

## SUPERVISORY STATUS UNDER THE "KENTUCKY RIVER" CASES

On September 29, 2006, the National Labor Relations Board ("NLRB") issued three long-awaited decisions applying the 2001 decision of the United States Supreme Court in *NLRB v. Kentucky River Community Care*.

The decisions issued by the NLRB address the distinction between "supervisors" and "employees," as each term is critically defined under the National Labor Relations Act ("NLRA"). As employers are intimately aware, the distinction between "supervisor" and "employee" has significant impact in the workplace. Most importantly, individuals who qualify as supervisors are not protected by the NLRA and are not required to be included in private sector bargaining units.

- Section 2(11) of the NLRA defines "**supervisor**" as follows: 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.
- Under that definition, there are three essential elements of supervisory status:
  - (1) Authority to exercise one or more of the twelve enumerated functions.
  - (2) The exercise of such authority pursuant to the employer's interest.
  - (3) The use of independent judgment in performing at least one of the functions.

Unfortunately, applying the elements above to an individual or group in a particular workplace is not always a straightforward task. In *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Supreme Court urged the NLRB to clarify the distinction between supervisors and employees. In doing so, the Supreme Court rejected the NLRB's argument that the exercise of "ordinary professional" or "technical" judgment in directing another employee may **not** be used to establish supervisory status under the

NLRA. The Court held that the correct interpretation relates to whether these professional and technical decisions are involved in the exercise of any of the twelve supervisory functions enumerated in the NLRA. If so, then the degree of discretion involved in making the decision, not the type of discretion, determines whether individuals exercise the requisite "independent judgment" of supervisors. For example, if the use of professional judgment leads the person to assign an employee to a particular area of work, that may be the exercise of a supervisory function.

### **Recent NLRB Interpretations and Guidance**

The NLRB decisions in response to the *Kentucky River* case provide more careful interpretation of the terms "assign" and "responsibly to direct," two supervisory functions listed in Section 2(11). Through these decisions, the NLRB now offers the following guidance regarding these terms:

- "Assign" means "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." By contrast, assignment does not include "ad hoc instruction that [another] employee perform a discrete task."
- "Responsibly to direct" means that "the person directing and performing the oversight of the employee must be accountable for the performance of the task by [an]other [employee], such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." In other words, the putative supervisor must both effectively oversee other employees and be accountable for these other employees' performance. The alleged supervisor must also be charged with the responsibility to take corrective action if the direction is not properly carried out.

The NLRB decisions also provide guidance on the meaning of the use of "independent judgment." The NLRB explained that "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, "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices."

### **The Kentucky River Cases**

The NLRB's lead case in response to *Kentucky River* is *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006). In this case, the NLRB found that some charge nurses were supervisors, rather than employees, because they exercise independent discretion in assigning significant overall duties to other nurses and employees. With respect to rotating charge nurses, the NLRB found that the employer had not established that the rotating charge nurses performed any of the statutory supervisory functions with sufficient regularity. Therefore, the rotating charge nurses were employees, not supervisors, under the NLRA. Although the charge nurses directed the work of others, the NLRB concluded that they were not accountable for the directions given and, therefore, did not meet the criteria for "responsible" direction.

The *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006), case was decided the same day as *Oakwood Healthcare*, applying the analysis adopted in that case. In *Golden Crest Healthcare Center*, the NLRB found that the charge nurses in a certain nursing home are not supervisors because they do not have actual authority to "assign" other employees as that term is defined. Although the NLRB did find that these charge nurses do "direct" other employees, it found that they do not "responsibly" do so as required by the NLRA.

The third of the "*Kentucky River*" cases differs from the others in that it involves lead people in a manufacturing plant, and not nurses. In *Croft Metals, Inc.*, the NLRB found that the lead persons do not "assign," but do "responsibly direct" other employees. However, the NLRB found that these individuals are not supervisors, because the direction occurs without the exercise of independent judgment.

### **Impact on Employers**

Although it is too early to determine the long term effects that the "*Kentucky River*" cases will have on the field of management-labor relations, the guidance provided by the NLRB should be applied when making decisions regarding the supervisory status of individuals in the workplace. Employers who have employees covered by the NLRA should take this opportunity to:

- Consider (or reconsider) which employees should be treated as "supervisors."
- Review the authority and responsibility accorded each employee currently considered to be a supervisor, with particular emphasis on the extent of the employee's actual exercise of discretion.

As demonstrated by these recent cases, this analysis is highly fact-specific and needs to be conducted on a case-by-case basis. Given the risk of violating the NLRA where there is an ongoing bargaining obligation, employers who currently have employees who are represented by one or more labor organizations are especially advised to seek legal guidance before acting in response to these cases.

**If you have any questions or would like more information regarding any of the "Kentucky River" cases discussed in this Alert, or have any other questions about our Labor & Employment practice group, please contact any member\* of our Labor & Employment practice group:**

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