time devoted to each issue. The *Disney* directors spent 10 years in litigation and 37 days in trial establishing what a good set of minutes could have established. The lesson here could not be clearer.

- ❑ **Understand that the basics still matter and that structure does not replace judgment.** Directors should insist on receiving materials well in advance of board meetings. Also, board and committee meetings should be scheduled so as to provide sufficient time for deliberations, and draft minutes should be circulated promptly after the conclusion of meetings. The key for directors, both to fulfill their fundamental

responsibilities and to protect themselves from liability, is to carefully exercise their informed business judgment.

Mr. Brown is the Chairman of the Corporate Department at the national law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. Former special counsel to the U.S. Senate Committee on Governmental Affairs in the 2002 Enron investigation, he also is an adjunct professor of law at the Vanderbilt University School of Law where he teaches corporate and securities law and serves as general counsel to the Ethics and Compliance Officer Association.

What Are Waters Of The United States?

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stringent than the federal CWA. However, removing the Corps’ permitting stage will reduce the amount of time and money spent obtaining federal permits.

The Tennessee General Assembly has taken interest in the jurisdictional aspects of “waters of the state.” Chapter 899, Pub. Acts of 2006, established a Water Quality Control Act Study Committee. The study committee is made up of six members, with three members appointed by

the speaker of each house of the general assembly. It will investigate amending the definition of waters of the state as used in the Tennessee Water Quality Control Act. The investigation will include a review of the state water quality plan, the current condition of the state’s waters, and applicable federal laws. A report is due to the each house’s respective environmental standing committee by February 1, 2007, at which point the Committee will cease to exist.

Clearly the Committee will be looking into areas where the state interpretation of “waters” is more stringent than that of the federal law. No doubt the Rapanos/Carabell cases will be of interest in those discussion.

William L. Penny is an attorney with Stites & Harbison, PLLC. He can be reached at 615-782-2308 or by e-mail at bill.penny@stites.com.

DENSO Receives 2006 Platinum Shingo Award

DENSO Manufacturing Tennessee Inc., Instrument Cluster Division, was awarded the 2006 Platinum State Shingo Prize on Tuesday at the Marriott Hotel in Knoxville.

The Shingo Prize, dubbed the “Nobel Prize of Manufacturing” by Business Week Magazine, was created in 1988 to recognize and award companies for manufacturing excellence.

DENSO Tennessee’s Instrument Cluster Division in Maryville is the first DENSO North American location to achieve an environmental milestone for the company — a 95 percent landfill waste reduction.

DENSO Manufacturing Tennessee is part of a global company that is one of the world’s largest manufacturers of advanced components and systems for the world’s major automakers.

The Instrument Cluster Division employs more than 650 people who build instrument clusters, center displays and air-conditioning control panels. DENSO customers include Toyota, Daimler-Chrysler, Honda, Ford and General Motors. Jack Demboldt, senior vice president of DENSO’s Instrument Cluster Division, said, “This is a constant and continuous process for us — and it’s ingrained in all of our associates. Everyone at DENSO strives for this. It’s not just management, it’s the entire corporation.”

The Tennessee evaluation team, led by the University of Tennessee’s Center for Industrial Services (CIS), rates companies based on vision and strategy, innovations in market service and products, environmental practices, partnering with customers and suppliers and manufacturing processes and operations.

The Shingo Prize is named for Japanese industrial engineer Shigeo Shingo, who implemented revolutionary manufacturing programs at Toyota Motor Co.

Entry forms for the 2007 Shingo Prize are due at the end of February, and site visits for next year’s competition will begin in May.



Tennessee Supreme Court Finds 2004 Workers Comp Reform Act Constitutional

By Terry L. Hill, Esquire

In a ruling that provides a stamp of validity to the 2004 Workers' Compensation Reform Act, the Tennessee Supreme Court has held the Act to be fully constitutional. The Court's rulings in *JerryWayne Lynch v. City of Jellico*, No. E2006-00208-SCR3-CV (Tenn. Aug. 30, 2006) and *David A. Lozano v. Lincoln Memorial University*, No. E2-6-00207-SC-R3-CV (Tenn. Aug. 30, 2006) reverse a decision of the Campbell County and Claiborne County Chancery Courts, respectively, which invalidated the Act on a number of constitutional grounds.

Court Addressed Mandatory Prelawsuit Mediations

In its August 30, 2006 decision, the Supreme Court addressed the constitutionality of the 2004 Reform Act under both the Tennessee and the United States Constitutions. Specifically, the Court evaluated the constitutionality of the Act's provisions concerning mandatory pre-lawsuit mediations, the use of multiplier provisions in determining permanent partial disability benefits, and the use of the AMA Guides as the standard text for the expert evaluation of impairment.

Court Ruling Was Unanimous

In a unanimous 5-0 decision, the Court upheld the constitutionality of all three challenged

portions of the 2004 Act. The Court found that the three provisions did not violate the due process, the separation of powers, or the open courts doctrines of the United States and Tennessee Constitutions.

Tennessee employers are urged to abide by the 2004 Reform Act as it appears entrenched in Tennessee law in the indefinite future. While the Legislature may tweak the Act with future reforms, the Supreme Court has already affirmed the basic Constitutionality of its most controversial provisions.

Panel Overturms Combining Of Awards for Distinct Injuries

In a completely separate ruling by the Workers' Compensation Appeals Panel, it was determined that distinct and separate injuries cannot be combined for purposes of calculating an award.

In *Pirtle v. Humboldt Utilities*, No. W2005-02075-SC-WCM-CV (Tenn. Workers' Comp. Panel Aug. 21, 2006), the Workers' Compensation Appeals Panel reversed a judgment of the trial court which erroneously combined awards for an employee's hand and back injuries. The Panel affirmed the trial court finding that both injuries were compensable.

In *Pirtle*, the Gibson County Chancery Court ruled that the plaintiff employee had suffered

both an acute injury to his back, as well as a gradual carpal tunnel injury to both of his wrists. The proof at trial established that the plaintiff's back injury occurred suddenly in March 2002, while the plaintiff's date of gradual injury for his carpal tunnel claim fell in May of 2004.

Because the plaintiff had returned to work with his pre-injury employer, the trial court awarded the plaintiff 2.5 times the 17% impairment rating assigned by the plaintiff's IME physician. This 17% rating, however, comprised impairment for both the plaintiff's back and arm claims.

On appeal, the Panel found that the trial court could not calculate an award based on one combined impairment rating for two injuries with two different dates of injury. The Panel remanded the case to trial for a computation of two separate awards for two separate injury dates.

This case should discourage the practice of many IME physicians to combine multiple impairment ratings for distinct injuries to create a single over-inflated rating. Each injury must now be evaluated by the trial court individually in cases involving multipliers.

Terry Hill is a partner in the firm of Manier & Herod in Nashville. He can be reached at (615) 244-0030.



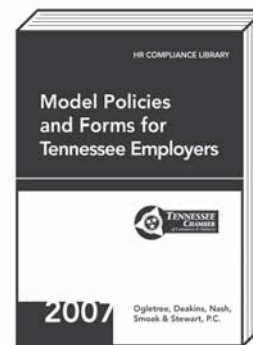
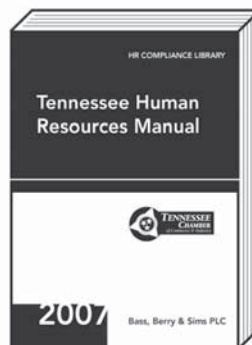
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NOTICE TO THE MEMBERSHIP

The members of the Tennessee Chamber of Commerce & Industry will elect officers and members of the Board of Directors, in accordance with the By-Laws, at a general membership meeting immediately following the board meeting at approximately 1:30 p.m. Central Time, December 12, 2006, at The City Center, 27th Floor, Nashville.

Joe Internicola, chairman of the Tennessee Chamber and the Nominating Committee, said, "The Nominating Committee was very pleased with the openness of our process and the increased participation of our membership. We received a number of very qualified nominations from the membership and were able to find slots for many of those nominated. It was important to the Nominating Committee that we found individuals to fill board seats who are willing and able to be involved in leading our organization toward greater effectiveness.

"It is truly an honor to be elected to serve on the Tennessee Chamber board. More than ever, we sought to nominate individuals fully engaged in leading the Tennessee Chamber to new heights while ensuring a balance among the Grand Divisions of the state and the various business sectors of the Chamber's membership."

Members of the Board of Directors are elected to three-year terms. Officers are elected to one-year terms and concurrently serve on the Board of Directors.

Here is the slate proposed by the Nominating Committee:

OFFICER CANDIDATES:

Chairman

Crawford Gallimore, Hamilton-Ryker, Martin

Chairman Elect

Darrell Corpening, Eastman Chemical, Kingsport

Treasurer

Charlie Floyd, Weyerhaeuser, Kingsport

BOARD OF DIRECTORS CANDIDATES

East Region:

Philip Ball, W.R. Grace & Company, Chattanooga – 2nd Term

Middle Region:

Dennis Alpert, Wal-Mart Stores Inc., Lebanon – 1st Term

Darlene Marsh, Burr & Forman, LLP, Nashville – 1st Term

West Region:

Kent Carter, Marvin Windows & Doors of Tennessee, Ripley – 1st Term

Gary Downey, Bekaert Corporation-Dyersburg, Dyersburg – 1st Term

Susan Dew, Quebecor World – Dyersburg, Dyersburg – 1st Term

At Large:

Mike Prince, Cooper Tire & Rubber Company, Surgoinsville – 1st Term

Dr. Jim Burton, Middle Tennessee State University, Murfreesboro – 1st Term

Andy Hall, Wellmont Health System, Kingsport – 1st Term

2006 EXECUTIVE COMMITTEE CANDIDATES

Human Resources Committee Chair

Quency Holmes, Robert Bosch Corporation, Gallatin

Tax Committee Chair

Andy Wagner, FedEx, Memphis

Manufacturing Excellence Council Chair

Geoff Cromer, Alcoa, Knoxville

Public Affairs Committee Chair

John Van Mol, Dye, Van Mol & Lawrence Inc., Nashville

Education Committee Chair

Anthony Haynes, University of Tennessee, Knoxville

Environmental Committee Chair

Richard Holland, Packaging Corp. of America, Counce

At-Large Executive Committee Members

Tracy Woodard, Nissan North American Inc., Nashville

Jerry Dodds, Brother International Corp., Bartlett

Carter Todd, Garlord Entertainment, Nashville



An HR Reality Check

The following list of questions will provide a snapshot for you to use in determining whether or not you are complying with fundamental employment laws and regulations. You should know the answer to every one of these questions. Although a “No” answer does not necessarily mean you are in violation of any laws or regulations, you should understand why the answer is “No.”

The page number provides a quick reference to the new HR Compliance Library available now.

Yes	No		Page Reference
<input type="checkbox"/>	<input type="checkbox"/>	Have you posted all required employee notices in conspicuous places (EEO, minimum wage, unemployment compensation, workers’ compensation, child labor, etc.)?	365
<input type="checkbox"/>	<input type="checkbox"/>	Do you keep all medical records separate from other personnel files?	356
<input type="checkbox"/>	<input type="checkbox"/>	Do you have all new hires complete I-9 forms and do you keep the I-9 forms separate from supporting documentation?	7
<input type="checkbox"/>	<input type="checkbox"/>	Do you retain employment records for as long as you should?	349
<input type="checkbox"/>	<input type="checkbox"/>	Do you know what questions you can’t ask job applicants, and which ones you should?	6
<input type="checkbox"/>	<input type="checkbox"/>	Do you check all job and personal references before hiring?	12
<input type="checkbox"/>	<input type="checkbox"/>	Are your employees properly designated as exempt or non-exempt under the Fair Labor Standards Act?	105
<input type="checkbox"/>	<input type="checkbox"/>	Do you have an employee handbook? If so, is it regularly updated, and do you include a clear statement that employment is at-will and not guaranteed?	25
<input type="checkbox"/>	<input type="checkbox"/>	Do you pay required overtime compensation to nonexempt employees, which can include salaried employees?	108
<input type="checkbox"/>	<input type="checkbox"/>	Do you have a written unlawful harassment policy, and are your employees aware of it?	61
<input type="checkbox"/>	<input type="checkbox"/>	Do you have a procedure for investigating employee complaints about harassment?	63-65
<input type="checkbox"/>	<input type="checkbox"/>	Do you test for drugs or alcohol in compliance with both Tennessee and federal law?.....	307
<input type="checkbox"/>	<input type="checkbox"/>	Do you have a progressive discipline policy, and do your supervisors understand it and apply it consistently?.....	93
<input type="checkbox"/>	<input type="checkbox"/>	Are you aware of federal requirements regarding continuation of group health care coverage?.....	287
<input type="checkbox"/>	<input type="checkbox"/>	Does your company need an affirmative action policy?	237
<input type="checkbox"/>	<input type="checkbox"/>	Do you have a plan for dealing with workplace violence?.....	323
<input type="checkbox"/>	<input type="checkbox"/>	Do you have a system for handling wage garnishment or income deduction orders?	125
<input type="checkbox"/>	<input type="checkbox"/>	Do you know if your employees are eligible for family and medical leave?	129
<input type="checkbox"/>	<input type="checkbox"/>	Are your employees represented by a union? If not, are you prepared for a union campaign?	327
<input type="checkbox"/>	<input type="checkbox"/>	Does your company have a plan for complying with WARN in the case of a mass layoff or plant closing?	169
<input type="checkbox"/>	<input type="checkbox"/>	Do you know the procedure for reinstating a veteran after military leave?	221
<input type="checkbox"/>	<input type="checkbox"/>	Does your workers’ compensation insurance carrier provide managed medical care as required by Tennessee law?.....	261
<input type="checkbox"/>	<input type="checkbox"/>	Does your company have an electronic mail, Internet and other communications policy?	15

HR Compliance Library for Tennessee Employers

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Upcoming Seminars and Programs

DATE	SEMINAR	LOCATION
November 2, 2006	Safety Programs	Clarksville
November 8, 2006	Forklift	Dyersburg
November 9, 2006	TOSHA 101	Dyersburg
November 15, 2006	Basic Safety	Humboldt
November 15, 2006	TOSHA 101	Morristown
November 16, 2006	Safety Programs	Kingsport
November 29, 2006	Forklift	Knoxville
December 1, 2006	TOSHA Requirements for Monitoring, Evaluation & Inspection	Jackson
December 5, 2006	Manufacturing Summit	Nashville
December 8, 2006	TOSHA Requirements for Monitoring, Evaluation & Inspection	Nashville
December 14, 2006	TOSHA Requirements for Monitoring, Evaluation & Inspection	Morristown
December 15, 2006	Forklift	Nashville

2007

February 6, 2007	Public Affairs Conference	Nashville
February 28, 2007	Annual Membership Meeting	Nashville



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