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Election Season: Supervisors and the Union Organizing Campaign

Employers who have faced union organizing activity know that fundamental to winning the election is knowing who is on your side. Under the National Labor Relations Act, supervisors may not vote because they are considered members of management, not employees whose union activity is protected by the law.

Indeed, front-line supervisors who work closely with employees are often management's best resource for communicating its message during a union campaign. Training such individuals on how to advocate lawfully against a union can spell the difference between winning and losing an election. So, many union supporters were unhappy with a recent decision of the National Labor Relations Board that rather broadly defines the term "supervisor."

According to the Board's decision in *Oakwood Healthcare, Inc.*:

- The test for supervisor status includes having the authority to use independent judgment in assigning employees and having the responsibility to direct their work.
- To use "independent judgment" means to recommend employment action or to give instruction to others by "discerning and comparing data," not merely by consulting company policies, following the instructions of higher management, or referring to the provisions of a collective bargaining agreement. The key question is whether the employee is expected to add his or her own analysis or merely to administer specific rules mandated by others.
- To "assign" means to designate an employee to a location or department of the employer, or to appoint an employee to a time (such as a shift or overtime) or to certain overall duties. It means more than to provide ad hoc instructions to perform certain discrete tasks.
- To have the "responsibility to direct" others, an employee must not only direct and have oversight for their job performance, but also must be held accountable by higher management for that performance. Being accountable, the Board said, means to face the prospect of discipline or some other adverse consequence if the performance of others is unsatisfactory.

TIP

The *Oakwood* decision recognizes the importance of knowing who supervisors are as an employer confronts a union election. The Board's analysis provides guidelines for an employer to examine job duties—not simply titles and job descriptions—to identify supervisors.



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