Insights: Alerts

NLRB Creates New Headaches for Employers Using Staffing Agency Workers

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It has become increasingly common for employers to use workers supplied by a staffing agency or other third party to supplement their work forces, often in the form of "temporary workers" or leased workers. Although these workers frequently are considered to be jointly employed by both the company supplying them and the company using them, the National Labor Relations Board ("NLRB") has for years taken the position that jointly employed workers from a "supplier" agency could not be included in the same collective bargaining unit with the "user" employer's regular employees without the consent of both employers. This rule made it difficult for a union to organize all of the employees at a workplace that included both regular employees and employees from a supplier agency because the two employers involved typically would not consent to the all-inclusive bargaining unit. On July 11, 2016, however, the NLRB ruled in *Miller & Anderson, Inc.* that workers jointly employed by a user employer and a supplier agency and the user employer's regular employees are not required to obtain employer permission if they wish to be represented for purposes of collective bargaining in a single unit.

In its 3-1 decision in *Miller & Anderson, Inc.*, the NLRB held that an employer's regular employees and workers that are considered jointly employed by the employer and a supplier agency could combine in one bargaining unit, without employer consent, provided they share a community of interest. In this ruling, the NLRB returned to its previously overruled precedent in the 2000 case of *M.B. Sturgis, Inc.* The NLRB further held that when a bargaining unit consisting of an employer's solely employed employees and its jointly employed employees is established and represented by a union, the employer is required to bargain with the union regarding all terms and conditions of employment for the unit employees it solely employs, but with respect to the jointly employed workers, it is obligated to bargain only over those terms and conditions it has the authority to control.

Practical Implications

The NLRB's decision in *Miller* represents a significant departure from the previous standard that allowed the user employer to veto a bargaining unit comprised of employees it jointly employed and its regular employees. The ruling in *Miller* makes it easier for temporary workers and other contracted workers to obtain union representation and introduces new issues for an employer to consider in responding to union-organizing efforts targeting both its regular employees and jointly employed workers. For example, anticipating union organizing and defeating a union campaign spearheaded by contracted workers can present unique challenges to the user employer, who may have more limited access to and less personnel information about the contracted workers compared to its regular employees. An employer's ability to manage its defense against union-organizing efforts efficiently also may be impacted, as it will ordinarily have to coordinate not only with its own managers, but with the supplier employer as well.

Bargaining units consisting of both solely employed employees and jointly employed employees will result in

bargaining that is more complex and unwieldy. A user employer may be left with the highly complex task of bargaining with the supplier employer, a completely independent third party with differing interests, as well as with the jointly employed workers and its regular employees, who may have differing and competing interests and different terms and conditions of employment.

Employers should be wary of dismissing the implications of the *Miller* ruling on the theory that it is not the joint employer of its temporary or leased workers. As we previously addressed in our August 28, 2015 Legal Alert on the NLRB's ruling in *Browning-Ferris Industries of California, Inc.*, the bar for establishing that the employer is a joint employer of temporary or leased workers is relatively low, and it is likely that the majority of such workers will be found to be jointly employed by the employer utilizing the services of such workers. Thus, with the ruling in *Miller*, a threshold joint employment finding by the NLRB will allow a union to expand a bargaining unit to include the temporary or leased workers utilized by the employer as well as its regular employees. Employers should be concerned about the NLRB's continued efforts to link separate, independent businesses.

Kilpatrick Townsend's Labor and Employment attorneys will continue to monitor these issues and keep you informed of significant developments as they occur. In the meantime, please feel free to contact our attorneys if you have any questions about this topic.

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