NLRB Reinstates Liberal Standard For Unionizing Temp Workers

LABOR BOARD CONTINUES EFFORT TO ASSIST ORGANIZED LABOR

Insights
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In today's 3-1 decision, the National Labor Relations Board (NLRB) resurrected a union-friendly standard making it easier for unions to combine jointly employed temporary workers with an employer's existing workforce to form a union. For over a decade, employers had enjoyed a standard which permitted them to block such a combined pairing by refusing to provide consent. As of today, however, that standard has been scrapped (*Miller & Anderson, Inc.*).

As reported in our August 2015 Alert, the NLRB's issuance of a new standard for determining if two businesses are "joint employers" for collective bargaining purposes was just the first step in an effort to provide unions an advantage in trying to organize temporary employees (*Browning-Ferris of California, Inc.*). With today's decision in *Miller & Anderson*, the other shoe has dropped.

Brief History Of Seesawing Standard
In today's decision, the NLRB recounted the long history involving this issue, describing how the standard has flip-flopped several times. In the early days of the National Labor Relations Act (NLRA) and for over four decades, the Board routinely found bargaining units of the employees of a single employer appropriate, regardless of whether some of those workers were jointly employed by another employer.

However, in 1990, the Board shifted gears and issued a decision requiring employer permission if a union were to be formed including workers who were jointly employed by another entity. In the waning months of the Clinton Administration, the NLRB overruled that standard in the infamous *M.B. Sturgis* decision from 2000, concluding that the 1990 decision improperly extended a multi-employer analysis to the joint employer context.

The *Sturgis* decision pointed out that employer consent should be required when the employers are entirely independent businesses, with nothing in common except the industry in which they operate. When employers are physically and economically separate, their operations are not intermingled, and their employees are not jointly controlled, it makes sense for employer consent to be necessary in order to form a single collective bargaining unit including workers covering separate employers. However, when those elements are not present, the Board held, employer consent should not be required.

Fast forward another four years to the middle of the Bush Administration, and the Board once again changed course by issuing the 2004 employer-friendly *Oakwood Care Center* decision. The Board concluded that the *Sturgis* standard was misguided as a matter of statutory interpretation and sound national labor policy. It once again reinstituted the employer consent requirement, ruling that the NLRA did not authorize union elections for bargaining units comprised of workers of more than one employer, and also pointing out that the *Sturgis* standard had given rise to significant conflicts among various employers and groups of employees.

After over a decade of existing under this paradigm, today's decision sets aside the *Oakwood* standard and once again establishes the *Sturgis* standard as the law of the land.

Today's Decision: Workers Do Not Need Employer Permission To Join Forces

The NLRB recognized the significance of its actions. It pointed out that the most recent Bureau of Labor Statistics survey indicated that contingent workers comprised over 4% of the national workforce, close to six million workers, but that these numbers were probably even greater than that at present time. Further, temporary employment has expanded in the last decade to include a much wider range of occupations, and is recognized as one of the largest and fastest growing industries in terms of employment. This decision, in other words, will have a substantial impact on the national economy.

The Board's conclusion was simple enough: employer consent is no longer necessary for bargaining units that combine jointly employed and solely employed workers of a single user employer. The NLRB said it seemed most logical to combine the two, provided the "community of interest" factors were present to demonstrate that the employees in the unit are performing work for the user employer and are employed within the meaning of the common law by that same employer.

The Board concluded that a variety of factors should be examined to determine whether a mutuality of interests in wages, hours, and working conditions exist among the workers involved. Following the resurrected *Sturgis* standard, the Board pointed out that a group of employees working side-by-side at the same facility, under the same supervision, and under common working conditions would likely share a sufficient community of interest to constitute an appropriate collective bargaining unit.

Therefore, in such a situation, the workers would be free to choose to either join together to form a single union, or could organize separately if they desired. In either event, employers would no longer have the ability to block a combined unit by withholding consent.

What Does This Mean For Employers?

While the NLRB's decision is clearly intended to assist organized labor, employers (temporary and otherwise) still have options. You should, of course, consider this latest decision when formulating and implementing an effective employee relations program. As a result of today's decision, employers and temporary service providers alike should start by scrutinizing the parameters of

their work arrangements to determine whether a sufficient community of interest exists among their jointly shared workers.

If so, it is now more likely than not that these workers could be combined to form a single combined collective bargaining unit without your consent. However, to the extent workers can be segregated by facility, supervision, or common working conditions, both the user and supplier employers may be able to attack any attempt to combine their employees based on traditional community of interest grounds.

If you have any questions about this decision, or how it may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific NLRB decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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