Employer Consent and Temporary Employees of Joint-Employers

In *Miller & Anderson, Inc.*, 364 NLRB No.39 (2016), the Board held that workers who are employed solely by an employer and contingent (temporary) workers who simultaneously are employed by the same employer and by a staffing agency, now have the option to jointly petition for recognition in the same bargaining unit without first seeking the consent of the employer. The two groups of employees will have to pass the traditional community of interest test in order to be deemed an appropriate unit.

The Board, in overruling *Oakwood*, determined that the holding in *Sturgis* better effectuated the purpose of the NLRA ("the Act"), which is "to protect and facilitate employee's opportunity to organize unions to represent them in collective bargaining negotiations." The consent requirement was found to be a hindrance to effectuating the purpose of the Act because this allowed employers to dilute the bargaining power of their employees. Since employers had the sole decision of determining how many temporary workers it would employ, they *de facto* had power in determining what percentage of their workforce could join a potential bargaining unit.

Opponents to the Board's overruling of *Oakwood*, raised unpersuasive arguments alleging that such an action contravenes the Act, and would frustrate labor policy. In response, the Board explained that the Act defines an employer and employee broadly, and added that an appropriate employer unit consists of employees who perform all of their work for the same employer irrespective of whether some of the employees are employed solely or jointly. Further, nothing in the Act prohibits a single bargaining unit that is made up of solely and jointly-employed employees

"*Sturgis* Units," as the Board termed them, are distinct from multi-employer bargaining units and are instead more appropriately identified as joint-employer bargaining units. In *Browning-Ferris*, the Board explained the standard as two businesses having sufficient control over terms and conditions within an appropriate bargaining unit, which obligates both businesses to jointly engage in collective bargaining. However, each business would only be required to negotiate regarding employees it actually employs. So a staffing agency would not be obligated to bargain over the solely employed employees.

In response to arguments that the Board was acting beyond its authority, the Board responded that it is charged with the duty "to adapt the Act" so as to be consistent with current economic conditions. In furtherance of that, the Board reviewed research which showed that the workforce has been shifting since 1990 from permanent employees to more utilization of temporary employees; with the largest growth among temporary workers being in blue collar industries.

Therefore, the Board determined that due to the changes in the economy, it was an opportune time to revisit its joint-employer standard. In so doing, it returned to the *Sturgis'* holding that eliminates the employer consent requirement and returns to the sufficient common interest test in determining the appropriateness of bargaining units composed of solely and jointly employed employees.

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