

### NATIONAL LABOR RELATIONS BOARD'S RECENT DECISION MAY MEAN MORE "SUPERVISORS" FOR HOSPITALS AND OTHER EMPLOYERS

In the recent case of *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006), the National Labor Relations Board clarified who is a "supervisor" under the National Labor Relations Act (NLRA). The Board's 3-2 decision effectively reclassifies some workers as "supervisors" and, therefore, places them beyond the protections and rights of "employees" under federal labor law. While some critics contend that the ruling disenfranchises workers, businesses generally view the decision as a reasonable clarification of the definition of "supervisor." Either way, the ruling will impact many industries and employers.

#### Who is a "Supervisor"?

The NLRA provides employees with certain rights, including the right to form or join a labor organization, to bargain collectively with an employer, to engage in other concerted activities for the purpose of collective bargaining, and the right to refrain from doing any of those things. Whether an individual is an "employee" or a "supervisor" is important, because "supervisors" generally do not have these rights.

Section 2(11) of the NLRA defines a supervisor as:

[A]ny 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.

Under this definition, an individual is a supervisor if:

- he or she holds the authority to engage in any one of the 12 supervisory functions listed in Section 2(11) above;
- the exercise of such authority is not merely routine or clerical, but requires the use of independent judgment; and
- the authority is held in the interest of the employer.

#### Charge Nurses

In *Oakwood Healthcare*, the employer had about 181 staff RNs who provided direct care to patients in its acute care facility. Twelve RNs at the facility served as permanent charge nurses; the others took turns rotating in the charge nurse position.

Applying the Section 2(11) definition of supervisor to the charge nurses at the Oakwood Healthcare facility, the Board concluded that only the facility's 12 permanent charge nurses – not the rotating charge nurses – were supervisors under the NLRA, excluding them from the union's unit of registered nurses at the facility. In deciding that the permanent charge nurses met the definition of a supervisor, the Board considered the charge nurses' responsibilities, which included overseeing patient care units, assigning work and schedules to other RNs, and receiving additional pay for their duties. The Board stated that "if an individual has authority to exercise at least one of the 12 functions listed in Section 2(11) of the Act, they are considered a supervisor, provided that the authority is held in the interest of the employer and with independent judgment."

### **To "Assign," "Responsibly Direct," and Use "Independent Judgment"**

To be a supervisor, an individual must have the authority to assign and responsibly direct others, while using independent judgment when making decisions, and must perform at least one other function of a supervisor in Section 2(11).

The Board defined "assign" as 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. In the healthcare setting, the Board stated that "a charge nurse designating a LPN to be the person who will regularly administer medications to a patient or a group of patients, or giving that overall duty to the LPN is an assignment. However, on the other hand, a charge nurse ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment."

To be "responsible," according to the Board, "the person directing and performing the oversight of an 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." Thus, to establish accountability for purposes of responsible direction, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary, and the prospect of adverse consequences for the putative supervisor if he does not take these steps."

The Board adopted an interpretation of "independent judgment" that "applies irrespective of the Section 2(11) supervisory functions and without regard to whether the judgment is exercised using professional or technical expertise." The Board concluded that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set by company policies or rules or instructions of a higher authority, or provisions of a collective bargaining agreement." For example, a charge nurse's decision to staff a shift with a certain number of nurses is not an independent decision if the decision is determined by a fixed nurse-to-patient ratio. However, the Board noted that "the existence of company policies do not eliminate independent judgment from decision-making if the polices allow for discretionary choices."

## Impact of the Expanded Definition of “Supervisor”

Although the Board’s decision in *Oakwood Healthcare* dealt with charge nurses in the healthcare industry, its expanded definition of “supervisor” will likely impact many industries. The Board’s guidelines should prompt employers on a case-by-case basis to reevaluate and scrutinize whether a particular individual is a supervisor for purposes of the NLRA. When determining who is a supervisor, employers should consider whether an individual has the authority to make assignments and independent discretion with regard to the performance of supervisory functions. Lastly, employers should also consider whether the individual is held accountable for the direction provided to other employees.

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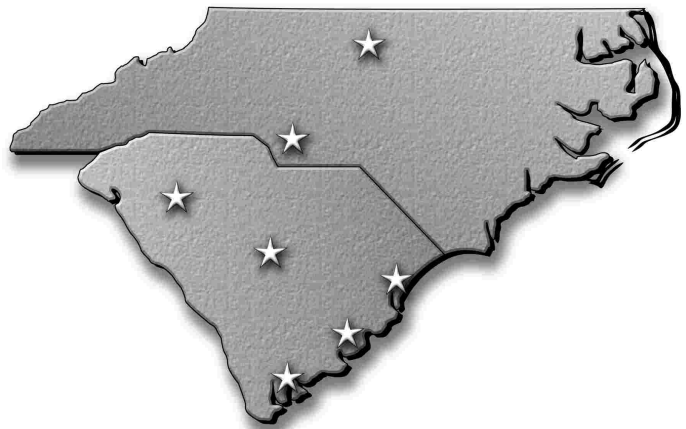
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