NLRB Issues New Guidelines For Determining Supervisory Status Under The National Labor Relations Act

What happened?

Last week, the National Labor Relations Board issued its long-awaited decision setting forth new guidelines for determining who is a “supervisor” under federal labor law.

What does it mean?

The Board’s decision in Oakwood Healthcare, Inc., applies to employers in nearly all industries and is likely to result in the removal of some workers from the protection of the National Labor Relations Act. In addition, the Board’s decision will have a significant impact on employer strategies for collective bargaining and in response to union organizing efforts.
The case before the National Labor Relations Board arose from a dispute regarding whether certain charge nurses employed at an acute care hospital operated by Oakwood Healthcare, Inc. were “supervisors” as defined by the National Labor Relations Act (NLRA). A labor union had petitioned to represent all registered nurses employed at the Oakwood Heritage Hospital, and the hospital sought to exclude its charge nurses on the grounds that they were supervisors, who may not organize for purposes of collective bargaining.

Under the NLRA, a “supervisor” is any individual having the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them or adjust their grievances, or to effectively recommend such action. Further, the individual must exercise independent judgment in the exercise or recommendation of any of the foregoing actions. In its decision, the Board provided new interpretations of what it means (1) to “assign” employees, (2) to “responsibly to direct” employees and (3) to exercise “independent judgment” in assigning or responsibly directing others. These criteria have been the subject of much litigation in recent years, and both the business community and organized labor have hoped the Board’s ruling would provide greater clarity in this area.

In Oakwood Healthcare, Inc., the Board interpreted “assign” as the act of “designating an employee to a place (such as a location, department or wing), appointing an individual to a time (such as a shift or overtime period) or giving significant overall duties, i.e. tasks, to an employee.” In contrast, the board found that an “ad hoc instruction that the employee perform a discrete task” within broader assignments, or to perform one discrete task before another, was not a hallmark of the authority to assign.

The Board then interpreted the term “responsibly to direct,” finding that for direction to be “responsibly,” the individual “directing and performing the oversight of the 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.” The Board emphasized the element of accountability. If the assigned task is not performed properly, there must be a “prospect of adverse consequences” for the supervisor. The employer must have “delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary.”

Finally, the Board adopted an interpretation of the term “independent judgment” that applies regardless of the specific supervisory function implicated or whether the judgment is exercised using professional or technical expertise. There are two aspects to the Board’s interpretation of “independent judgment.” First, judgment is not independent if it is “dictated or controlled by detailed instructions.” Such instructions could be included in company policies, procedures, or rules, the provisions of a collective bargaining agreement or the verbal instructions of a higher authority. However, the mere existence of such rules or policies would not eliminate independent judgment if the individual is allowed to make discretionary choices in the application of those rules or policies. Second, to be independent, the judgment must involve a degree of discretion that rises above the “routine or clerical.” Therefore, if the individual is given discretion under a policy, but the exercise of that discretion involves only making an obvious choice or assigning “on the basis of equalizing workloads,” for example, that would not be viewed as an exercise of independent judgment.

Applying the new guidelines to the case before it, the Board initially found that the charge nurses did not meet the “responsible direction” test under the new guidelines because they were not held accountable for the performance of the tasks they oversaw, and did not have the authority to take corrective action if errors were made. However, the Board went on to find that the permanent charge nurses at the hospital were supervisors for purposes of the Act based on their authority to “assign” staff to particular patients and to specific positions within the emergency room.

Specifically, the Board found that the permanent charge nurses exercised independent judgment in assigning staff insofar as it required them to take into account the levels of skill and specialty of the staff members, the particular needs of the patients and other factors involving a significant degree of discretion. Therefore, the permanent charge nurses were deemed supervisors within the meaning of the Act. In contrast, the Board found that a group of “rotating” charge nurses who acted as charge nurses only sporadically were not supervisors.

While the Board’s decision was immediately criticized by the AFL-CIO as a partisan assault on workers’ rights, it is interesting to note that in two companion cases decided the same day, the Board ruled that, under its new guidelines, charge nurses at a nursing home and lead persons at a manufacturing plant were not supervisors under the Act. The divergent results in these cases underscore that determining an individual’s status under the NLRA will continue to be a highly fact-intensive inquiry. Thus, while the Board may have “moved the line” on supervisory status in a manner which will result in more employees being deemed supervisors, there will continue to be cases close to the line that result in litigation.

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