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NLRB Provides New Guidance on Who Is a Supervisor

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On Oct. 3, a split National Labor Relations Board issued a controversial decision on the long contentious issue of who is a "supervisor" under the National Labor Relations Act and, therefore, is ineligible for union representation and collective bargaining. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006). The decision will undoubtedly impact workers in a wide variety of industries.

The NLRB applied the new guidelines in two other decisions issued the same day. A board spokesperson indicated that the NLRB plans to remand approximately 47 pending representation cases to regional directors for reconsideration in light of the new guidelines.

In *Oakwood Healthcare* the union was seeking to organize all registered nurses (RNs) at Oakwood Heritage Hospital in Taylor, Mich. The employer contended that any RN who acted as a "charge nurse" was a statutory supervisor and therefore could not be included in the bargaining unit.

Charge nurses were responsible for overseeing patient care units, assigned other RNs and other employees to patients on their shifts, monitored patients, met with doctors and patients' families, followed up on unusual incidents and earned an additional $1.50 per hour when acting as a charge nurse. Twelve RNs served permanently as charge nurses, while nearly every other RN took turns rotating into a charge nurse position or occasionally served as a charge nurse when permanent charge nurses were off duty or on vacation.

The National Labor Relations Act, 29 U.S.C. § 152(11), defines a supervisor as "any individual having 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 *Oakwood Healthcare*, the NLRB addressed the meaning of the often disputed terms "assign," "responsibly to direct" and "use of independent judgment."

The board first determined that the statutory term "assign" referred to 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 period), or giving significant overall duties, i.e., tasks, to an employee." Thus, "[t]he assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain overall tasks (e.g., restocking shelves)" would meet the definition of "assign" under the act.

On the other hand, the NLRB explained that "choosing the order in which the employee will perform discrete tasks within those assignment (e.g., restocking toasters before coffeemakers)" would not be "assigning" other employees. Thus, an individual who orders another employee to perform a discrete task (e.g., ordering an LPN to administer a sedative to a particular patient) is not "assigning" that employee, whereas scheduling someone to be the person who administers medications generally would be "assigning" that employee.

The NLRB then determined that the statutory terms "responsibly to direct" meant "to be answerable for the discharge of a duty or obligation," and that the focus should be whether the alleged supervisor is "held fully accountable and responsible for the performance and work product of the employees" he or she directs.

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Thus, the term "responsibly to direct" encompassed two distinct and separate factors:

1. The employer must have delegated to the individual the authority to direct the work and the authority to take corrective action, if necessary, to ensure the completion of the work.
2. The person directing the other employee must be accountable for the performance of the task by the other, such that some adverse consequence might befall the one providing the direction if the tasks are not performed properly.

Lastly, the NLRB addressed the meaning of the statutory terms "use of independent judgment." As a starting point, the board stated that "to exercise 'independent judgment' an individual must at

minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Judgment would not be "independent" if it were dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority or the provisions of a collective-bargaining agreement.

However, if company policies or rules allowed for discretionary choices, then the mere existence of a policy would not preclude a finding that the judgment was "independent." Decisions of a "routine or clerical nature," such as when there is only one obvious choice or when assignments are made solely on the basis of equalizing workloads, do not meet the definition of "independent judgment."

The NLRB then applied these new guidelines to determine whether the disputed employees in *Oakwood Healthcare* were supervisors under the act. The board concluded that the 12 permanent charge nurses were "supervisors" under the act. The board found that the charge nurses did not "responsibly direct" other employees because the employer did not hold the charge nurses accountable for other employees' failures to perform their tasks.

However, the NLRB determined that the charge nurses had the authority to "assign" other nurses to specific patients and, in that role, exercised "independent judgment" in matching nurses' skills to patients' needs. Although part of the charge nurses' assignments involved balancing workloads among other nurses, the NLRB held that this balancing did not merely include assessing the quantity of work (which would have made it merely "routine or clerical in nature") but also assessing the relative difficulty of the work involved and thus required the use of "independent judgment."

The NLRB distinguished between the 12 permanent charge nurses who assigned other employees to patients and charge nurses assigned to the emergency room who assigned other employees to geographic locations rather than to specific patients. While the emergency room charge nurses "assigned" other employees, they did not use "independent judgment" because they did not consider either patients' needs or nurses' skills in making those geographic assignments. Thus, the emergency room charge nurses were not "supervisors" under the act.

The NLRB also found that the rotating charge nurses were not "supervisors" because there was no established pattern or predictable schedule for when those RNs would serve as charge nurses. While the NLRB did not appear to consider the amount of time each rotating charge nurse spent as a charge nurse, focusing solely on the "established pattern or schedule" to decide supervisory status, the board reaffirmed established precedent that employees could be considered statutory supervisors even if they spent only 10 to 15 percent of their total work time in a supervisory role.

Two members joined in a strong dissent to the *Oakwood Healthcare* decision, arguing that none of the RNs were statutory supervisors and predicting that the majority's opinion could result in a "rude shock to nurses and other workers who for decades have been effectively protected by the National Labor Relations Act, but who now may find themselves treated, for labor-law purposes, as members of management, with no right to pursue collective bargaining or engage in other concerted activity in the workplace."

This prediction was not borne out in the NLRB's application of the *Oakwood Healthcare* guidelines to two other cases on the same day. In *Beverly Enterprises-Minn., Inc. d/b/a Golden Crest Healthcare*, 348 NLRB No. 39 (Sept. 29, 2006), the board concluded that charge nurses were not supervisors. Unlike the charge nurses in *Oakwood Healthcare*, the charge nurses in Golden Crest could not require, but only request, other employees to perform tasks and therefore did not "assign" other employees.

Further, although the charge nurses could shift section assignments, these decisions were based solely upon balancing workloads and did not involve a balancing of patients' needs and nurses' skills, thus they did not exercise "independent judgment."

Lastly, while the charge nurses had the authority to "direct" other employees in their tasks, they had no accountability for the performance of other employees, thus they did not "responsibly direct" those employees.

Similarly, in *Croft Metals, Inc.*, 348 NLRB No. 38 (Sept. 29, 2006), the NLRB held that the employer's lead persons were not "supervisors." First, the board rejected the employer's assertion that the lead persons "effectively recommended" hiring, discipline, discharge and evaluation of employees because the employer did not place any special weight on the recommendations of lead persons and independently investigated each incident where a lead person recommended such action.

The NLRB also rejected the employer's assertion that lead persons "assigned" employees to tasks because most employees performed the same task or job every day, and while a lead person could occasionally switch tasks among employees, this was not a common occurrence and did not involve the use of "independent judgment."

Lastly, while recognizing that lead persons had the authority to "direct" other employees in their tasks and were held accountable for their failure to perform those tasks, making such direction "responsible," the board found that such direction was based upon following pre-established schedules and loading patterns, making it merely "routine or clerical in nature" and not the exercise of "independent judgment."

Union leaders have labeled the NLRB's decision in *Oakwood Healthcare* a blow against union organization and claimed the decision welcomes employers to strip millions of workers of their right to have a union by reclassifying them as supervisors in name only. Time will tell if predicted union efforts to lobby Congress to enact legislation that would overturn the *Oakwood Healthcare* decision are successful. In the meantime, the decision in *Oakwood Healthcare* gives employers, employees and unions greater guidance in determining who is a supervisor under the act.

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