

## National Labor Relations Board Rules That Charge Nurses May Be Supervisors

Last Friday, the National Labor Relations Board issued its long-awaited decision in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006), concerning the supervisory status of charge nurses. In the decision, the Board established guidelines for determining whether charge nurses (and indeed other categories of employees) are “supervisors” under the National Labor Relations Act (“NLRA”) and therefore ineligible for collective bargaining. For the first time, the Board ruled that charge nurses who assign other nurses (or other staff) to particular patients based on the charge nurses’ professional nursing assessment of the patient’s clinical needs or the staff’s clinical skill sets will qualify as supervisors. Although widely expected, the decision has broad implications for healthcare employers and creates many possible strategies for healthcare employers to adopt.

Plainly, the decision in *Oakwood Healthcare* clears the way for substantially more charge nurses to be excluded both from existing bargaining units (where nurses are already unionized) and from future organizing activity (where unions are not yet present) than was true under prior NLRB decisions. And, although the *Oakwood Healthcare* decision was addressed to charge nurses in a hospital, its basic premises also apply to charge nurses in non-hospital healthcare settings and to nurses in a number of other nursing roles, such as nurse practitioner, CRNA, nurse mid-wife, nurse educator and “operating room first assist” titles, depending on the specific duties and responsibilities of nurses in those positions. Indeed, in some facilities (such as nursing homes), the *Oakwood Healthcare* decision may support a finding of supervisory status for staff RNs, based on their supervision of non-RN staff.

### Background

Under the NLRA, an individual is a supervisor, and therefore ineligible for collective bargaining, if the individual 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 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.”

Essentially from the time that healthcare employers were first covered by the NLRA in 1974, it has been hotly contested whether charge nurses (and other nurse categories) are supervisors, even if they do not carry out the classic “hire/fire/discipline” functions, on the basis of their assignment of work to, and direction of, other nurses and other staff. Over the years, the courts have overturned Board decisions, based on a variety of theories, that charge nurses were not supervisors. Most recently, the Board had taken the view that charge nurses who assign and direct other staff are not supervisory because the charge nurses’ decisions, based on their professional nursing expertise, did not constitute “independent judgment” exercised “in the interest of the employer.”

But in 2001, the United States Supreme Court in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), rejected the Board’s narrow interpretation, forcing the Board to re-visit the issue. For five years, the healthcare industry has been waiting to see whether the Board would try to come up with yet another theory for giving collective bargaining rights to charge nurses, or would effectively acquiesce in the “handwriting on the wall” handed down by the Supreme Court.

The answer from the Board is that charge nurses may indeed be supervisors, based on their assignment and direction of the work of other staff, depending on how the charge nurses' particular duties measure up against newly announced definitions of what qualifies as "assigning" and "responsibly directing" employees and what qualifies as "independent judgment."

## The Decisions

In *Oakwood Healthcare* and two companion cases decided last week, the Board established new guidelines for determining whether charge nurses (or indeed any employees who assign or direct work but who do not have traditional "hire/fire/discipline" functions) are supervisors.

In *Oakwood Healthcare*, the Board ruled that most permanent charge nurses at the hospital were supervisors, based on their assignment and direction of other staff using their professional nursing judgments as to patients' needs and staffs' skill sets, but that the hospital's ER charge nurses were not supervisors because they simply assigned particular nurses to cover particular ER rooms on a random basis with no exercise of nursing judgments. The Board also ruled that the hospital's rotating charge nurses were not supervisors because they did not fill the charge role with any regularity.

In another decision issued the same day, the Board found that charge nurses at a nursing home exercised no real discretion in assigning or directing other staff, and therefore were not supervisors. *Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center*, 348 NLRB No. 39 (Sept. 29, 2006).

In a third case, the Board applied the same standards to a non-healthcare employer, and ruled that the lead persons at a manufacturing facility did not exercise independent judgment in assigning or directing other staff and therefore were not supervisors.

## The Standards

The *Oakwood Healthcare* decision defines four key concepts for purposes of determining supervisory status: "assigning employees," "responsibly directing employees," "exercising independent judgment" and exercising supervisory authority on a "regular and substantial" basis.

### 'Assigning' Employees

A charge nurse (or other individual) qualifies as "assigning" other employees if the charge nurse:

- designates the other staff to work at a particular place, such as a location, department, or wing;
- appoints the other staff to work at a particular time, such as a shift or overtime;

*or*

- gives the other staff significant overall duties or job tasks (giving *ad hoc* instructions to perform a particular discrete task does not qualify as assigning "overall" duties, though it may still qualify as the "responsible direction" of other staff).

### 'Responsibly Directing' Employees

A charge nurse (or other individual) qualifies as "responsibly directing" the work of others if the charge nurse:

- oversees the work of other staff by giving directions to them, including *ad hoc* instructions to perform specific tasks;

*and*

- can be held accountable with adverse consequences if the work overseen is not performed properly;

*and*

- can hold the staff whose work is overseen accountable for not properly performing the work.

### **‘Independent Judgment’**

A charge nurse (or other individual) qualifies as “exercising independent judgment” if the decisions are:

- not “merely routine or clerical in nature;”

*and*

- made free of the control of others (decisions that are dictated by detailed instructions such as upper managers’ directives, detailed employer policies or union contract provisions do not qualify);

*and*

- based on forming an opinion or evaluation by discerning and comparing data (the Board accepted the Supreme Court’s *Kentucky River* pronouncement that professional or technical judgments, such as professional nursing judgments that a particular clinical task needs to be performed, can satisfy this standard).

### **‘Regular And Substantial’**

It has been established Board law that, to be a supervisor, an individual must exercise (or be vested with) supervisory authority on a “regular and substantial” basis, not merely sporadically and infrequently.

- “Regular” means according to a pattern or schedule, not sporadic.
- “Substantial” means at least 10% -15% of the individual’s work time.

## **Applying the Standards**

Although the application of these standards to any individual or group of individuals depends on the particular facts, clearly:

- many charge nurses will qualify as supervisors based on their assignment of other staff to specific patients based on the charge nurse’s clinical judgments as to patient acuity or staff skill sets;
- directing other staff to perform a particular clinical task on a particular patient will qualify as responsible direction of work, if based on a professional assessment of patient needs and/or staff skill sets, *if* the charge nurse can visit consequences on the other staff or suffer adverse consequences herself if the work is performed poorly;
- the former is the bigger change, since, under the Board’s new definition of “responsible direction,” any charge nurse who qualifies under this test probably already met the traditional standard of having the power to discipline or reward employees.

## **What Does This Mean For You?**

The NLRB’s decision in *Oakwood Healthcare* is certain to be appealed to a United States Court of Appeals, and ultimately may be reviewed by the United State Supreme Court. For the time being, however (and more than likely even after the

appeals process has been concluded), the decision has significantly altered the labor relations landscape for hospitals and other healthcare employers.

How the decision in *Oakwood Healthcare* will apply to your facility, and what steps you should take now in response to this decision, will depend on several considerations including, of course, how charge nurses function today at your facility, your overall labor relations objectives and operational needs, and the terms of any collective bargaining agreements currently in effect. While the “decision-tree” for every facility will necessarily be different, the following may be helpful as you consider the implications of this important decision.

### **Do You Want To Exclude Charge Nurses From An Existing Bargaining Unit?**

Although many unionized health care employers might answer this question in the affirmative without a moment’s hesitation, the proposition may not be so self-evident for others.

- Where charge nurses are in an existing bargaining unit, an effort by the employer to remove charge nurses will almost certainly have at least a short-term, negative impact on the bargaining relationship, given the national prominence of this issue and the fear by local unions that it may be a first step toward substantially eroding the bargaining relationship. Many employers may be perfectly willing to accept union unhappiness as a price for excluding charge nurses or other positions.
- In addition, some union contracts preclude the performance of bargaining unit work by non-bargaining unit employees. In those situations, taking charge nurses out of the unit may be a disaster, because it would mean that the charge nurse could no longer take patient assignments.
- Removing charge nurses from an existing bargaining unit may also be viewed as a highly negative change by the charge nurses themselves, some number of whom might prefer transferring to a staff nurse position (or leaving for another hospital) in order to keep the perceived benefits of a union contract.
- At some hospitals, the current cohort of charge nurses may not be a group that is well-suited to act as the true, front-line voice of management.

All of these considerations (and likely others) should be carefully weighed before embarking on a significant effort to remove charge nurses from an existing unit.

### **Keeping Charge Nurses out of a Future Bargaining Unit**

For a non-union facility, taking the steps today which might bolster a future finding of supervisory status will raise far fewer concerns. Still, if charge nurses have functioned well in a particular, arguably non-supervisory, role for years, the desirability of modifying that role to better mirror the supervisory requirements of *Oakwood Healthcare* must still be weighed against operational and clinical concerns.

### **What Are Your Facts Today?**

In determining whether charge nurses are supervisors, there can be no substitute for a clear, accurate and detailed understanding of your facts as they currently exist. At a minimum, you will want to know precisely what role your charge nurses play in “assigning nurses and aides to particular patients” and to what degree they exercise “independent judgment” in doing so (while you will certainly want to consider whether charge nurses are “responsibly directing” other employees, the Board’s articulation of this standard makes it far less likely to apply to the typical charge nurse). This will

require a close reading of current job descriptions (and an updating of the job descriptions if they fail accurately to reflect the full scope of the charge nurses' responsibilities), and also a review of any facility policies governing how patients are assigned.

As you conduct your review of the facts, here are some tips to consider:

- Ultimately, there will be no substitute for talking directly with the managers most familiar with the situation, likely at the level of a nurse manager or, perhaps, a department head, to find out what really happens on the floors, day in and day out. You will need to determine not only what charge nurses have been authorized to do in theory, but more importantly what they actually do in practice.
- As the Board's *Golden Crest Healthcare Center* decision makes clear, "Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority."
- You will need to get beyond generalizations to see if there are specific examples supporting (or undermining) supervisory status.
- You will need to develop these facts unit by unit since the role of the charge nurse may vary widely across the facility (as shown by the *inclusion* of the emergency department charge nurses in *Oakwood Healthcare*, given the largely ministerial way in which they assigned nurses and other staff to geographic areas of the ER, while all other permanent charge nurses were *excluded* from the unit based on their exercise of meaningful judgment in assigning specific nurses to specific patients).

And remember, although the *Oakwood Healthcare* decision focused solely on "assigning" and "responsibly directing," establishing that a charge nurse (or any other employee) regularly exercises or even "effectively recommends" *any* of the indicia of supervisory status will suffice. So, for example, and as is true at some hospitals, charge nurses who have primary responsibility for evaluating staff RNs, depending on the purposes for which evaluations are used, or for hiring or disciplining staff on their shifts, may be supervisors under the NLRA even if they do not meet the other supervisory criteria.

### Can You Change Your Facts?

For non-unionized employers, there is no barrier under the NLRA to your changing the facts tomorrow, if you don't like the way they look today.

- If charge nurses today might be found to be non-supervisors because they assign staff to patients by strict rotation or according to an inflexible staffing matrix developed by the nurse manager, nothing prevents the facility from giving the charge nurse the discretion to "make an assignment based upon the skill, experience, and temperament of other nursing personnel and on the acuity of the patients," so as to create the requisite "independent judgment."
- Likewise, if rotating (non-permanent) charge responsibilities are today spread over nearly all the registered nurses, such that no nurse spends a "regular and substantial portion of his/her work time performing supervisory functions," you could limit temporary charge responsibilities to a smaller, core group of staff nurses, for whom supervisory status might then successfully be argued.

Of course, there may be very good reasons for the way things are done today, and the risk of possible union organizing may be of relatively little importance when compared to overriding clinical or operational concerns. As with many labor relations issues, it is critically important to identify what is the dog, and what is the tail, before committing to major operational changes.

For unionized charge nurses (or unionized nurses taking temporary charge), changing the facts may still be possible. But doing so may involve bargaining obligations, or even require the union's agreement, during the term of any existing collective bargaining agreement. The advice of legal counsel should be sought on this potentially thorny issue.

### Are You Stuck for the Life of an Existing Union Contract?

Perhaps counter-intuitively, it is not *illegal* (though it may well be improvident) for supervisors to be included in a bargaining unit. Under existing Supreme Court and NLRB decisions, where an employer has agreed to include supervisors in a collective bargaining agreement, the employer will not be permitted to escape its bargain while the contract remains in effect.

Many contracts, while excluding "supervisors" from their coverage, expressly mention both permanent charge nurses (through the existence of a higher pay scale, for example) and rotating charge nurses (*e.g.*, through a charge differential). An employer with such a contract provision may well be forced to live with it until the contract expires. At that point, if charge nurses are in fact "supervisors" under the NLRA, the employer may unilaterally withdraw recognition of the union as the charge nurses' bargaining representative (subject to the union's right to assert, before the NLRB, that the charge nurses in fact do *not* meet the Board's "supervisory" standard). Accordingly, unionized employers for whom removing charge nurses makes sense should carefully consider the terms of their collective bargaining agreements and consult with legal counsel concerning the proper legal time and manner to seek the exclusion of charge nurses from the bargaining unit.

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The NLRB's *Oakwood Healthcare* decision offers important opportunities for healthcare employers. Making the best use of those opportunities will require employers to make well-informed and well-planned decisions, may call for both short-term and long-term strategies, and may force a careful weighing of labor relations priorities against operational concerns.

### Contact Information

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