

**October, 2006****National Labor Relations Board Clarifies Standard  
for Determining “Supervisory Status”**

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The National Labor Relations Act (Act) distinguishes between “supervisors” and “employees” and the distinction is an important one for all employers, whether unionized or not. The right to engage in concerted and protected activities or to form a union is guaranteed for “employees.” No such guarantee exists for “supervisors” who are instead tasked with the responsibility of “asserting the interests of management - disregarding, if necessary, [the] employees’ contrary interests.”

Section 2(11) of the Act defines a “supervisor” as any individual who has the authority to “*hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or to effectively 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.* An individual who exercises even one of the twelve enumerated supervisory functions and does so in a way that is neither routine nor clerical in nature will be deemed a “supervisor.”

While ten of the enumerated functions are easily recognized, two of them – “assign” and “responsibility to direct [employees]” – have continued to generate confusing, inconsistent results from the Board and the courts. So, too, have the words “independent judgment,” particularly in the context of individuals utilizing professional and technical expertise.

On September 29, 2006, the Board issued a decision by a narrow 3-2 vote that found permanent charge nurses employed at an acute care hospital are supervisors under the Act. *Oakwood Healthcare, Inc.* In so doing, it clarified the words “assign”, “reasonably to direct” and “independent judgment.”

### Assignment

The authority to “assign” will henceforth be found where the alleged supervisor (1) designates an employee to a place (such as a location, department or wing); (2) appoints an employee to a time (such as a shift or overtime period); or (3) designates significant overall duties to an employee (as opposed to an ad hoc instruction to perform a particular discreet task.) A connection between an assignment and the employee’s basic terms and conditions of employment, like the authority to assign more or less desirable tasks, is no longer a critical factor in the analysis. Thus, there is no further need, at least in the majority’s view, for a showing that the putative supervisor must be able to determine the basic terms and conditions of an employee’s job.

### Responsible Direction

If a person on the shop floor has employees working under him/her, and if that person decides what job shall be undertaken next or who shall do it, that person will be deemed a supervisor, provided that the direction he/she gives is both “responsible” and carried out with “independent judgment.” In determining whether “direction” in a particular case is “responsible,” the focus is on whether the alleged supervisor is held accountable for the performance and work product of the employees. Accountability for purposes of responsible direction will now be found when it is shown that the employer has not only delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, but that there is also a prospect of adverse consequences for the alleged supervisor if he/she does not exercise this responsibility.

### Independent Judgment

The existence of discretion has always been a focal point in an “independent judgment” analysis. However, the kind of discretion – whether professional, technical or otherwise – has oftentimes controlled the result before the Board. For example, even where a Section 2(11) function involved a substantial exercise of discretion, no independent judgment was found if the judgment was of a particular kind, namely, “ordinary professional or technical judgment in directing less-skilled employees to deliver services.”

Five years ago the U.S. Supreme Court criticized the “kind of discretion” analysis, suggesting that the degree of discretion possessed and exercised by the alleged supervisor was the appropriate inquiry. *NLRB v. Kentucky River Community Care*. Consistent with the Court’s analysis, the Board has now adopted an interpretation of the term “independent judgment” that applies irrespective of the supervisory function implicated,

and without regard to whether the judgment is exercised using professional or technical expertise.

Independent judgment will now be found where the decision-making is free of control by detailed instructions, whether written (such as in the form of a company policy or a collective bargaining agreement) or verbal. Moreover, even where there is a company policy addressing a particular subject or issue, freedom from control will nevertheless be found if the policy simply recites factors that the alleged supervisor might consider when exercising his/her decision-making.<sup>1</sup>

### Implications and Practical Considerations

Despite organized labor's negative rhetoric and dire forecast that the *Oakwood* decision will provide employers with a road map for denying worker rights, the decision is not likely to have a dramatic impact on most workers. Four groups of individuals were scrutinized in the three decisions and only one group was found to be supervisory. Nevertheless, the decisions will likely make it easier for employers to establish the supervisory status of employees.

Employers with unionized facilities should reexamine whether certain job classifications – currently part of the represented bargaining unit – should now be considered excluded supervisor positions. However, it is important to exercise caution before actually applying the revised guidelines to individuals in existing bargaining units, as there are significant legal restrictions as to when and how the scope of a bargaining unit may be changed, especially during the term of a labor agreement. Where appropriate, employers may wish to consider filing unit clarification petitions with the Board asking the agency to declare certain members of the bargaining unit to be a “supervisor” and thereby excluded from the represented unit.

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<sup>1</sup> Applying the definitions articulated in the *Oakwood* decision, a Board panel concluded in a companion case that, unlike *Oakwood's* permanent charge nurses, the charge nurses' assignments to nursing assistants were little more than requests and that any mandates communicated by the charge nurses originated from the charge nurses' supervisor. *Golden Crest Healthcare*. In a second companion case, the Board concluded that while the alleged supervisors possessed a “responsibility to direct” by virtue of the accountability factor, the direction to putative subordinates involved a degree of discretion that was routine and clerical in nature – e.g., in loading trucks the alleged supervisors simply followed a pre-established delivery schedule, and production and maintenance employees, once trained in their positions, carried out repetitive tasks on a regular basis with only minimal guidance. *Croft Metals, Inc.*

For some unionized employers a more liberal definition of supervisor could complicate the status of “lead persons.” Many employers have reduced the head count of true supervisors and relied on bargaining unit members working as “leads” to manage work areas while continuing to perform bargaining unit work. If these individuals are now eliminated from the unit they may lose their right to perform bargaining unit work by operation of other contract language. In those contracts where the company and union have struck this balance and are satisfied with the status quo, it is unlikely that either party will push the issue of the new supervisory standard.

Employers with non-union facilities should carefully evaluate the authority and responsibilities of all employees whom the employers regard as supervisors. It is particularly advisable to do so well before any union organizing occurs so that, if necessary, particular responsibilities and position descriptions can be adjusted or clarified, thereby reducing, if not eliminating later issues in representation election proceedings as to whether particular employees exercise supervisory authority. In any representation election determinations as to supervisor status have significant legal and practical implications. If a lead person is a statutory supervisor that individual can bind the company with an illegal threat (“if the union wins, the company will close the plant”) which if uttered by a non-supervisor would be harmless rhetoric. Further, it is possible that unions may rely on the more liberal supervisory standards to remove leads, who often support the company, from being able to vote in an election.

Finally, the potential impact of the Board’s ruling in areas outside of the federal labor laws should be considered by all employers, whether unionized or union-free. For example, while Board decisions may not serve as legal precedent in a Title VII case, the analysis employed by the courts in employment discrimination cases in determining whether an employee is a supervisor or agent for purposes of employer liability purposes is oftentimes patterned after the Board approach. Similarly, supervisory status is an important consideration when deciding who should be included in management training sessions addressing the law of equal employment opportunity, positive employee relations and the maintenance of an issue-free workplace.

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If you have any questions about the issues raised by this e-alert, please feel free to contact Thomas W. Mackenzie or Donald J. Cairns at (414) 273-3910 or by e-mail at [tmackenzie@lindner-marsack.com](mailto:tmackenzie@lindner-marsack.com) or [dcairns@lindner-marsack.com](mailto:dcairns@lindner-marsack.com).

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