


NEED TO KNOW
**Is Your "Supervisor" Really
A Supervisor?**

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The National Labor Relations Board has issued a long-awaited decision refining and clarifying the definition of "supervisor" under the National Labor Relations Act. Using principles from NLRB v. Kentucky River Community Care, in Oakwood Healthcare, Inc., the Board explained what it means to "assign" to "responsibly direct" and to exercise "independent judgment" under the National Labor Relations Act which sets forth the criteria for determining if someone is a supervisor and thus not eligible to be in a union. This decision was described by current Board Members Liebman and Walsh as "among the most important in the board's history."

The importance of the decision was indeed made evident by the immediate and partisan (sometimes emotional) reaction from union and management supporters. The AFL-CIO called the "Republican-Controlled NLRB Decision a Disgrace," vowing to "pursue political action to expand, rather than restrict, the rights of American employees." The President of the United Steelworkers, Leo Gerard, said that "[t]he collective bargaining rights of millions of workers, who up till now were assumed by all to have the right to form a union, are now in jeopardy." The U.S. Chamber of Commerce applauded the decision with one of its representatives stating that "[t]he board has given a clear, reasonable, and fair standard employers can apply in determining who is and who is not a supervisor." William Gould, former Board member and current professor at Stanford Law School, stated that the decision is "a radical reinterpretation of the statute" that is "flawed and erroneous."

Commenting on the impact of the decision for the American workforce, the two-member dissent in Oakwood projected that, by 2012, the decision could touch "almost 34 million" workers or "23.3 percent of the workforce." Standing in stark contrast, John Raudabaugh, former Board member, feels many are over-estimating the potential impact of the decision, stating that "I see isolated thunderstorms, but not a tsunami."

The most obvious and basic questions as a result of this case are: how should workers be treated who were statutory "employees" before the decision, but who are now arguably statutory "supervisors" (or post-decision "supervisors")? Should employers, for instance, continue to deduct union dues from the paychecks of these post-decision "supervisors"? Can employers lawfully and unilaterally change the terms of post-decision supervisors? Do post-decision supervisors have the same protections as statutory employees to engage in union activities? Can employers rely on the Oakwood decision to modify an employee's job in an effort to ensure that the employee is a statutory supervisor? Must employers bargain with the union before making an employee a supervisor?

These are all important and complex questions that the Oakwood decision unfortunately did not clearly answer. Existing Board law may, nonetheless, provide some guidance. Below is a non-exhaustive list of Board precedent that may help employers answer some of these questions. This should not, however, be a substitute for the sound legal advice from inside or outside counsel.

- Employers are generally not required to bargain with the union prior to making a bargaining unit employee a statutory supervisor whether through a promotion or

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modification of their duties. St. Louis Telephone Employees Association, 273 NLRB 625 (1984). There is an obligation to bargain, however, when the newly minted "supervisor" continues to do bargaining unit work. National Association of Government Employees (International Brotherhood of Police Officers), 327 NLRB 676 (1999).

- Employers that make employees statutory supervisors are not required to apply the terms of the existing collective bargaining agreement to these newly minted "supervisors." St. Louis Telephone Employees Association, 273 NLRB 625 (1984). This would thus allow an employer to unilaterally cease deducting dues from their paycheck. Id. Employers may, however, continue, on a purely voluntary basis, applying the terms of the existing collective bargaining agreement to these newly created supervisors. See 28 U.S.C. § 145(a).
- Employers may lawfully discipline or discharge a supervisor for engaging in union activity, except when the discipline or discharge directly interferes with the rights of statutory employees. Miller Electric Co., 301 NLRB 294 (1991).
- Employers may not change the job duties of an employee if the purpose is to either strip them of their Section 7 rights or dilute the union's support. American Tissue Corp., 336 NLRB 435 (2001); AMFM of Summers County, 315 NLRB 727 (1994); Regency Manor Nursing Home, 275 NLRB 261 (1985).

This decision clearly has significant implications for all employers. The time to make this determination is now versus once a union is claiming someone you consider to be a supervisor to be in the bargaining unit.

¹Michael W. Hawkins argued and won the case of *NLRB v. Kentucky River Community Care, Inc.* before the Supreme Court of the United States.