

JULY 28, 2016 | TRADITIONAL LABOR RELATIONS

NLRB Makes It Easier for Employers with Temp Workers to Become Unionized

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On July 11, 2016, the National Labor Relations Board ("Board") reversed decade old precedent requiring consent from the host employer and a staffing agency before a union election that includes temporary employees could take place. Through its 3-1 [decision in the *Miller & Anderson, Inc.* case](#), the Board revoked its 2004 *Oakwood Care Center* holding and reinstated its 2000 decision in *M.B. Sturgis* by finding that bargaining units covering both regular employees and temporary employees do not require employer approval. Indeed, the Board explained that based on the broad definition of employee in the National Labor Relations Act ("the Act") and Congress's "statutory charge" to the Board, it interprets the term "employer unit" in Section 9(b) be made up of both employees solely employed by the host employer and joint employees employed by both the host employer and the staffing agency, when those employees share a community of interest. In a statement released regarding its decision, the Board made clear that host employers would be expected to bargain as usual with their regular employees, and "will only be obligated to bargain over the jointly-employed workers' terms and conditions which it possesses the authority to control."

The main argument against reversal of the *Oakwood Care Center* decision and the problem that arises in permitting such a bargaining unit, as explained in Board Member Philip Miscimarra's dissent, is that multiple employers, at least two in this circumstance, must engage in multi-employer bargaining. Pursuant to Sections 8(a)(5) and 8(b)(3), which prevent the union and employer from refusing to bargain with the representative of the employer's employees respectively, the Act limits multi-employer bargaining to those situations where all the parties, significantly the employer, consent. Permitting bargaining units that include temporary employees, also working for a staffing agency, and employees solely employed by the host employer, the process necessarily requires the participation of a second employer with no relationship to some portion, potentially a majority, of the unit employees.

Yet, under this decision, neither employer is permitted to withhold its consent. As Board Member Miscimarra points out, Section 9(b) of the Act must be evaluated in the context of the entire Act, including section 9(a) – a bargaining unit must be "appropriate" for "purposes of collective bargaining" – 8(a)(5) and 8(b)(3), limiting the parameters of the bargaining unit to those employees over which the employer has some authority. However, the majority's decision further increases union organizing ability and erodes employer rights.

Beyond expanding the types of available bargaining units, another significant effect of this decision, which Board Member Miscimarra identifies in his dissent, is that it “substantially enlarge[s] the expanded joint-employer platform created by *Browning-Ferris*.” In *Browning-Ferris*, the Board made it much easier to establish joint employer status. Specifically, the Board established a broader standard in which two or more entities are joint employers if (1) they are both employers within the meaning of the common law and (2) they share or codetermine those matters governing the essential terms and conditions of employment.

The Board’s decision in *Miller & Anderson, Inc.* bolsters the impact of this holding by now making it easier for temporary workers to actually unionize. It facilitates temporary employees’ ability to unite with regular employees and bargain in a similar manner over the terms and conditions of employment. Although a community of interest will not always exist between regular and temporary employees to establish a bargaining unit, the inclusive standard for joint employment will allow the Board to get to this step more readily. Moreover, the collective bargaining agreement between a host employer and a bargaining unit that incorporates both regular and temporary employees, may be used as evidence of a joint employer relationship in this and other contexts.

The significance of the joint employer relationship extends beyond the circumstance of union organizing and bargaining to wage and hour obligations under the Fair Labor Standards Act (“FLSA”) and workplace safety under the Occupational Safety and Health Act (“OSH Act”). In fact, both the Occupational Safety and Health Administration (“OSHA”) and the Department of Labor (“DOL”) have ongoing enforcement initiatives focused on holding joint employers accountable. In 2014, OSHA established its Temporary Worker Initiative, which it has used to both clarify joint employer obligations and prioritize the evaluation of the employer-worker relationship during inspections to ensure employers are meeting their safety responsibilities to temporary workers. Similarly, the DOL has made the assessment of independent contractor relationships a focus of enforcement, releasing recent guidance clarifying its position on independent contractors (namely, that most are actually employees) and forming alliances with state entities for administration purposes.

Thus, the impact of the Board’s recent decisions regarding joint employers could extend beyond the union context, potentially affecting the evaluation of that relationship, and its resulting obligations, under other employment laws. Indeed, the joint employer issue will likely become more and more significant as laws such as the Affordable Care Act and the new white collar exemption regulations promote increased use of temporary workers and independent contractors. All employers with temporary workers should immediately review their vendor contracts to avoid a finding of joint employer, and remember that an employer’s campaign to remain free of union interference is a 365 day a year campaign with constant training to managers and supervisors on labor relations strategies.