

## Client Bulletin #366

### NLRB Clarifies When an Employee Is a “Supervisor”

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In three separate decisions of interest to both union and non-union employers, the NLRB has provided some much-needed guidance regarding when an employee is a “supervisor” within the meaning of the National Labor Relations Act. Although the issue remains highly fact intensive, and we expect litigation of these issues to continue, the Board’s decisions are helpful.

Legally, an employee is a “supervisor” within the meaning of Section 2(11) of the NLRA if he or she (1) performs one of the twelve supervisory functions (such as hiring, firing, “responsibly directing” or “assigning”) enumerated in the Act; (2) exercises “independent judgment” in performing those duties, and (3) exercises his or her authority for the benefit of the employer. However, the Board has not always provided sound guidance regarding what “responsibly direct,” “assign,” and “exercises independent judgment” mean.

To further complicate matters, many employers have “lead” employees or “charge” employees who oversee and direct operations on a day-to-day basis. These individuals often perform the same work as other employees, and they seldom have the authority to hire, fire, discipline, lay off, or promote. Yet they are perceived as occupying a higher status, and having more authority, than other employees.

Historically, the Board has been criticized by the courts for its results-oriented approach to resolving these questions. The Board has often found that an individual was a “supervisor” when a union alleged that the individual committed unfair labor practices. On the other hand, when a union wanted the individual to be included in a bargaining unit or an employer disciplined the individual, the Board tended to find that the individual was not a “supervisor.” In short, it often appeared that the Board’s decision regarding whether an individual was a “supervisor” was based on what would be most helpful to unions.

We hope that those days are over with the Board’s recent decisions in the three cases – [Oakwood Healthcare](#) (finding that permanent, but not part-time, charge nurses were “supervisors”), [Golden Crest Healthcare Center](#) (finding that charge nurses at nursing home were not “supervisors”), and [Croft Metals](#) (finding that lead persons at manufacturing facility were not “supervisors”) – in which the Board has provided concrete guidance.

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## PRELIMINARY QUESTIONS

### **How are these decisions relevant to non-union employers?**

Organizing campaigns are often spearheaded by “lead” or “charge” persons, who perform the same work as their peers, yet have a higher level of authority within the organization. If these individuals are “supervisors” within the meaning of the NLRA, then they cannot be part of a bargaining unit and cannot vote in an election. The employer also has the right to expect “supervisors” to be loyal to the company.

On the other hand, if these individuals are not “supervisors,” then they can be involved in the campaign from the union’s side, and they can be very effective because of the respect they already have due to their positions of leadership among the employees.

The industries most vulnerable to organizing campaigns right now are manufacturing, restaurant, hotel, and health care.

### **How are the unions reacting to the decisions?**

Not well. The executive director of the Massachusetts Nursing Association is threatening a strike if employers try to implement these decisions at their workplaces. John Sweeney, president of the AFL-CIO, called the Oakwood Healthcare decision “outrageous and unjustified,” and said that “if the [Bush] administration expects us to take this quietly, they’re mistaken.” And an anti-Oakwood rally was held in Los Angeles by nurses represented by a division of the Service Employees International Union.

On the political scene, Senate Democratic leader Harry Reid accused the Bush Administration of leading a “continuous assault against American working families” and vowed to make changes in January, when (he hopes) there will be a Democratic majority in Congress.

## WHAT THE DECISIONS ACTUALLY SAID

The following is a summary of the Board’s findings (quotations are from the decisions):

### **What does it mean to “responsibly direct” employees?**

“Direction” of employees “may encompass ad hoc instruction to perform discrete tasks.”

“If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it,” then the person is ‘directing’ others under Section 2(11).

Mere “direction” of employees will not be enough to satisfy this part of the “supervisor” test. The individual must “responsibly” direct employees. This means that the individual must be accountable, and must have the ability to take corrective action when necessary. Also, there must be a prospect of adverse consequences for the individual if the direction is not successful – for example, the individual must face meaningful consequences if the employees fail to perform.

The individual must responsibly direct the employees “in the interest of the employer,” and must exercise “independent judgment” in doing so.

## **What does it mean to “assign”?**

The term “assign” means 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 health care settings, “assign” will encompass “the charge nurses’ responsibility to assign nurses and aides to particular patients.”

However, in assigning duties, the individual must do more than merely make “ad hoc instruction that the employee perform a discrete task.” (This is different from the “responsibly direct” requirements discussed above, which allow ad hoc instruction.) Instead, the individual must have the authority to designate the “significant overall duties to an employee,” thereby affecting the terms and conditions of the employee’s employment.

The Board cites the following as examples of “assignments”: placing an employee in a given department or a given shift; or requiring the employee to perform significant overall tasks, such as stocking shelves.

Ad hoc instructions include “choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers).” This will not qualify as “assignment.”

The individual must have authority to “assign” in the interest of the employer and must exercise “independent judgment.”

## **What is “independent judgment”?**

First, the individual must exercise judgment without external control. This means that the individual must be free from the control of others, and must be able to form an opinion “by discerning and comparing data.” Judgment is not independent “if it is 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.” However, if a policy allows for discretionary choices – rather than removing the discretion from the individual’s control – it will not defeat a finding that the individual was free from external control. On the other hand, if the policy removes discretion from the individual’s control, the Board will find that the individual had external control.

Second, the “judgment” must not be routine or clerical in nature. This means that there must be meaningful available choices. If there is only one “obvious and self-evident choice,” the discretion exercised is routine and does not involve independent judgment.

## **How do we treat part-time lead people?**

Part-time lead or charge employees (which we will collectively refer to as “leads”) may be supervisors if they spend a regular and substantial portion of their work time performing supervisory functions. The lead must perform supervisory functions “according to a pattern or schedule, as opposed to sporadic substitution.” In the past, the Board has found supervisory status where the leads have served in a supervisory role for at least 10-15 percent of their total work time.

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## RECOMMENDATIONS

What should employers do?

Non-union employers should perform a “check-up” to determine whether they are vulnerable to union organizing, particularly among lead persons, charges, or any employees who perform the same work as their peers, yet have a higher level of authority within the organization. The check-up should include a careful review of job descriptions, as well as an assessment of the following:

- What role do “leads” have in setting schedules, locations of work, or other divisions of tasks?
- Are there any work rules governing the division of tasks by leads?
- Are these work rules rigid, or do they provide a framework within which leads make independent decisions that take into account employees’ individual skills?
- How does the organization document decisionmaking by these leads?
- When leads tell other employees to perform discrete tasks, are the leads held accountable for the outcome?
- Is there any documentation showing leads were personally held accountable if the tasks were not performed correctly?
- If there are any part-time leads, are they assigned on a schedule, or are they randomly assigned?
- How much of the time do part-time leads perform their “lead” duties?

If you have (or think you may have) issues relating to leads, please contact any member of [Constangy's Labor Relations Practice Group](#), or the Constangy attorney of your choice.