The NLRB Clarifies and Expands the Definition of a Supervisor

James M. Pender, Esq.
October 2006

Introduction

The National Labor Relations Board (NLRB) issued three major and much-anticipated decisions this month that clarify and expand the test of whether an employee is a “supervisor” under the National Labor Relations Act (NLRA). These decisions may have great significance for private sector employers with regard to employees with supervisory responsibilities because a “supervisor,” as defined by the NLRA, is not eligible to join a union.

The clarification of the supervisor definition was prompted by the United States Supreme Court decision NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001). In Kentucky River, the Court had criticized the Board’s holding that employees exercising discretion regarding professional and technical matters, such as nurses, could not exercise “independent judgment,” one of the factors used by the Board in determining supervisory status. The Court found the Board’s holding on this matter to be unreasonable and contrary to the text of the NLRA.

These newly-issued NLRB decisions, often referred to collectively as the “Kentucky River Trilogy,” are Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006), Golden Crest Healthcare, 348 NLRB No. 39 (2006), and Croft Metals, 348 NLRB No. 38 (2006). In Oakwood Healthcare, the Board defined three key statutory terms that are used in determining whether particular individuals are deemed “supervisors” and thus excluded from the NLRA’s definition of “employee.” In all three cases, the Board applied the new definitions in analyzing whether the employees could properly be excluded from the bargaining units at issue. The Board also held that individuals who relieve supervisors on a sporadic, random, or rotational basis would not qualify as statutory supervisors.

The Board's Revised Supervisor Test

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

[A]ny individuals 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.

In interpreting Section 2(11), the Board has generally held that an employee is a supervisor if he or she has the authority to do any one of the listed functions, provided the exercise of that authority requires the use of independent judgment and is exercised in the interest of the employer.

In Oakwood Healthcare, the lead case in the Kentucky River Trilogy, the Board defines the key Section 2(11) terms “assign,” “responsibly to direct,” and “independent judgment.”

1. **Assign**: To assign involves 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 general, to “assign” refers to the designation of significant overall duties to an employee, not to the discrete instruction to perform a specific task. In the health care setting, the term “assign” would include a charge nurse’s responsibility to assign nurses and aides to particular patients.

2. **Responsibly to Direct**: The term “responsibly to direct” means that the putative supervisor can direct and performs oversight over employees in the performance of tasks. In addition, the supervisor may be subject to “adverse consequences” if he or she fails to direct employees properly. As a result, the Board held that supervisors are not limited to “department heads” because supervisors can be a person on the shop floor with “men under him” who decides what task shall be undertaken next and who should do it.

3. **Independent Judgment**: A supervisor exercises “independent judgment” if he or she exercises judgment in non-routine and non-clerical matters that is free of control by others and not “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” This standard is applied regardless of whether or not professional or technical expertise is instrumental in the judgment, in conformity with the Kentucky River decision.

**Application of the New Test**

In Oakwood Healthcare, the Board held, using the revised supervisor test, that the permanent charge nurses at an acute care hospital were supervisors because they “assigned” work to other nurses using “independent judgment.” On a daily basis, the charge nurses assigned “significant overall duties” to nurses by pairing them with specific patients. The Board concluded that this assignment involved “independent judgment” primarily because it required the charge nurses to assess (1) various patients’ conditions and nursing needs; (2) nurses’ particular skill sets in relation to patients’ conditions and
needs; and (3) the quantity of work that should be assigned to each nurse, based on
patients’ needs and the nurse’s ability.

The Board separately concluded that permanent charge nurses working solely in the
emergency department of the hospital did not exercise the necessary independent
judgment to be supervisors because they were not required to assess nursing skill or
patient acuity when they made nursing assignments. The Board also excluded rotating
charge nurses from supervisory status because the hospital failed to show that such nurses
performed the charge nurse role with any regularity or in accordance with a set schedule.

Using the revised test outlined in Oakwood Healthcare, the Board held, in Golden Crest
Healthcare, that the charge nurses were not supervisors because they lacked the
independent judgment to make “assignments” because (1) most assignments were mere
requests rather than mandates and (2) the only mandates communicated by charge nurses
to nursing assistants were the result of direction from one of the charge nurses’
supervisors. The charge nurses also lacked the authority to “responsibly direct” other
employees because there was no showing of possible “adverse action” against a charge
nurse in connection with their alleged supervisory functions.

In Croft Metals, the Board found that lead persons at a Mississippi window and door
manufacturer were not supervisors because they did not “assign” tasks because their
sporadic rotation of tasks among other employees did not constitute the “designation of
significant overall duties” to those employees. Moreover, while the lead persons did
“responsibly direct” other employees, they did not exercise “independent judgment” in
doing so, because their decisions were governed by set delivery schedules and established
procedures that did not allow any genuine discretion to the lead persons.

The Significance of the Kentucky River Trilogy for Employers

The effect of the Kentucky River Trilogy decisions will become more evident as
additional cases are determined using the revised test for supervisory status. The
decisions have already been strongly criticized by many labor organizations because the
revised test may result in the expansion of positions defined as “supervisors,” resulting in
their exclusion from unionization.

Unionized private sector employers may want to assess whether any currently unionized
employees could possibly be defined as “supervisors” pursuant to the revised test. Upon
consultation with labor counsel, the employer may be able to take steps to clarify the
bargaining unit that could lead to the exclusion of those employees with supervisory
functions.

Non-unionized private sector employers subject to the NLRA may want to review the job
responsibilities of employees as well as workplace policies to determine any effect they
may upon the supervisory status of employees under the revised test. In the event of a
unionization effort, adjustments to job duties and workplace policies could result in the
exclusion of additional employees eligible to vote for or be a member of a union.
James Pender, Esq. is an attorney with Morgan, Brown & Joy, LLP. Jim may be reached at (617) 523-6666 or at jpender@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, should not be construed as legal advice or a legal opinion on any specific facts or circumstances by Morgan, Brown & Joy, LLP and its attorneys. This newsletter is intended for general information purposes only and you should consult an attorney concerning any specific legal questions you may have.