



Regulatory Advisory

November 28, 2006

NLRB ISSUES GUIDELINES FOR SUPERVISORY STATUS

AT A GLANCE

The Issue:

On September 29, the National Labor Relations Board (NLRB) issued its latest guidance on when a “charge nurse” meets the definition of “supervisor” under the law and, as a result, is exempt from collective bargaining. In a 3-2 decision in *Oakwood Healthcare, Inc.*, the NLRB found that hospital charge nurses who regularly assigned nursing personnel to specific patients and make the assignments based upon “the skill, experience, and temperament of other nursing personnel, and on the acuity of the patients,” meet the test for supervisor. The NLRB also found in the absence of an established pattern or predictable schedule that rotating charge nurses are not regularly assigned supervisory duties and, as a result, are not exempt from collective bargaining.

Our Take:

The ruling provides important clarification for hospitals and recognizes the important role of charge nurses in providing high-quality patient care. Collective bargaining issues should not impede a hospital’s ability to provide the best possible care to patients. This ruling enables hospitals to depend on their charge nurses to ensure continuity of care for patients.

What You Can Do:

- Share this Advisory with the executive management team.
- Evaluate your policies and practices using the NLRB’s guidance.

Further Questions:

If you have questions, please contact Maureen Mudron, AHA Washington counsel, at mmudron@aha.org, Jo Ann Webb, AONE senior director, Federal Relations and Policy, at jwebb@aha.org, or Becky Frederick, ASHRA executive director, at bfrederick@aha.org.

AHA's Regulatory Advisories are produced whenever there are significant regulatory developments that affect the job you do in your community. A four-page, in-depth examination of this issue follows.



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BACKGROUND

On September 29, the National Labor Relations Board (NLRB) issued two decisions clarifying the criteria it would use in determining whether charge nurses are “supervisors” under the National Labor Relations Act (NLRA) and, as a result, exempt from collective bargaining. These decisions – *Oakwood Healthcare, Inc.* (<http://www.aha.org/aha/content/2006/pdf/Oakwood.pdf>), a hospital case, and *Golden Crest Healthcare Center* (<http://www.aha.org/aha/content/2006/pdf/GoldenCrest.pdf>), a nursing home case – respond to a 2001 Supreme Court decision, the *Kentucky River* case, in which the Court criticized the NLRB’s interpretation of “independent judgment,” one of the essential characteristics of supervisory status. In 2003, the NLRB consolidated the two cases with a third, non-health care case and issued a notice seeking comments on how to interpret some of the key terms used in the NLRA to define “supervisor.” The American Hospital Association (AHA), American Organization of Nurse Executives (AONE), American Society for Healthcare Human Resources Administration (ASHHRA), and the Michigan Health and Hospital Association filed an amicus brief (<http://www.aha.org/aha/advocacy/legal/031100-amicus-brief-oakwood.doc>) with the NLRB emphasizing a hospital charge nurse’s important and unique role and hospitals’ reliance on their exercise of independent judgment and discretion on their behalf.

Under the statute, 12 functions are identified as supervisory that, if exercised with independent judgment as a regular part of the employee’s responsibilities, will result in the employee being exempt from collective bargaining. The two functions at issue in the NLRB’s decisions are: “assign” and “responsibly to direct.” To “assign” refers to the act of designating an employee to a place (such

as location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties (tasks) to an employee. “Responsibly to direct” means that the employee overseeing another employee is accountable for the other employee’s performance of the task; i.e., there would be some adverse consequence for the supervising employee if the task performed was not performed properly.

In addition, the exercise of that supervisory authority must require independent judgment, meaning it cannot be routine or clerical in nature. The Supreme Court criticized the NLRB’s previous interpretation that excluded from consideration the use of “ordinary professional or technical judgment in directing less skilled employees to deliver services,” regardless of how much discretion was exercised. Instead, the Court held that the determining factor is the *degree* of discretion exercised, not the *kind* of discretion.

If the employee performs a supervisory function on a part-time basis, an additional consideration is whether the function constitutes a regular and substantial portion of his or her work time. The NLRB has not adopted a numerical definition of substantiality but has found supervisory status where individuals served in a supervisory role for at least 10-15 percent of their total work time.

AT ISSUE

The NLRB held that, in certain circumstances, charge nurses meet the definition of “supervisor” and, as a result, are exempt from collective bargaining. In the lead case decided by the NLRB, *Oakwood Healthcare, Inc.*, it found (in a 3-2 decision) that permanent charge nurses in a hospital who assign nursing personnel to the specific patients for whom they would care during their shift, and who make the assignments based upon “the skill, experience, and temperament of other nursing personnel, and on the acuity of the patients,” meet the test for supervisor under the NLRA. In contrast, permanent charge nurses in the emergency department (ED) who assign employees to particular locations within the ED, rather than to particular patients, are not supervisors. It also found that charge nurses who rotate into the role in the absence of an established pattern or predictable schedule do not serve in a supervisory role on a regular basis and, as a result, are not exempt from collective bargaining.

AS IT STANDS

The NLRB used the *Oakwood* case to establish its refined guidance for determining whether an employee meets the statutory definition of a supervisor. It also provided significant discussion of the various responsibilities assumed by charge nurses and analyzed them under the “supervisor” test.

In the health care setting, the NLRB specifically interpreted the term “assign” to encompass the charge nurse’s responsibility to assign nurses and aides to particular patients. It distinguished between a charge nurse’s designation of significant overall duties to an employee and an ad hoc instruction that the employee perform a discrete task (e.g., designating a licensed practical nurse (LPN) to regularly administer medication to a patient or group of patients versus ordering an LPN to immediately give a sedative to a particular patient). The NLRB also commented on the potential effect an assignment could have on a nurse’s aide’s work day and the opportunity for future promotions or rewards. It noted that matching a patient’s needs to the skills and special training of a particular nurse is important to a hospital’s ability to successfully deliver health care services.

The NLRB next looked at whether the charge nurses exercised sufficient discretion to meet the test for “independent judgment.” It recognized that the unique needs of each patient must be taken into account and that matching a nurse with a patient may have significant consequences for the health of a patient. It also commented that the degree of discretion involved in a charge nurse’s decision to assign a nurse to a patient is notably different from assignment decisions made in industries outside of health care.

The NLRB distinguished assignment decisions implementing detailed instructions (e.g., a staffing decision based on a fixed nurse-to-patient ratio, or pursuant to a bargaining agreement requiring that seniority be followed) from company policies that allow for discretionary choice (e.g., a policy that details how a charge nurse should respond in an emergency, but the charge nurse determines when an emergency exists or may deviate from the policy based on his or her assessment that a significant change is needed).

In the *Oakwood* case, the NLRB concluded that the permanent charge nurses in all of the units except the ED met the test for independent judgment. It found that the assignments in the ED do not take into account patient acuity or nursing skills, but rather only involve assigning an employee to a location within the ED. For most of the charge nurses at the hospital who serve in the role on a rotating basis, the NLRB also had to examine whether they serve in the role on a regular basis. It found that under the facts presented they do not (noting the absence of an established pattern or predictable schedule for the rotation). It also considered whether the charge nurses at the hospital meet the test for “responsibly to direct.” It concluded they do not, finding that, while they could delegate certain tasks to another staff member, they do not have the required accountability (authority to take corrective action) for the staff member’s performance.

In the *Golden Crest Healthcare Center* case, the NLRB (in a 3-0 decision) held that charge nurses employed in a nursing home are not supervisory. It

concluded that the charge nurses do not have any authority to require staff to work past the conclusion of their shifts or to mandate that a staff member come into work on a day off, the tasks which the nursing home argued indicated the power to “assign” employees. In addition, because the charge nurses are not held accountable for the work of subordinates, they do not “responsibly direct” other employees.

NEXT STEPS

The NLRB will use the recent guidance to resolve disputes that come before it. While it established general principles and discussed examples of how it would apply them in the health care context, the practical implications of the guidance will evolve over time as the NLRB continues to make case-by-case fact intensive reviews. The AHA, AONE and ASHRA will continue to monitor developments at the NLRB to assist and advance the ability of hospitals to meet their responsibilities to provide continuous, high-quality care to their patients.

For additional resources, see

<http://www.aha.org/aha/advocacy/legal/legal-resource-library-index.html>,
<http://www.aone.org> or <http://www.ashhra.org>. If you have questions contact Maureen Mudron, AHA Washington counsel, at mmudron@aha.org, Jo Ann Webb, AONE senior director, Federal Relations and Policy, at jwebb@aha.org, or Becky Frederick, ASHRA executive director, at bfrederick@aha.org.