

L a b o r & E m p l o y m e n t
A L E R T

OCTOBER
2006

NEW NLRB GUIDANCE ON DETERMINING WHO IS A "SUPERVISOR"

Employers often grapple with the question of which of their employees are "supervisors" that cannot be represented by a union without the employer's consent, as opposed to professional employees that can be represented by a union. On October 3, 2006, the National Labor Relations Board (NLRB) issued three decisions clarifying its interpretations of provisions of the National Labor Relations Act (NLRA) related to determining whether an individual is a "supervisor." The definition of "supervisor" has been broadened. Employees who assign other employees to overall duties, are held accountable for directing subordinates to undertake specific tasks, and have the discretion to do so without close direction from management will now be recognized as "supervisors."

In *NLRB v. Kentucky River Community Care*, 532 U.S. 707 (2001), the Supreme Court directed the NLRB to reconsider its interpretation of the Section 2(11) term "independent judgment." Section 2(11) of the NLRA defines "supervisors" as individuals who have the authority "in the interest of the employer" to do at least one of 12 things: hire, fire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, or

responsibly direct or adjust the grievances of others. All of these factors must require the use of "independent judgment" if the individual is to be considered a "supervisor."

Pursuant to the Supreme Court's directions, the NLRB has removed from its interpretation of "independent judgment" any consideration of whether the judgment is or is not based on the professional training or expertise of the individual. The NLRB explained that "professional or technical judgments are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." The NLRB further explained that, to be sufficiently "independent," the person's judgment cannot be controlled by another person and cannot be merely routine or clerical in nature, such as when the person's discretion is limited by detailed instructions or regulations.

The NLRB defined "assign" as the authority to designate an employee to a place (such as a location or department), a time (such as a shift or overtime period), or overall duties (such as designation of significant overall duties, not *ad hoc* instructions to perform discrete tasks). The

(continued on page 2)

(New NLRB Guidance...continued from page 1)

NLRB further explained that for an employee to “responsibly direct” another, he or she must do more than simply tell another employee what to do or to decide which among several employees must do a particular job. To “responsibly direct,” explained the NLRB, an employee must be held accountable if the work is done wrong and have the power to take corrective action.

Employers whose employees are not already unionized or part of a union bargaining unit should audit the duties and responsibilities of their employees to ensure that employees considered to be supervisors are delegated authority to perform supervisory duties as outlined above and are held responsible for the performance of those duties.

Employers should also review their job descriptions and performance evaluation forms to ensure that they comply with the foregoing principles. Employers who have employees who are really “supervisors” but who are part of a collective bargaining unit should consider utilizing a procedure called a “Unit Clarification Petition,” which enables an employer to have the NLRB determine whether employees are properly included in a bargaining unit. These analyses require a close review of the specific facts involved and the nature of the work and how it is performed.

This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking legal action.