

# Employee or supervisor? Classification affects union eligibility

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One of the toughest tasks for HR is to decide which employees are supervisors. Employers need to know this because supervisors are excluded from a collective bargaining unit for union organizing and voting purposes.

The National Labor Relations Board (NLRB) recently decided a series of cases to help employers determine who on their staff is considered a supervisor.

Most important, the decisions show employers what additional duties they can add to employees' job descriptions to remove them from the rank and file and "promote" them into supervisory status.

## **Supreme Court set the standard**

In 2001, the U.S. Supreme Court took a significant step toward defining which employees may be excluded from a collective bargaining unit because of their status as "supervisors" under Section 2(11) of the National Labor Relations Act (NLRA).

In that ruling (*NLRB v. Kentucky River Community Care*), the court determined that certain registered nurses may be excluded from a bargaining unit because they exercise sufficient supervisory powers.

The court reasoned that under the plain text of the NLRA, employees are supervisors if:

1. They hold the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees; or if they hold the responsibility to direct them; or to adjust their grievances or effectively to recommend such action.
2. Their exercise of authority is not merely routine or clerical but requires independent judgment.
3. Their authority is held "in the interest of the employer."

However, this decision was problematic because it did not clearly define a number of the important terms found in the act. Therefore, it still left employers guessing which employees qualified as supervisors.

## **NLRB tries to clarify definitions**

In response to continuing confusion among employers, the NLRB issued several decisions in September 2006 to define terms like "independent judgment," "assign" and "responsibly to direct," and provided examples of duties performed by supervisors under the NLRA:

**"Assign."** The NLRB defined "assign" as the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties or tasks to an employee.

For example, in the health care setting, an "assignment" sufficient for supervisory status would include a charge

nurse designating a specific employee to regularly administer medications to a patient. However, a charge nurse's order to immediately give a sedative to a particular patient is not an "assignment."

Therefore, the authority to "assign" under Section 2(11) refers to a supervisor's power covering *overall duties*, not to an *immediate instruction* to another employee.

**"Responsibility to direct."** The NLRB defined this phrase to include individuals who exercise basic supervision, but lack the power to hire, fire, promote or engage in any of the other statutory supervisory functions.

For example, if a person on the shop floor has others who report to him, and if that person decides what job shall be undertaken next or who shall do that job, that person is a supervisor, provided that the direction is both responsible and carried out with independent judgment.

The NLRB ruled that the element of "responsible" direction involved a finding of accountability. The supervisor must have authority to direct the work, take corrective action if necessary and be held accountable for the directions to other employees.

**"Independent judgment."** The NLRB said that to exercise "independent judgment," a person must effectively recommend action that is free from the control of others and be based on the personal evaluation of available circumstances.

That judgment is not independent if it is set forth by company policies, dictated by a higher authority or in the provisions of a collective bargaining agreement. It's important to note that the mere existence of company policies doesn't eliminate independent judgment as long as the policies allow for discretionary choices.

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## **Classifying supervisors: The 4 steps**

*Employers who want to make sure they are properly classifying employees as supervisors can follow these steps:*

1. Maintain clear and concise documentation that accurately describes the authorities and duties of individuals in each job classification.
2. Make sure the job duties fit into one of the categories described by the court in the original *Kentucky River* case from 2001.
3. Require those employees who are to be classified as supervisors be given the authority to make independent judgments and assign other employees to complete tasks.
4. Hold meetings to reiterate and reinforce the job duties of each employee and supervisor. Make sure everyone understands his role and the roles of his superiors.