NLRB Significantly Broadens Scope of Unionization of Temporary and Supplied Workers in U.S.

On July 11, 2016, the National Labor Relations Board ("NLRB" or "Board") issued its opinion in *Miller & Anderson, Inc.*, and held employer consent is no longer necessary for a union to organize a single bargaining unit consisting of both the employer's regular employees and temporary workers that are supplied from other companies. In the wake of last year's *Browning-Ferris* decision and the NLRB's expansion of its joint employment standard, *Miller & Anderson* seems to be the latest effort of the NLRB to broaden the reach of the National Labor Relations Act ("NLRA" or "the Act"). The decision reversed previous Board precedent, which gave employers discretion to consent to the inclusion of workers who are supplied by other companies into a single bargaining unit. Now, combined units may be approved if the workers share a community of interest. This decision is significant as it greatly expands employer's bargaining obligations toward temporary workers and other supplied workers, and potentially lengthens the relationship between the parties.

Case Background

Miller & Anderson is a mechanical contractor that supplemented its own workforce for a hospital construction project with temporary workers supplied by Tradesmen International, a construction labor supplier. On April 20, 2012, the Sheet Metal Workers International Association filed a petition seeking to represent "All sheet metal workers employed by [Miller & Anderson, Inc. and/or Tradesmen International] as either single or joint employers on all job sites in Franklin County, Pennsylvania." The NLRB Region 5 Director rejected the petition on April 26, 2012, noting that under then-current Board precedent, "a unit consisting of employees employed by a single employer and by a joint employer is a multiemployer bargaining unit and is appropriate only if all employers consent."

The Union filed a request for review on May 10, 2012, asking the Board to reverse its previous holdings and determine that employers' consent is not necessary for units that include temporary workers and regular employees of a single user employer. On May 18, 2015, the Board granted the Union's request for review.

Additional Insight

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When you mention the words "unionization campaign," most people think of picket lines, strikes and collective bargaining tables. Although they sometimes make headlines, labor disputes have traditionally been somewhat private affairs between companies and their employees about internal issues like better wages, benefits, hours and overall working conditions. Not anymore. Read more.

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The NLRB's Holding

In *Miller & Anderson, Inc.*, the Board held that "[e]mployer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer." In so holding, the Board stated that it was acting under its "statutory command" to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." In so doing, the Board will now permit workers supplied by a staffing agency to be unionized within a single unit with the regular workforce.

The Board reasoned that requiring employer consent to multiemployer bargaining would deny workers "full freedom of association." It further reasoned that where regular employees and supplied workers are all performing work for the same user employer, they are part of a "common enterprise" and must be permitted to join a single bargaining unit. The workers need only pass the traditional "community of interest" test before bargaining together.

The Board dismissed concerns that regular employees and temporary workers may often have conflicting interests, stating that the employees could simply decline to join a single bargaining unit. The Board likewise dismissed concerns that supplier employers and user employers may have conflicting interests, stating that joint employers are forced to negotiate together despite conflicting interests in other circumstances. Further, although the Board stated that employers are only obligated to bargain with workers over those terms and conditions under their control, it did not explain how an employer could make such a distinction in practice when supplied workers and regular employees are side-by-side in the negotiations.

Impact on Employers

1. Employers can no longer veto the unionization of bargaining units that combine the employer's regular employees with workers who are supplied to the employer by another organization.

2. Employers should expect increased union efforts to organize temporary workers and jointly-employed workers.

3. Bargaining units may significantly increase in size and include temporary workers and jointly-employed workers.

4. Employers may be forced into collective bargaining relationships with the employers of the supplied workers, potentially stemming from grievances the supplied workers have against their staffing companies.

5. Depending on individual circumstances and the terms of any collective bargaining agreement, employers may lose their ability to easily change and/or end their relationship with worker staffing companies.

How We Can Help

Our Employment Counseling & Litigation attorneys understand the complexities of today's workforces and the underlying business relationships. Our attorneys routinely provide advice to companies regarding their obligations under the NLRA as well as the various joint employer standards.

Our Employment Counseling & Litigation attorneys can:

- Audit worksites for unionization susceptibility and vulnerability;
- Advise on worker staffing relationships, joint employer status, and supply chain verification;
- Provide practical advice regarding company's rights and obligations under the National Labor Relations Act; and
- Represent company interests during collective bargaining to help obtain an agreement that delivers optimal flexibility and cost control.

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