WHO IS A SUPERVISOR?

The answer to this question can have significant ramifications for California employers, who may be surprised at the answer. In California employers are strictly liable if a supervisor discriminates against an employee, which includes sexual or other forms of harassment based on an employee's protected status such as race or national origin. Quite simply this means that if a supervisor sexually harasses an employee, even if the employer knows nothing about it, the employer will be liable for damages to the employee.

The California Fair Employment and Housing Act (FEHA) defines a supervisor as, "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." This is the same definition of supervisor that has been in the National Labor Relations Act since 1947 and the National Labor Relations Board (NLRB), the federal agency that deals with organized labor (union) issues, has now expanded this definition to include even more employees. Although the NLRB's decision is not binding under California discrimination law it may predict where it will move in this area and that may have unanticipated consequences for California employers.

In the decision the NLRB first observed that under this definition, individuals are supervisors if (1) they hold the authority to engage in any one of the twelve delineated supervisory functions; (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) their authority is held "in the interest of the employer." Possession of the authority to engage in (or effectively recommend) any one of the twelve supervisory functions establishes supervisory status. Since the law lists twelve separate functions, the premise is that each supervisory function is to be accorded a separate meaning. Consequently, to "assign" and "responsibly to direct" have two different and distinct meanings.

The NLRB then went on to explain the common elements of the definition and the terms, "assign," "independent judgment," and "responsibly direct" as they apply to the 12 supervisory functions. The first element discussed was the term: "assign." The NLRB relied on the ordinary meaning of the term, "to appoint to a post or duty." Because this function shares with other functions—i.e., hire, transfer, suspension, layoff, recall, promotion, discharge, reward or discipline—the common trait of affecting a term or condition of employment, it was construed to refer to the act of designating an employee to a place (such as a location or department), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties or tasks to an employee.

With respect to the requirement that the assignment must involve independent judgment, the NLRB adopted an interpretation of the term "independent judgment" that applies irrespective of the supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise. In short, professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the twelve supervisory functions. To ascertain the contours of "independent judgment," the NLRB turned first to the ordinary meaning of the term. "Independent" means "not subject to control by others, and "judgment" means "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." Thus, 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. 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. Thus, for example, a decision to staff a shift with a certain number of employees would not involve independent judgment if it is decided by an objectively determined criterion. Similarly, if a collective-bargaining agreement required that only seniority be followed in making an assignment, that act of assignment would not be supervisory. On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.

For 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, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and 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.

Applying this analysis to the functions performed by its employees, employers may discover that they are exposed to liability for the acts of employees with only very little supervisory authority. More importantly these employees may lack the training or experience to recognize discrimination or harassment by them or their subordinates and co-workers. Employers are urged to examine their work force with these criteria in mind and provide adequate training to those employees who are supervisors. Also, employers of 50 or more employees are required by the FEHA to provide this training to all supervisors. EBG professionals are available to assist in the evaluation and the training.

Ezra | Brutzkus | Gubner LLP offers its clients advice and counsel in all areas of labor and employment law . **Richard L. Mann** has 30 years of experience representing employers around the nation in all aspects of labor and employment law including discrimination, wrongful termination and wage-hour disputes and traditional labor relations. Mr. Mann has represented employers in a variety of industries including apparel, hospitality, manufacturing, transportation, entertainment, packaging and various service industries.

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