



NLRB Rulings Regarding Supervisors Provide Clarity But May Spark Controversy

Insights

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The National Labor Relations Board (NLRB) has issued three highly anticipated decisions addressing which employees are considered to be supervisors and therefore ineligible for union membership under the law. Despite a lot of dire warnings from union leaders, the so-called *Kentucky River* decisions appear unlikely to create major changes in determining who is eligible for union membership and who is not.

They revisit the Board's analysis, which the United States Supreme Court found to be flawed when it decided *NLRB v. Kentucky River Community Care* in 2001. These decisions shed some additional light on what has historically been a very fact-specific inquiry. They will be of help to employers with employees that traditionally fall on the borderline between supervisors and regular employees, such as those in healthcare and the construction industries. Nevertheless we anticipate a continuing public debate.

Independent Judgment

The Board decided the leading case, *Oakwood Healthcare, Inc.*, by just a 3-2 margin. Oakwood is an acute care hospital employing both "permanent" and rotating charge nurses. As these cases illustrate, charge nurses' responsibilities may vary considerably. However, the term generally refers to the lead nurse in a department during a given shift. Charge nurses normally report to a unit manager. A "permanent" charge nurse carries these responsibilities on a full-time basis. A staff nurses who assumes charge responsibilities occasionally may be referred to as "rotating" charge nurse.

As part of their regular duties, the Oakwood's permanent charge nurses assigned other nursing personnel to specific patients. These charge nurses exercised independent judgment in making patient assignments and were expected to direct employees' activities and take corrective action as necessary.

The charge nurses were also subject to adverse consequences arising from their work performance. Therefore, the Board concluded that the *permanent* charge nurses were supervisors and not eligible for union membership. On the other hand, Oakwood failed to establish that *rotating* charge nurses exercised such authority during a substantial part of their work time. Thus, they are not considered supervisors and remain eligible for union membership.

Explaining what it means to exercise "independent judgment," the Board said the purported supervisor's judgment must rise above "routine or clerical" and it must not be effectively controlled by another authority, such as a detailed policy or regulation. Also, the Board explained, the authority to "assign" means more than giving occasional instruction to perform a specific task. It means to designate significant overall duties to an employee.

Why Are Supervisors Ineligible For Union Membership?

In 1947, Congress amended the National Labor Relations Act (NLRA) specifically to exclude supervisors from the definition of employees who are eligible to join a union. This was largely to protect unions from the interests and influences of having supervisors inside their organizations. It also protected employers by assuring that their agents remained loyal strictly to the company. But determining who qualifies as a supervisor has been and continues to be a highly fact-specific inquiry. The Board's most recent decisions do not change this.

Historically, charge nurses, straw bosses, lead employees and others who exercised relatively minor supervisory authority were not considered supervisors and thus have been eligible to join a union. To be a supervisor, and therefore ineligible for union membership, an individual must engage in certain activities during a substantial part of their work time.

In addition to certain obvious attributes such as the authority to hire or fire, supervisory activities include the ability to "assign work" and "responsibly to direct" the work of others so long as they exercise "independent judgment" in carrying out their duties in the interests of the employer. The Board's most recent decisions merely refine the definitions of these key terms.

Unions have seized upon these cases to assert that the NLRB was threatening to strip millions of workers of their "democratic right to join a union." These highly-anticipated decisions are sure to generate considerable reaction from union leaders who have jumped at every opportunity to bring these cases to the attention of nurses and others.

Companion Decisions Demonstrate Fact-Specific Nature of This Analysis

Significantly, in *Golden Crest Healthcare Center*, the Board applied the same analysis adopted in the *Oakwood* case, but concluded that charge nurses at issue in that case were *not* supervisors. Unlike the charge nurses in *Oakwood*, these charge nurses at an 80-bed nursing home were not held accountable for the work of others. Further, they did not have the authority to "assign" or "responsibly direct" other workers.

Finally, in *Croft Metals, Inc.*, the Board used the definitions it established in *Oakwood* to determine that lead persons at a manufacturing facility were not supervisors for the purposes of the NLRA. The lead persons managed their teams, corrected improper performance and could shift employees around, but their exercise of judgment was limited by pre-established guidelines and they did not "assign" work to their teams.

These decisions, particularly the application of the Board's definitions to specific facts, provide some guidance concerning who will be considered a supervisor and who will not. The answers will never be cut and dry however, because there is no mechanical rule to apply. Before making any decision as to whether a particular employee is or is not a supervisor at your place of business, you should consult with counsel. Considering the detailed nature of the analysis and the politics of Big Labor the controversy is probably far from over.

This Labor Alert is intended to provide a summary of the important points in three cases. It is not intended to be, and should not be considered, as legal advice for any particular situation. For more information contact your regular F&P lawyer.