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Attorney Labor Unions

By Mitchell H. Rubinstein

Introduction

Interest in the law governing attorney labor unions (and, for that matter, interest in an article on the subject) is usually the result of one of two factors. The first is that unhappy staff attorneys may be thinking about organizing and bargaining collectively. The other is that their superiors in the firm or office may be worrying that they are planning to do just that, and are intent on preventing it. This article outlines certain key issues that can arise where attorneys attempt to organize a union.

Attorneys may be interested in joining a labor union for the same reasons as other employees.¹ Through a collective voice, attorneys may be able to achieve "more," which has always been the goal of organized labor. They might obtain more wages, more benefits and, perhaps most importantly, more job security. Unionization may also bring order to a law firm by imposing certain job-related standards, such as hours of work. Violations could be grieved under the collective bargaining agreement, just as in any workplace where a union and a collective bargaining agreement exist.

Although there is relatively little precedent or history in the area of attorney unions, the federal National Labor Relations Board (NLRB or "Board") has asserted jurisdiction over law firms since 1977,² provided a firm has \$250,000 in gross revenue.³ The general process of establishing a union would be the same as it is for employees in other fields.⁴

There are instances where such unionization has occurred without contest.⁵ Many reported cases involving law firms actually concern support staff,⁶ although there are those that also involve attorneys.⁷

What if there is a contest? As a general proposition, attorneys enjoy the same legal rights as other employees in deciding whether or not they want to be represented by a union.⁸ The employer's or law firm's desires are irrelevant. However, attorney-employers are likely to raise certain points in opposition to attorney unionism. They may argue that staff attorneys are not eligible to unionize because they are either confidential employees,

or supervisors, or managerial employees. They might also claim that attorneys should not organize because the ethics of the legal profession will impede the collective bargaining process. Each of these is discussed in turn.

Exclusion of "Confidential Employees"

Employees in law firms and private corporations, including attorneys, must be treated like any other employees covered under the National Labor Relations Act (NLRA or the "Act").⁹ Thus, the Board has rejected attempts by some law firms to exclude attorneys and other law firm employees from the definition of employee because they are "confidential employees."¹⁰

Like many terms in labor law, the term "confidential employee" is a term of art. A confidential employee has nothing to do with the confidential nature of attorney work. Rather, confidential employees are those involved in internal confidential labor relations matters with respect to their employer. The focus is on the attorney's employer – not his or her clients.

The general rationale for the exclusion of confidential employees from the definition of "employees," who may join a union, is as follows: management should not be forced to negotiate with a union which has among its members employees with access to advance information on the company's collective bargaining negotiating position, grievances and other labor relations matters.¹¹ The U.S. Supreme Court addressed this exclusion, however, in *NLRB v. Hendricks County Rural Electric Corp.*¹² Under *Hendricks*, an individual claimed to be exempt on this basis must work directly for and in a confidential capacity to a person who decides and effectuates labor relations policy. As the Board later explained:

The Board's long-established test for determining whether an employee possesses confidential status is whether that employee "assist[s] and act[s] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." This is termed the "labor nexus" test and its validity as an appropriate measure of confi-

dential status was endorsed by the Supreme Court in *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170 (1981). Under this definition it is insufficient that an employee may on occasion have access to certain labor related or personnel type information. What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it.¹³

Consequently, access to confidential business information does not transform someone into a confidential employee, since the standard is limited to those who act and assist in a confidential capacity to persons who exercise managerial authority in labor relations.¹⁴ More recently, the Board seemed to narrow confidential employees to those who “work on labor relations issues on a regular basis.”¹⁵

The burden of establishing that an individual is a supervisor is on the party attempting to exclude such person from the protection of the Act.

Most law firm associates or staff attorneys will not be confidential employees. This is because they are not involved in labor issues involving the management of the firm for which they work.

“Supervisors” as Exempt Category

Perhaps the most significant hurdle with respect to attorney unionization concerns the fact that many attorneys supervise secretaries and other support staff, or even junior associates, and thus might be considered “supervisors,” which would prevent them from becoming a member of a union. The term “supervisor” is also a term of art in labor law, and is often litigated. There has not been much litigation with respect to attorneys, but there have been developments in the law that must be considered in evaluating their status.

The burden of establishing that an individual is a supervisor is on the party attempting to exclude such person from the protection of the Act, and that party is typically the employer.¹⁶ However, not every “order giver” qualifies – a traffic director might tell the president of the company where to park, but that does not make him or her a supervisor.¹⁷ Additionally, the NLRA does

not require that every work location have a supervisor present.¹⁸

In *NLRB v. Health Care & Retirement Corp.*,¹⁹ the Supreme Court described the appropriate test for supervisory status:

[T]he statute requires the resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have the authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require “the use of independent judgment”? Third, does the employee hold the authority “in the interest of the employer”?²⁰

Significantly, an employee need only possess *one* indicia of supervisory authority to be a supervisor.²¹ However, this must always involve the exercise of independent judgment.²² The Board has found that the exercise of judgment beyond regular or customary activities, which is not controlled by outside sources, is “independent.”²³ In *Providence Hospital*,²⁴ the NLRB held that certain nurses were not supervisors, reasoning:

[W]hen a professional gives directions to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give. For example, designing a patient treatment plan may involve substantial professional judgment, but may result in wholly routine direction to the staff that implements that plan.

In *NLRB v. Kentucky River Community Care, Inc.*,²⁵ however, the U.S. Supreme Court largely rejected this analysis. The Court seemed to be concerned with the Board’s “categorical exclusion” of professional judgment. The Court did recognize that some nominally supervisory judgments may be performed without a sufficient *degree* of judgment or discretion, and thus would not warrant a finding of supervisory status. Unfortunately, the Court did not further explain what it meant by this, other than to state that “the degree of judgment . . . may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.”²⁶ In *dicta*, the Court also indicated that the Board can distinguish between employees who “direct the manner of others’ performance of discrete tasks from employees who direct other employees.”²⁷ However, the Board has not appeared to distinguish supervisory status in this exact manner.

On September 29, 2006, the NLRB issued a trio of decisions designed to clarify what is meant by the terms “assign,” “responsibly to direct” and “independent judgment” as those terms are used in the definition of a supervisor in § 2(11) of the Act.²⁸ These decisions, which the NLRB itself described as “major,”²⁹ are particularly applicable to attorney unionization because it is likely that an employer may claim that the attorneys assign or

responsibly direct the work of others with the requisite independent judgment.

*Oakwood Healthcare, Inc.*³⁰ is the most important of the trio because the other two decisions simply apply the law established in *Oakwood*. In *Oakwood*, the NLRB, divided along party lines, held that fulltime regularly employed charge nurses³¹ were supervisors within the meaning of the Act. In so holding, the Board described the word “assign” as follows:

The ordinary meaning of the term “assign” is “to appoint to a post or duty” . . . we construe the term “assign” to refer to 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, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. In the health care setting, the term “assign” encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients. It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function.

The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as “assign” within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffee makers) would not be indicative of exercising the authority to “assign.” . . . In sum, to “assign” for purposes of Section 2(11) refers to the charge nurse’s designation of significant overall duties to an employee, not to the charge nurse’s ad hoc instruction that the employee perform a discrete task.³²

However, with respect to the term “responsibly to direct,” the Board held that term may encompass ad hoc instructions even though such instructions would not constitute an assignment. Interestingly, the majority defined the responsible direction by responding to the dissent’s claim that such responsible direction should be limited to actions undertaken by department heads or higher level management:

[T]he authority “responsibly to direct” is not limited to department heads as the dissent suggests. . . . If a person on the shop floor has “men under him,” and if that person decides “what job shall be undertaken next or who shall do it,” that person is a supervisor, provided that the direction is both “responsible” . . . and carried out with independent judgement. * * * [F]or direction to be “responsible,” . . . the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. . . . Thus,

. . . it must be shown that the employer delegated to the putative supervisor the authority to . . . take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.³³

Oakwood also confirmed that any one of the 12 listed functions contained in § 2(11) must be done with independent judgment for an individual to be a supervisor, and defined independent judgment as follows:

“Independent” means “not subject to control by others.” . . . Thus, as a starting point, to exercise “independent judgment” an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.

* * *

[W]e find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.³⁴

In *Golden Crest Healthcare Center*,³⁵ a second case from the trio, the Board noted that there is a distinction between requesting certain action and having the authority to require certain action to be taken, such as



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mandating that employees stay late. For an individual to be a supervisor, he or she must have the authority to take supervisory action.³⁶ In *Croft Metals, Inc.*,³⁷ the third case in the trio, the Board noted that a lead person occasionally switching tasks that need to be performed is not a supervisory “assignment” because that is similar to ad hoc instructions involving a discrete task.³⁸

These definitions present obvious difficulties in attempting to organize attorneys. However, these issues are not unique to attorneys. In their dissent in *Oakwood*,

Some attorney-employers may seek to argue that attorneys cannot unionize because they are “managerial employees.”

the two Democratic Board members, Wilma B. Liebman and Dennis P. Walsh, stated that they feared that most professionals may be swept up into supervisory status under the majority’s definition, which would be contrary to the intent of Congress which recognized that professionals are employees under the Act.³⁹

In one of the first cases decided after the trio, the Board held that staff nurses were not supervisors.⁴⁰ This was largely because the testimony lacked specificity and was conclusory. Although, § 2(11) only requires that a supervisor have the authority to carry out supervisory duties, the evidence must establish that the purported supervisor actually has such authority.⁴¹

It is important to recognize that the law in this area of labor law is still developing.⁴² Therefore, it is necessary to also examine some cases that were decided before the trio. In *Hospital General Menonita v. NLRB*,⁴³ for example, the First Circuit held that an RN’s assignment of tasks to LPNs and to technicians was not statutory supervision. The RN’s role in assigning tasks was regulated by management protocol and by the physician’s orders, which negated the need for any meaningful supervision. “This is precisely what the Supreme Court meant when, in *Kentucky River*, it indicated that discretion ‘may be reduced below the supervisory threshold by detailed orders and regulations.’”⁴⁴

Some authority to assign, discipline and hire is not considered statutory supervision if, as indicated above, those responsibilities are considered routine, and do not require the exercise of independent judgment.⁴⁵ In one case, one employee occasionally notified other employees that they must fill in for someone who was out, and initialed time cards and time-off requests in the supervisor’s absence. That employee was not considered a supervisor. The employee did not actually verify attendance, and signed off on time-off requests as a routine matter; fur-

ther, although the employee participated in interviews for new hires, he did not make any independent hiring recommendation. Rather, he discussed with more senior management whether they should recommend that the person be hired.⁴⁶

Similarly, in *Armstrong Machine Co., Inc.*,⁴⁷ the Board held that a job repair foreman was not a supervisor. This was because he did not exercise independent judgment in assigning work or in addressing customer inquiries;⁴⁸ merely giving some instructions or minor orders to other employees does not confer supervisory status on the employee in question. Only individuals with “genuine management prerogatives” are considered supervisors.⁴⁹

Accordingly, merely reporting an incident is insufficient to establish that an employee effectively recommended discipline.⁵⁰ The Board has also held that “program managers” who did not have the authority to suspend or discharge “resident advisors” – even though they had the authority to issue general counseling and verbal warnings as part of a progressive discipline system – were not supervisors. The Board viewed the managers’ role as “reportorial” because written warnings had to be approved by higher management, and none of the verbal warnings introduced into evidence referenced a prior verbal warning. The Board concluded that the employer did not meet its burden of establishing that “actual consequences flow from the documented verbal warnings.”⁵¹

As one can see, determining whether an employee is a supervisor is often difficult and can be the product of litigation. Undoubtedly, some attorneys are indeed supervisors; however, it is equally likely that many attorneys are not. Any such determination with respect to attorneys or other employees needs to be examined on a case-by-case basis, in accord with the law discussed above.

The “Managerial Employees” Exclusion

Some attorney-employers may seek to argue that attorneys cannot unionize because they are “managerial employees.” The NLRA itself is silent with respect to the issue. However, the legislative history of the 1947 amendments to the NLRA indicates that Congress intended to exclude them from the definition of “employee” under the Act.⁵² The managerial exclusion is the product of case law developed by the NLRB and U.S. Supreme Court.⁵³

Managerial employees are defined as those who “formulate and effectuate management policies by expressing and making operative decisions of their employer.” The central inquiry made by the NLRB and the courts is whether the employee “represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.”⁵⁴ The party seeking to exclude employees as managerial has the burden of proof.⁵⁵

After the Supreme Court’s decision in *Bell Aerospace*,⁵⁶ the Board on remand held that the employees at issue

(buyers) were not managerial employees. The Board, noting that the employees did not exercise sufficient discretion to be aligned with management, relied upon the fact that the employer had "comprehensive manuals and instructions," which limited the buyers' discretion. The Board also explained that managerial status is not conferred on rank-and-file workers or upon employees who make routine decisions. Rather, managerial employees are those who hold executive-type positions.⁵⁷

To be aligned with management, the employee's duties must be "outside the scope of duties routinely performed by a similarly situated professional."⁵⁸ As the D.C. Circuit explained: "The Supreme Court has made it clear that employees whose decision making is limited to the routine discharge of professional duties in projects to which they are assigned are not managers under the Act."⁵⁹

Occasional advice to management does not transform someone into a managerial employee, particularly where he or she is simply providing information, or advising management. The critical question is whether the employee could take "discretionary action" and whether his or her recommendations "control or implement" company policy.⁶⁰

The managerial exclusion is obviously similar to the supervisory exclusion. However, the managerial exclusion can pertain to executives who may or may not have direct supervisory responsibility.⁶¹ Thus, even if an employee is not a supervisor, he or she may still not be a simple employee under the Act, but rather a manager. However, as with the other categories of excluded employees discussed above, the facts of each case must be carefully examined.

Staff physicians and dentists, without more, are generally not managerial employees.⁶² The same should hold true with respect to staff attorneys. As most staff attorneys and associates are not involved in the management of the law firm or company that employs them, most will not be considered to be "managerial employees."

Attorney Professional Responsibilities

Attempts to disqualify attorneys and others from organizing a union based on a perceived violation of professional conduct have generally been rejected.

The Board has repeatedly rejected arguments that lawyers' professional responsibilities prevent them from organizing a union.⁶³ The fact that attorneys are officers of the court is not a sufficient basis for denying them the protections and benefits of the NLRA.⁶⁴ In fact, the Board interpreted EC 5-13 as specifically recognizing that attorneys have the right to join unions.⁶⁵

Attorney ethical requirements need to be distinguished from union conflict of interests – which may occur with respect to attorney as well as non-attorney bargaining unit members. In general, a union may not represent employees if a conflict of interest exists on

the part of the union, such that good-faith negotiations between the employer and the union could be jeopardized. The burden of proof is on the party making this claim, and it is a very heavy burden. It must be shown that representation would cause an "innate danger" that the union would bargain on behalf of its own interests rather than for the employees whom the union seeks to represent. Such extreme situations generally arise only where the union actually owns or controls a business enterprise in the same industry as the employer, in direct competition with the employer.⁶⁶ A "conflict of interest" on the part of union-side law firm attorneys representing unions has been rejected as a basis for halting attorney unionizing activity.⁶⁷

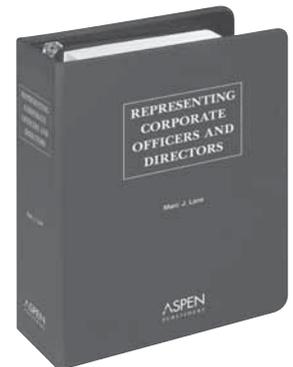
Conclusion

While there is surprisingly little NLRB precedent with regard to attorneys, they are no different from other employees in the area of unionizing activity. If the attorney works in an employment-at-will state such as New York, which provides virtually no protection to employees, unionization may be a viable option to consider.⁶⁸ The reasons why partners and other legal managers want to avoid a union are ultimately no different from those found in other industries, and union organizers should keep this in mind.

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If there is interest, the NLRB maintains an excellent Web site which attorneys, unfamiliar with traditional labor law, can visit and use.⁶⁹ This Web site contains links to cases, a representation manual and copies of the requisite forms. Perhaps, unionization is something that attorneys might want to consider. ■

1. Though less than 10% of the private sector workforce is unionized, studies show that between one-third and one-half of American workers would be interested in joining a union. Joseph E. Slater, *The "American Rule" That Swallows the Exceptions*, — Emp. Rts. & Emp. Pol'y J. — (forthcoming 2007) (collecting authorities and noting some of reasons for the disparity in the percentage of unionization in this country, as compared with the number of employees who are interested in joining unions). There is no reason to believe that attorneys would be less interested in joining unions than the American workforce in general.

2. *Foley, Hoag & Eliot*, 229 NLRB 456 (1977). For a discussion of prior law, see *Recent Development: Labor Law – NLRB Declines to Assert Jurisdiction Over Law Firms*, 41 Tenn. L. Rev. 745 (1974).

3. *Camden Reg'l Legal Servs., Inc.*, 231 NLRB 224 (1977); *David Van Os & Assocs., P.C.*, 346 NLRB No. 79 (Mar. 31, 2006).

4. For those who believe unionization may be a viable option, it takes only 50% plus one of the unit members to vote in favor of unionization. The union election is held in the unit of employees which is "appropriate" for bargaining as determined by the NLRB. The appropriate unit for bargaining is very important to both labor and management. It will determine who can vote in the election and who will be in the union if the union prevails. *Am. Hosp. Ass'n v. NLRB*, 899 F.2d 651 (7th Cir. 1990), *aff'd*, 499 U.S. 606 (1991). Two types of issues typically come up: unit scope (if there are a multiple locations) and unit composition (specific job titles that would be covered). See, e.g., *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570 (1st Cir. 1983) (distinguishing between unit scope and unit composition). It is beyond the scope of this article to discuss appropriate unit principles in any more detail other than to state that there can be more than one appropriate unit, and that the employees do not have to petition for the "most appropriate unit." Therefore, a separate unit of attorneys might be appropriate, as well as a combined unit of attorneys and other employees.

5. Under the NLRA, employers can voluntarily recognize unions. *Triangle Bldg. Prods. Corp.*, 338 NLRB 257 (2002). Additionally, NLRB elections are often held pursuant to stipulated election agreements. In fiscal year 2004, the Board was able to negotiate a stipulated election agreement in 89% of such cases. *Performance and Accountability Report FY 2004*, at 2 (NLRB 2004), available at <www.nlr.gov>. While a stipulated election agreement does not necessarily mean that the parties did not engage in litigation over certain conduct (such as post election Unfair Labor Practices or Objections), the fact that such a large percent of elections are conducted pursuant to stipulations means that many unions are recognized without litigation.

6. *Foley, Hoag & Eliot*, 229 NLRB 456 (1977) (unit of file clerks and messengers); *Camden Reg'l Legal Servs.*, 231 NLRB 224 (unit of secretaries, receptionists, clerks, assistant bookkeeper, clerical assistant); *Stroock & Stroock & Lavan*, 253 NLRB 447 (1980) (unit of clerical and support staff); *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 NLRB 450 (1980) (unit of office workers, executive secretaries, administrative secretary, file clerk, mail clerk, receptionists).

7. *Wayne County Neighborhood Legal Servs., Inc.*, 229 NLRB 1023 (1977) (unit of staff attorneys); *Kaplan, Sicking, Hessen, Sugarman, Rosenthal & Zientz*, 250 NLRB 483 (1980) (unit of attorney, paralegal, law clerk and investigator); *Am. Fed'n of State-County-Mun. Employees Council 93*, 1-RC-21569 (Regional Director, Dec. 5, 2002) available at <http://www.nlr.gov/nlr/shared_files/decisions/dde/2002/1-RC-21569.pdf> (self determination election ordered to determine if associate general counsels should be in a separate unit or in a unit including field staff representatives, senior field staff representatives, organizers); *Kennedy, Schwartz & Cure, P.C.*, 2-RC-22718 (Regional Director 2003) available at <http://www.nlr.gov/nlr/shared_files/decisions/dde/2003/2-RC-22718.pdf> (election in unit of attorneys or attorneys and secretaries, legal assistants, receptionists and bookers ordered). Cf. *In re Lumbermen's Mut. Cas. Co. of Chicago*, 75 NLRB 1132 (1948) (unit consisting in part of attorneys employed by insurance company).

8. Indeed, the *Restatement of Law* (3rd) governing lawyers recognizes that lawyers are subject to the same labor relations laws as other employees. Specifically, the *Restatement* (3rd) provides in relevant part: "A lawyer who hires a lawyer or nonlawyer as an employee is subject to applicable law governing the employment relationship, such as contract law, antidiscrimination legislation, unjust-discharge law, and labor relations law." *Restatement* (Third) of Law Governing Lawyers § 56(k).

9. *Kennedy, Schwartz & Cure, P.C.*, 2-RC-22718, slip op. at 24 (Regional Director 2003) available at <http://www.nlr.gov/nlr/shared_files/decisions/dde/2003/2-RC-22718.pdf>.

10. *Id.* at 22, n.12; *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 NLRB 450 (1980).

11. *NLRB v. Meenan Oil Co.*, 139 F.3d 311 (2d Cir. 1998).

12. 454 U.S. 170 (1981).

13. *Intermountain Rural Elec. Ass'n*, 277 NLRB 1, 3-4 (1985), *aff'd*, 1988 WL 166520, 112 Lab. Case (CCH) ¶11, 269 (10th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989) (citation omitted).

14. *Ford Motor Co.*, 66 NLRB 1317, 1322 (1946).

15. *E.C. Waste Mgmt. Inc.*, 339 NLRB 262, n.2 (2003).

16. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001); *Mich. Masonic Home*, 332 NLRB 1409 (2000); *Health Res. of Lakewood, Inc.*, 332 NLRB 878 (2000); see *NYU Med. Ctr. v. NLRB*, 156 F.3d 405 (2d Cir. 1998).

17. *NLRB v. Sec. Guard Serv.*, 384 F.2d 143 (5th Cir. 1967); *Food Store Employees v. NLRB*, 422 F.2d 685, 690 (D.C. Cir. 1969) ("Almost any employee 'directs' other employees in some fashion at some time."); *Miss. Power & Light Co.*, 328 NLRB 965, 971 (1999) ("Both the Board and courts have recognized that not every act of assignment or direction makes an employee a supervisor."); *abrogated by Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001); *Hosp. Gen. Menonita v. NLRB*, 393 F.3d 263 (1st Cir. 2004) ("[T]he mere fact that an employee gives other employees instructions from time to time does not . . . render him . . . a supervisor.").

18. *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 649 (D.C. Cir. 1999).

19. 511 U.S. 571 (1994).

20. *Id.* at 573-74 (quoting *Northcrest Nursing Home*, 313 NLRB 491, 493 (1993)). These 12 factors are contained in the definition of a supervisor. Section 2(11) of the NLRA defines a supervisor as follows: "The term 'supervisor' means any individual having 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."

21. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001); *Pub. Serv. Co. v. NLRB*, 271 F.3d 1213 (10th Cir. 2001) (§ 2(11) requirements are read in the disjunctive).

22. *King Broad. Co.*, 329 NLRB 378 (1999).

23. *Training Sch. at Vineland*, 332 NLRB 1412 (2000).

24. 320 NLRB 717 (1996), *enforced*, 121 F.3d 548 (9th Cir. 1997), *overruled by Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006).

25. 523 U.S. 706 (2001).

26. *Id.* at 714.

27. *Id.* at 720 (emphasis in original).

28. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (Sept. 29, 2006); *Golden Crest Healthcare Ctr.*, 348 NLRB No. 39 (Sept. 29, 2006).

29. *NLRB Issues Lead Case Addressing Supervisory Status in Response to Supreme Court Decision in Kentucky River*, Press Release, Oct. 3, 2006, available at <www.nlr.gov>.

30. 348 NLRB No. 37.

31. Where an individual only is engaged in supervisory duties part of the time, the test is "whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions." This refers to a pattern or schedule. While there is no strict numerical test, the Board has found supervisory status where the individual functioned as a supervisor 10%-15% of their total work time. *Id.*, slip op. at 11. For other cases, see, *Entergy Gulf States v. NLRB*, 253 F.3d 203 (5th Cir. 2001). See also *Training Sch. at Vineland*, 332 NLRB 1412 (2000) (employee who provides limited oversight to other employees is not a statutory supervisor); *Somerset Welding Co.*, 291 NLRB 913 (1988) (exercise of some supervisory authority in clerical, perfunctory or sporadic manner does not require a finding of supervisory status); *Commercial Fleetwash*, 190 NLRB 26 (1971) (occasional isolated instance is generally insufficient to establish that an individual is a supervisor); *Robert Greenspan, D.D.S.*, 318 NLRB 70 (1995), *enforced*, 1996 WL 98783 (2d Cir.) (n.o.r.), *cert. denied*, 519 U.S. 817 (1996) (same, finding that dentists did not supervise dental assistants.); *Franklin Home Health Agency*, 337 NLRB 826 (2002) ("The exercise of 'some supervisory authority in routine, clerical, perfunctory or sporadic manner' or through giving 'some instructions or minor orders to other employees' does not confer supervisory status.").

32. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 slip op. at 4-5.

33. *Id.*, slip op. at 7-8.
34. *Id.*, slip op. at 9-10.
35. 348 NLRB No. 39 (Sept. 29, 2006).
36. *Id.*, slip op. at 4-5.
37. 348 NLRB No. 38 (Sept. 29, 2006).
38. *Id.*, slip op. at 7.
39. 348 NLRB No. 37, slip op. at 20 (Liebman and Walsh, dissenting).
40. *Avante at Wilson, Inc.*, 348 NLRB No. 71 (Oct. 31, 2006). In this case, the Board also considered the secondary factor of supervisory ratio. If the Board were to find that the staff nurses were supervisors, as argued by the employer, there would be an "improbably high ratio of 22 supervisors to 27 employees." *Id.* at n. 4.
41. *Id.*, slip op. at 2.
42. Indeed, after these trio of decisions were decided, a number of cases were remanded back to the Regional Director. See, e.g., *Rockspring Development, Inc.*, 348 NLRB No. 75 (Nov. 15, 2006).
43. 393 F.3d 263(1st Cir. 2004).
44. *Id.* at 268.
45. *Los Angeles Water & Power Employees' Ass'n*, 340 NLRB 1232 (2003).
46. *Id.*
47. 343 NLRB No. 122 (2004).
48. *Id.* The Board described the foreman's duties as follows: "Meier answered employees' questions and assigned departmental work. In making work assignments, Meier referred and adhered to a priority list generated by management. He also took into account employees' skills and experience and whether the employees were able to work together. In addition, when the Respondent's owner, Clifford Porter, was absent, Meier answered customer inquiries related to the repair department. . . . [T]he record fails to demonstrate that Meier exercised independent judgment in assigning work or in addressing personnel problems. . . . Nothing in the record supports a finding Meier's employee placements are based on anything other than common knowledge, present in any small workplace, of which employees have certain skills and which employees do not work well together. In other words, the record fails to evince that Meier's assignment of work was anything other than routine."
49. *Id.* at n.4.
50. *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644 (D.C. Cir. 1999). *Nathan Katz Realty v. NLRB*, 251 F.3d 981(D.C. Cir. 2001) (same); *Los Angeles Water & Power Employees' Ass'n*, 340 NLRB 1232 (2003).
51. *Ken-Crest Servs.*, 335 NLRB 777 (2001); *Hosp. Gen. Menonita v. NLRB*, 393 F.3d 263 (1st Cir. 2004) ("[I]t is well settled that where an employee's involvement in the evaluation process is merely reportorial in nature, it is not sufficient to meet the supervisor classification.").
52. Gorman & Finkin, *Basic Text on Labor Law* § 3.7 (2d ed. 2004).
53. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).
54. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682-83 (1980).
55. *LeMoyne-Owen Coll.*, 345 NLRB No. 93 (2005) (holding that faculty were managerial employees because they effectively make decisions in critical areas such as curriculum, course content, determination of honors, grading, admission standards, and participation in tenure decisions).
56. 416 U.S. 267 (1974).
57. *Bell Aerospace Co.*, 219 NLRB 384 (1975).
58. *Nurses United*, 338 NLRB 837, 840 (2003).
59. *Evergreen Am. Corp. v. NLRB*, 362 F.3d 827 (D.C. Cir. 2004).
60. *NLRB v. Meenan Oil Co.*, 139 F.2d 311 (2d Cir. 1998).
61. For example, the exercise of editorial discretion, without more, does not confer executive type status. *Bakersfield Californian*, 316 NLRB 1211, 1219 (1995). However, an editor who is directly involved in making fundamental decisions about the direction of the newspaper and who chaired policy meetings was held to be a managerial employee. *Bulletin Co.*, 226 NLRB 345 (1976).
62. *Third Coast Emergency Physicians*, 330 NLRB 756 (2000); *Montefiore Hosp. & Med. Ctr.*, 261 NLRB 569 (1982).
63. *Lumbermen's Mut. Cas. Co. of Chicago*, 75 NLRB 1132 (1948); *Foley Hoag & Eliot*, 229 NLRB 456, 458 (1977); *Kennedy, Schwartz & Cure, P.C.*, 2-RC-22718, slip op. at pp. 20-25 (Regional Director 2003) available at <http://www.nlr.gov/nlr/shared_files/decisions/dde/2003/2-RC-22718.pdf>.
64. *Lumbermen's Mut. Cas. Co. of Chicago*, 75 NLRB 1132.
65. *Kennedy, Schwartz & Cure, P.C.*, 2-RC-22718, slip op. at pp. 10-25 (Regional Director 2003) available at <http://www.nlr.gov/nlr/shared_files/decisions/dde/2003/2-RC-22718.pdf>. EC 5-13 provides:
- A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how to fulfill his or her professional obligations to a person or organization that employs the lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, the lawyer should be vigilant to safeguard his or her fidelity as a lawyer to the employer, free from outside influence.
66. *CMT, Inc.*, 333 NLRB 1307 (2001); see *Guardian Armored Assets LLC*, 337 NLRB 556 (2002) (no conflict where union seeks to represent private guards because union also represents police officers in public sector).
67. *Kennedy, Schwartz & Cure, P.C.*, 2-RC-22718, slip op. at 22, n.12.
68. See *Horn v. N.Y. Times*, 100 N.Y.2d 85, 760 N.Y.S.2d 378 (2003) (employer may discharge employee for a good reason or no reason so long as it does not violate some statutory right). Even in conservative states such as New York, however, a cause of action for breach of an implied contract is recognized if an attorney is terminated for insisting that his or her law firm comply with DR 1-103(A), which imposes an obligation on attorneys to report another attorney's misconduct. *Wieder v. Skala*, 80 N.Y.2d 628, 593 N.Y.S.2d 752 (1992). See also *Connolly v. Napoli, Kaiser & Bern LLP*, 12 Misc. 3d 530, 817 N.Y.S.2d 872 (Sup. Ct., N.Y. Co. 2006) (associate fired for refusing to violate DR 1-102 which imposes an obligation on attorneys not to engage in dishonesty, fraud, deceit or misrepresentation states a cause of action for breach of implied contract). Outside the area of professional ethics, attorneys are treated the same as other employees.
69. Some attorneys who practice employment law or pension law may sometimes identify themselves as labor lawyers, but their area of practice is to be distinguished from traditional labor law matters where unionization is involved. The NLRB's Web site is www.nlr.gov.

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