

# Are Your Doctors Poised for an Organizing Push? A Recent NLRB Decision May Provide Some Incentive

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Generally speaking, most healthcare employers would not think that their employed physicians are at risk for unionization. As opposed to interns and residents, who have experienced their own unionization push in the past several years, employed or “staff” physicians supervise nurses and other medical providers and direct the day-to-day operations of healthcare services. They are regarded as “management” and part of leadership within most hospitals. Thus, many hospital administrators naturally assume that physicians are seen as “supervisors” under the law, and like other supervisors, would be barred from seeking to organize or join a union under the National Labor Relations Act. Doctors certainly should not be allowed to seek union representation, like their nurse colleagues, since the positions are fundamentally different. Simple, right?

Maybe not. One NLRB Regional Director recently reinforced the argument that physicians, and other highly-credentialed medical providers, are not supervisors simply by virtue of their position near the top of healthcare institution chain of command – and can in fact seek to organize. They could also be part of the same unit with other staff. On January 21, 2022, in *Piedmont Health Services, Inc. and Piedmont Health Services Medical Providers United*, Case 10-RC-286648, the NLRB directed an election of a proposed bargaining unit consisting of physicians, nurse practitioners, certified nurse-midwives, and physician assistants. Supervisors are of course excluded from the proposed unit, but, as will be explained below, the NLRB in this case draws a clear line between what constitutes a supervisor when it comes to medical providers, and what does not.

**BACKGROUND** On November 23, 2021, Piedmont Health Services Medical Providers United (the “Union”) filed a representation petition seeking to represent 50 employees working at ten Piedmont Health Services, Inc. (“Piedmont”) facilities across North Carolina. The Union sought to represent “All community health center medical providers (defined as physicians, nurse practitioners, certified nurse-midwives, and physician assistants)” employed at these ten locations. Excluded from representation were “all other employees, lead providers, guards, and supervisors as defined by the [NLRA].” Piedmont then sought to dismiss the petition on the basis that all employees covered by the proposed bargaining unit were statutory supervisors, since they had authority to direct other employees. In addition, Piedmont argued the petitioned-for employees recommended hiring, promotion, and discipline of other employees, and recommended the adjustment of other employees’ grievances and the assignment of work. Also, Piedmont argued that the physicians in general did not share a community of interest with the other petitioned-for employees, and it would be inappropriate to include physicians in the proposed bargaining unit. **THE RULING** Under the NLRA, an employee is considered a “supervisor” when they have the authority to perform any

number of personnel actions, including hiring, firing, transferring, suspending, laying-off, recalling, promoting, discharging, assigning, rewarding, or otherwise disciplining employees, having the responsibility to direct employees, and adjusting their grievances. An employee who possesses the ability to effectively recommend these actions can also be considered a supervisor, so long as the recommendation requires the use of independent judgment, and is not simply routine or clerical in nature. The NLRB held a two-day hearing to take evidence from both parties regarding their positions. The Regional Director ultimately held that the petitioned-for employees were not supervisors and were allowed to petition for representation, and that all the petitioned-for employees shared a community of interest making one bargaining unit appropriate. In making this finding, the NLRB relied on the following facts determined by the evidence:

- At each individual site, Piedmont employs a lead medical provider who is responsible for overseeing all healthcare providers at their assigned site. These lead medical providers report to the Chief Medical Officer. The parties stipulated that lead medical providers were statutory supervisors to be excluded from any proposed unit.
- Lead medical providers are responsible for supervising all other providers at the site, and were responsible for administrative tasks such as authorizing time off and directing work hours, completing performance evaluations, monitoring work flow, and reviewing generally the work of the health care providers and their interactions with staff.
- Lead medical providers are also responsible for ensuring health care providers are practicing medicine up to current standards.
- The petitioned-for employees, on the other hand, were generally expected to provide healthcare services to patients and did not participate in the administrative functions reserved for the lead medical providers or other administrative staff, such as human resources.
- For example, the petitioned-for employees did not assign schedules for other employees, did not assign employees to work at specific locations, did not possess authority to hire employees (despite the fact they could recommend employees for hiring), did not have authority to promote employees, and did not actually adjust any employee grievances (again, only providing recommendations for adjustment).
- The NLRB also discredited the fact that certain petitioned-for physicians were found to be the “supervising physician” of another credentialed provider, as required by North Carolina’s professional licensing law. This was because the NLRB has previously held that a governmental requirement that a healthcare provider be supervised by a physician does not necessarily establish them as a supervisor under the NLRA.
- The fact that the petitioned-for employees would occasionally fill-in as lead medical providers was also not sufficient to deem them supervisors.
- Additionally, the physicians shared a community of interest with the other petitioned-for employees as they were not organized into separate departments, and were functionally integrated with each other, including sharing common supervision. Likewise, all the petitioned-for employees generally performed similar or identical work – providing healthcare services to patients.

**TAKEAWAY** The NLRB in this case decided that the petitioned-for employees, especially the physicians, were not supervisors for two simple reasons – (1) they did not possess any authority to

engage in supervisory acts as defined under the Act, and (2) there was no evidence that their recommendations regarding any of these acts were done with independent judgment and implemented by the employer without additional oversight. Without this evidence, the petitioned-for employees could not be considered supervisors and were free to attempt to organize into a bargaining unit. Healthcare employers should take notice of this decision and examine their own medical provider workforce, especially their employed physicians. If these employees lack the supervisory authority like those in the *Piedmont* case, then it's likely they will be allowed to seek union representation if they so choose. That is not to say that employers should rush to provide these employees with supervisory authority - doing so would also present its own challenges separate and apart from union concerns. However, healthcare employers should simply be cognizant of the fact that even highly credentialed professionals, such as physicians, may still fall within the broad purview of the NLRA and be allowed to seek union representation.