

# Labor Law Bulletin

---

Labor and employment law trends  
of interest to our clients and other friends.

October 6, 2006

## Labor Board Provides Guidance on Supervisor Status

### *Board Looks at Charge Nurses and Lead Persons*

Under the National Labor Relations Act, employers may exclude supervisors from an employee bargaining unit and thus the determination of whether an individual is or is not a supervisor is of great import to employers and unions. On September 29, 2006, the National Labor Relations Board (the “Board”) issued three long-awaited decisions clarifying the definition of “supervisor” under section 2(11) of the Act. Long before they were announced, organized labor politicized the anticipated decisions as a proxy for the Board’s view toward expanding or contracting union organizing rights.

### *What Is a Supervisor?*

Section 2(11) defines a supervisor as someone who has the authority to engage in any one of 12 functions listed in the statute (e.g., hire, transfer, discharge, assign, responsibly direct) if the individual exercises the function(s) through “the use of independent judgment.” In the recently decided cases, the Board clarified what it means “to assign” and “to responsibly direct” through the “use of independent judgment.” Of particular interest to health care employers, two of the cases decided whether charge nurses were statutory supervisors. The third case reviewed the supervisory status of lead persons in a manufacturing setting.

### *Permanent and Rotating Charge Nurses at an Acute Care Hospital*

In the lead case, *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (Sept. 29, 2006), the Board considered whether permanent and rotating charge nurses at an acute care hospital were supervisors. The Board focused on whether the charge nurses had the authority “to assign” and “to responsibly direct” other employees.

The Board defined the term “to assign” as the “act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” Applied to the charge nurses at Oakwood, the Board said that the term “assign” includes the charge nurses’ authority to assign nursing and other staff to particular patients, but would not include a charge nurse’s “ad hoc instruction that the employee perform a discrete task.”

The authority to “responsibly direct,” according to the Board, requires that the person who is directing be held accountable for the performance of the task by the other person and have the authority to take corrective action. This element of accountability was distinguished from a situation where a person may direct others but is not subject to any adverse consequence if the task being directed is not done properly.

Finally, the Board clarified what is meant by the exercise of “independent judgment.” The individual “must act or effectively recommend action free of the control of others and form an opinion or evaluation by discerning and comparing data.” The Board will evaluate the degree of discretion exercised by the putative supervisor. At one end of the spectrum is the person who exercises total discretion, while at the other is the person whose judgment is of a merely routine or clerical nature. Judgment is not independent if regulated by detailed instructions, whether verbal or written. However, the mere existence of policies does not preclude independent decision-making if the policies allow for discretionary choices.

The Board found that charge nurses on hospital units who assigned specific nursing staff to particular patients and charge nurses in the emergency room who assigned staff to particular areas within the emergency room had the authority “to assign” under the Act. In both cases, the authority exercised by the charge nurses had a material effect on the terms and conditions of employment of the staff being assigned.

However, the Board held that the emergency room charge nurses did not exercise independent judgment because they merely assigned nurses to particular areas within the department. In contrast, charge nurses on other patient care units did exercise such judgment because they were required to assess the competency and skills of the staff and match those competencies with the specialized needs of the patients to whom the staff would be assigned.

According to the Board, none of the charge nurses had the authority to responsibly direct because none of them were held accountable for the performance of the directed tasks and none had authority to correct any errors. Although the hospital held them accountable for the performance of their own tasks, they faced no adverse consequences if the staff under their charge did not perform their jobs properly.

Although the Board found that 12 permanent charge nurses outside of the ER were statutory supervisors, it also found that the 112 nurses who rotated into charge nurse positions did not spend a “regular and substantial” portion of their time performing supervisory functions. None of the units had an established pattern or predictable schedule for when and how often a particular nurse served as charge nurse. Significantly, the Board strongly suggested that a nurse rotating into the role of charge nurse on a regular pattern or schedule would meet the supervisory standard so long as she functioned as a charge nurse for 10 to 15 percent of her total work time.

### ***Charge Nurses at a Nursing Home***

At issue in *Golden Crest*, 348 N.L.R.B. No. 39 (Sept. 29, 2006), was the supervisory status of 8 registered nurses who worked as permanent charge nurses and another 11 licensed practical nurses who occasionally performed as charge nurses in a nursing home.

The Board held that none of the nurses were statutory supervisors. It rejected the argument that they assigned other staff because the record showed they could request but not require staff to work overtime, return from home for an extra shift or change assignments. The Board also found that although the charge nurses directed staff members by assigning them tasks, the charge nurses were not held accountable for the performance of those tasks. As a result, none of the charge nurses were deemed supervisors.

### ***Lead Persons***

In *Croft Metals*, 348 N.L.R.B. No. 38 (Sept. 29, 2006), the supervisory status of lead persons at a window and door manufacturer was the issue. The Board found that the lead persons did not have the authority to assign

because they did not prepare work schedules, appoint employees to production lines, departments or shifts, or give significant overall duties to employees. To the extent that a lead person occasionally switched employees from one job to another, the Board considered it an ad hoc instruction for a discrete task insufficient to show supervisory authority.

The Board did find that the lead persons were engaged in responsible direction of other employees because they decided which jobs should be performed and by whom. They also could be and had been disciplined if the tasks under their management were improperly performed. However, the Board concluded that the direction was of a routine nature that did not require the exercise of discretion and independent judgment. The result was that the lead persons did not fall with the definition of a supervisor.

### ***Impact of the Decisions***

The Board's trilogy provides substantial clarity to labor and management alike in determining who is and is not a supervisor. Notwithstanding the critical overreaction of organized labor, the actual result in the three cases was that almost all persons asserted by the employers to be supervisors were held *not* to have met the statutory definition.

The Board laid out a fairly precise set of standards in determining when an employee exercises the authority to assign or to responsibly direct others through the use of independent judgment. Employers who seek to confer supervisor status on particular employees or job functions now have a template they can follow to attain that objective. Employers may need to revise job descriptions and actual job functions, confer additional authority, impose new accountabilities, decrease rigorous reliance on written policies and procedures, and implement a regular rotation of employees into responsible positions.

Of course, an employer's decision to make any given employee a supervisor under the Act should be carefully considered. Newly created supervisors who straddle the line between supervisor and nonsupervisor may harbor divided loyalties to management. Increasing the number of statutory supervisors may reduce the population of potential or actual bargaining unit members, but also may increase the risk of imputed liability to the employer who is responsible for their acts and omissions.

Vedder Price attorneys are available to discuss the options available to your organization. Feel free to call Bruce R. Alper (312/609-7890), Kevin Hennessy (312/609-7868), Kenneth F. Sparks (312/609-7877), or any Vedder Price attorney with whom you have worked.

## VEDDER, PRICE, KAUFMAN &amp; KAMMHOLZ, P.C.

Vedder, Price, Kaufman & Kammholz, P.C. is a national full-service law firm with approximately 225 attorneys in Chicago, New York City, Washington, D.C. and Roseland, New Jersey. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, general litigation, corporate and business law, commercial finance, financial institutions, environmental law, securities, investment management, tax, real estate, intellectual property, estate planning and administration, health care, trade and professional association and not-for-profit law.

© 2006 Vedder, Price, Kaufman & Kammholz, P.C. The *Labor Law Bulletin* is intended to keep our clients and interested parties generally informed on labor law issues and developments. It is not a substitute for professional advice. Reproduction is permissible with credit to Vedder, Price, Kaufman & Kammholz, P.C.

Questions or comments concerning the Bulletin or its contents may be directed to its Editor, James S. Petrie (312/609-7660), or the firm's Labor Practice Leader, Bruce R. Alper (312/609-7890), or the Managing Shareholder of the firm's New York office, Neal I. Korval (212/407-7780), or, in New Jersey, John E. Bradley (973/597-1100).

*Chicago*

222 North LaSalle Street  
Chicago, Illinois 60601  
312/609-7500  
Fax: 312/609-5005

*New York*

805 Third Avenue  
New York, New York 10022  
212/407-7700  
Fax: 212/407-7799

*Washington, D.C.*

888 16th Street, N.W.  
Suite 800  
Washington, D.C. 20006  
202/355-1395  
Fax: 202/349-1394

*New Jersey*

Five Becker Farm Road  
Roseland, New Jersey 07068  
973/597-1100  
Fax: 973/597-9607