

eLABORate

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THE NATIONAL LABOR RELATIONS BOARD ISSUES RULING PROVIDING GUIDELINES REGARDING SUPERVISORY STATUS

A major issue in almost any union organizational campaign is whether an employee is a supervisor. The supervisory status of an employee has important implications regarding the National Labor Relation Act (“NLRA”), because supervisors are not protected by the NLRA.

On October 3, 2006, the National Labor Relations Board (“NLRB”) released a 3-2 decision in *Oakwood Healthcare Inc.*, 348 NLRB No. 37, which provided new guidance for determining who is a supervisor. In *Oakwood Healthcare*, the NLRB found that permanent charge nurses were supervisors and therefore, not covered by the NLRA. Additionally, the NLRB found that employees who undertake charge nurse duties on a rotating basis were not supervisors. The NLRB found that the employer’s permanent charge nurses regularly assigned other personnel to specific patients and exercised independent judgment in their duties. Conversely, the rotating charge nurses did not exercise supervisory authority for a substantial part of their time at work.

In *Oakwood Healthcare*, the NLRB issued new interpretations regarding certain criteria defining a supervisor. The NLRA has historically defined a supervisor as an employee who has the authority to perform any of twelve (12) tasks, to perform those tasks in the interest of the employer, and to use independent judgment in the performance of those tasks. The NLRB issued new interpretations regarding the meaning of “assigning” other employees, responsibly “directing”

others, and using “independent judgment.”

The NLRB interpreted the task of “assigning work” 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 to an employee. The NLRB found that choosing the order in which an employee will perform discrete tasks within the assignments (e.g. restocking one item before another item) would not be indicative of exercising the authority to assign.

The NLRB interpreted the task of “responsibly directing work” as requiring the person directing and performing the oversight of an employee to be accountable for the performance of the task by the other employee. Such responsibility and oversight must create some adverse consequence to the one providing the oversight if the task performed by the employee is not performed properly. The NLRB found that “responsible” direction requires a showing that the employer delegated to the supervisor the authority to direct the work and the authority to take corrective actions, if necessary.

With regard to “independent judgment,” the NLRB found that judgment is not independent if it is dictated or controlled by detailed instructions. The NLRB explained that it is of no consequence, whether the instructions are set forth in company policies or

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rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement. The NLRB explained that the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.

The full implication of the NLRB holding in *Oakwood Healthcare* is not certain at this time. Labor advocates argue that this holding has the potential to enable employers to undercut employees' right to select union representation by simply reclassifying employees as supervisors in name only. On the other hand, most management groups do not believe that the holding is as far-reaching as labor and union groups argue. In two other cases released the same day, the NLRB held that charge nurses at a nursing home (*Beverly Enterprises-Minnesota Inc.*) and lead persons at an aluminum and vinyl products manufacturing plant (*Croft Metals, Inc.*) were not supervisors.

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