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eAlert

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NLRB BREAKING NEWS

NLRB ISSUES LANDMARK RULING ESTABLISHING GUIDELINES FOR DETERMINING WHETHER AN EMPLOYEE IS A SUPERVISOR

On October 3, 2006, a divided NLRB issued a landmark decision establishing guidelines for determining whether an employee is a supervisor under the National Labor Relations Act. By a 3-2 majority in *Oakwood Health Care, Inc.*, the Board held that permanent charge nurses employed at an acute care hospital exercised supervisory authority in assigning employees within the meaning of Section 2(11) of the National Labor Relations Act. ([Oakwood Health Care, Inc.](#), 348 NLRB No. 37)

The Board and reviewing courts have struggled for years with the question of whether an employee is a supervisor under the NLRA. This is an important question because supervisors are not bargaining unit members. Section 2(11) defines "supervisor" as:

"any 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."

In *NLRB v. Kentucky River Community Care*, 532 US 706 (2001), the United States Supreme Court instructed the Board to adopt definitions for three terms in Section 2(11): "assign," "responsibly to direct," and "independent judgment". Five years later, in *Oakwood Health Care*, the Board has complied with the Supreme Court's request by adopting definitions for each of these terms.

"Assign"

First, the Board defined "assign" to mean "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime), or giving significant overall duties, i.e., tasks, to an employee."

Further, the Board held that while the assignment of an employee to a certain department, to a certain shift, or to certain significant overall tasks would generally qualify as "assign," choosing the order in which the employee will perform discrete tasks within those assignments would not be indicative of exercising the authority to "assign."

"Responsibly to direct"

Next, the Board defined the phrase "responsibly to direct" to mean that "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." In other words, the Board held that to establish the necessary accountability for purposes of responsible direction, the employer must show that it delegated to the individual the authority to direct the work and the authority to take corrective action, if necessary. In addition, the employer also must show that there is a prospect of adverse consequences for the individual if he or she does not take these steps. As an example, the Board stated that 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.

"Independent judgment"

Finally, the Board held that the term "independent judgment" applies irrespective of the Section 2(11) supervisory function implicated and without regard to whether the judgment is exercised using professional or technical expertise. Thus, the Board held that to exercise "independent judgment," an individual must at a minimum "act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." The Board stated 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. Significantly, the mere existence of company policies does not eliminate independent judgment from decision-making provided that the policies allow for discretionary choices.

The Board's application of these definitions

Applying the new definitions in *Oakwood Health Care*, the Board held that the charge nurses were supervisors within the meaning of Section 2(11). The Board noted that the charge nurses exercised independent judgment in the assignment of patients to other staff and in the assignment of nurses to specific geographic locations within the emergency room.

It is noteworthy that in two other cases decided the same day, the Board reached the opposite conclusion. Based on analysis of the facts in those matters, the Board held that charge nurses in a nursing home and lead persons in a manufacturing facility were not supervisory employees. See *Golden Crest Health Care Center*, 348 NLRB No. 39, and *Croft Metals, Inc.*, 348 NLRB No. 38.

Practical implications

The Board's decisions in these three cases demonstrate that the guidelines established in *Oakwood Health Care* must be applied on a case by case basis. The determination of whether an employee is a supervisor will depend on the facts and circumstances of each case.

Additionally, it worth noting that the *Oakwood Health Care* decision is not likely to affect whether employers or union organizers want an employee to be classified a supervisor and to be outside of the bargaining unit. However, the Board's guidelines are likely to impact the ways in which particular positions are structured and the language of job descriptions and some workplace policies.

Bullard Smith will continue to monitor and report on post *Oakwood Health Care* developments. In addition, please feel free to contact Bullard Smith Jernstedt Wilson with any questions about this decision, the classification of employees as supervisors or non-supervisors, or any other labor, employment and/or benefit matters.

~ADAM S. COLLIER

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