

CRS Report for Congress

The Definition of "Supervisor" Under the National Labor Relations Act

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Summary

The National Labor Relations Act (“NLRA”) establishes certain protections for private sector employees who want to form or join a labor union. These protections do not extend to supervisors. Historically, Congress has debated where to draw the line between employees who have different levels of management responsibility. It is generally agreed that employees who have significant supervisory duties, such as hiring and firing, are supervisors. However, disagreement occurs with respect to employees who have minor supervisory duties.

In 2001, the U.S. Supreme Court ruled that the test administered by the National Labor Relations Board (“NLRB” or the “Board”) to determine whether an employee is a supervisor was inconsistent with the NLRA. In response to *NLRB v. Kentucky River Community Care, Inc.*, the Board issued a September 2006 decision in *Oakwood Healthcare, Inc.* in which it established new definitions for three key terms that are used to identify supervisors for purposes of the NLRA: to “assign” and “responsibly to direct” employees and to exercise “independent judgment.”

Applying the new definitions, the NLRB concluded that 12 permanent charge nurses employed by Oakwood Healthcare were supervisors. The Board found that the nurses exercised independent judgment in assigning employees to patients and assigning overall tasks to other employees. However, the Board found that none of the charge nurses at Oakwood Healthcare responsibly directed other employees.

Following the decision in *Oakwood Healthcare Inc.*, Representative Robert Andrews and Senator Chris Dodd introduced the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (“RESPECT”) Act (H.R. 1644/S. 969). The RESPECT Act would eliminate “assign” and “responsibly to direct” from the current definition of supervisor in the NLRA. In addition, the act would add a limiting phrase to the definition of supervisor. Under the act, employees would be classified as supervisors if they are engaged in supervisory activities more than 50% of the time. Currently, an employee may be classified as a supervisor if the employee acts as a supervisor for at least 10-15% of the employee’s worktime. This change would reduce the number of employees who are classified as supervisors and, therefore, increase the number of employees protected by the NLRA.

The RESPECT Act, if it were enacted, may have a significant impact on foremen. In 1947, the Supreme Court upheld the position that the Board followed at the time that supervisors were included in the definition of employee. In response, Congress amended the NLRA to exclude supervisors from the definition of employee. The new definition was included in the Labor Management Relations Act of 1947 (P.L. 80-101). Because the RESPECT Act would eliminate “responsibly to direct” as a supervisory function, foremen and employees with similar duties may no longer be classified as supervisors. They could, therefore, receive the same protections as other employees under the NLRA. This report will be updated as issues and legislative activity warrant.

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The National Labor Relations Act (“NLRA”) establishes certain protections for private sector employees who want to form or join a labor union. These protections do not extend to supervisors. Historically, Congress has debated where to draw the line between employees who have different levels of management responsibility. It is generally agreed that employees who have significant supervisory duties, such as hiring and firing, are supervisors. However, disagreement occurs with respect to employees who have minor supervisory duties.

In 2001, the U.S. Supreme Court ruled that the test administered by the National Labor Relations Board (hereinafter referred to as the “NLRB” or the “Board”) to determine whether an employee is a supervisor was inconsistent with the NLRA.¹ In response to *NLRB v. Kentucky River Community Care, Inc.*, the Board issued a decision in September 2006 in *Oakwood Healthcare, Inc.* in which it established new definitions for key terms that are used to identify supervisors under the NLRA.

After the NLRB’s 2006 decision, Representative Robert Andrews and Senator Chris Dodd introduced the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (“RESPECT”) Act (H.R. 1644/S. 969). The RESPECT Act would narrow the definition for the term “supervisor” in the NLRA.

This report examines the potential impact of the RESPECT Act in terms of the NLRB’s decision in *Oakwood Healthcare, Inc.* The report begins with the definitions of “employee” and “supervisor” under the NLRA. Next, it examines the decision in *Oakwood Healthcare, Inc.* The report then summarizes the RESPECT Act and examines its potential impact on the number of employees protected by the NLRA.

The Definition of Employee Under the NLRA

Section 7 of the NLRA identifies the collective bargaining rights of most employees in the private sector. Section 7 provides, in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

¹ *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001).

choosing ... and shall also have the right to refrain from any or all of such activities....²

Section 2(3) of the act states that an employee “shall include any employee ... but shall not include any individual ... employed as a supervisor....”³ The term “supervisor” is further defined to include any individual with the authority to perform any one of 12 specified functions, if the exercise of such authority requires the use of independent judgment and is not merely routine or clerical. According to section 2(11):

The term “supervisor” means any individual having 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.⁴

Because the 12 functions and the term “independent judgment” are not further defined, the NLRB and Supreme Court have sought to provide meaning to this language.

The Kentucky River Case and Oakwood Healthcare, Inc.

In *NLRB v. Kentucky River Community Care, Inc.*, the U.S. Supreme Court considered whether certain nurses should be classified as supervisors for purposes of the NLRA when their judgment was based on professional or technical training or experience. Kentucky River Community Care, the operator of a care facility for individuals with mental retardation and illness, sought to exclude six registered nurses from a bargaining unit on the grounds that they were supervisors. The NLRB concluded that the nurses were not supervisors because they failed to exercise sufficient independent judgment. According to the Board, the nurses used “ordinary professional or technical judgment” in directing less-skilled employees to deliver services in accordance with employer-specified standards.⁵ The U.S. Court of Appeals for the Sixth Circuit rejected the Board’s position, and the Supreme Court affirmed the Sixth Circuit’s decision.

The *Kentucky River* Court understood section 2(11) of the NLRA to set forth a three-part test for determining supervisory status. Employees will be considered supervisors if (1) they hold the authority to engage in any one of the 12 supervisory functions identified in section 2(11); (2) their exercise of authority is not of a “merely routine or clerical nature, but requires the use of independent judgment,” and (3) their

² 29 U.S.C. § 157.

³ 29 U.S.C. § 152(3).

⁴ 29 U.S.C. § 152(11).

⁵ 532 U.S. at 713.

authority is held in the interest of the employer.⁶ At issue in *Kentucky River* was the second part of the test. Although the Court recognized the NLRB's discretion to clarify the meaning of the term "independent judgment," it maintained that it was inappropriate for the Board to characterize judgment that reflects "ordinary professional or technical judgment" as failing to be independent judgment.

The Court said that the NLRB's reference to "ordinary professional or technical judgment" established a "startling categorical exclusion" that was not suggested by the statutory text of the NLRA.⁷ The Court observed:

What supervisory judgment worth exercising, one must wonder, does not rest on 'professional or technical skill or experience?' If the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate 'supervisors' from the Act.⁸

Moreover, the Court indicated that it was unaware of any NLRB decision that concluded that a supervisor's judgment ceased to be independent judgment because it depended on the supervisor's professional or technical training or experience.⁹ The Court maintained that when an employee exercises one of the functions identified in section 2(11) with judgment that possesses a sufficient degree of independence, the NLRB "invariably finds supervisory status."¹⁰

Four justices dissented from the majority's position on independent judgment.¹¹ The dissent maintained that the NLRB's interpretation of independent judgment was fully rational and consistent with the NLRA. The dissent noted: "The term 'independent judgment' is indisputably ambiguous, and it is settled law that the NLRB's interpretation of ambiguous language in the [NLRA] is entitled to deference."¹²

In September 2006, the NLRB revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*¹³ Oakwood Healthcare employed approximately 181 registered nurses ("RNs") in 10 patient care units at an acute care hospital. Many of the nurses served as charge nurses who were responsible for overseeing their patient care units and assigning other RNs, technicians, and medical personnel on their

⁶ *Id.* (quoting 29 U.S.C. § 152(11)).

⁷ 532 U.S. at 714.

⁸ 532 U.S. at 715.

⁹ 532 U.S. at 716.

¹⁰ *Id.*

¹¹ Justice Stevens filed an opinion, joined by Justices Souter, Ginsburg, and Breyer, that dissented from the majority opinion on the question of independent judgment. However, Justice Stevens' opinion concurred with the majority opinion on the question of which party bears the burden of proving or disproving an employee's supervisory status in an unfair labor practice proceeding.

¹² 532 U.S. at 725-726.

¹³ 348 NLRB No. 37 (2006).

shifts. Some of the RNs worked permanently as charge nurses, while others rotated into the charge nurse position. Oakwood Healthcare sought to exclude both the permanent and the rotating charge nurses from a proposed bargaining unit on the grounds that the nurses were supervisors within the meaning of section 2(11). Oakwood Healthcare maintained that the charge nurses were supervisors because they “used independent judgment in assigning and responsibly directing employees.”¹⁴

The NLRB viewed *Oakwood Healthcare, Inc.* as an opportunity to define the terms “assign,” “responsibly to direct,” and “independent judgment” as those terms are used in section 2(11) of the NLRA.¹⁵ For each term, the NLRB considered the language used by Congress, as well as the NLRA’s legislative history, applicable policy considerations, and Supreme Court precedent.¹⁶ The NLRB concluded that the term “assign” should be construed to refer to the act of designating an employee to a place (such as a location or department), appointing an employee to a time, or giving significant overall duties or tasks to an employee.¹⁷ The NLRB noted that in the health care setting, the term “encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients.”¹⁸ The term would not apply, however, to an individual who simply chooses the order in which an employee will perform discrete tasks within an assignment.

Citing the legislative history of section 2(11), the NLRB interpreted the term “responsibly to direct” to apply to individuals who not only oversee the work being performed, but are held responsible if the work is done poorly or not at all. The NLRB observed:

... for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. This interpretation of ‘responsibly to direct’ is consistent with post-*Kentucky River* Board decisions that considered an accountability element for ‘responsibly to direct.’¹⁹

According to the Board, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the

¹⁴ *Id.* at 2.

¹⁵ 348 NLRB at 3 (“Thus, exercising our discretion to interpret ambiguous language in the Act, and consistent with the Supreme Court’s instructions in *Kentucky River*, we herein adopt definitions for the terms ‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as those terms are used in Section 2(11) of the Act.”).

¹⁶ *See* 348 NLRB at 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 348 NLRB at 8.

authority to direct the work and the authority to take corrective action.²⁰ The possibility of adverse consequences for the putative supervisor must also be established.

With regard to the term “independent judgment,” the NLRB maintained that at a minimum an individual must act or effectively recommend action that is “free of the control of others and form an opinion or evaluation by discerning and comparing data.”²¹ The Board further elaborated that a judgment is not independent if it is dictated or controlled by detailed instructions in company policies, the verbal instructions of a higher authority, or the provisions of a collective bargaining agreement.²² The NLRB sought to interpret the term “independent judgment” in light of the phrase “not of a merely routine or clerical nature,” which appears before “independent judgment” in section 2(11). The NLRB stated:

If there is only one obvious and self-evident choice ... or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment....²³

Applying the new definitions for the terms “assign,” “responsibly to direct,” and “independent judgment,” the NLRB concluded that 12 permanent charge nurses employed in 5 of 10 patient care units at Oakwood Healthcare were supervisors for purposes of the NLRA.²⁴ Within the new meaning of the terms:

- *Assign.* The Board found that 12 charge nurses assigned employees to patients and assigned overall tasks to other employees.
- *Responsibly to Direct.* The Board did not find that any of the charge nurses at Oakwood Healthcare responsibly directed other employees. The Board concluded that the charge nurses were not subject to discipline or lower evaluations if employees they directed failed to adequately perform their tasks.
- *Independent Judgment.* Finally, the Board found that the 12 charge nurses exercised independent judgment in assigning other staff. The charge nurses made assignments in light of the skills of employees and the nursing time that would be required during a given shift.

²⁰ *Id.*

²¹ 348 NLRB at 9.

²² 348 NLRB at 10. The NLRB did indicate, however, that the mere existence of company policies would not eliminate independent judgment from decision-making if the policies allow for discretionary choices.

²³ 348 NLRB at 8-9.

²⁴ In two other decisions issued on the same day as *Oakwood Healthcare, Inc.*, the NLRB applied its new definitions and concluded that charge nurses at a nursing home in Hibbing, Minnesota and so-called “lead persons” at a manufacturing facility in McComb, Mississippi were not supervisors. See *Beverly Enterprises-Minnesota, Inc., d/b/a/ Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006).

The NLRB noted that the “process of equalizing work loads at the hospital involves independent judgment.”²⁵ Although Oakwood Healthcare maintained a written policy for assigning nursing personnel to deliver care to patients, the Board observed that charge nurses were given considerable latitude in making decisions on how to assign nursing personnel. The Board concluded that when a charge nurse makes an assignment based on the skill, experience, and temperament of nursing personnel and the patients, that nurse has “exercised the requisite discretion to make the assignment a supervisory function ‘requir[ing] the use of independent judgment’.”²⁶

In addition, the Board found that, because the 12 charge nurses served in that capacity on every shift that they worked, they spent a “regular and substantial” portion of their work time performing supervisory functions.

The Board also found that charge nurses in the emergency room were not supervisors. The Board concluded that the nurses did not exercise independent judgment in assigning employees to places within the emergency room.

Finally, the Board found that none of the rotating charge nurses was a supervisor.

Dissent in Oakwood Healthcare, Inc.

The dissent in *Oakwood Healthcare, Inc.* maintained that the definitions established by the NLRB would have the effect of removing collective bargaining rights from many employees with only minor supervisory responsibilities. The dissent noted that the language of the NLRA, its structure, and its legislative history “all point to significantly narrower interpretations of the ambiguous statutory terms ‘assign ... other employees’ and ‘responsibly to direct them’ than the majority adopts.”²⁷

The dissent was especially critical of the majority’s definition of the term “assign.” By defining the term to include the assignment of tasks, the dissent said that the majority disregarded the syntax of section 2(11), which states, in relevant part: “The term ‘supervisor’ means any individual having authority, in the interest of the employer, to ... assign ... other employees....” Citing *Kentucky River*, the dissent noted that the word “employees” serves as the grammatical object of the verbs identifying supervisory functions in section 2(11). The dissent stated simply: “In short, it must be the employees who are being assigned, not the tasks.”²⁸

²⁵ 348 NLRB at 16.

²⁶ *Id.*

²⁷ 348 NLRB at 20.

²⁸ 348 NLRB at 24.

The dissent also challenged the majority's definition of the term "responsibly to direct." Citing the legislative history of the term, the dissent maintained that the term refers to the "general supervisory authority delegated to foremen overseeing an operational department and the accountability that goes with it, in contrast to the kind of one-on-one task direction" that would be given to an employee.²⁹ The dissent noted that the majority's definition failed to recognize the "scope and scale of supervisory function that 'responsibly to direct' was intended to capture."³⁰

The RESPECT Act

Following the decision in *Oakwood Healthcare Inc.*, Representative Robert Andrews and Senator Chris Dodd introduced the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers ("RESPECT") Act (H.R. 1644/S. 969). The RESPECT Act would create a narrower definition of supervisor than exists under current law. Supporters of the legislation argue that the RESPECT Act would ensure that only true supervisors are excluded from protection under the NLRA.³¹ Opponents maintain that the legislation would change the definition of supervisor that has been in place for 60 years.³²

The RESPECT Act would amend the NLRA's definition of "supervisor" by removing two supervisory functions from the existing 12 functions and by adding a limiting phrase. The legislation would eliminate "assign" and "responsibly to direct" from the current supervisory functions.³³ In addition, the act would add (immediately after "in the interest of the employer") the phrase "and for a majority of the individual's worktime." This addition would seem to respond to the NLRB's decision in *Oakwood Healthcare, Inc.* In its decision, the Board maintained:

Where an individual is engaged part time as a supervisor and the rest of the time as a unit employee, the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his/her work time

²⁹ 348 NLRB at 28.

³⁰ *Id.*

³¹ Honorable George Miller, *Markup of H.R. 1644, The Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act*, opening statement, September 19, 2007, p. 2.

³² Honorable Howard P. "Buck" McKeon, *Markup of H.R. 1644, Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act*, press release, September 19, 2007, p. 1.

³³ As introduced, H.R. 1644 provided for the elimination of the clause "responsibility to direct them" from the NLRA's definition of the term "supervisor." During consideration of H.R. 1644 by the House Committee on Education and Labor, the language was corrected to provide for the elimination of the clause "responsibly to direct . . ." See Sara Lubbes, *Bill Would Clarify Supervisors' Rights to Join a Union*, available at [<http://www.cq.com/display.do?dockey=cqonline/prod/data/docs/html/committees/110/committees110-2007091900237930.html@committees&metapub=CQ-COMMITTEEMARKUPS&searchIndex=0&seqNum=1>].

performing supervisory functions. Under the Board's standard, "regular" means according to a pattern or schedule, as opposed to sporadic substitution. The Board has not adopted a strict numerical definition of substantial and has found supervisory status where the individuals have served in a supervisory role for at least 10-15 percent of their total work time. We find no reason to depart from this established precedent.³⁴

Under the RESPECT Act, an employee would be classified as a supervisor if he or she was engaged in supervisory activities at least 50% of the time.

The RESPECT Act would not apply to railroad or airline employees. Workers in both industries are covered by the Railway Labor Act. Nor would the legislation apply to most federal employees, who are covered by the Civil Service Reform Act.

On May 8, 2007, the House Education and Labor Subcommittee on Health, Employment, Labor, and Pensions held a hearing on the RESPECT Act. On September 19, 2007, the full Committee approved the measure by a vote of 26 to 20. To date, the Senate has not taken action on the legislation.

Potential Impact of the RESPECT Act

The RESPECT Act would create a more restrictive definition of supervisor than exists since the decision in *Oakwood Healthcare, Inc.* The measure would reduce the number of supervisory functions from 12 to 10. For a larger employer, many of the remaining functions (e.g., hiring, firing, or transferring) may be performed by a human resource department. Because the act would eliminate "responsibly to direct" as a supervisory function, foremen and employees with similar duties may no longer be classified as supervisors.

Under current law, an employee may be classified as a supervisor if the employee performs supervisory functions at least 10-15% of the employee's worktime. The RESPECT Act would raise this threshold to anything more than 50%. Even if the functions "assign" and "responsibly to direct" were not removed from the current definition of supervisor, this change would reduce the number of employees who are classified as supervisors. Because they would be included in the definition of employee, they would receive the protections provided by the NLRA.

Foremen

The RESPECT Act may have a significant effect on foremen and employees with similar duties. In 1947, the Supreme Court upheld the position that the Board followed at the time that supervisors were included in the definition of employee. In response, Congress amended the NLRA to exclude supervisors from the definition of employee. The new definition was included in the Labor Management Relations Act of 1947 (P.L. 80-101), commonly called the Taft-Hartley Act after its main sponsors Robert Taft and Fred Hartley Jr.

³⁴ 348 NLRB at 11.

The House report on legislation approved in the House said that the legislation excluded “foremen and other supervisory personnel from the definition of ‘employee’....” In the Senate, Senator Ralph Flanders offered an amendment to add “responsibly to direct” to a list of 11 supervisory functions that were in the Senate bill. Senator Flanders said:

The definition of “supervisor” in this act seems to cover adequately everything except the basic act of supervising. Many of the activities described in [section 2(11)] are transferred in modern practice to a personnel manager or department.... In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated.... He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance.

The Senate report on its version of the Labor Management Relations Act said that the amended definition of employee distinguishes “between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.” The Report went on to say that, without the change in definition, “management would be deprived of the undivided loyalty of its foremen.”³⁵

By eliminating the function “responsibly to direct” employees from the definition of supervisor, the RESPECT Act may increase the number of employees protected by the NLRA.

Estimating the Impact of Oakwood Healthcare, Inc. and the RESPECT Act

Regardless of how the decision in *Oakwood Healthcare, Inc.* is applied, it is difficult to estimate how many employees may be affected. Similarly, it is difficult to estimate how many employees may be affected by the RESPECT Act, if it were enacted. Data from household and employer surveys that are often used to estimate the potential impact of policy changes may not include enough information to identify whether an employee is a supervisor under the NLRA. For example, a person’s occupation or job title may not be sufficient to determine whether an employee should be classified as a supervisor. Equally important, surveys usually do not ask respondents how much time they spend on different tasks — information that would be needed to determine the percentage of time that an employee spends on supervisory activities.

Nevertheless, removing the phrase “responsibly to direct” from the definition of supervisor may result in many foremen and similar workers being reclassified as employees for purposes of collective bargaining. A 2002 report by the Government

³⁵ National Labor Relations Board, *Legislative History of the Labor Management Relations Act, 1947*, Washington: U.S. Govt. Print. Off., 1985, pp. 304, 410-411, 1303.

Accountability Office (“GAO”) estimated that, in February 2001, there were an estimated 8.6 million full-time foremen in the private sector who were not covered by the NLRA.³⁶

According to an estimate by the Economic Policy Institute, if Oakwood Healthcare’s interpretation of the definition of supervisor were to stand (i.e., applying the definition of supervisor to all charge nurses, including rotating charge nurses), 8 million workers would no longer be protected by the NLRA.³⁷ In the *Oakwood Healthcare, Inc.* decision, however, the NLRB concluded that 12 permanent charge nurses were supervisors and that none of the rotating charge nurses was a supervisor. In the two other decisions announced on the same day, the Board concluded that, in *Croft Metals*, none of approximately 25-35 lead persons were supervisors.³⁸ And in *Golden Crest Healthcare*, the Board decided that none of 19 nurses was a supervisor.

³⁶ In the GAO report, foremen are called “first-line” supervisors, who are employees who direct staff in face-to-face meetings (instead of through an intermediate supervisor) and who do not have as their principal duty the same work as their subordinates. U.S. Government Accountability Office, *Collective Bargaining Rights: Information on the Number of Workers With and Without Bargaining Rights*, GAO-02-835, September 2002, pp. 12, 30-31.

³⁷ Ross Eisenbrey and Lawrence Mishel, *Supervisor in Name Only: Union Rights of Eight Million Workers at Stake in Labor Board Ruling*, Issue Brief 225, July 12, 2006, available at [<http://www.epinet.org/issuebriefs/225/ib225.pdf>], pp. 1-2.

³⁸ See note 24.