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The NLRB Eases Organizing of Temp Workers

On Monday, July 11, the National Labor Relations Board (NLRB) held, in *Miller & Anderson*, that temporary workers can organize in a single unit with the company's direct hires if they share the same community of interest.

The decision overturned the *Oakwood Care Center,* 343 NLRB 659 (2004), decision that required a staffing agency and leasing employer to consent to the staffing agency workers and the leasing employer's direct hires organizing into the same unit. The NLRB has returned to the standard set forth in *M.B. Sturgis,* 331 NLRB 1298 (2000), that allows unions to petition for a unit with both a company's direct hires and any temporary workers without the consent of the company and the staffing agency.

The NLRB stated that a key component of the right to organize includes the "right to draw the boundaries of that organization – to choose whom to include and whom to exclude." *Specialty Healthcare & Rehabilitation Center of Mobile,* 357 NLRB 934, 941 fn. 18 (2011), *aff'd sub nom*, *Kindred Nursing Centers East, LLC v. NLRB,* 727 F3d 552 (6th Cir. 2013). It held that employees, not the employer, should choose whether they wish to organize together, as long as they share the same community of interest. Therefore, the new standard allows for direct hires and temporary agency workers who share the same community of interest to decide whether they want to organize collectively or separately.

The *Miller & Anderson* decision foreseeably will be applied in conjunction with the joint-employer standard set forth in the *Browning-Ferris* decision, 362 NLRB No. 186 (2015). In light of *Browning-Ferris*, "[e]ach employer is obligated to bargain only over the employees with whom it has an employment relationship and 'only with respect to such terms and conditions which it possesses the authority to control.'" Therefore, there are no additional bargaining obligations on the "supplier employer because its bargaining obligation extends only to the employees it jointly employs and only with respect to such terms and conditions which it possesses the authority to control." In the event that the employer uses more than one staffing agency, each staffing agency will need to bargain over the terms and conditions of employment for its own workers, and the leasing employer will bargain over the terms and conditions of employment for all workers who perform work for it in the represented unit, regardless of whether they are direct hires or employed through temporary staffing agencies.

The *Miller & Anderson* decision further facilitates the ability of unions to organize by easing union access to companies. Whether through temp/direct hire units or microunits, unions increasingly are given the green light to choose the proposed bargaining unit that is most likely to lead to their being successful during organizing campaigns. Moreover, it is substantially harder to replace a staffing agency if a company has joint-employer bargaining obligations. Therefore, it may be in the staffing agency's interest to not oppose a union.

This decision serves as a reminder that it is never too early to develop and put in place strategies to minimize the appeal of unions, such as creating an environment where unions are not viewed as needed. Also, staffing agency relationships should be reviewed to minimize the risk that their workers will seek to organize while performing work for your company.

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