Supreme Court Overturns NLRB Standard On Supervisory Status
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The U.S. Supreme Court has just overturned a key element of the standard long applied by the National Labor Relations Board ("NLRB") in determining whether an employee is a supervisor. The Court ruled that certain registered nurses were supervisors where they directed the work of other employees through the exercise of "ordinary professional or technical judgment." *NLRB v. Kentucky River Community Care, Inc.*, No. 99-1815 (May 29, 2001).

The National Labor Relations Act ("NLRA"), which protects the right of employees to engage in collective bargaining and other union-related activity, expressly excludes "supervisors" from the definition of "employees" and thereby from the protections of the statute. The NLRA defines supervisor as an individual who has the authority, in the interest of the employer "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibily to direct them" provided that the exercise of such authority "is not of a merely routine or clerical nature, but requires the use of independent judgment." In interpreting the supervisor exclusion, the NLRB has long held that where an individual directs other employees using "ordinary professional or technical judgment," such direction does not constitute "responsible direction" so as to make the individual a supervisor. The NLRB reasoned that such direction arises out of the individual's expertise and experience rather than his or her exercise of true management prerogatives.

In the *Kentucky River* case, the NLRB applied these standards and rejected the contention of the employer, an operator of a health care facility, that its nurses were supervisors who should be excluded from a facility-wide bargaining unit a union sought. The Supreme Court overruled the NLRB's decision, finding that the NLRB's standard for determining supervisory status is inconsistent with the terms of the NLRA. The statute itself, the Court noted, sets forth only three elements in the definition of supervisors: (1) they hold the authority to perform any of the enumerated personnel actions; (2) their exercise of this authority is not merely routine but requires independent judgment; and (3) they act "in the interest of the employer." The NLRB exceeded its authority, the Court found, by adding an additional element which is not found in the statute -- a requirement that the individual exercise more than "ordinary professional or technical judgment" in directing other employees in order to be considered a supervisor.

The primary effect of the *Kentucky River* decision will be to make it easier for employers to establish that individuals are statutory supervisors and therefore ineligible to unionize. However, the expansion of the definition of supervisors also carries pitfalls for employers. Since employers are generally responsible for the conduct of all of their supervisors, employers involved in union organizing campaigns may be found to have committed unfair labor practices by virtue of the actions of individuals who the employer did not realize were supervisors and who would not have been considered...
supervisors under prior law. It is in the interest of all employers, even before the onset of union activity, to periodically review their operations and determine clearly which employees qualify as supervisors in light of the change in the applicable standard arising from the *Kentucky River* decision.