PUBLICATION

The NLRB Eases the Way for Temporary Employees to Unionize

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On July 11, 2016, the National Labor Relations Board (NRLB) released a decision reversing 12 years of established precedent. In *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016), the Board held that a bargaining unit can be comprised of both regular employees and temporary employees on assignment from staffing agencies, provided that the employees in question share a "community of interest." Previously, the rule was that such bargaining units could only exist if both employers consented. Now that consent is no longer necessary, there may be significant consequences for employers who utilize the services of temporary workers.

The context for this case is relatively simple. Miller & Anderson (Miller) is a mechanical company that employed regular, full-time metal workers at many of its job sites. Miller also contracted with a staffing agency, Tradesmen International (Tradesmen), to supply additional metal workers necessary for the company's workload (often called "temps"). Importantly, both Miller and Tradesmen "jointly employed" all of the temps in question. That was not in dispute. Rather, the issue was whether those temps could organize and collectively bargain alongside their regular employee counterparts – without first getting consent from Miller and Tradesmen. Previously, the NLRB said they could not. In this case, however, the Board reversed its precedent.

The Board pointed to two primary things in making its ruling. First, it noted that expanding bargaining units in this way was consistent with the National Labor Relations Act's broad definitions of "employer" and "employee," as well as the Act's policy to "assure…employees the fullest freedom in exercising their rights" to engage in protected, concerted activity. Indeed, the Board quipped that to require "employees to obtain employer permission to organize in such a way is surely not what Congress intended" in passing the NLRA. Second, the Board emphasized that these expanded bargaining units must (a) comprise employees of "joint employers" who (b) share a sufficient "community of interest" to justify being grouped together. Those factors, the Board believes, will ensure that these bargaining units will not be comprised of employees who have *substantively* distinct employers. Rather, the overlap and alignment of interests will ensure they are, practically speaking, one and the same. At least, that is the Board's rationale. Only time will tell whether it proves to be true.

Significance for Employers:

1. Know where you stand with regard to your temps: (i) Have you crossed the threshold from hiring your temps as independent contractors into "jointly employing" them? (ii) Do they share a "community of interest" with your regular employees? Both of these determinations can be rather nuanced, so consult with counsel to be sure. The factors to consider for a "community of interest," among others, are: whether the employees have the same or distinct skills, training or job functions; whether they are integrated with or work alongside one another; whether they are grouped together into a department; and whether they are jointly or separately supervised.
2. In an organizing drive, temps are likely to be pro-union because of their lower wages and few, if any, benefits. Thus, if they are grouped into a single bargaining unit with your regular employees, it is more likely that bargaining unit will vote to unionize.

3. Realize the complication these joint bargaining units would create during a union drive or election campaign. In that event, coordinating your unionization defense with the staffing agency you have hired will be necessary.