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## NLRB Clarifies Standards For Determining Supervisory Status

In *Oakwood Healthcare, Inc.*, issued on October 3, 2006, the National Labor Relations Board clarified and expanded the standards for determining whether an individual is a “supervisor” under the National Labor Relations Act.

Individuals who are supervisors under the Act are not protected for the purpose of participating in union activities, bargaining collectively, or engaging in other concerted activities for mutual aid or protection. In two previous cases, the U.S. Supreme Court in *NLRB v. Health Care and Retirement Corp.* (1994), and *NLRB v. Kentucky River Community Care* (2001), criticized the Board’s prior attempts to articulate the meaning of key terms in the Act’s definition of a supervisor.

A supervisor is defined in Section 2(11) of the Act as: “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.”

Thus, an individual is a supervisor for purposes of the Act if he or she meets three statutory benchmarks: (1) the individual has authority or effectively recommends any of the 12 listed functions, provided, in addition that (2) the individual exercises that authority in the interest of the employer, and (3) in a manner that is not routine or clerical but requires the use of independent judgment. The burden of proving supervisory status is on the party asserting it.

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## Supreme Court Articulates Broad New Standards For Retaliation Claims

On June 22, 2006, in *Burlington Northern & Santa Fe Railway Co. v. White*, the United States Supreme Court articulated new standards to be applied to employees’ claims of retaliation under Title VII of the Civil Rights Act of 1964 (“Title VII”). Prior to this decision, the Circuit Courts of Appeals had reached different conclusions about whether an alleged retaliatory action must be employment-related and about how harmful the alleged action must be to rise to the level of retaliation.

Sheila White worked as a forklift operator for Burlington Northern & Santa Fe Railway Company. During her employment, White complained to Company officials that her immediate supervisor made inappropriate gender-based remarks, including a comment that women should not work in her department. Following an internal investigation, a Company official informed White that her supervisor would be disciplined and that White would be reassigned from operating a forklift to a job as a track laborer. White subsequently filed a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”), claiming among other things that the reassignment of her job duties constituted retaliation for her earlier complaint.

Approximately two months later, White filed a second charge of discrimination with the EEOC, alleging that she had been placed under surveillance and that her daily activities were being monitored. A few days later, following a disagreement with a supervisor, White was suspended without pay for insubordination. Following an internal

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## Supreme Court Permits Reimbursement By Benefit Plans From Participant Recoveries

On May 15, 2006, the Supreme Court, in *Sereboff v. Mid Atlantic Medical Services, Inc.*, ruled that a health plan may recover reimbursements of the medical benefit payments made by the plan from a judgment the participant recovered from a third party.

The Supreme Court’s decision is a victory for many employer-sponsored benefit plans. Since the Supreme Court decided *Great West Life & Annuity Ins. Co. v. Knudson* in 2002, the federal courts have generally been unwilling to grant such plans the right to recover from an injured or disabled participant amounts received from a third party as reimbursement for benefits paid by the plan. The Employee Retirement Income Security Act of 1974 (“ERISA”), which governs employee benefit plans, authorizes equitable relief only. The Court in *Knudson* held that because reimbursement of the plan was a legal, not an equitable remedy, it was not permitted under ERISA.

In *Sereboff*, participants in an employer-sponsored health plan were injured in a car accident. The plan paid benefits to the Sereboffs, and later, the Sereboffs settled claims against the third party alleged to have caused the accident. The plan subsequently sought reimbursement for the benefits it had paid.

The Supreme Court analogized the plan’s claim for reimbursement to a case from 1914 in which an attorney promised two other attorneys a share of a contingency recovery the attorney expected. When the promise was made, the Court in *Barnes v. Alexander* held that an equitable lien was created that could be applied to the recovery enjoyed by the promising attorney.

The Court identified as a key fact that the funds to be recovered were in the possession of the Sereboffs, and separate from their other assets. In fact, the Sereboffs had separated amounts claimed by the plan and held them in a separate account pending resolution of the case. The separate account was established by order of the District Court after the plan obtained a restraining order and preliminary injunction against the Sereboffs.

The Court decided that the plan’s claim was against the amount recovered and could be traced by the plan. Importantly, the plan was not seeking to impose personal liability on, or to recover against, the Sereboff’s personal assets. The Court held that the plan’s claim therefore was permitted to enforce the terms of the plan.

*Sereboff* provides a means and a potential roadmap for plans to obtain reimbursement for benefits paid when a participant has recovered from a third party who has caused the injury. There, the Court allowed the plan to recover because the funds to be recovered were in a separate account maintained separately from the participants. Thus, a plan seeking reimbursement should consider doing the following:

- \* Include language in the plan document and the summary plan description that obligates the participant to reimburse the plan from the participant’s recovery and to segregate the recovered funds until reimbursement is made.
- \* Be sure that the plan document states that the plan imposes an equitable lien on any participant’s recovery from a third party and provide that the plan may seek equitable relief to enforce the lien.
- \* The plan should specifically provide that the lien applies only to the amount recovered, not to the participant’s general assets.
- \* Finally, when a participant receives a recovery and reimbursement will be sought, the plan administrator

should act quickly to compel the participant to maintain the separate account required under the plan’s terms. ■

## Mandatory Arbitration Agreements May Not Preclude NLRB Charges

In a decision released on June 8, 2006, the National Labor Relations Board held in *U-Haul Co. of California* that an employer’s policy that mandated arbitration of any “legal or equitable claims and causes of action recognized by local, state, or federal law or regulations” violated federal labor law because it would reasonably tend to inhibit employees from filing charges with the Board.

The Board made it clear that its ruling was limited to the specific language at issue and that it was not passing on the lawfulness of mandatory arbitration provisions in general. Indeed, the Board suggested that it would uphold a similar arbitration provision that expressly excepted the filing of charges with the Board. Nevertheless, the Board reiterated that arbitration provisions that reasonably tend to restrict the exercise of rights protected by the National Labor Relations Act are void and invalid as a matter of public policy.

The Board’s ruling in *UHaul* has significant implications for employers. The Board has made it clear that implementing a broadly worded mandatory arbitration policy for resolving employment disputes may violate federal labor law if the policy does not exclude the filing of charges with the Board. Accordingly, employers should review their arbitration policies in light of *UHaul* to ensure that their policy cannot reasonably be read to preclude the filing of unfair labor practice charges with the Board. ■



## Employers Must Draft Waivers of Age Discrimination Claims Carefully

In *Syverson v. International Business Machines Corp.*, the United States Court of Appeals for the Ninth Circuit ruled recently that a waiver form used in connection with a severance benefit package did not meet the “knowing and voluntary” standard required under the Older Workers Benefit Protection Act (“OWBPA”) and was therefore ineffective to waive employees’ rights under the Age Discrimination in Employment Act (“ADEA”).

The OWBPA protects employees by requiring the waivers of rights or claims under the ADEA to be “knowing and voluntary.” To be “knowing and voluntary,” a waiver must, among other things, be “written in a manner calculated to be understood” by the average employee. The OWBPA also sets forth other requirements, such as the requirement that employees must be advised to consult with an attorney prior to signing a waiver, and that waivers cannot impose any penalties or other limitations adversely affecting an individual’s right to challenge the agreement.

While releases and covenants not to sue have the same purpose, covenants not to sue are often used by employers to recover attorneys fees and costs in the event a former employee breaches the agreement and attempts to assert rights in court. Yet the ADEA protects employees by prohibiting agreements from imposing any penalty upon an individual’s right to challenge the agreement.

In *Syverson*, IBM drafted a severance agreement containing a release which both waived the employee’s right to sue, and expressly excluded ADEA claims from a covenant not to sue. The Ninth Circuit ruled that the release did not meet the OWBPA’s “knowing and voluntary” standard because the agreement did not explain the relationship between the

release and the covenant not to sue and created confusion by suggesting that those terms were used interchangeably. Accordingly, there was no bar to the employee bringing age discrimination claims against IBM in spite of the severance agreement.

Employers can draft effective release agreements that preserve the right of an employee to challenge, without penalty, the waiver of ADEA claims. In order to do so effectively, employers must ensure that their agreements are written in a manner that is clear and understandable, particularly with respect to potentially complex issues such as the relationship of the covenant not to sue and release of claims. ■

### (... cont. *NLRB Clarifies Standards For Determining Supervisory Status*)

In its recent decision, the Board focused on the meaning of the terms “assign,” “responsibly to direct,” and “independent judgment.” The Board first interpreted “assign” to include the act of designating an employee to work in a specific location, department or other “place,” or appointing the employee to work at a specific time, such as on a particular shift or overtime period. Assigning work also includes delegating significant duties or functions, as opposed to providing *ad hoc* instructions to perform a discrete task.

The Board further explained that “responsibly to direct” means the individual is accountable for the work to be performed, has authority to take corrective action if necessary, and faces the possibility of adverse consequences if the work is not completed properly.

The Board also explained that “independent judgment” requires both that the individual’s judgment is not effectively controlled by another authority, including the requirements contained in written policies or contract provisions, and that the degree of the individual’s discretion is more than merely routine or clerical. In the earlier *Kentucky River* case, the Board had found that ordinarily professional or technical judgment, such as exercised by nurses, is

not performed “in the interest of the employer.” The Supreme Court rejected this limitation, and the Board in *Oakwood Healthcare* followed the Court’s direction. In determining whether an individual exercises independent judgment, the Board now focuses on the *degree* of the individual’s discretion, rather than the *kind* of discretion being exercised.

Applying these standards to the case before it, the Board found that 12 permanent charge nurses who independently assigned staff to patients on a unit based on their judgment of factors including the patients’ condition, were supervisors under the Act. The Board held that the charge nurses assignments’ were made with independent judgment because the nurses did “assess the quantity of work to be assigned, the relative difficulty of the work involved, and the competence of the staff available to do the work.” By contrast, the Board ruled that emergency room charge nurses were not statutory supervisors because they simply assigned employees to general areas and did “not take into account employee skill or the nature or severity of the patient’s condition when making the assignment.” The Board also found that rotating charge nurses were not supervisors because the hospital failed to show that they performed the charge nurse role with any regularity.

While the Board’s new standards provide helpful guidance for employers in determining supervisory status, that determination will continue to be factually intensive. As a result, the impact of the Board’s new standards will depend on the specific circumstances of each workplace. ■

### (... cont. *Supreme Court Articulates Broad New Standards For Retaliation Claims*)

investigation into that incident, the Company concluded that White had not been insubordinate. White was reinstated to her position and awarded back pay for the 37 days she was suspended. White



subsequently filed an additional charge of discrimination with the EEOC, claiming retaliation based on her suspension.

White ultimately filed a lawsuit in federal court alleging that Burlington Northern retaliated against her in violation of Title VII by reassigning her from forklift to laborer duties, and later suspending her for 37 days. A jury found in White’s favor on both claims and awarded her compensatory damages in the amount of \$43,500.00. While the Sixth Circuit Court of Appeals affirmed the judgment in favor of White, the members of the court differed as to the proper legal standards to apply in a retaliation case.

On appeal, the Supreme Court concluded that Title VII’s anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. Unlike Title VII’s anti-discrimination provision, which is limited to actions that affect employment or alter the conditions of the workplace, the Court found that the anti-retaliation

provision was drafted more broadly to deter “the many forms that effective retaliation can take,” including actions causing harm outside the workplace.

The Court also concluded that in order to establish actionable retaliation, a plaintiff must show that a reasonable employee would have found the challenged action “materially adverse.” The Court distinguished materially adverse actions from trivial harms, noting that “petty slights, minor annoyances, and simple lack of good manners” do not rise to the requisite level. The Court further emphasized that the standard for judging harm is an objective one which often will depend upon the particular circumstances at issue.

Applying these standards to the case before it, the Supreme Court determined there was sufficient evidence to support the jury’s verdict in favor of White. Cautioning that reassignment of job duties is not automatically actionable, the Court nevertheless found sufficient

evidence to support the jury’s conclusion that White’s forklift operator position was objectively a better, more prestigious job and that her reassignment to a “more arduous and dirtier” job was materially adverse. The Court also determined that White’s 37-day suspension without pay was a materially adverse action, even though she ultimately received back pay, because “an indefinite suspension without pay could well act as a deterrent” to an employee considering filing a discrimination complaint.

The Supreme Court’s decision in *Burlington Northern* creates what is widely viewed as an “employee-friendly” standard in retaliation cases and underscores the need for employers to develop and enforce effective policies prohibiting discrimination, retaliation and harassment in the workplace and to train supervisors and managers to promptly and appropriately handle internal complaints. ■

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