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The RESPECT Act: Congress Should Preserve Balance Between Management and Employees

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Under federal law, unions cannot organize supervisors, but legislation favored by Organized Labor—the Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (H.R. 1644, S. 969), or RESPECT Act—would dramatically limit which workers the National Labor Relations Act (NLRA) classifies as supervisors. Unions see the legislation as a fix to a recent National Labor Relations Board (NLRB) ruling that clarified the definition of a supervisor and slightly increased the number of workers considered supervisors. In contrast, the RESPECT Act would make virtually all employees non-supervisors for NLRA purposes. This would allow unions to collect tens of millions of dollars in compulsory dues from supervisors, open the door to massive litigation, and harm companies, which need supervisors without divided loyalties to run effectively. Congress should reject calls to change the legal definition of a supervisor.

Legal Definition of Supervisor. Section 2 (11) of the NLRA defines a "supervisor" as an employee with the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively to recommend such action" so long as this authority requires the use of "independent judgment."[1] By law, supervisors belong to the management of the company they help run. Unions cannot organize management.

Organized Labor has long resented this fact, since it deprives unions of tens of millions of dollars of compulsory dues from supervisors each year. They have pushed the NLRB to narrowly define supervisor, but the Supreme Court voided previous definitions as inconsistent with the text of the NLRA.[2] In *Oakwood Healthcare Inc.* and two related cases, the NLRB modified the definitions of "assign," "responsibly direct," and "independent judgment" (all used to determine a supervisor) to conform to these Supreme Court rulings.[3] Under the new definition, the NLRB designated 12 of the 178 employees involved in these cases as supervisors—roughly 7 percent of the total.

Exaggerated Impact. Organized Labor responded to this limited decision with outrage. Unions claimed that the ruling would deprive 8 million workers of the right to join a union because they belonged to a management.[4]

This claim has virtually no factual basis. The study that generated the 8 million figure relied on a Bureau of Labor Statistics (BLS) classification of supervisor that is far broader than the NLRA definition. Under the BLS definition, workers do not have to perform any of the statutory duties (such as disciplining, hiring, or responsibly directing employees) that define supervisors under the NLRA. Further, the BLS definition includes "lead

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workers" on projects—a category of workers that the NLRB explicitly ruled are not supervisors. The NLRB decisions only marginally expanded the number of workers considered supervisors. And since the decisions, few employers have sought to reclassify employees as supervisors for collective bargaining purposes.[5] Despite the unions' outrage, the *Oakwood* decision has had little impact on workplace relations.

Push to Eliminate Supervisory Status. The RESPECT Act would remove from the definition of "supervisor" the duties of assigning and responsibly directing other employees. The legislation also specifies that supervisors must "hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees" for a *majority* of their work time. These changes would virtually eliminate the status of supervisor from labor law.

The essential role of a supervisor is managing and directing other employees' work. Almost no supervisor spends a majority of his or her time hiring, firing, rewarding, or disciplining employees. They spend part of their time managing the employment status of their workers, but most of their time is spent directing those employees' work. What Organized Labor promotes as a legislative remedy for an overly broad NLRB ruling is in fact a push to abolish the distinction between supervisors and non-supervisors in the workplace.

Upends Balance in the Workplace. This far-reaching change would upend the long-established balance between labor and management in the workplace. Being in the same bargaining unit as the workers would divide supervisors' loyalties between the company and the union.

In order to run effectively, a company needs supervisors with undivided loyalty to management. Supervisors should make decisions based on efficiency and merit, not internal union politics or the union's preferred work rules. Nor should supervisors face internal union discipline for making decisions that the union opposes. Conflicts between labor and management over work issues should be resolved during collective bargaining, not through steep union fines levied against supervisors as punishment for unpopular decisions.

Keeping supervisors out of the collective bargaining unit also provides important protection for non-supervisory employees. Workers should feel free to challenge their union without facing retaliation from their supervisor. If a worker's supervisor belongs to the union, then workers who stand up to union bosses would have cause to fear being fired. Unions could also use supervisors to collect union authorization cards. Few workers will refuse to sign a union card when their boss presses them to do so, regardless of whether or not they actually want union representation.

Unions Want More Members. Organized Labor wants to virtually eliminate the supervisory exception from the labor code because adding supervisors to their membership will swell their compulsory dues income by tens of millions of dollars a year. With supervisors in the bargaining unit, unions can also use supervisors to pressure reluctant workers to join the union. The RESPECT Act represents a union push for more members and more money, not a correction to an overreaching NLRB decision.

Conclusion. The NLRA excludes supervisors from union coverage. This exception provides important balance in the workplace. It ensures that supervisors do not have divided loyalties or face union discipline for their management decisions. It also protects employers from retaliation from their supervisors if they stand up to their union.

1. 29 USC §152(11).
2. See *NLRB v. HCR* (1994) and *NLRB v. Kentucky River Comty. Care, Inc.* (2001).
3. 348 NLRB No. 37, 348 NLRB No. 38, and 348 NLRB No. 39 (2006).
4. Ross Eisenbrey and Lawrence Mishel, "Supervisors in Name Only," The Economic Policy Institute *Issue Brief* No. 225, July 12, 2006, *at www.epi.org/content.cfm/ib225*.
5. Testimony of the U.S. Chamber of Commerce, the HR Policy Association, the Society for Human Resource Management, by G. Roger King, before the Health, Employment, Labor and Pensions Subcommittee of the Education and Labor Committee of the U.S. House of Representatives, May 8, 2007, at *http://edworkforce.house.gov/testimony/050807RogerKingtestimony.pdf*.

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Unions now want Congress to pass legislation that would define almost every worker in America as a non-supervisor. Organized Labor claims that Congress must pass this change to prevent an NLRB decision from defining 8 million workers as supervisors and hence ineligible for union membership. The study that produced this figure is without academic merit. The *Oakwood* decision had a limited scope, and employers have reclassified few employees as supervisors since its adoption.

The unions' true goal is to obtain tens of millions of dollars in compulsory dues income from supervisors. Congress should not adjust the NLRA's definition of supervisor.

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