

# REINHART

E-NEWSLETTER

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## Labor & Employment E-News

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### LABOR LAWYERS IN THE LIMELIGHT

**Daryll Neuser** was named as a *Wisconsin Rising Star* 2006 by Super Lawyers magazine. Only 2.5% of Wisconsin's newer attorneys are selected as Wisconsin Rising Stars. Daryll was named in the Labor and Employment Law category.

**Rob Sholl** has been elected by his fellow attorneys to *Best Lawyers in America* 2007, the definitive guide to legal excellence in the United States. Rob has also been selected for *Super Lawyers 2006*, an annual listing of the top 5% of practicing attorneys in a state. In both instances Rob was voted to be among the most respected practitioners in Labor and Employment Law.

**Lynn Stathas** has been appointed Managing Shareholder of the Firm's Madison office. Lynn was also recognized as among the top civic-minded executives in Dane County by *In Business* magazine, and named by her peers as one of the top Labor and Employment Law attorneys in Dane County by *Madison Magazine*.

### OAKWOOD HEALTHCARE, INC.: THE NATIONAL LABOR RELATIONS BOARD SPEAKS ON WHICH WORKERS ARE "SUPERVISORS" FOR LABOR LAW PURPOSES

The National Labor Relations Board (NLRB) recently issued a decision important to all employers who grant some amount of supervisory authority to its low-level workforce leaders. 348 NLRB No. 37 (2006). In *Oakwood Healthcare, Inc.*, the NLRB set forth new criteria for determining when a low-level leader is a "supervisor" under the National Labor Relations Act (NLRA). The determination as to who is a "supervisor" has several practical effects that should change the way you select, train and manage your leadership staff.

#### The Definition of "Supervisor"

The NLRA gives "employees" specific legal rights including the right to organize into unions, the right to bargain collectively, as well as protection from discrimination. However, workers who meet the definition of "supervisor" are not "employees" and do not enjoy all the legal rights accorded under the NLRA. The NLRA defines a "supervisor" as:

1000 North Water Street  
P.O. Box 2965  
Milwaukee, Wisconsin  
53201-2965  
414-298-1000  
800-553-6215

22 East Mifflin Street  
P.O. Box 2018  
Madison, Wisconsin  
53701-2018  
608-229-2200  
800-728-6239

W233 N2080  
Ridgeview Parkway  
P.O. Box 2265  
Waukesha, Wisconsin  
53187-2265  
262-951-4500  
800-928-5529

2215 Perrygreen Way  
Rockford, IL  
61107  
815-633-5300  
800-840-5420

"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 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*." (emphasis added)

Thus, the NLRA sets forth a three-part test for determining whether a worker is a "supervisor":

1. The worker has the authority to engage in *any one* of the twelve listed supervisory functions;
2. The exercise of such authority requires the use of independent judgment; and
3. The authority is held in the interests of the employer.

In some cases, it is easy to determine whether an employee hires, transfers, suspends, lays off, recalls, promotes, rewards, or disciplines other employees, or adjusts their grievances. However, in many situations, it had been difficult to determine whether the employee "assigns" or "responsibly directs" other employees. The *Oakwood Healthcare, Inc.* decision resolves some of the ambiguity.

#### *The Oakwood Healthcare, Inc. Decision*

In *Oakwood Healthcare, Inc.* a union was seeking to represent Oakwood's employees and filed a representation petition with the NLRB to trigger a union election. At the representation hearing Oakwood argued that certain charge nurses should be excluded from the proposed bargaining unit because the charge nurses were statutory "supervisors" and not "employees." The NLRB's Acting Regional Director concluded that Oakwood's charge nurses were not "supervisors," should be included in the proposed bargaining unit, and should be allowed to vote in the union election.

Oakwood appealed the decision to the full NLRB. The NLRB reversed the Acting Regional Director and concluded that Oakwood's charge nurses were "supervisors" and thus not eligible to vote. The NLRB provided helpful guidance as to what the statutory terms "assign", "responsibly direct" and "independent judgment" mean. The NLRB then applied those criteria to determine that several of Oakwood's charge nurses who exercised some - but not complete - supervisory authority were "supervisors" and could not be represented by the union seeking to organize Oakwood employees.

Prior to the *Oakwood Healthcare, Inc.* decision, the United States Supreme Court in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), offered some guidance on applying the statutory definition of "supervisor". The Supreme Court decided that "independent judgment" includes the direction of less-skilled employees in the delivery of services in accordance with employer-specified standards, and decided that the NLRB had the authority to determine whether the purported statutory supervisor exercises the requisite *degree* of independent judgment (*i.e.*, the judgment is not "merely routine or clerical in nature.") The Court specifically left to the NLRB the tasks of applying the ambiguous portions of the statute in particular cases, and of setting forth further guidance for future cases.

In reaching its decision in *Oakwood Healthcare, Inc.*, the NLRB clarified the meaning of three critical statutory terms, "assign," "responsibly direct," and "independent

judgment", which can be used to determine that a worker is a "supervisor". The NLRB decided:

1. The meaning of "assign". Employees who designate other employees to work in a location within a facility (e.g. department or wing) or appoint other employees to work at a time (e.g. shift or overtime period) "assign" those other employees for the purposes of the NLRA. Additionally, employees who assign overall, and not singular tasks, "assign" for the purposes of defining "supervisors." For example, if a charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of the overall duty to the LPN is an assignment. On the other hand, a charge nurse's ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment.

2. The meaning of "responsibly direct". Supervisors "responsibly direct" others when they are accountable for the performance of the task by the staff they direct and oversee, and when they have the authority to correct errors made by the staff they direct and oversee. For example, the *Oakwood Healthcare, Inc.* decision found that certain charge nurses did not "responsibly direct" when they were not subject to discipline for the failures of the staff members under them to complete adequately those tasks.

3. The meaning of "independent judgment". The "independent judgment" portion of the definition is met when employees make relatively significant decisions in their own discretion, outside the control of a higher authority or a policy that would dictate what to do. For example, in the *Oakwood Healthcare, Inc.* case charge nurses exercised "independent judgment" when they matched other nurses to patients for a shift because the charge nurses formed their own analysis about an important decision and independently assigned the nurses to patients accordingly.

Finally, the NLRB made clear that a worker may be a "supervisor" even though the worker only regularly serves in that role 10-15% of his or her total work time.

It is important to note that the implications of *Oakwood Healthcare, Inc.* are not limited to the health care industry. In fact, in *Croft Metals, Inc.*, a companion case to *Oakwood Healthcare Inc.*, the NLRB applied the new guidance but found that certain lead persons in a manufacturing plant were not "supervisors" and should be allowed to vote in a union election. 348 NLRB No. 48 (2006).

#### **The Practical Effects of *Oakwood Healthcare, Inc.***

The decision has broad reaching implications for both union and non-union employers and requires employers to re-examine their employee relations and labor relations strategies, programs and training. It is very likely that an employer now has people working for it whom it did not know were "supervisors" under the NLRA, and, perhaps, people it did not intend to be "supervisors" under the NLRA. Any worker who uses "independent judgment" to "assign" large tasks to other employees or "responsibly direct" them is a "supervisor" for labor law purposes. At an irreducible minimum, this means that these workers:

- (1) Are not covered by all of the NLRA's protective provisions;
- (2) Are agents of the employer and can create legal liability for the employer if they discriminate against, interfere with, retrain or coerce employees' in the exercise of the employee's labor law rights; and

(3) Cannot engage in collective bargaining with their employer.

Finally, the *Oakwood Healthcare, Inc.* case also highlights the fact-intensive inquiry and analysis that is required to resolve questions of who is a "supervisor." If you have questions regarding how the *Oakwood Healthcare, Inc.* decision may affect your operations, or how you can prepare for changes it has created in your workplace, please contact one of the attorneys in Reinhart's Labor and Employment Department.

This *Labor & Employment E-Newsletter* is an electronic publication of the law firm of Reinhart Boerner Van Deuren s.c. and is prepared by attorneys in its Labor & Employment Department. This publication is intended to afford timely notice to our clients and friends on current developments in labor and employment law. It is not intended, nor should it be used, as a substitute for specific legal advice regarding particular factual situations.



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