

VI. UNIT EXCLUSIONS

A. *Independent Contractors*

Section 2(3) of the Act excludes from the definition of “employee” an individual having the status of an independent contractor. In *Roadway Package System*, 326 NLRB 842 (1998) and *Dial-a-Mattress Operating Corp.*, 326 NLRB 884 (1998), the Board adopted the common law test of agency to determine whether an employee is an independent contractor. The common law test is set forth in *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). The inquiry is generally fact-intensive; the factors to be considered in determining employment status include: (1) whether the work performed is an essential part of the company’s regular business; (2) whether the person is engaged in an occupation or business that is distinct from the company’s regular business; (3) the length of time for which the person is employed or contracted; (4) the skill required in the particular occupation; (5) whether the company provides the tools and instrumentalities necessary to perform the work; (6) the method of payment; and (7) the extent to which the company controls the details of the work. All factors regarding the parties’ relationship must be considered, not just those involving the right to control.

See *An Outline of Law and Procedure in Representation Cases*, Section 17–400.

Relevant Questions:

1. In what occupation is the individual employed?
2. What are the duties performed, and describe the skills required.
3. How was the relationship between the individual and the employer established? Have the parties entered into a contract? Oral or written contract? If written, obtain a copy for the record.
4. Is the individual free to reject work for the employer without breaking the terms of their agreement?
5. Is this individual’s work part of the normal business of the employer, i.e., does the employer regularly use this individual as part of the business operation? Is the individual employed for a particular length of time? Is the individual’s work continuous and regular? Is the individual’s work based on a particular “project” that is limited in duration?
6. What is the individual’s method of payment (e.g., hourly rate, by the job, salary, percentage of sales, percentage of load)? Compare method of payment with that of the employer’s employees.
7. Is the individual on the company payroll? Under what designation?

8. Who determines the amount and method of payment? Is it negotiated between the employer and the individual? Is it predetermined by the employer? Is there anything the individual can do to vary the amount of payment? If so, what?

9. Does the employer deducted FICA or withholding taxes on behalf of the individual?

10. Who controls the day-to-day work of this individual in the following areas (compare with the employer's employees):

(a) Who supervises the individual? What is the nature of the supervision? Obtain details.

(b) Does the individual have to report to employer officials on a daily basis? How does this communication take place?

(c) Are these individuals subject to disciplinary action? If yes, what kinds of disciplinary action, e.g., warnings, suspensions, discharge? What types of infractions warrant such disciplinary action?

(d) Does the employer mandate the number of hours worked per day or per week? Can the individual establish his/her own schedule?

(e) Does the employer require that the work be performed in a specific fashion? If the individual is a driver, are drivers required to run predetermined routes or can they vary from a route schedule?

(f) Is the relationship between the individual and the employer covered by any of the employer's rules and/or policies? If so, introduce rules/policy in the record. Are any of these policies required by State or Federal regulations? Identify which policies are government-regulated and by which government agency. Obtain a copy of the government regulations.

(g) Does the individual have to wear a company uniform? If yes, who provides it? Is the individual required to pay for the uniform?

11. Does the individual have the opportunity to affect his/her income by cultivating business or customers?

12. Does the individual purchase or own the equipment used in the work or is it provided to the individual? If the individual purchases or owns the equipment, has the employer loaned the individual money to purchase the equipment? Is the employer the seller of the equipment? What are the terms of the loan? Does the equipment used in performing the work bear any logo? Who carries the insurance on the property and equipment owned or used by these individuals?

13. Does the individual hire others to perform work for the employer? If others are hired to perform work, who hires, fires, supervises and pays them? How many are hired and what is their rate of pay and classification?

14. Compare the individual's fringe benefits with those of the employer's employees, e.g., vacation time, holiday pay, sick leave, unemployment compensation benefits, worker's compensation benefits.

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15. Does the individual use all or part of the employer's facilities?
16. Who pays any license fees or taxes?
17. Does the individual depend on this work for regular income? What are the individual's other sources of income?
18. Is the individual free to contact and perform work for, or sell goods of another employer using his employees or equipment? Is the individual subjected to any penalty, monetary or otherwise, if work is performed for any other employer?
19. Is the individual free to sell or transfer his job, lease or service area? Are there any penalties if the individual transfers, sells or leases the job or service area to another individual? If so, describe the nature of the penalties.
20. Can this individual extend credit to customers without the employer's permission? Is there a limit on the extension of credit?
21. What records are these individuals required to keep, who prepares them and where are the records maintained? Which records, if any, are required by government regulations?

B. Agricultural Employees

Section 2(3) of the Act excludes from the definition of employee any employee who is an agricultural laborer. The Board relies on Section 3(f) of the "Fair Labor Standards Act of 1938" (29 U.S.C. 201 et seq.) to define agricultural employees:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities...the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The Board's lead case applying the definition is *Camsco Produce Co.*, 297 NLRB 905 (1990).

Whether an employee is an exempt agricultural laborer is determined either by the work he performs or by the work performed by his employer. The fact that the employer performs some phases of direct farming work falling within the primary definition of agriculture does not necessarily mean that it is a farmer within the meaning of Section 3(f). Further, employees who regularly perform any nonagricultural work are covered by the Act with respect to that portion of the work with is nonagricultural.

The burden of proving that individuals are exempt as agricultural laborers rests on the party asserting the exemption. *Agrigeneral L.P.*, 325 NLRB 972 (1998). The question of employee status is decided not on an employer wide basis, but on a classification by classification analysis.

See *An Outline of Law and Procedure in Representation Cases*, Section 17–100.

Relevant Questions:

1. Describe the employer's operations, including any related operations of the employer.
 - (a) Is the employer a farmer?
 - (b) Does the employer perform farming work on land owned, leased and controlled by it and devoted to its own use?
 - (c) Does the employer own and bear the risk of loss of the commodities while they are raised or produced?
 - (d) Is the work performed on the same farm on which the commodities are raised or produced?
 - (e) Does the employer control the method and means by which the commodities are raised or produced?
 - (f) What type of product results from the operation?
 - (g) Is the raw or natural state of the commodity changed and a value added?
 - (h) Does the operation entail only the preparation of the product for market?
 - (i) Does the employer have an extensive commercial operation with a substantial investment in processing equipment?
2. What is the relation of the work in question to the actual farming work? Is the work performed as an incident to or in conjunction with the actual farming operations?
3. Describe the employees' duties. Secure specific details.
 - (a) Is the employee involved in "cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities... the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."
4. Do the employees also perform any nonagricultural work:
 - (a) Describe such work.
 - (b) Do they perform nonagricultural work on a regular basis?
 - (c) How often do they perform nonagricultural work?
 - (d) What percentage of their working time is spent performing such work?
 - (e) Is there interchange with employees who perform no agricultural tasks? Frequency and reason.
5. Does the work in question involve handling, on a regular basis, any amount of

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commodities not raised or produced by the employer? If so:

- (a) Who raised or produced such commodities?
- (b) What is the amount of such commodities?
- (c) How frequently are such commodities handled?

C. Guards and Watchmen

Section 9(b)(3) of the Act defines a guard as “any individual employed...to enforce against employees and other persons rules to protect the property of the employer or to protect the safety of persons on the employer’s premises.” *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996). Section 9(b)(3) of the statute has two elements: (1) it prohibits the Board from finding appropriate any bargaining unit that includes both guards and nonguards; and (2) it prohibits certification of a union representing a unit of guards if the union admits nonguards to membership or is directly or indirectly affiliated with a union that admits nonguards. Thus, a petitioned-for unit of guards must include only guards and the union seeking certification must admit only guards to membership. If possible, secure a stipulation from the parties that the labor organization(s) involved admits only guards to membership.

Employees who perform some guard-like duties that are “incidental” to their other duties are not guards under Section 9(b)(3). *Wolverine Dispatch, Inc.*, 321 NLRB 796, 798 (1996); *55 Liberty Owners Corp.*, 318 NLRB 308 (1995).

A union that receives direct or indirect assistance from a nonguard union can be disqualified from representing a unit of guards. This concept is sometimes referred to as “fronting.” The Board requires “clear and definitive evidence” to establish a union’s disqualification based on its affiliation with nonguard unions. *Wackenhut v. NLRB*, 178 F.3d 543 (D.C. Cir. 1999); *Lee Adjustment Center*, 325 NLRB 375, 376 (1998). Indirect and affiliation between a guard union and a nonguard union is established with the “extent” and “duration” of the dependence indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action. Where a union has received assistance from a nonguard union only in the formative stages of organizing, and no further assistance exists beyond the formative stages, the Board has found the union certifiable under 9(b)(3). *Wackenhut*, supra; *Lee Adjustment*, supra; and *Bally’s Park Place*, 257 NLRB 777 (1981).

See *An Outline of Law and Procedure in Representation Cases*, Sections 18–200–240.

Relevant Questions:

Status of Employees as Guards:

1. Describe, in detail, the duties of the employees and the employer’s operations.
2. Do the employees carry weapons, clubs or other security-type devices? What kinds?

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3. Do the employees wear uniforms, identification badges and/or name tags? Do such identify them as being security of guard personnel?
4. Are the employees' uniforms/badges different from those worn by admitted guard employees?
5. Are they given any specialized training or instruction? What are the particulars of such instruction? Obtain a written copy of the instructions.
6. Where are the employees physically situated, e.g., in a security booth, at a reception area or in front of closed circuit televisions or computer monitors?
7. What are the employer's instructions on actions to be taken if employees witness suspicious activities on the premises? What are they expected to do in the event that there is a threat to the security of the premises or property? Are they instructed/expected to use physical force or are they instructed/expected to leave such action to other persons and/or to the local police authorities? If instructions are in writing, obtain them for the record.
8. Do the employees enforce any rules regarding the employer's property, employees or other persons? Secure the employer's rules regarding the safeguard of the employer's property or the conduct of employees or other persons while on the property. How do the employees respond if they observe an infraction of the rules, e.g., is the infraction reported, to whom is it reported, what is done when a rules is violated?
9. Do the employees perform any other work for the employer? Who often do they perform these other tasks versus the alleged guard duties?
10. Do the employees make periodic rounds of the premises? How often? Do they complete reports of their rounds? Obtain copies of the reports. Do they use a two-way radio or other means to maintain contact with a central location or with each other?
11. Do the employees monitor the entrance and exit of persons at the premises? Do they issue visitor passes and/or require persons to sign-in to gain access to the premises? 12. Do they inspect items being carried by persons entering or exiting the premises? Are they involved in the "frisking" of persons entering the facility? Are they involved in "sweeps" or "Shake-downs" of the facility?
13. Do the employees have keys or other means to provide them access to secured or restricted access areas? For what purpose do they have such access?
14. Are the employees required to fill out incident reports Secure copies of incident reports, if any. What happens to the incident reports after they are completed?

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15. Are the employees required to be bonded?
16. Are the employees deputized?
17. Does the employer's insurance require that it employ guards?
18. Are the employees fingerprinted and/or photographed at the time of hire?
19. Is any security check or police check of their background performed at the time of hire?
20. Are the employees expected to play a role in performing security functions in the event of a strike? Are there any written plans or instructions which reflect their role in the event of a strike? Have they ever played such a role during the course of a strike? If so, obtain a copy of the instructions for the record.
21. By whom are the employees supervised? Compare such supervision with that of other admitted guard and nonguard employees.
22. Are there differences in the employees' terms and conditions of employment as compared to those of other employees or admitted guards? If so, describe.
23. Do the employees substitute for other admitted guard employees? When and how often?

Section 9(b)(3) Status of Labor Organization:

Where there is an issue as to whether a labor organization is certifiable under Section 9(b)(3) because it admits to membership one or more classifications of nonguards, ask the following:

1. Obtain classifications that are admitted to membership. If possible, obtain a stipulation as to whether these classifications are Section 9(b)(3) guards.
2. If the classifications are employed by another employer, identify the employing entity and whether it is an employer as defined in Section 2(3).
3. If there is an issue as to whether the employees employed by another employer are guards, ask:
 - (a) When and how were the employees in question admitted to membership? By stipulated election agreement, directed election, voluntary recognition?
 - (b) Secure an offer or proof as to how the party would establish that the employees admitted to membership are not guards under 9(b)(3). Contact Regional management for guidance, particularly if those employees are questionable, or "close-call" guards. Rapid Armored Corp., 323 NLRB 709, 710-711 (1997).

Claims of Affiliation with Nonguard Union:

Where a party claims that a guard union is directly or indirectly affiliated with a nonguard union, ask the following questions:

1. What kind of assistance did the petitioner (or other intervening labor organization) receive from the other union? Obtain details.
2. Was the assistance limited to an initial contact or meeting?
3. Were any financial aid or legal services provided? Were such in the form of a loan or a donation?
4. Was there assistance in security card signers, lending an office for meetings, etc.?
5. When did the assistance commence? Has the assistance ended? If so, when did it end?
6. Does the assisting labor organization admit nonguards to membership? If possible, secure a stipulation.
7. Is there any overlap between the guard union's officers and the nonguards union's officers? If so, explain in full.

D. Confidential Employees

Confidential employees are those who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations or regularly substitute for employees having such duties. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981); *Associated Day Care Services*, 269 NLRB 178 (1984); *B.F. Goodrich Co.*, 115 NLRB 722 (1956). This is known as the "labor nexus" test. Mere access to confidential labor relations material is not sufficient to confer confidential status. *Greyhound Lines, Inc.*, 257 NLRB 477, 480 (1981). Employees who have access to confidential financial or business information or personnel records are not considered confidential employees. *Fairfax Family Fund*, 195 NLRB 306 (1972); *Brodart, Inc.*, 257 NLRB 380, 384, fn. 10 (1981).

See *An Outline of Law and Procedure in Representation Cases*, Sections 19–100.

Relevant Questions:

1. What are the duties of the employee? Get specific details?

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2. What are the duties of the employee's supervisor? Does the employee's supervisor handle the employer's labor relations, e.g., bargaining or handling grievances, with respect to employees of the entire plant, department or other group?
3. What is the nature of the confidential material handled? Get details of the type of material at issue, e.g., documentation relating to the employer's proposals during bargaining, minutes of meetings where bargaining strategy is discussed, grievance investigation reports, employer's policy on grievances, etc.
4. How does the employee come into contact with the confidential material?
 - (a) Is the employee present during management meetings regarding labor relations, e.g., preparation for bargaining sessions or discussion of grievances? If so, how often is the employee present (all the time or isolated incident)? Develop details of employee's responsibilities during meetings.
 - (b) Does the employee assist in preparation of the confidential material? If so, describe how.
 - (c) Where is the confidential material maintained and how does the employee have access to it?
5. Does this employee substitute for a confidential employee? If so, how often?
6. Do other employees also have access to the alleged confidential material? If so, who? Develop details including the nature of the access to the material.
7. Does employee have access to labor relations policy data regarding the entire plant, one department or other group?
8. Does the employee have access to confidential material prior to the time that material is available to any labor organization or to other employees?

E. Supervisors

Section 2(11) of the Act states:

The term "supervisor" means 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.

The traditional test for determining supervisory status used for *all* employees, including health care professionals, is:

- (1) whether the employee has the authority to engage in any one of the twelve criteria listed in Section 2(11) of the Act;

(2) whether the exercise of such authority requires the use of independent judgment; and

(3) whether the employee holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573–574 (1994).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if the authority has not yet been exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001).

The burden of proving supervisory status lies with the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1866 (2001), 167 LRRM 2164. Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000). Mere inferences or conclusory statements without detailed, specific evidence are insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). It is the obligation of the hearing officer to ask follow up questions and to obtain specific examples when the parties elicit generalized testimony regarding matters in issue, including issues on which the parties have a burden. If parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. Where the testimony is confusing, unclear or incomplete, the hearing officer should ask questions that will clear up the confusion or make the record complete.

In *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001), 167 LRRM 2164, the Court rejected the Board's interpretation of "independent judgment" in finding that registered nurses do not use "independent judgment" when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. Although the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. In discussing the tension in the Act between the Section 2(12) definition of professionals, the Court also left open the question of the interpretation of the Section 2(11) supervisory function of "responsible direction," noting the possibility of "distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees." On September 29, 2006, the Board, in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37; *Croft Metals, Inc.*, 348 NLRB No. 38; and *Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center*, 348 NLRB No. 39, defined "assigning" work to, and "responsibly directing" employees (or effectively recommending such actions). The Board also provided the definition of "independent judgment" in exercising those authorities.

See *An Outline of Law and Procedure in Representation Cases*, Chapter 17.

Relevant Questions:

General Questions:

1. Describe the duties of the individual in question. What is his or her correct title?

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How and where does this individual fall in the employer's organizational and operational structure?

2. For what is the individual held responsible by the employer? Describe in detail.
3. Where does the individual fit in the employer's supervisory hierarchy?
4. Is the individual the highest ranking individual present at any time or on any shift?
5. Which classifications report to the individual?
6. Compare the individual's duties with those of persons working immediately over and under him or her. To whom does the individual report?
7. How many disputed individuals are there compared to the number of employees in each of the other classifications in the unit?

HIRE

1. Is the individual involved in hiring?
2. Describe the hiring process and the individual's role in that process.
3. Does the individual interview job applicants?
4. Is any other supervisor or member of management present at such interviews? If not, do other supervisors or managers interview the applicant thereafter?
5. Does the individual have the authority to make the final decision regarding hiring? Give specific examples.
6. Does the individual assess the applicant's technical ability to perform the work by tests or other means? If so, describe the process.
7. Does the individual make recommendations whether the applicants should be hired?
8. What happens to that recommendation? Is the recommendation accepted? Give specific examples.

TRANSFER

1. Is the individual involved in transfers?
2. Who makes the decision to transfer employees?
3. Under what circumstances are transfers made?
4. Are there procedural guidelines for transferring employees?
5. Are the transfers at issue the result of preexisting staffing criteria or guidelines?
6. Are the transfers voluntary or involuntary?
7. Are the transfers permanent or temporary?
8. If the person in question makes a decision, what factors are considered in making the decision to transfer? (Skills, seniority, employee preference, operating needs, etc.)

9. Does the transfer affect the wages or working conditions of the transferred employee?
10. Does the individual have the authority to make the final decision regarding transfer?
11. Does the individual make recommendations whether the transfer should take place?
12. What happens to that recommendation? Is the recommendation accepted?
13. What is the process of review of the recommendation? Does any other supervisor or member of management consider the transfer request? Get specific examples and names of individuals transferred.

SUSPEND/DISCIPLINE

1. Does the individual suspend or discipline employees?
2. Does the individual issue oral or written warnings to employees?
3. Under what circumstances are warnings issued? Under what circumstances are employees suspended? Is a progressive discipline system involved?
4. Who signs written warnings or suspension notices? Describe the process followed in issuance of a warning/suspension?
5. Does a superior review the warning or the suspension? Specifically, what does the superior do when reviewing the warning or suspension? Does the superior investigate the underlying events that gave rise to the warning/suspension? Based on the review, does the superior affirm or reject the recommendation?
6. Do such warning notices affect employees' jobs?
7. Do warnings and/or suspensions serve as a basis for more serious disciplinary action under a system of progressive discipline?
8. Do suspensions affect employees' wages, e.g., are there paid or unpaid suspensions?
9. Are warnings or suspensions taken into account for evaluation purposes?
10. Are warnings or suspensions placed into employee personnel files?
11. Describe the circumstances under which employees are suspended. Is it automatic for certain kinds of misconduct? Describe that conduct.
12. Does the individual have the authority to make the final decisions regarding warnings or suspensions?
13. Does the individual make recommendations whether warnings or suspensions should take place?
14. What happens to those recommendations? Are those recommendations accepted?

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LAYOFF/RECALL

1. Does the individual layoff or recall employees?
2. Is he/she involved in the decision to layoff or recall employees?
3. Is he/she involved in selecting employees for layoff or recall?
4. What system is utilized to determine which employees are laid off or recalled, e.g., by department, seniority, performance, skills.
5. Does the individual have the authority to make the final decision regarding layoff or recall?
6. Does the individual make a recommendation whether the layoff or recall should take place?
7. What happens to that recommendation? Is the recommendation accepted?
8. What is the process of review of the recommendation? Does any other supervisor or member of management consider the layoff or recall? Get specific examples and names of individuals laid off or recalled in the past.

PROMOTE/REWARD (INCLUDING EVALUATIONS, OVERTIME ASSIGNMENTS, TIME OFF, WAGE INCREASES)

1. Does the individual promote or reward employees, including granting time off, overtime, wage increases, bonuses or evaluations?
2. Are there established guidelines governing the promotion of employees? If written, obtain them.
3. Describe the circumstances under which the individual has promoted other employees? Give specific examples.
4. Does the individual have the authority to grant time off to employees, including sick leave and vacation time?
5. In what circumstances does the individual have the authority to grant time off, including vacation and sick leave? Has that authority been exercised? Give specific examples. Describe the procedures utilized and the standards applied when granting time off?
6. Does the individual have the authority to grant or authorize overtime to employees? In what circumstances does the individual have the authority to authorize overtime? Has that authority been exercised? Give specific examples. Describe the procedures utilized and the standards applied when authorizing overtime? If written, obtain them.
7. Does the individual have discretion to determine to whom the overtime is assigned?

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8. Is there an established procedure for assignment of overtime? Are overtime assignments based on seniority or rotating lists? If written, obtain them.
9. Are overtime assignments voluntary? Does an employee have the right to reject overtime assignments?
10. Are there established guidelines governing wage increases or bonuses granted to employees? If written, produce the documents.
11. How are wage increases or bonuses determined? Are they automatic, based on merit, years of service, evaluations, productivity?
12. Does the individual prepare written evaluations? If so, how? Describe the nature of such evaluations.
13. Describe the employer's evaluation process/system. If there is a form, obtain it for the record. Describe how the individual evaluates other employees and describe what is done with the evaluation after it is completed. Give specific examples.
14. When preparing evaluations, do they include recommendations for specific personnel actions? If so, what kind of personnel action?
15. Do evaluations affect employees' job status, wage increases, promotions or disciplinary action? Give specific examples.
16. How much weight does the employer place on these evaluations?
17. Do higher-level managers obtain information from other sources for evaluation purposes?
18. Does the individual make recommendations regarding the evaluations?
19. What happens to that recommendation? Is the recommendation accepted?
20. What is the process of review of the recommendation? Does any other supervisor or member of management consider the evaluation? Get specific examples and names of individuals evaluated.

ADJUST GRIEVANCES

1. If the individual handles grievances, describe methods used and extent of involvement. If there is a written grievance procedure, attempt to obtain a copy for the record, if available.
2. Do employees typically come to this individual to resolve problems?
3. What types of grievances is he/she authorized to resolve without higher authority?
4. Give specific examples.

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DISCHARGE

1. Is the individual involved in discharging employees?
2. Are there established guidelines or policies that result in the discharge of employees?
3. Describe the discharge process and the individual's role in that process.
4. Does the individual have the authority to make the final decision regarding discharge? Give specific examples.
5. Does the individual make recommendations whether employees should be discharged?
6. What happens to that recommendation? Is the recommendation accepted?
7. What is the process of review of the recommendation? Does any other supervisor or member of management look into the basis for the discharge? Get specific names of individuals discharged.

ASSIGNMENT AND RESPONSIBLE DIRECTION

1. Is the individual involved in the assignment or direction of work? Who and which classifications report to the individual?
2. How is the individual involved in assignments? Are the assignments made in collaboration with others?
3. Does the individual make the decisions; if so, on what factors are those decisions based (skills, training, experience, availability, seniority, operational needs, etc.)? Does the individual have discretion to determine which among several employees should be assigned to an individual task?
4. What is the nature and duration of the assignments given by the individual?
5. Are there established guidelines (e.g. company policies or rules, verbal instructions of higher authority, or provisions of a collective-bargaining agreement) relating to these assignments?
6. In the event there is a change in work requirements, can the individual decide how to reassign employees without consulting anyone else? What factors does the individual consider in doing so?
7. Does the individual prioritize work?
8. Does the individual direct employees' work (The act of directing which job shall be done next or who shall do it)? Describe and give examples of the type of orders or instructions given and the tasks involved. Once a task is assigned, does the employee need any guidance?

9. Is the individual “responsible” for the directed work? (i.e. Is the individual held accountable for the overall performance of that task?) If so, describe how the person is held accountable, including the effects on his/her terms and conditions of employment.
10. Is there a prospect of adverse consequences to the person directing the work if the work is not performed properly, or if no corrective action is taken? If so, describe and give specific examples.
11. Does the individual have the authority to correct, or direct the correction of, any errors made by employees? If so, has such authority been exercised? Describe and give specific examples.
12. Does the individual inspect the work of employees? For what purpose?
13. Is the individual responsible for the training of other employees?
14. Does the individual assign employees to:
 - a. a place (such as location, department or wing); give specific examples; or
 - b. a time (such as shift or overtime); give specific examples; or
 - c. a task (which must involve “significant overall duties,” not ad hoc instructions to perform a discrete task). Describe in detail the duties and/or tasks assigned.
15. In a health care setting, does the individual’s authority to “assign” encompass the responsibility to assign nurses and aides to particular patients? If so, what factors (e.g., an objective or subjective appraisal of the employee’s skills and training; the nature or severity of the patient’s condition; an assessment of the probable amount of nursing time required, and the allocation of available resources; employee and/or patient personalities; employer policies; etc.) are relied upon to make those decisions?

SECONDARY INDICIA

Indicia other than those enumerated in Section 2(11) are secondary indicia. Although secondary indicia may be considered in determining supervisory issues, they are not dispositive. In the absence of one of the enumerated primary indicia, secondary indicia, standing alone, are insufficient to establish supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

See *An Outline of Law and Procedure in Representation Cases*, Section 17–507

Relevant Questions:

1. Does the individual attend supervisory meetings? Regularly? If not, how frequently? What is the reason for such attendance? What is the extent of his or her participation?
2. Does the individual receive any benefits not granted to other employees? If so, describe.

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3. Compare with those of other employees and admitted supervisors the individual's rate of pay, manner of pay, overtime, vacations, insurance, pensions, bonus, use of facilities, incentive plans, parking areas, type of clothing worn while working, use of time-clock, restrooms, cafeteria, payment for time lost. Describe any special privileges or compensation given the individual by virtue of the position.
4. Is the individual designated on the payroll as a supervisor?
5. Is the individual regarded as a supervisor by other employees and admitted supervisors?
6. What is the ratio of supervisory to non-supervisory employees?
7. Where is the individual's work location? Does he or she work in an office or at a desk?
8. Does the individual keep time records for employees?
9. Obtain job descriptions.

SUBSTITUTION & INTERMITTENT

The test for determining the status of individuals who intermittently substitute for statutory supervisors is whether the part-time supervisors spend a "regular and substantial" portion of their working time performing supervisory tasks or whether such substitution is sporadic and insignificant. *Carlisle Engineered Products Inc.*, 330 NLRB 1359 (2000). The sporadic assumption of supervisory duties when the statutory supervisor is on vacation or sick leave is not sufficient to establish supervisory status. *Jakel Motors*, 288 NLRB 730 (1988). Rotation in and out of supervisory positions, as in the construction industry, may be indicative that the individual is an employee and not a statutory supervisor. *General Dynamics Corp.*, 213 NLRB 851 (1974).

Relevant Questions:

1. If the individual in question is an employee who substitutes in a supervisory position, does he or she spend a regular and substantial portion of his or her time doing so? On the other hand, does the individual only sporadically assume supervisory duties during times such as annual vacation periods, rather than on a routine and regular basis?
2. If the individual substitutes for conceded supervisors, what authority does the individual possess during those periods? Specific examples should be provided as to the exercise of this authority.
3. Is the individual the highest ranking individual present at any time or on any shift? If so, does the individual have authority to make final decisions or must he/she check with other officials? If the individual makes recommendations, what further action is taken and by whom? Give examples.

4. Do employees work permanently or temporarily under the individual? If temporarily, describe the circumstances surrounding their assignment to work under him/her, including the frequency, type of work performed, duration and the extent of his/her authority and responsibility.

F. Managerial Employees

The Board has defined managerial employees as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer and those who have discretion in the performance of their jobs independent of their employer’s established policy.” *General Dynamics Corp.*, 213 NLRB 851, 857 (1974). Also see *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

See An Outline of Law and Procedure in Representation Cases, Section 19–200.

Relevant Questions:

General

1. What is the employee’s job title and position?
2. What are the duties and responsibilities of the position?
3. To whom does he/she report? What is the extent of supervision of his/her work?
4. How is the employee compensated? Are there any differences in amount and/or kind of benefits paid to other employees?
5. Where is the employee’s work location?
6. Is the employee’s position considered to be an “executive” position?
7. Is he/she held out as being a representative of management? Does he/she consider himself/herself as such?

Polycymaking

1. Is the employee involved in the formulation and effectuation of management policies? Give specific examples of formulation or effectuation of management policies.
2. Does the employee have discretion in the performance of his/her job, independent of the employer’s established policies? Give specific examples of such discretion.
3. What types of decisions is the employee called on to make? Give specific examples.
4. Are such decisions subject to approval by others in management?
5. What and whom do such decisions affect?

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6. Does he/she attend/participate in meetings conducted to formulate and effectuate management policies?
7. Is the employee involved in labor relations matters, including the formulation or effectuation of policies? Does any other manager review the formulation or effectuation of that policy?
8. Does the employee have access to knowledge, data or records pertaining to labor relations? Identify specific records involved and the circumstances of that access.

Financial

1. Does the employee have the authority to pledge the employer's credit?
2. Does the employee have discretion or use independent judgment in committing the employer's credit? Are such purchases subject to review?
3. Are such purchases of a routine or non-routine nature?
4. Are there established or expressed dollar limitations placed on such purchasing authority?

Production/Scheduling

1. Does the employee have any responsibility for establishing production or other schedules?
2. How is that scheduling arranged or established? Is it reviewed by other managers?
3. What factors are used or considered by the employee to determine the schedule or distribution of work? Is this function routine, i.e., does the employee follow preestablished guidelines, or does it involve the use of independent judgment? If guidelines exist, obtain a copy for the record.
4. Does the employee participate in decisions regarding production changes or additions to or reductions in the size of the work force?
5. Is the employee involved in establishing or coordinating production or other business activities?

Training

1. Is the employee involved in training of employees or supervisors? If so, how?
2. Does such involvement include responsibility for developing training courses or manuals or for formulating or approving the content of such?

Editorial Policies

1. Is the employee involved in formulating or deciding editorial policies or content? If so, how?

Stock Ownership

1. Are the employees shareholders who collectively hold a majority of the stock in the employer's business?
2. In circumstances where the employee-shareholders do not hold a majority interest in the employer, are they nonetheless in a position to exert influence on management policy? E.g., do the employee shareholders select one or more members of the board of directors?

Note: In situations involving an Employee Stock Ownership Plan (ESOP), a contention may arise that all employees are managerial. In that instance, the hearing officer should ensure that the record fully reflects the extent to which employee-stockholders are involved in operational, personnel, entrepreneurial or other decisions; any limitations on such involvement; the exact nature of the decision-making process; and the exact types of decisions in which employees have participated.

G. Management Trainees

Determining the unit inclusion and/or placement of management trainees involves examining both the disputed individuals' supervisory or managerial status *and* their community of interest with unit employees. Management trainees generally are treated the same as other individuals who are in line for elevation to supervisory positions. Where a party seeks to exclude a management trainee on the basis that he or she is a supervisor, the hearing officer should refer to the supervisory status questions set forth in Section V, A, Community of Interest. Where a party seeks to exclude a management trainee on the basis that he or she lacks a sufficient community of interest with unit employees, the hearing officer should refer to the community of interest questions set forth in Section V, A, Community of Interest and ask the questions below. For cases demonstrating application of these factors, see *Nationsway Transport Service*, 316 NLRB 4 (1995), citing *Curtis Industries*, 218 NLRB 1447, 1452 (1975).

See *An Outline of Law and Procedure in Representation Cases*, Section 17–506.

Relevant Questions:

1. Was the trainee hired based on his or her possession of relevant education or experience?
2. Is the trainee's continued employment dependent upon his or her entrance into

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management, such that if not accepted, the individual must leave the employ of the employer?

3. Does the employer maintain a planned management trainee program? Describe.
4. Is there a distinction of wages and working conditions between management trainees and the employees with whom they work? Describe in detail.

H. Relatives of Management

The statutory definition of an employee in Section 2(3) of the Act specifically excludes “any individual employed by his parent or spouse.” In *Scandia*, 167 NLRB 623 (1967), the Board announced a policy of excluding from bargaining units the children and spouses of individuals who have substantial stock interests in closely held corporations. Clearly, the child of a sole shareholder is excluded. *Bridgeton Transit*, 123 NLRB 1196 (1959). Children of majority shareholders are also excluded. *Cerni Motor Sales*, 201 NLRB 918 (1973).

When the ownership is less than 50-percent, the Board applies a different test for determining eligibility. In *NLRB v. Action Automotive*, 469 U.S. 490 (1985), the Supreme Court affirmed the Board’s practice of excluding from a bargaining unit close relatives of the owners of a closely held corporation, even in the absence of special job related benefits. The Court also endorsed the Board’s policy requiring that eligibility of relatives in a non-closely held corporation depends on whether or not the employee enjoys “special status.”

Thus, although the standard for inclusion in the bargaining unit is community of interest, in cases of relatives of corporate shareholders, the inquiry as to community of interest is expanded to include consideration of the amount of stock owned by the relative shareholders, whether the employee is a dependent of the stockholder and similar considerations. The individual in question may also be excluded if his or her job duties reflect a special relationship. The special status test is also applied to determine the eligibility of relatives of nonowner managers. *Cumberland Farms*, 272 NLRB 336, fn.2 (1984); *Allen Services Co.*, 314 NLRB 1060 (1994).

See *An Outline of Law and Procedure in Representation Cases*, Section 19–300.

Relevant Questions:

1. Is the individual employed by a parent, spouse or child in a sole proprietorship or partnership?
2. Is the individual employed by a corporation in which a member or members of his/her family own stock? If so, what percentage of stock in the corporation does the family member(s) own?

3. If the individual is employed by a corporation wherein his/her family owns more than 50-percent of the stock, ask the following:

- (a) How many shares are outstanding in the corporation? How many shares are owned by family members?
- (b) What is the relationship of the individual to the family member or members who own stock in the corporation?
- (c) If the individual is not an immediate family member (e.g., father, mother, son, daughter, brother, sister, spouse), ask the special status questions set forth below starting at question 4.

4. If the individual is employed in a corporation in which family members own 50-percent or less of the stock, ask the following:

- (a) What is the percentage of stock ownership?
- (b) What is the relationship to the family member/owner?
- (c) Does the individual live at home with the owner/manager?
- (d) Does the individual receive financial support (e.g., payment of tuition, free room and board) from the owner? If so, specify.
- (e) What are the person's duties and location of work?
- (f) What are the rates of pay, hours, supervision?
- (g) Are there benefits or privileges they receive that are not given to other employees?
- (h) Is there special consideration given by virtue of relationship?
- (i) Give examples, if any, of instances where relationship has affected the employment status of the individual.

5. If the individual is employed by an employer in which a family member is a nonowner but is in a management position, ask the following:

- (a) What is the relationship to the manager?
- (b) What is the manager's title? Position in the corporate hierarchy?
- (c) What authority does the manager have?
- (d) What opportunity is there for the manager to influence the individual's working conditions, wages, hours?
- (e) Is special consideration given by virtue of the individual's relationship to the manager?
- (f) Does the individual live at home with the manager? Does the manager provide any financial support to the individual? If so, specify.