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While many employers focus their efforts on defeating the Employee Free Choice Act currently being debated in Congress, unions are pushing another equally troubling bill: The Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers ("RESPECT") Act. The RESPECT Act, introduced into the Senate and House of Representatives on March 22, 2007, would turn millions of supervisors into rank and file employees subject to union organizing by dramatically changing the 60-year old definition of "supervisor" contained in the NLRA.

Labor Management | A Littler Mendelson Newsletter

The RESPECT Act: A Bad Law With A Snappy Acronym Is Still A Bad Law

By Todd M. Nierman

While employers are intently focused on defeating the Employee Free Choice Act (EFCA) (See, *The Employer Free Choice Act: It's More Than Just a Misleading Name*, Littler Insights, March 2007), the AFL-CIO's Congressional majority is pulling an end run, trying to push another equally troubling piece of pro-labor legislation through Congress. The Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers ("RESPECT") Act, introduced into the Senate and House of Representatives on March 22, 2007, would turn millions of supervisors into rank and file employees subject to union organizing by dramatically changing the 60-year old definition of "supervisor" contained in Section 2(11) of the National Labor Relations Act (NLRA).

Background

The NLRA excludes "supervisors" from its protections. Under current law, unions cannot require supervisors to be included in a bargaining unit, and supervisors do not have a protected right to promote unionization in the workplace. On the other hand, a supervisor's conduct toward his or her subordinates can expose the employer to liability for unfair labor practices. The definition of "supervisor" is contained in Section 2(11) and reads 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.

Prior to 2006, the National Labor Relations Board (NLRB) had a long history of inconsistently applying this definition. That inconsistency led several courts of appeals to question the deference to which the NLRB's decisions on this issue were entitled, and caused the Supreme Court twice to reject NLRB interpretations of the definition of a supervisor.

As a result, late last year the NLRB issued three decisions concerning supervisory status, in which the NLRB clarified the meaning of the terms "assign," "responsibly to direct," and "independent judgment" in Section 2(11) of the Act. (Throughout this article, the three decisions collectively will be referred to as the "Oakwood Decision," after the lead case *Oakwood Healthcare*, 348 NLRB No. 37 (2006)).

One would think that a clear definition of the term "supervisor" would benefit all parties involved in organizing campaigns – unions, employers and employees. Yet for several months prior to the issuance of the Oakwood Decision, organized labor was already mounting a major campaign designed to erode any support for the yet unissued decision. According to the AFL-CIO's rhetoric, the NLRB's yet to be issued decision was going to cause some 8,000,000 employees to lose their protection under the NLRA.

Ironically, the Oakwood Decision, when it issued, turned out to be more narrow and indeed more favorable to labor's viewpoint

than labor had anticipated. In the Oakwood Decision, only 12 of the 172 individuals at issue were deemed by the NLRB to be supervisors under the clarified definition. The other 160 workers were found still to be protected by the NLRA. Nonetheless, since Oakwood was announced in October 2006, the rhetoric and hyperbole have continued unabated. One wonders whether organized labor even read the Oakwood Decision.

In response to the Oakwood Decision, organized labor's Congressional majority has introduced the RESPECT Act. According to the AFL-CIO, the RESPECT Act is intended to reverse the Oakwood Decision by righting "a wrong done to potentially millions of Americans when the Bush-Board [NLRB] stripped away their right to bargain." With due apologies to Rodney Dangerfield – under this law employers are the ones who "get no respect."

The Proposed Law

The RESPECT Act would make three significant changes to the definition of supervisor in Section 2(11):

1. delete "assign;"
2. delete "responsibly to direct;" and
3. require that the individual spend the majority of his or her time performing the remaining supervisory functions in Section 2(11) in order to be classified as a supervisor.

The Ramifications

This is not a "correction" or a "restoration of Congressional intent," as the RESPECT Act's supporters contend. These are wholesale and dramatic changes to a 60-year old law. Consider how many current supervisors actually spend more than 50% of their time engaged in supervisory functions other than assigning and directing work. Probably only a few. The fact of the matter is that this law will change the supervisory status of many individuals who have been deemed supervisors for many years prior to the Oakwood Decision. It would upset the balance Congress intended when it mandated that individuals who possess supervisory authority owe allegiance to management, not labor unions. The world of union organizing will be changed dramatically if the RESPECT Act becomes law.

The current statutory definition of "supervisor" turns on the existence of supervisory authority, not the frequency of its exercise. That is how Congress wrote the law 60 years ago. And a long line of NLRB and court decisions make clear that when an individual regularly exercises any one of the enumerated powers in Section 2(11), albeit less than 50% of the time, the definition is satisfied. It is a qualitative, not a quantitative test. Occasional or isolated instances of actions which might otherwise be supervisory have never been deemed sufficient to satisfy the definition, and that was not changed by the Oakwood Decision. There simply is no need to insert an arbitrary temporal criterion.

Furthermore, the current definition's use of the phrase "*responsibly* to direct" strikes the proper balance between supervisory individuals who are held accountable by their employers to direct the work of subordinates as a primary duty; and non-supervisory lead persons, journeymen, and skilled workers who, as an incident to their primary function of performing non-supervisory tasks, direct less skilled employees. Therefore the terms "assign" and "responsibly to direct" are key, self-limiting terms in the supervisor definition. They should not be deleted.

Just as they are trying to do with the EFCA, the AFL-CIO's Congressional majority, through the RESPECT Act, is seeking to obliterate 60 years of legal precedent with the sole objective being the revitalization of the labor movement. Even the title of the law is misleading. The vast majority of the "skilled and professional employees" and "construction trade workers" whom the Unions claim they are seeking to protect with the new legislation are *not* supervisors under the current definition of "supervisor" as interpreted by the NLRB in the Oakwood Decision.

What You Can Do

It is imperative that employers rebut the AFL-CIO's assertion that the Oakwood Decision will lead to massive reclassification of workers to supervisors. It is equally important that employers inform Congress how radically the proposed legislation would change the current status of most supervisors. As is the case with the EFCA, there are several things employers can do:

1. Work with your trade organization to lobby on the RESPECT Act. Given the potential impact of this law, this is an instance where employers should make themselves heard.
2. Contact and support other organizations with which you may have a relationship or who are making positions known on the law. A good example is the U.S. Chamber of Commerce. The U.S. Chamber currently is looking for employers to share with it the practical effect of the Oakwood Decision.
3. Write to any member of Congress who may serve an area in which your entity has a location. While writing to one's Congressperson may sound trite or outdated, it can be very effective.

Passage of the RESPECT Act would have a profound effect on all employers, whether union or non-union. Your close attention to the status of this legislation is strongly recommended.

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