Backgrounder

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How the RESPECT Act Hurts Companies and Employees Alike

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The Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act largely eliminates the definition of supervisor from the National Labor Relations Act (NLRA). This change would undermine companies' efficiency and productivity. Specifically, it would:

- Necessitate the hiring of "deadweight" employees who add little value to the company, hurting businesses at precisely the wrong time;
- Restore workplace hierarchies;
- Prevent supervisors from making essential business decisions;
- Prevent employers from rewarding or promoting supervisors on a performance or merit basis; and
- Subject employers to an increased number of lawsuits under other statutes, including the Fair Labor Standards Act (FLSA) and Title VII of the Civil Rights Act of 1964.

These consequences would hurt companies under normal circumstances but would be particularly painful during a recession. Therefore, Congress should not virtually eliminate the definition of supervisor from the NLRA.

Legal Definition of Supervisor

Under the law, supervisors are part of management and members of the company that they help to run. Consequently, they cannot join unions because, if the company is to be run effectively, shareholders need managers with undivided loyalty.

Talking Points

- Federal labor law bars unions from organizing supervisors because supervisors are part of management.
- The RESPECT Act would largely eliminate this restriction. Only employees who spend a majority of their time on personnel matters such as hiring and disciplining workers would remain classified as supervisors.
- This would force businesses to hire "deadweight employees" who add little other value, thereby hurting businesses in the middle of a recession.
- The act would restore strict workplace hierarchies, preventing supervisors from working alongside rank-and-file workers and workers from gradually assuming managerial duties.
- The law would undermine competitiveness by bringing "working supervisors" into the union and preventing employers from promoting them on the basis of merit.
- By redefining the criteria used to determine whether an employee is a supervisor, the RESPECT Act would destroy the delicate equilibrium between management and organized labor.

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Congress carefully crafted the NLRA to balance the competing interests of management and labor when considering whether an employee is a supervisor, defined in Section 2 (11) of the NLRA 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...[so long as this authority] requires the use of independent judgment.

The RESPECT Act would change the definition of "supervisor" by altering Section 2 (11) in the following three ways:

- Striking the word "assign";
- Striking the phrase "or responsibly to direct them"; and
- Inserting the phrase "and for a majority of the individual's worktime" after the phrase "in the interest of the employer."

These changes would largely eliminate the position of "supervisor" as a legal classification since very few managers spend the majority of their work time hiring and firing employees.

The RESPECT Act would also increase the number of workers that unions can organize. Since between 1 percent and 2 percent of union members' earnings is spent on union dues, this would mean a significant financial boost to organized labor—a financial windfall that would come at considerable cost to the economy.

Likely Consequences of the RESPECT Act

Loss of Flexibility and Encouragement of Deadweight Hirings. Currently, the NLRA allows employers to use their supervisory workforce to perform management and non-management functions concurrently.[1] A supervisor hires and promotes workers but also works with them on the shop floor. Under the RESPECT Act, employees classified as "supervisors" would be largely "precluded from performing non-supervisor or bargaining unit work."[2] Employees could not use supervisors to perform multiple tasks on the job.

Small companies trying to weather the current economic storm need employee flexibility. The ability of workers to perform a variety of tasks can make the difference between success and bankruptcy, but the RESPECT Act would prevent such flexibility. Instead, many small-business owners would be forced either to hire additional employees to comply with the act or to forgo a portion of their business operations entirely.

In most instances, these additional employees would be hired to perform a specific task that does not require a full-time, or even a part-time, position. Consequently, such new hires would essentially constitute "deadweight" employees—workers that, other than assuring compliance with the act, offer the company little to no additional value. Indeed, money spent on wages and benefits for these workers would likely far exceed any modest gains in productivity. Few small businesses can afford that burden in this recession.

The RESPECT Act would hit public utilities particularly hard. American households need water and electricity, even if workers strike. Utilities rely on their supervisors to keep facilities operating during a strike when all non-supervisors are on the picket lines. Under the RESPECT Act, utilities would need to hire dozens of "supervisors" for the sole purpose of having employees to call on during strikes, thereby adding to the costs passed on to consumers. Failure to hire these additional supervisors would force companies to operate with skeleton crews or less during strikes, potentially endangering lives in the event of a mishap.

Restoration of Workplace Hierarchies. The RESPECT Act would bring back top-down hierar-

1. G. Roger King, "Are NLRB and Court Rulings Misclassifying Skilled and Professional Employees as Supervisors?" testimony before the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and Labor, U.S. House of Representatives, May 8, 2007, at *http://edworkforce.house.gov/testimony/050807RogerKingtestimony.pdf* (May 6, 2009).
2. *Ibid.*

chical workplaces. In the modern workplace, the job hierarchy has flattened, blurring the lines between management and supervisor. Employers expect workers today to communicate with their bosses, use their individual knowledge, and exercise initiative on the job. This represents a sharp change from a generation ago when most workplaces operated with top-down command and strict divisions between labor and management.[3] By narrowly defining supervisors as employees who spend a majority of their time hiring or disciplining employees, the RESPECT Act would reestablish the strict labor–management divisions that used to characterize the workplace.

In order to run effectively, businesses need some managers who are loyal to the firm. Because of this necessity, businesses would respond to the RESPECT Act by reassigning job duties or hiring new employees that spend a majority of their time doing nothing but making personnel decisions, thereby securing the managerial loyalty essential to a successful business by stripping supervisory functions from other deserving employees. Instead of today's world of flattened hierarchies, the RESPECT Act would harden the distinction between worker and supervisor.

Hierarchical workplaces also separate supervisors from the rank and file. The NLRA currently allows regular employees to gradually assume greater managerial responsibilities. By requiring "supervisors" to spend more than 50 percent of their time on supervisory activity, the RESPECT Act would remove the ability of employees to assume managerial duties over time. This new requirement would have two detrimental effects.

First, rank-and-file workers would have fewer opportunities to obtain the managerial experience essential to career advancement, further reinforcing the strict division between labor and management.

Second, supervisors would be legally prevented from spending more than 49 percent of their time working on the same tasks as the workers they manage. Consequently they would have less insight into the concerns of rank-and-file workers, who would have less opportunity for advancement under a less responsive and less informed management.

The RESPECT Act would also negate one more advantage provided by the traditional supervisor: the benefits gained when a boss works alongside his or her employees, performing the same tasks under the same conditions. Since supervisors would be brought back into the bargaining unit, the message that the workplace is unified, working toward a common goal would be lost.

Less Effective Managers. Under current law, supervisors make personnel decisions and direct employees to perform specific tasks. If the RESPECT Act becomes law, however, many supervisors who "assign" and "responsibly direct" workers without making personnel decisions will be brought into the union. These employees will essentially become "working supervisors": men and women expected to perform some managerial functions while remaining part of the bargaining unit.

This change would hinder the ability of these employees to direct workers in the best interest of the firm because they would be subject to union discipline. For example, consider a "working supervisor" who assigns a less senior but more capable employee to a critical task or who makes changes in the workplace that improve productivity but require more effort from the employees. Affected employees could file a grievance, and during the subsequent hearing, the union would side with the grievant and subject the working supervisor to union fines for his managerial decisions. In the eyes of the rank-and-file employees, the working supervisor—an essential component of workplace efficiency and profitability—would be rendered ineffective.

Unrewarded Performance. By bringing working supervisors into the bargaining unit, the RESPECT Act would prevent employers from rewarding good performance or disciplining unproductive managers. Unions typically negotiate seniority-based pay systems that give the same raises to all workers regardless of effort. By law, employers may not uni-

3. Jeffrey M. Hirsch and Barry T. Hirsch, "The Rise and Fall of Private Sector Unionism: What Next for the NLRA?" *Florida State University Law Review*, Vol. 34, No. 4 (2007), at *http://ssrn.com/abstract=933493* (May 6, 2009).

laterally pay an individual worker more than is called for by the union contract.

The RESPECT Act would require employers to ignore the individual performance of the working supervisors who assign and responsibly direct the tasks of their fellow employees. Employers could not give raises or promotions for good performance or fire or demote ineffective managers. Companies could not create incentives for good performance by the men and women who make critical business decisions for them. This lack of incentive would also hold back businesses at precisely the wrong time.

Restoring strict workplace hierarchies, undermining the authority of managers, and preventing employers from rewarding or disciplining managers would severely restrict workforce flexibility. Employers would have less ability to assign the right employees to the right tasks and to provide them with the best motivation to get the job done. The effect of these changes would be to retard productivity and, ultimately, to hinder overall economic growth.

Statutory Confusion. Many federal statutes do not define the term "supervisor." Consequently, courts frequently look to other statutes—particularly the NLRA—for guidance. When considering what constitutes sexual harassment under Title VII, for example, courts have used the NLRA as a point of reference.[4]

While the RESPECT Act would not automatically change other laws such as Title VII or the FLSA, it would provide a new means by which statutes that lack a formal definition of "supervisor" can be interpreted. For instance, an employee might have qualified as a supervisor under both the NLRA and the FLSA but, in the wake of the RESPECT Act, would now be a supervisor only under the FLSA. Such new interpretations would inevitably cause confusion among employers who are already struggling to balance variances in how the law defines "supervisor."

Disturbing a Delicate Equilibrium

Through seemingly minor statutory alterations, the RESPECT Act, by redefining the criteria used to determine whether an employee is a supervisor, would destroy the delicate equilibrium that currently exists between management and organized labor. As a result, productivity and efficiency would decrease—a dangerous development under any economic conditions, let alone during the current recession.

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4. Matthew B. Schiff and Linda C. Kramer, eds., *Litigating the Sexual Harassment Case*, *Second Edition* (Chicago, Ill.: American Bar Association, 2000), p. 22.