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## Labor Board Clarifies Definition of “Supervisors” Unable To Unionize

In three major decisions, the National Labor Relations Board (Board) has clarified when employees will be considered “supervisors” under the National Labor Relations Act (Act). As management representatives, supervisors have no right to vote in union elections or be represented by a union, and can be legally fired for encouraging others to support a union. It is thus critically important that employers be able to identify accurately who is and is not a supervisor under the Act.

Although unions have denounced these decisions as an attack on worker rights, the Board adopted a realistic, fact-specific approach to what it means to be a supervisor. While two of the three decisions involved health care employers, making it easier for hospitals to treat some charge nurses as supervisors, the factors cited by the Board apply to all types of workplaces.

### **Act’s Definition Of “Supervisor”**

The Act gives employees – but not supervisors – certain rights, including the right to form, join or assist unions, to bargain collectively, to engage in concerted activities for their own “mutual aid or protection,” and to not be disciplined or discharged for exercising any of those rights. Section 2(11) of the Act defines a supervisor as “any individual having the authority, in the interest of the employer, to hire, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” Under this definition, individuals are supervisors if (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11), such as “assign” or “responsibly to direct,” (2) their exercise of such authority requires the use of independent judgment, and (3) their authority is exercised in the employer’s interest. An employer that claims an employee is a supervisor has the burden of proving it.

### **Board’s Decisions**

In the lead case recently decided by the Board, *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (2006), a union petitioned the Board to conduct an election among a group of registered nurses (RNs). The employer argued that certain RNs known as “charge nurses” were ineligible to vote because they were supervisors. In generally agreeing with that position, the Board found that an employee who *assigns overall duties* to other employees or is *held responsible for directing* such other employees to perform specific assignments, and who *exercises independent judgment and discretion* in doing so, will be considered a “supervisor” under the Act.

First, the Board held that “assign” means “designating 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, to an employee.” At the same time, the Board made clear that the word means more than just giving an employee some *ad hoc* instructions to perform a specific task. It thus distinguished between telling a nurse to care for a certain patient (which would fall within the definition of “assign”) from merely telling her to administer a sedative to the patient (which would not). The Board held that because the charge nurses at issue were responsible for assigning nurses and aides to particular patients or areas, or assigning them specific duties or responsibilities, they “assigned” work within the meaning of Section 2(11).

Second, the Board clarified what it means for an employee to have the authority “responsibly to direct” other employees. It held that an employee responsibly directs other employees when he or she uses independent judgment in assigning work to such employees and is held personally accountable for the employees’ resulting work product, such that the supervisor will personally suffer adverse consequences if the assigned work is not properly performed. To establish such accountability, therefore, the employer must show that it delegated to the supervisor “the authority to direct the work and the authority to take corrective action, if necessary,” with the supervisor facing the risk of “adverse consequences” should he or she fail to take such steps. In *Oakwood*, the Board held that the employer had failed to show that its charge nurses responsibly directed the nursing staff, because there was no evidence they had to take corrective action if the staff failed to adequately perform assigned work.

Third, the Board held that “independent judgment” turns on the degree of discretion, rather than the kind of discretion, that an employee exercises. It found that professional or technical judgments involving the use of independent judgment are supervisory if they involve any one of the 12 supervisory functions listed in Section 2(11) of the Act (*i.e.*, hiring, suspending, laying off, recalling, promoting, discharging, assigning, rewarding, disciplining, or responsibly directing employees, adjusting their grievances, or effectively recommending such action). The Board recognized that “judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” It noted, however, that policies which allow for discretionary choices do not eliminate independent judgment from decision-making, as distinct from policies which leave the employee with nothing more than “routine or clerical” discretion. The Board held that most of the charge nurses at issue exercised independent judgment in deciding how to allocate resources for the shift, based upon the skill, experience, and temperament of the other nurses and the acuity of the patients. It also found, however, that the emergency room charge nurses exercised no such independent judgment, because they assigned nursing staff to certain geographic areas rather than making meaningful choices based on an assessment of the staff members’ individual attributes.

Finally, the Board addressed how to treat an employee who spends only part of his or her time performing supervisory functions. It held that to qualify as a supervisor, an employee must spend “a regular and substantial portion of his/her work time” performing such functions. “Regular” means “according to a pattern or schedule, as opposed to sporadic substitution.” The Board said it will not apply a hard-and-fast rule as to when an employee spends a “substantial portion” of time supervising, noting that it had reached such a conclusion where individuals spent as little as 10 to 15 percent of their time doing so. Emphasizing the individualized nature of this inquiry, the Board found that some rotating charge nurses spent a regular and substantial portion of their work time performing supervisory functions, while others did not.

In the other two cases, *Croft Metals, Inc.*, 348 N.L.R.B. No. 38 (2006), and *Golden Crest Healthcare Center*, 348 N.L.R.B. No. 39 (2006), the Board applied the *Oakwood* standards to find that various employees – manufacturing lead persons in *Croft Metals* and charge nurses in *Golden Crest* – were not supervisors, making them eligible to vote in union elections. In *Croft Metals*, the Board found that the lead persons did not exercise independent judgment in directing their crew or line members, because their discretion was routine or controlled by company policies. In *Golden Crest*, the Board found that charge nurses did not “responsibly direct” other employees, because they faced no real adverse consequences if their subordinates failed to perform properly. In particular, the Board held that the mere fact that the charge nurses’ performance evaluations included a section rating how well they directed work did not rise to the level necessary to show that they responsibly directed other employees.

## **What the Decisions Mean**

If employees seek to unionize, an employer must know who is and is not legally protected in carrying out the organizing drive and who can and cannot vote in any resulting election. It also needs to know which employees it can safely trust to implement its strategy on how to respond to the organizing campaign, and legitimately hold accountable for failing to support top management’s decision to oppose unionization. All non-union employers, therefore, should carefully analyze the actual duties and responsibilities of any individuals who oversee other employees’ work to determine whether they meet the standards set out in the Board’s decisions. To maximize the likelihood that such persons will be viewed as supervisors under the Act, an employer may need to adjust their duties and responsibilities (and the corresponding job descriptions) to match the tests laid out by the Board.

Unionized employers should consider whether they want to try to remove certain employees from the bargaining unit on the grounds that, under the Board’s new approach, those employees are supervisors. Such a challenge would involve filing a “unit clarification petition” with the Board seeking to have such person excluded from the unit as supervisors. Unions are

likely to aggressively oppose any such move, and may well seek provisions in collective bargaining agreements that would prohibit employers from filing such petitions, or from assigning work to employees that could transform them into supervisors under the Act.

## We Can Help

We can help you analyze the legal effect of your employees' job duties, review and adjust job descriptions, and determine how best to adjust employee responsibilities to make it more likely that they will meet the Board's standards for being a "supervisor" under the Act. Please contact any of the Labor and Employment attorneys listed below to assist you in understanding your options in this area.

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