

## *The Supervisor Bombshell*

In a decision much awaited by employers and unions alike, the five member National Labor Relations Board (“NLRB”), in a 3-2 “landmark ruling” made public on September 29, 2006, broadened the analysis of who a “supervisor” is within the meaning of the National Labor Relations Act (“NLRA”).

The decision is Oakwood Healthcare, Inc., 348 N.L.R.B. No. 37. Under the NLRA, a supervisor is defined 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.”

An individual need only perform one of the twelve tasks listed in this definition to qualify as a supervisor. Nonetheless, up to now, the NLRB interpreted the definition narrowly. In doing so, it received criticism from the Federal Courts which review NLRB decisions.

In Oakwood, the Board expanded its view of supervisory status as applied to individuals who “assign” or “responsibly direct” other employees. It held that such individuals are supervisors if they use

“independent judgment” and spend a regular and substantial portion of their work time performing supervisory tasks. While the Board did not adopt a strict numerical definition of substantiality, it noted that supervisory status has been found where individuals perform supervisory tasks at least 10% to 15% of their work time.

In reaching the decision, the Board followed the Supreme Court’s analysis in N.L.R.B. v. Kentucky River Community Care, Inc., 532 U.S. 706 (2000). In the Kentucky River case, the Supreme Court reversed the NLRB which had held that registered nurses do not use “independent judgment” when they assign or direct the activities of less-skilled employees because they are then merely exercising “ordinary professional or technical judgment”. That no longer is the law.

In Oakwood, the NLRB held that registered nurses who regularly perform the duties of a “charge nurse” are supervisors. That is a major departure from prior Board rulings. Up to now, charge nurses have routinely been included in RN bargaining units.

### **WHAT THE DECISION MEANS TO YOU**

Under the NLRA, supervisors may not organize to form a union or become part of a union bargaining unit of non-supervisory employees. Nor may supervisors assist a union in attempting to organize non-supervisory employees. In short, whether they like it or not, supervisors are deemed to be part of management for purposes of the NLRA.

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In a non-union setting, the more supervisors you have, the better off you will be. Excluding employees from a voting/bargaining unit on the basis they are supervisors enables the employer to use the individuals during a union-organizing drive to convey the employer's message as to why the voting/bargaining unit employees should reject the union.

In a union setting, during a strike or other interference with work, an employer may properly use supervisors and other members of management to perform the work the striking employees would normally be doing.

In a union setting, an employer may now file a unit clarification petition with the NLRB to pull out of a union bargaining unit those employees now in it whom the Board would now deem to be supervisors under the new guidelines. This would be particularly pertinent in the healthcare, construction and manufacturing sectors.

### THE BOMBSHELL

The reaction of unions to the Oakwood decision was swift and bombastic.

AFL-CIO President John Sweeney said: "the decision welcomes employers to strip millions of workers of their rights to have a union by reclassifying them as supervisors in name only." Candice Owley of the American Federation of Teachers said the ruling provided a "road map for excluding workers from a union" and that the "Bush-dominated Board is giving employers the blueprint to make workers supervisory." AFL-CIO Organizing Director Stewart Acuff stated that affiliates of the federation will be mobilizing and demonstrating across America over the next week to 10 days.

Stephen Bokat of the National Chamber Litigation Center in Washington, D.C., got it right when he noted:

"eliminating even a small number of potential [bargaining/voting] unit members in an organizing effort could have a dramatic effect on a union election, especially if those supervisors have significant influence on others in the unit."

In those cases, Mr. Bokat added:

"it would be worthwhile to bring in the lawyers and sort out who is a supervisor."

### PUNCHLINE

It likely would be a good idea to follow Mr. Bokat's advice. Who is or who is not (and perhaps could be) a supervisor is a fact-driven analysis under the NLRB's new guidelines.

In addition, although the United States Department of Labor's 2004 regulations interpreting who is an exempt executive employee under the Fair Labor Standards Act (the Federal wage and hour law) are somewhat different and seemingly more restrictive than the definition of a supervisor under the NLRA, the NLRB's new guidelines in broadening the scope of the NLRA definition may be persuasive in tipping the scale in a close case under the Fair Labor Standards Act.

We would welcome the opportunity to assist your organization in making the fact-driven analysis that both the NLRA and the Fair Labor Standards Act require.