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Changing The Formal Definition Of A Supervisor

Respect Act would add thousands to ranks of potential union members

By JASON R. STANEVICH

It is widely acknowledged that the Employee Free Choice Act (EFCA) remains top legislative priority for organized labor. However, after U.S. Sen. Arlen Specter (R-Pa.) announced that he will not support the elimination of secret ballot elections, nor the mandatory binding arbitration procedures proposed in EFCA, organized labor may look to secondary priorities in light of the apparent loss of the necessary vote that would allow EFCA to survive filibuster.

One possibility could be the revitalization of the Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers Act (Respect Act) that was introduced in 2007. Indeed, President Barack Obama and Vice-President Joseph Biden articulated support for the proposed legislation while on the campaign trail.

Under the National Labor Relations Act (NLRA), employees – but not supervisors – are afforded the right to form or join labor unions for the purposes of collective bargaining. The Respect Act, as proposed in 2007, would radically change the National Labor Relations Board's (NLRB) definition of supervisory status. If reintroduced into Congress, and passed into law, the Respect Act would open union membership to thousands upon thousands of employees who are currently classified as supervisors.

Section 2(11) of the NLRA defines a supervisor as "any individual 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 direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. 152 (11).

Under NLRB case law, an employee is considered a supervisor if he or she exercises any one of the above 12 listed functions and does so through the exercise of independent judgment. The Respect Act would change this 60-year-old definition in three fundamental ways: (1) by inserting the phrase "and for a majority of the individual's work time" after the phrase "interest of the employer"; (2) by striking the word "assign"; and (3) by striking the phrase "or responsibility to direct them."

These changes appear minor at first glance, but the scalpel-like modifications would affect the supervisory status of tens of thousands of front-line supervisors. Many supervisors do not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline their employees, or to adjust their grievances. Therefore, the terms "assign" and "responsibly direct" are the heart of the current definition of a supervisor.

'Independent Judgment'

After the U.S. Supreme Court, in 2001 rejected the NLRB's test for determining supervisory status, the NLRB reconsidered its application of the definition in *Oakwood Healthcare Inc.*, 348 NLRB 37 (2006). The NLRB, in *Oakwood* and two companion cases articulated objective, reasonable and statutorily accurate definitions of what it means to "assign" employees and to "responsibly direct" employees, as well as what it means to perform these two functions with "independent judgment."


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The NLRB held that certain charge nurses are supervisors because they exercise sufficient independent judgment in assigning employees. The NLRB concluded that assignment could refer to an act of (1) designating an employee to a place; (2) appointing an employee to a time; or (3) giving significant overall duties to an employee. Based on that definition, the NLRB held that, by assigning certain nursing personnel to particular patients or areas of the hospital, the charge nurses assigned employees within the meaning of § 2(11) of the NLRA.

In deciding whether the charge nurses act with sufficient "independent judgment" in assigning employees, the NLRB held that a supervisor must act in a manner that is more than merely "routine or clerical" and that is "free of the control of others." Therefore, judgment that is "dictated or controlled by detailed instructions" is insufficient to meet supervisory status.

The NLRB concluded that although the hospital maintains a written policy regarding the assignment of nursing personnel, the policy only guided the decision-making process of charge nurses and is "not so detailed as to eliminate a significant discretionary component involved in matching nursing personnel to patients."

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'Held Accountable'

The NLRB also provided a definition and application to the term "responsibly direct." The NLRB held that the responsible direction of other employees means that a supervisor must be "held accountable for the performance of the task, and must have some authority to correct any errors made." Because the charge nurses are not held accountable in this way, the NLRB refused to find that the charge nurses qualified as supervisors under this standard.

Lastly, the NRLB noted that it would adhere to prior decisions holding that the "substantial" requirement would be satisfied as long as an individual spends 10 to 15 percent of his or her work time in a supervisory capacity.

When *Oakwood* was announced, organized labor commented that the decision would dramatically alter the landscape of labor-management relations and cause hundreds of thousands of employees to lose the right to union representation.

Those predictions have not come to pass. In fact, the best evidence remains the outcome in *Oakwood* and its progeny. For example, only 12 out of 124 charge nurses in *Oakwood* qualified as supervisors. Furthermore, the NLRB held that the 25 to 35 lead persons and 19 charge nurses at issue in the companion cases, *Croft Metals Inc.* 348 NLRB (2006) and *Golden Crest Healthcare Center* 348 NLRB 39 (2006), did not meet the statutory supervisor definition. The determination as to who is and who is not a supervisor remains highly fact-specific and NLRB decisions have not changed significantly in light of the above decisions.

Fundamental Change

The proposed Respect Act was a direct response to *Oakwood* and its progeny. The legislation, however, goes well beyond simply reversing NLRB precedent and instead fundamentally changes who is considered a supervisor and who can be represented by a union.

The elimination of "assign" and "responsibly direct" from § 2 (11) would move tens of thousands of front-line supervisors, especially in health care and building trades, within the protection of the NLRA. The Respect Act would be especially harmful to small and medium-size businesses because these employers use their supervisory workforce to concurrently perform § 2 (11) supervisory duties and also non-management functions. The Respect Act would overturn well-established NLRB precedent by requiring these individuals to perform § 2(11) duties for the majority of their time instead of the 10 to 15 percent that is required to maintain supervisor status currently under the NLRA.

The Respect Act, while not presently pending in Congress, is every bit as important as the omnipresent EFCA. While the current definition of a supervisor may not be perfect, it represents a carefully crafted and long-standing equilibrium between the interests of employers and organized employees.

Employers require the unfettered loyalty of their supervisors if they are to remain competitive and deliver their products and services in an effective manner. Supervisors are generally considered to be legal agents of their employers and, as such, employers are bound by the actions of supervisors. In light of the current economy, now is not the time to add more uncertainty in the workplace. ■