CLIENT ALERTS & INSIGHTS

NLRB Establishes Guidelines for Determining Who is a Supervisor

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Last week, the National Labor Relations Board ("NLRB") released a major decision setting forth guidelines for determining when an individual is a supervisor under the National Labor Relations Act, *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006).The majority opinion is signed by Chairman Robert J. Battista and Members Peter C. Schaumber and Peter N. Kirsanow, a former Benesch attorney.The NLRB also applied these new guidelines in two other cases, *Golden Crest Healthcare Center*, 348 NLRB No. 39 and *Croft Metals, Inc.*, 348 NLRB No. 38, released the same day.

The importance of who is a supervisor stems from the exclusion of supervisors from the protections of the National Labor Relations Act ("NLRA").This exclusion means supervisors are not eligible to vote in union representation elections or be members of a bargaining unit.Because the exclusion of a few individuals from a proposed bargaining unit can dictate the results of a union election, the issue of who is a supervisor has been the subject of many legal challenges.

Section 2(11) of the NLRA defines "supervisor" as:

[A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to 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.

29 U.S.C. § 152(11).Thus, an individual is considered a supervisor, if he/she has the authority to exercise (or effectively recommend the exercise of) at least one of these 12 functions and the exercise of this authority requires the use of independent judgment and is held in the interest of the employer.In 2003, the NLRB called for briefs by interested parties to address the meaning of "assign," "responsibly to direct," and "independent judgment" within the context of Section 2(11).

The question of supervisory status has been most heavily litigated in the healthcare industry, where the NLRB has been reluctant to find that nurses qualify as supervisors under the NLRA.The NLRB's last attempt at guidelines for determining who is a supervisor received harsh criticism from the U.S. Supreme Court in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001).In that decision, the Supreme Court expressly rejected the NLRB's independent judgment test.That test, which applied specifically to nurses, reasoned that the direction of less skilled employees to deliver services involved ordinary professional or technical judgment and thus, did not constitute the use of

independent judgment.In rejecting this test, the Supreme Court admonished that it is the "degree" of discretion involved in decision making, not the "kind of" discretion, that determines the existence of independent judgment under Section 2(11).

In response to instructions from the Supreme Court in *Kentucky River*, the NLRB refined the analysis for assessing supervisory status and adopted definitions for the terms "assign," "responsibly to direct," and "independent judgment" as they are used in Section 2(11) of the NLRA.The dissenting Members of the NLRB, Wilma B. Liebman and Dennis P. Walsh, disagreed with the definitions of the terms "assign" and "responsibly to direct."

Assign

The NLRB defined "assign" as the "act of 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."The NLRB also clarified that "assign""refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task."As an example in the health care setting, the NLRB explained that the designation of an LPN as the person who will regularly administer medications to a patient or a group of patients is an assignment, while ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment.

Responsibly to Direct

The phrase "responsibly to direct" was added by Congress to the definition of supervisor to ensure that the exemption encompassed individuals who exercise basic supervision over the work of other employees, but lack the authority or opportunity to carry out the other statutory supervisory functions enumerated in Section 2(11) of the NLRA.

In *Oakwood Healthcare*, the NLRB defined the phrase "responsibly to direct" with the following explanation: "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."The NLRB further explained that "responsible" direction involved a three-prong finding of accountability.The putative supervisor must have the authority to direct the work and the authority to take corrective action, if necessary, and there must be a prospect of adverse consequences for the putative supervisor should the employees under his/her direction not perform.

Independent Judgment

Taking the cue from the Supreme Court in *Kentucky River*

, the NLRB interpreted "independent judgment" irrespective of the Section 2(11) supervisory term implicated and without regard to the kind of discretion (professional, technical or otherwise) exercised.

The NLRB broke down the definition of "independent judgment" into two concepts.First, to be independent, the "individual must at minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data."Thus, a judgment that 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" is not sufficiently independent.Second, the judgment must "involve a degree of discretion that arises above the ‘routine or clerical.'"

Application of Oakwood Healthcare

The NLRB applied the guidelines to 12 permanent charge nurses and to the rotating charge nurses at Oakwood Heritage Hospital, an acute care hospital.The NLRB found that the permanent charge nurses assigned nursing personnel to specific patients to provide care during their shift.The NLRB also found that the employer met its burden to show that these charge nurses exercised independent judgment in making these assignments.On the other hand, the NLRB determined that the employer did not meet its burden of establishing that the rotating charge nurses exercised supervisory authority for a "substantial" part of their work time.Thus, the NLRB held that the permanent charge nurses were supervisors, while the rotating charge nurses were not. The dissenting Members disagreed with the determination that the permanent charge nurses exercised supervisory authority in assigning other employees.

The NLRB applied the *Oakwood Healthcare* guidelines for supervisory status in *Golden Crest Healthcare* (charge nurses at nursing home) and *Croft Metals* (lead persons at a manufacturing plant). In both of these decisions, the NLRB found that the individuals at issue were employees, not supervisors, under the NLRA.

The Impact of Oakwood Healthcare

Unions have condemned the *Oakwood Healthcare* guidelines and claim to be planning demonstrations to protest the decision and preparing legislation to overturn the decision.The impact of *Oakwood Healthcare* on union organizing efforts and the potential for such efforts is anticipated to be significant, especially in the healthcare industry.Employers should undertake an examination of the delegation and use of supervisory authority now, before uncovering evidence of a union organizing campaign. *Oakwood Healthcare* provides a blueprint for evaluating your workplace and buttressing supervisory authority.Employers with existing bargaining units which include personnel falling within the revised supervisor definition may be able to challenge the composition of the bargaining unit through NLRB proceedings or wait to address the issue during their next round of collective

bargaining negotiations.In all cases, however, Employers should reexamine their supervisory structure to understand and prepare for the impact of the *Oakwood Healthcare* decision.

To learn more about supervisory status issues and implications, please contact one of the members of our Labor and Employment Practice Group.

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