Insight

IN-DEPTH DISCUSSION

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NLRB Paves the Way for Bargaining Units Composed of Employees of Two Different Employers

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In a widely anticipated decision, the National Labor Relations Board has reversed its 2004 decision in *Oakwood Care Center*,[1] and determined that a union seeking to represent employees in a bargaining unit composed of employees solely employed by a "user employer" (a company that hires temporary workers) and those jointly employed by the user employer and temporary labor provider is not required to obtain the consent of both employers. In Miller & Anderson, Inc.,[2] the Board held that in determining if a combined unit is appropriate, it will apply traditional "community of interest" factors. The Board added that, in a combined unit, a user employer is required to bargain over all terms and conditions of employment for unit employees it solely employs, but only the terms and conditions of employment of jointly-employed employees that it possesses the authority to control. The decision represents yet another repudiation of precedent issued by the Board under the previous Administration, and appears to be a natural progression of the Board's expansive view of joint employer relationships, a view most prominently articulated in Browning-Ferris Co.[3] last year. It is also a continuation of the NLRB's effort to expand the reach of the National Labor Relations Act to alternative work arrangements and contingent workforces—fixtures of the modern workplace.

Background

Miller & Anderson arose out of the commonplace factual setting of one company contracting with another to provide labor services. In this case, Miller & Anderson, the user employer, and a temporary worker supply company were alleged to have singly or jointly employed sheet metal

1 343 NLRB 659 (2004).

2 364 NLRB No. 39 (July 11, 2016).

3 362 NLRB No. 186 (Aug. 27, 2015).

workers of both entities at a job site in Pennsylvania.[4] The union petitioned to represent a combined unit of all sheet metal workers at the site, and the Regional Director dismissed the petition, noting that both employers failed to consent to such a unit.

The majority in *Miller & Anderson* held that the propriety of petitioned-for units combining solely and jointly employed workers of a single user employer rises or falls based on the traditional *community of interest* factors for determining unit appropriateness, regardless of whether the employers in question consent to inclusion of their employees in a combined bargaining unit. Those "community of interest" factors include criteria such as: common functions and duties, shared skills, functional integration, interchange, frequency of contact with other employees, commonality of wages, hours, and other working conditions, permanent transfers, shared supervision, common work location, and bargaining history.

The *M.B. Sturgis* Rule: No Employer Consent Required for "Mixed" Unit

In *M.B. Sturgis*,[5] the Board in 2000 considered whether to approve a unit consisting of employees employed by M.B. Sturgis, plus a group of temporary employees employed by Sturgis and a staffing agency. The petition was initially dismissed because both Sturgis and the temp agency did not consent to the inclusion of the employees in the same unit. The Board reversed, holding that the consent of both employers was irrelevant where the community of interest factors supported a combined unit of "user employees" (those employed by Sturgis) plus the employees jointly employed by Sturgis and the agency. The Board distinguished situations involving true "completely independent user employers" in multi-employer bargaining units from situations in which a user and supplier employer jointly employ individuals alongside the user's solely-employed employees. The Board found that while employer consent was still required in situations involving multiple employers where there was no common "user employer," such consent was not required in cases like Sturgis, where the user employer employed all of the employees in the proposed unit, even if another entity partially employed some of those individuals as well.

Oakwood Care Center Re-institutes Consent Requirement

Just four years later, the NLRB reversed *M.B. Sturgis* and held that the consent of both employers was required to approve a combined unit of jointly-employed user and supplier company employees with solely-employed user company employees. The Board reasoned that Section 9(b) of the National Labor Relations Act, which governs the Board's authority to make unit determinations, speaks in terms of "employer unit" as well as smaller sub-units within an "employer unit." The Board in Oakwood found that the type of unit approved without consent in *Sturgis* was, by definition, not an "employer unit" because it inherently involved two different employers. The Board noted that the legislative history behind Section 9(b) focused on units within an employer, rather than units involving more than one employer.

Miller &Anderson: A Return to *Sturgis*

Referencing the broad statutory purpose and provisions favoring collecting bargaining rights, the Board found that nothing in the text of Section 9(b) explicitly mandated a consent requirement, nor was the term "employer unit" defined under that provision. It distinguished a *Sturgis*-style unit from a true multi-employer

4 Notably, by the time this case made its way to the Board, the temporary labor provider had moved to dismiss the petition on the grounds it was moot, as it no longer furnished workers to the site in question, had not done so for over three years, and never expected to do so again. Despite this evidence, the Board went ahead and announced its new rule, without commenting on whether the matter still involved a live dispute.

5 331 NLRB 1298 (2000).

unit by noting that in a Sturgis unit, the user employer employs all employees in the unit, either jointly or solely, and all employees perform work side-by-side as part of a common enterprise. In contrast, according to the majority, a true "multi-employer" unit situation often involves employers who compete with each other, operate in separate locations, and hire their own employees.

The Board reasoned that requiring consent of both the user and supplier employer was too limiting on employees' right to organize and determine whether they wished to be included in a mixed unit. While nothing under the *Sturgis* rule requires a unit of user and jointly-employed temporary agency employees, the Board found that allowing such units over the employers' objections "assures the fullest freedom" to employees to either organize such groups separately or together. In contrast, according to the Board, the consent requirement precludes contingent workers from effectively organizing because they are often spread out among different "user" clients.

The Board cited "changes to the American economy over the last several decades" as a further justification for its approach. Those changes include the dramatically increased use of contingent workers; the Board noted that the protection of the organizing rights of those workers is best served by elimination of the consent requirement in *Sturgis*-style units.

The Board dismissed concerns that its approach might complicate and introduce conflicts between the user and supplier employer at the bargaining table, remarking that even under *Oakwood*, a union could organize separate units of a user employer's employees and its joint-employer employees. As in *Browning-Ferris*, in which the Board changed its longstanding joint-employer standard, the Board dismissed bargaining-related concerns, reasoning that each employer would only be obligated to bargain over those areas in which the employer exercised meaningful control. The Board added that appellate courts, pre-*Sturgis*, had rejected such bargaining-related concerns in requiring joint employers to bargain with the same group of employees.

Dissent Blasts Holding

Member Philip Miscimarra issued a blistering dissent that hearkened back to his dissent in *Browning-Ferris*. In particular, Miscimarra took issue with requiring an entity to engage in multi-employer bargaining without consent, and despite the absence of any employment relationship between the entity and the employees over whom it must bargain. This concern is particularly acute given the vast expansion of the joint employer concept occasioned by *Browning-Ferris*. As Miscimarra observed, under Sturgis, a requirement of multi-employer bargaining was at least cabined by well-established joint employer principles ensuring that only employers that actually exercised the requisite control over the employees in question would be included in the bargaining process. Instead, eliminating the consent requirement while expanding the concept of joint employer beyond all bounds results in a "multi-employer/non-employer bargaining" regime, as Miscimarra termed it. This regime could result in multiple competitor-supplier employers being required to bargain together simply by virtue of all having a "shared user" client.

In the end, introducing into the bargaining process entities lacking any employment relationship with the employees or that, at worst, have adverse interests to the employer with the employment relationship, will make bargaining more complicated, more uncertain, and less stable. As Miscimarra noted, the approach "compounds the plethora of unworkable bargaining issues created by the expanded *Browning-Ferris* joint employer standard."

Takeaways

The decisions in *Browning-Ferris and Miller & Anderson* put employers in a quandary. First, *Browning-Ferris* makes it much more likely that an entity will be deemed a "joint employer" with a temporary labor provider in circumstances in which such a relationship was never contemplated, and even where control over the

subject employees is either non-existent or minimal. Second, to compound the situation, an employer that "jointly employs" temp workers under the *Browning-Ferris* standard will be forced to recognize and bargain with a unit of both its own regularly employed workers who work side-by-side with such temporary workers and those temporary workers, even though the latter workers' terms and conditions of employment may be controlled entirely by a different employer—one that, in turn, exercises no control over the user employer's employees.

The decision also increases the risk that an employer's own workforce will be organized by virtue of the organizing whims of the temporary workforce's employees. The consent requirement served as a firewall against such organizing, and ensured that employees of distinct employers would only be combined if the employers both thought it made sense. While it is true that petitioning unions will need to establish that the user employees and temp employees share a "community of interest," such a fact-intensive inquiry provides little guidance or predictability.

As a practical matter, employers wishing to avoid this scenario will need to maintain clear separation between their own employees and temporary employees to ensure as little similarity between the groups as possible in terms of supervision, working conditions, integration/interchange, work location, and skills and duties. The difficulty is that maintaining adequate differences between temporary agency employees and regular employees in these areas often defeats the purposes and efficiencies associated with the use of temporary employees who, by design, often work side-by-side with regular employees to supplement the workforce. Employers who are unable to adequately maintain sufficient distinctions between their own employees and contingent workers in these areas will need to be prepared for the possibility that contingent worker organizing may lead to organization of the entire workforce in a combined unit, and must react to such organizing efforts as they would to those involving their own employees.