

## VIII. CLASSIFICATIONS OF EMPLOYEES

### *A. Professional Employees*

Section 2(12) of the Act defines a professional employee as any employee engaged in work:

- (1) predominantly intellectual and varied in character, as opposed to routine mental, manual, mechanical or physical work;
- (2) involving the consistent exercise of discretion and judgment in its performance;
- (3) of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
- (4) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual study in an institution of higher learning or a hospital.

Note that the statute defines a professional employee in terms of the work the employee performs; individual qualifications are not controlling (e.g., a medical doctor working as truck driver is not a professional employee).

See *An Outline of Law and Procedure in Representation Cases*, Section 18–100 et. seq., 21–400.

Relevant Questions:

1. Describe the employer's business.
2. What is the job classification of these employees? How many employees are in this classification?
3. What are the education, training and experience requirements?
4. What type of schooling did these employees receive? How long? Courses? Degree?
5. Do they possess a state license or membership in a professional association? If so, describe. Is that required for the job?
6. Describe their duties.
7. Describe, in detail any work performed by the employee which is intellectual and varied in character. How often does the employee perform this work?
8. Describe, in detail, any work performed by the employee which involves the exercise of discretion and judgment. If so, how often?
9. Is their work of such a character that the output produced or result accomplished cannot be standardized in relation to a given period of time? Explain.

10. Is there any special knowledge required to perform the job? Explain.
11. Describe the nature of their supervision.
12. Are they working under the close supervision of a professional employee as part of a requirement of becoming professional employees? If so, who?
13. Ask community of interest questions in Section V, A, Community of Interest, and compare terms and conditions of employment of professional employees with other unit employees.

### ***B. Truckdrivers***

The unit placement of truckdrivers is decided primarily on community of interest considerations. Petitioned for separate units of truckdrivers have been found appropriate, as have petitioned for units combining truckdrivers and other employees. *Overnite Transportation*, 322 NLRB 743 (1996); *Transportation*, 325 NLRB 612 (1998). Unit determinations depend on the following factors:

- (1) the unit petitioned for;
- (2) whether the truckdrivers and the plant employees have related or diverse duties, the mode of compensation, hours, supervision and other conditions of employment; and
- (3) whether they are engaged in the same or related production processes or operations or spend a substantial portion of their time in such production or adjunct activities.

Local drivers and over-the-road drivers may constitute separate appropriate units, when requested, if it is shown that they are clearly defined homogeneous and functionally distinct groups with separate interests which can be effectively represented separately for bargaining purposes.

See *An Outline of Law and Procedure in Representation Cases*, Sections 15–140 through 144.

Relevant Questions:

1. Describe the employer's operations.
2. How many individuals are employed as drivers?
3. How many are employed as local or city drivers, how many as over-the-road drivers?
4. Describe their respective duties in detail. If the drivers spend only part of their time driving, determine the percentage of time spent driving and the percentage of time that they are engaged in other duties. What other duties do they perform? What other employees perform the same duties? Do these duties include selling the employer's

## CLASSIFICATIONS OF EMPLOYEES

products? If so, see Section D, Driver-Salesmen.

5. If the drivers spend part of their time in local and part of their time in over-the-road driving, what percentage of their time is spent in each type of driving?
6. Is special training or licensing required for the various driver positions?
7. Do the drivers wear uniforms? Are other employees required to wear uniforms? Compare.
8. How much of their time is spent on the employer's premises? What contact, if any, do they have with other employees? How frequent and of what duration is this contact?
9. What hours do they work? Do they punch a timeclock? How does this differ from other employees?
10. Who performs the maintenance service on the trucks they drive? What contact, if any, do they have with those individuals?
11. Do they load and unload their trucks? Are they given assistance? If so, by whom?
12. Can drivers bid on production and maintenance positions; can other employees bid on driver positions?
13. Compared to other employee, are the drivers engaged in the same or a related production process or operation? To what extent? Describe fully.
14. Do the drivers attend employer meetings? Where? With what group(s) of employees? How frequently?
15. What is the history of collective bargaining among the drivers and the other employees with whom they work?

**Note:** Where a party contends that drivers should be included with other classifications (e.g., mechanics, production and maintenance employees, warehousemen, shipping and receiving employees, etc.) refer to Section V, A, Community of Interest, and compare terms and conditions of employment among all classifications.

### *C. Warehouse Employees*

In non-retail situations or in combined retail and wholesale operations, the appropriateness of petitioned-for warehouse units is determined by application of a community of interest analysis. *Esco Corp*, 298 NLRB 837 (1990); *A. Russo & Sons, Inc.*, 329 NLRB 402 (1999).

In the retail industry, separate units of warehouse employees are appropriate only where: (1) the warehouse operation is geographically separated from the retail operations; (2) there is separate supervision of employees engaged in the warehousing function; and (3) there is no substantial integration between the warehouse employees and those engaged in other functions. *A. Harris Co.*, 116 NLRB 1628 (1957).

See *An Outline of Law and Procedure in Representation Cases*, Section 15–270.

Relevant Questions:

1. Is this a retail, wholesale or combination retail/wholesale operation?
2. Where is the warehouse operation located? Where is the remainder of the employer's operations located?
3. Who supervises the warehouse operation? Who supervises the remainder of the employer's operations?
4. How many warehouse employees are there? How are they classified?
5. What are the duties of the warehouse employees?
6. How many other classifications of employees are there; how many employees are there in each other classification?
7. Compare with the duties of other employees.
8. Is there employee interchange? Degree of interchange? Frequency? Duration?
9. What skills are required of the warehouse employees? Compare with other employees.
10. What are the job functions of the warehouse employees? Compare with other classifications of employees.
11. Is there any bargaining history involving warehouse employees? When? In what unit? In a recognized or certified unit?

**Note:** Where a party contends that warehouse employees should be included in a unit with any other classifications, ask community of interest questions located in Section V, A, Community of Interest, and compare terms and conditions of employment among all classifications.

***D. Driver-Salesmen***

Depending on their particular circumstances, driver-salesmen are included in production and maintenance units, in units with other drivers and in units with salesmen. Driver-salesmen have also been found to constitute a separate appropriate unit. The Board looks to community-of-interest considerations and whether their delivery duties are “an incident of their sales activities,” or whether their function is closely related to the production process. Employees who sell their employer’s products and deliver them “as an incident of [their] sales activity” have interests more closely aligned with salesmen than to drivers, production and maintenance or warehouse employees. *Plaza Provision Co.*, 134 NLRB 910, 911–912 (1961).

See An Outline of Law and Procedure in Representation Cases, Section 15–145.

Relevant Questions:

1. Describe the employer’s operations and describe the driver-salesmen’s place in the organizational structure.
2. How many individuals are employed as driver-salesmen?
3. Describe their duties in detail. What type of vehicles do they drive?
4. What percentage of their time is spent in delivering and stocking product? What percentage in sales activities?
5. Do the driver-salesmen have contracts of employment? Obtain a copy of the contract.
6. Does the employer employ other drivers? How many? How do their job duties compare to those of driver-salesmen?
7. By whom are the driver-salesmen supervised? Who supervises the other employees?
8. Does the employer employ any sales employees? How many? How do their job duties compare to those of driver-salesmen?
9. How are driver-salesmen paid? Compare to other drivers, sales force and production and maintenance employees.
10. Are there any special training or other job qualifications required for the driver-salesmen position?
11. Is there any history of collective bargaining at the facility in a driver, driver-salesmen or salesmen unit? Was it a recognized or a certified unit?

**Note:** Where a party contends that driver-salesmen should be included with any other classifications, refer to community of interest questions in Section V, A, Community of Interest, and compare terms and conditions of employment among all classifications.

**Note:** Where a party contends that driver-salesmen are independent contractors, refer to questions on independent contractor status, Section VI, A, Independent Contractor.

### ***E. Technical Employees***

Technical employees are defined as employees who do not meet the strict requirements of the term “professional employees” as defined in the Act but whose work is of a technical nature, involving the use of independent judgment and requiring the exercise of special training usually acquired in colleges, technical schools or through special courses. *Livingston College*, 290 NLRB 304, 306 fn.16 (1988). Unit placement of technical employees is based on all the factors relevant to a community of interest finding. *Virginia Manufacturing Co.*, 311 NLRB 992, 993 (1993); *Folger Coffee*, 250 NLRB 1 (1980).

See *An Outline of Law and Procedure in Representation Cases*, Sections 19–500 (technical employees) and 19–510 (for health care technical employees).

Relevant Questions:

1. What type of industry?
2. Where are the employees located within the employer's facility? Is this area a separately situated or controlled area?
3. To what department are technical employees assigned? With whom do they work?
4. Compare similarities between the skills and job functions of technical employees and rank-and-file employees.
5. Compare similarities between the skills and job functions of technical employees and professional employees.
6. What education, training or experience is required for the technical employees? Are they required to have any licenses or special certifications? How does this compare to professional employees? Do they actually possess the required education, training or experience?
7. What special tools or instruments do they use in the performance of their job duties?
8. Explore examples of the exercise of independent judgment.

## CLASSIFICATIONS OF EMPLOYEES

9. Do they have any inspection responsibilities for the work of rank and file employees? If so, what recommendations do they make and how effective are their recommendations?
10. Do they prepare any technical reports, data or handbooks?
11. What reports do they keep of their work?
12. Who evaluates their reports? To whom are they directed and for what purpose?
13. Who is their supervisor? What is the nature of their supervision?
14. Compare their supervision with that of rank-and-file and professional employees. Is their supervisor a professional?
15. What contact do they have with rank-and-file employees? With professional employees?
16. Is there any interchange with other employees? If so what is the nature, duration, and frequency of the interchange?
17. What is the bargaining history with respect to technical employees?
18. Does any union seek to represent technical employees separately?
19. Ask community of interest questions in Section V, A, Community of Interest, and compare terms and conditions of employment of technical employees with unit employees and professional employees.

### ***F. Clerical Employees***

Office clerical and plant clerical employees are generally not joined in a single unit unless the parties agree to their inclusion in a single unit. Plant clerical employees are normally included in a unit of production and maintenance employees. The designation of employees as either office clerical or plant clerical employees is based upon community of interest concepts and the distinction is not always clear. *Hamilton Halter Co.*, 270 NLRB 331 (1984). Historically, workers who perform clerical duties in close association with the production process and production employees have been included in production and maintenance units as “plant clericals,” even though they may utilize secretarial skills or are classified as clerks. *Brown & Root, Inc.*, 314 NLRB 19, 23 (1994). Clerical employees with duties related to general office operations do not share a community of interest with production employees and thus are not included in a production and maintenance unit. *Container Research Co.*, 188 NLRB 586, 587 (1971).

See *An Outline of Law and Procedure in Representation Cases*, Section 19–410.

Relevant Questions:

1. How are they classified? How many employees are there in each classification in issue?
2. To which department are they assigned?
3. By whom are they supervised?
4. Describe duties, machines operated, reports prepared, records kept.
5. What is their location in the plant?
6. Describe the relationship between their duties and production functions.
7. Do they have any direct contact with customers? Describe their duties and functions in this regard.
8. Describe working contacts with production, warehouse and/or office employees.
9. Does the employer have a computerized information processing system? Establish the classifications of employees that make entries into and obtain information from this system.
10. Describe and show frequency of interchange with production, warehouse and/or office employees.
11. Establish the percentage of office or plant clerical and other duties.
12. Compare their use of facilities with production and/or office employees.
13. Describe any similarity of working conditions with production, warehouse and/or office employees.
14. Who establishes their pay? In which department are they classified for payroll purposes?
15. Method of compensation—hourly, salary, bonus, incentive, piece rate.
16. Method of recording time—do they use a time clock? Is it the same time clock used by the production and/or office employees?
17. Compare employee benefits received with those received by production and/or office employees.



## CLASSIFICATIONS OF EMPLOYEES

18. Compare their hours of work and lunch breaks with those of production and/or office employees.
19. Do they dress in a manner similar to the production employees or to the office employees?
20. What background, education and training are required for performance of their duties? Compare with those of production, warehouse or office employees.
21. What types of skills do they utilize in performing their jobs?
22. What is the progression schedule from and to the classifications in question?
23. Is there a history of collective bargaining in a unit including office clerical employees? Is there any history of collective bargaining in a unit including plant clerical employees? Has this group of employees ever been represented in another bargaining unit? When? Was this a certified or recognized unit?
24. Ask questions on community of interest located in Section V, A, Community of Interest, and compare terms and conditions of employment of the clerical employees in dispute with other classifications in the unit.

### ***G. Faculty Units in Colleges and Universities***

When faculty are found to have managerial status, employee status has been denied. The party seeking to exclude employees as managerial has the burden of establishing that exclusion is appropriate.

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court found that the employer's college faculty were managerial employees excluded from the coverage of the Act. The court in *Yeshiva* noted that managerial employees "must exercise discretion within or even independently of established employer policy and must be aligned with management" and must represent "management interests by taking or recommending discretionary actions that effectively control or implement employer policy."

The appropriate inquiry under the *Yeshiva* decision is to determine the authority of the faculty with respect to hiring, promotion and tenure and their authority in setting university policy, including standards for admission, retention and graduation. Since the Board's decision in *Yeshiva*, some faculty units have been found appropriate. See, e.g., *University of Great Falls*, 325 NLRB 83 (1997).

#### Part Time Faculty:

Part-time faculty members have been found to be significantly different from full-

time faculty and have been excluded from units of full-time faculty. *New York University*, 205 NLRB 4 (1973).

Graduate Students:

In *New York University*, 332 NLRB No. 111 (2000), the Board found that graduate students who are paid for teaching functions are employees. However, graduate students do not share a community of interest with regular faculty and constitute a separate unit. *Adelphi University*, 195 NLRB 639, 640 (1972).

See *An Outline of Law and Procedure in Representation Cases*, Section 15–261.

Relevant Questions:

1. What is the governing structure and administrative hierarchy of the college?
2. Are there defined areas of responsibility and authority vested at various levels from the faculty through the board of trustees?
3. Are the responsibilities of the faculty set forth in writing, in the college's bylaws or in any books or other publications? If so, obtain and put in evidence.
4. Are there any reports issued by any accrediting body, which recite the role of the faculty in governance of the college? If so, obtain and put in evidence.
5. To what extent is the college faculty (full and/or part-time) involved in the decision-making process (individually, ad hoc committees or standing committees) in such areas as:
  - (a) Curriculum
  - (b) Course schedules
  - (c) Course content
  - (d) Course credit hours
  - (e) New degree programs
  - (f) Degree requirements
  - (g) Teaching methods
  - (h) Grading policies
  - (i) Classroom conduct
  - (j) Matriculation standards, policies and requirements
  - (k) Admission standards, policies and requirements
  - (l) Retention standards, policies and requirements
  - (m) Graduation standards, policies and requirements
  - (n) Size of the student body
  - (o) Tuition and fees
  - (p) Distribution of financial aid
  - (q) Scholarship standards and recipients
  - (r) Matters relating to retention, suspension, probation and expulsion of students

## CLASSIFICATIONS OF EMPLOYEES

- (s) Location of a school
  - (t) Teaching loads
  - (u) Student absence policies
  - (v) Enrollment levels
  - (w) Faculty hiring
  - (x) Faculty tenure and promotions
  - (y) Sabbaticals
  - (z) Faculty terminations
  - (aa) Contract renewals for probationary faculty
  - (bb) Faculty reappointments
  - (cc) Tenure
  - (dd) Faculty evaluations
  - (ee) Filling of administrative positions
  - (ff) Hiring of academic deans and other administrative officials
  - (gg) Appointment of department or division chairpersons
  - (hh) Significant faculty benefit terms, e.g., pension and health insurance coverage
  - (ii) Budgetary matters
  - (jj) Long-term planning
6. Specify any standing committees and the following:
- (a) their composition
  - (b) areas of responsibility
  - (c) extent of authority
  - (d) exercise of authority (specific examples)
  - (e) effectiveness of committee recommendations (specific examples where recommendations were followed or not)
7. How are faculty selected to participate in such committees? Appointed by the administration? Elected by their peers?
8. Are the committees comprised of administrators and others in addition to faculty? What is the composition of the committee (identity of those on the committee, numbers of faculty and number of administrators and others on the committee)?
9. What is the frequency with which they meet? What are the results of these meetings, e.g., issuance of reports, recommendations of further action?
10. Is there a faculty-wide vote or review of their decisions/recommendations?
11. Are their decisions/recommendations subject to veto by the administration, including academic deans and the board of trustees? Obtain examples.
12. Is such veto power exercised? Obtain examples.
13. Has the administration taken action in any of the aforementioned areas without faculty input or approval? Obtain examples.

For graduate students and research assistants:

When issues arise regarding graduate students and research assistants, secure evidence by department relating to all aspects of their employment, including but not limited to the following:

1. Whether their teaching duties are required for their degree;
2. How often they teach and the anticipated duration of their employment; and
3. Source of their funding.

#### ***H. Quality Control/Production Control Employees***

Based on traditional community of interest standards, quality control employees are generally included in a production and maintenance unit when the petitioning union seeks to include them. *Lundy Packing Co.*, 314 NLRB 1042 (1994), enf. denied 68 F.3d 1577 (4th Cir. 1995). In some circumstances, the Board has found appropriate a petitioned-for production and maintenance unit *excluding* quality control employees. *Lundy Packing Co.*, supra; *Penn Color*, 249 NLRB 1117 (1980); *Beatrice Foods*, 222 NLRB 883 (1976).

See *An Outline of Law and Procedure in Representation Cases*, Section 19–600.

Relevant Questions:

1. Describe the duties of the employee(s) in question.
2. Does the employer have any educational requirements for individuals seeking to hold such positions?
3. Does the employee possess any specialized technical training?
4. Where does the employee physically perform his/her duties? Compare the amount of time spent working on the production floor with that spent elsewhere (e.g., in an office or laboratory).
5. Describe the types and frequency of contacts with other unit and non-unit employees.
6. Who supervises these employees? Who supervises the other unit employees?
7. Identify rates of pay compared to other employees.
8. Does the employee use any testing equipment or conduct any technical analysis?
9. Does the employee have the authority to reject defective products or to stop a

## CLASSIFICATIONS OF EMPLOYEES

production line to correct a problem?

10. Does the employee perform time or motion studies of other employees?
11. What does the employee do with the data or information gathered as a result of such studies?
12. Does the employee have any involvement in determining or making changes in production processes or techniques or in establishing/changing rates of pay or quotas for jobs? What is the extent of the employee's involvement?
13. Is the employee involved in the scheduling of work? How does the employee do the scheduling? Is such scheduling in accordance with any established formula or procedures for the completion of production?
14. Does the employee have the authority to rearrange or alter schedules in order to meet deadlines or customer demands?
15. Does the employee have any authority to determine or authorize overtime work or to effectively recommend such in order to meet a production or shipping deadline?
16. Ask questions on community of interest located in Section V, A, Community of Interest, and compare the terms and conditions of employment of quality control employees with other unit employees and non-unit employees.

**Note:** If any party asserts the employee in question is a technical or professional employee, ask questions in Section VII, E, Technical Employees, or Section VIII, A, Professional Employees. If any party asserts that the employee(s) is supervisory, ask questions in Section VI, E, Supervisors.

