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WHO IS A "SUPERVISOR"? THE NLRB GETS A LESSON

WHO IS A SUPERVISOR? – THE NLRB GETS IT WRONG

If a person is a "supervisor" then that person is considered management, and under the NLRA that supervisor cannot be part of a union bargaining unit. Deciding who is a supervisor can have significant consequences for employers – especially when it comes to union organizing. This is demonstrated by the facts of a recent court case that held that the NLRB got it wrong when it ruled that LPNs were not supervisors and allowed them to be included in a bargaining unit of CNAs.

THE NLRB'S "METICULOUS DISREGARD OF THE EVIDENCE"

In an election where the NLRB had allowed LPNs to vote because they were not "supervisors," the employer lost and the union won. When the employer objected to the NLRB's determination, it refused to bargain with the union that represented the unit that included its LPNs who the employer claimed were "supervisors." The NLRB went to the federal appeals court to force the employer to bargain with the union that had won the election, arguing that the LPNs were not "supervisors." The NLRB has recently been inclined in its decisions to expand the rights of employees under the NLRA that has been the law since 1947. That expansion was halted by the federal Court of Appeals, and the NLRB was given a lesson in the meaning of supervisor under the NLRA. Indeed, the court was particularly pointed in criticizing the NLRB's decision when it said, "... this is not a case in which we merely disagree with the Board's conclusions. Our review of the record as a whole reveals that the Board *meticulously excluded or disregarded record evidence*, which, when taken into account, compels a different result."

WHO REALLY IS A SUPERVISOR?

This stinging comment by the court was made as it examined the factors that determine supervisory status. That examination starts with the NLRA's definition of "supervisor" as:

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*.

"COACHING" IS SUPERVISORY

In this case, the authority and independent judgment of the LPNs was found primarily in the coaching role that could be played by the LPNs in the employer's progressive discipline system. Under that program, employees who engage in misconduct or who are not meeting the employer's performance expectations can receive either a "Level One" or "Level Two" "coaching," depending on the severity of the issue. Coachings were prepared by the LPNs, either on their own initiative or at the instruction of management, and might or might not lead to formal discipline.

Level Two coachings were reserved for "serious failures of customer service standards" and automatically resulted in the suspension of the employee pending an investigation and frequently result in termination. Level One coachings were issued for more minor infractions, such as tardiness or failing to clock out for lunch, and required the employee and his or her "direct supervisor" to agree to a plan to address the issue. Employees with four active Level One coachings were automatically terminated.

The evidence showed that, although the actual exercise of the delegated supervisory authority might have been infrequent or sporadic, it was not necessary for there to be actual examples of the exercise of that authority. On the other hand, merely having "paper authority" such as in a job description alone would not be enough to establish supervisor status. There should be some evidence or testimony that the person was truly responsible and accountable for the performance of the subordinate and faced the prospect of some adverse consequence if the subordinate didn't follow the supervisor's direction.

At the end of the day, after examining many examples where the LPNs either could have or actually did exercise the authorities delegated to them by exercising independent judgment, the court held that the employer was within its rights to refuse to bargain with the union that represented a unit that included true supervisors.

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LESSONS IN SUPERVISION FOR EMPLOYERS

The determination of supervisory status is always tricky and turns on the facts of each case. Nevertheless, all private employers can learn from this court's holding, whether or not an employer is engaged in health care:

- The correct determination of supervisor status can mean the difference between union or non-union status for the employee and for the employer.
- A true supervisor need not actually do any of the twelve listed attributes of a supervisor.
- What is important is the *authority* to do any one (or a combination) of the twelve statutory attributes or effectively recommend taking the action.
- The supervisor's exercise of *independent judgment* is essential.
- Supervisor *accountability* is key.
- In order to be a true supervisor, the supervisor should be "*at risk*" of suffering adverse consequences because of the performance of others.
- The authority to "*assign*" means selecting employees to perform specific tasks on the basis of judgment about the individual employee's skills.
- Employers should take some time to identify who are the true supervisors in the organization by reviewing job descriptions and the delegation of authority in actual practice.

A supervisor is by definition on management's team. It makes sense to know who is on your team sooner than later.

If you have any questions, please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.

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