Labor and Employment Corner

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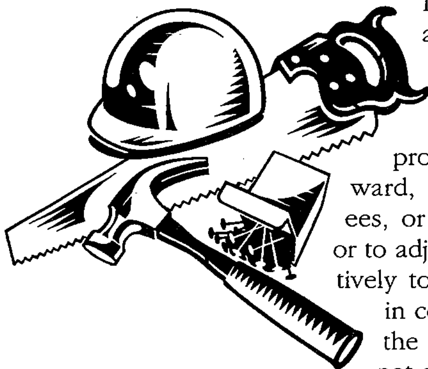
The National Labor Relations Board Defines Who Is, and Is Not, a "Supervisor"

It is always helpful to know the meaning of words. Being aware of a word's meaning helps individuals understand their legal relationships with other parties. Most important, when it comes to legislation, the meaning of words helps parties avoid potential liability. Such is the case with the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq.

For many years, the NLRA has been interpreted to mean that employers are not obligated to recognize an individual as part of a collective bargaining unit if that individual is defined as a "supervisor." However, the failure to classify such an employee as a "supervisor," or the refusal to recognize a collective bargaining unit because it contains an alleged "supervisor," can lead to liability for the employer. The question courts have struggled with is: How should the word "supervisor" be defined for purposes of the NLRA?

Webster's Dictionary defines a "supervisor" as "a person who supervises workers or the work done by others." The word derives from the verb "supervise," which means "to watch over and direct (a process, work, workers, etc.); oversee; superintend." The verb "supervise" itself stems from the prefix "super-" meaning "above, beyond" and the Latin word "videre" meaning "to see."

Congress defined "supervisor" as used in the NLRA as follows:



> The term "supervisor" means 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.[1]

The Supreme Court provided guidance on how to define the word and established the following three-pronged test for determining if an employee is a "supervisor":

- The individual has the authority to engage in one of the 12 supervisory functions listed in the statute.
- The individual can exercise such authority with independent judgment.
- The individual holds such authority in the interest of the employer.[2]

Accordingly, lawyers, employers, and employees were left to their own devices to come up with their respective definitions of the terms and phrases contained in the above statute and to determine what actually constitutes a "supervisor." In turn, lawyers, employers, and employees were forced to speculate which employees could, and could not, be excluded from both a collective bargaining unit and the overall protections provided by the NLRA.[3]

On Sept. 29, 2006, in *Oakwood Healthcare Inc.*,[4] the National Labor Relations Board (NLRB) sought to clarify this conundrum pursuant to the Supreme Court's decision in *NLRB v. Kentucky River Community Care Inc.*[5] The NLRB set forth definitions for the terms "assign," "responsibly to direct," and "independent judgment." Notwithstanding the specific facts and holding of *Oakwood Healthcare*, the impact of the ruling lies most substantially in the fact that it established these definitional standards.

First, the NLRB defined the term "assign" as "the act of designating an employee to a place, appointing an employee to a time, or giving significant overall duties to an employee."[6] This definition comports with the commonsense meaning of the term "assign," which, according to *Webster's*, is "to appoint, as to a post or duty." Most important, this definition provides lawyers, employers, and employees guidance as to one of the 12 supervisory functions listed in the NLRA.

Second, the NLRB defined the term "responsibly to direct," a phrase that, unfortunately, lacks a common definition. Therefore, in coming up with a definition, the NLRB looked to legislative history and past court decisions in order to understand its meaning. The board concluded that "responsibly to direct" describes both the authority to direct the work of and to take corrective action against subordinates and the consequence that such an employee is sub-

ject to adverse actions if the employee does not act pursuant to their vested authority.[7]

Finally, the NLRB prescribed a spectrum upon which attorneys, employers, and employees could gauge whether an employee exercises the above responsibilities with "independent judgment." The NLRB stated that a supervisor does not exercise independent judgment if such a judgment is dictated or controlled by company policies or instructions.[8] However, where company policies exist, if the supervisor has discretion to act on such policies, the supervisor still exercises "independent judgment."[9]

By virtue of the above standards, the Supreme Court's three-pronged test is now more clearly defined. An individual is a "supervisor" for purposes of the NLRA if—

- The individual has the authority to engage in one of the 12 supervisory functions listed in the statute, two of which ("assign" and "responsibly to direct") are now clearly defined.
- The individual exercises such authority with independent judgment (that is, his or her decisions are not dictated or controlled by policy, procedure, or supervisors).
- The individual holds such authority in the interest of the employer.

This new understanding is beneficial to lawyers, employers, and employees alike. Lawyers can now effectively address issues with their clients to avoid liability, at least as it pertains to the terms "assign" and "responsibly to direct," two of the 12 terms used by Congress in defining "supervisor." *Oakwood Healthcare* will assist lawyers in fulfilling their obligations to clients by increasing the effectiveness of such advice.

As to employers, the NLRB decision enables them to categorize employees more accurately. For example, if an individual regularly "assigns" work to other employees and does so with independent judgment on behalf of the employer, the individual should be viewed as a "supervisor" and does not need to be recognized as part of a collective bargaining unit.

The NLRB decision also enables employees to determine who to recruit as a member of a potential collective bargaining unit and who should not be included. Employees and union organizers can now more easily make this determination by virtue of the definitions noted above.

Before the NLRB's decision was released, labor unions were clamoring in opposition to what they viewed as a threat to unionization. One pro-union article stated: "Generally, a supervisor is someone who can hire, fire, or discipline other workers."[10] This position, however, ignored the 12 supervisory functions listed in the statute defining "supervisors." Another pro-union organization stated that eight million workers would be adversely affected by the NLRB decision if it "expanded" the definition of "supervise."[11] This claim, however, ignores the need for definitional clarity within the NLRA.

After the announcement of the NLRB's *Oakwood Healthcare* decision, employers and employees lined up to support or oppose the decision. Stephen Bokat, an attorney for the U.S. Chamber of Commerce, commended the decision, saying that it created a "good, clear standard."[12] On the other hand, John Sweeney, president of the AFL-CIO, condemned the decision: "[It] welcomes employers to strip millions of workers of their right to have a union by reclassifying them as 'supervisors' in name only."[13]

In the case of *Oakwood Healthcare*, the National Labor Relations Board has brought lawyers, employers, and employees one step closer to understanding their respective obligations and liabilities under the National Labor Relations Act. **TFL**

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Endnotes

[1]29 U.S.C. § 152(11) (2006).

[2]*NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994); *NLRB v. Kentucky River Community Care Inc.*, 532 U.S. 706, 713 (2001).

[3]*See* 29 U.S.C. § 164(a) ("no employer ... shall be compelled to deem individuals defined ... as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining").

[4]348 N.L.R.B. No. 37 (2006).

[5]532 U.S. 706 (2001).

[6]348 N.L.R.B. No. 37.

[7]348 N.L.R.B. No. 37.

[8]348 N.L.R.B. No. 37.

[9]348 N.L.R.B. No. 37.

[10]Paul Bigman, *Kentucky River Threatens to Swamp Labor*, Dollars & Sense, The Magazine of Economic Justice, www.dollarsandsense.org/archives/2006/0906bigman.html (last viewed Nov. 8, 2006).

[11]Ross Eisenbrey and Lawrence Mishel, *Supervisor in Name Only*, The Economic Policy Institute, Issue Brief #225, www.epinet.org/content.cfm/ib225 (last viewed Nov. 8, 2006).

[12]Will Lester, *NLRB Redraws Union Eligibility*, www.detnews.com/apps/pbcs.dll/article?AID=/20061004/BIZ/610040425/1001 (last viewed, Nov. 8, 2006).

[13]Dale Russakoff, *Some Workers Change Collars*, The Washington Post (Oct. 4, 2006).