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FOCUS ON NLRB

NLRB Continues to Expand the Joint Employer Relationship by Loosening the Standard for Unionizing Temporary Workers

On July 11, 2016, in a 3-1 decision, the National Labor Relations Board (NLRB) expanded the joint employer platform by concluding that employer consent is no longer necessary for bargaining units that combine jointly employed and solely employed workers of a single employer, so long as the employees "share a community of interest with one another."[1]

The Board's decision in *Miller & Anderson* reversed *Oakwood Care Center*, an employer-friendly decision rendered in 2004 in which NLRB held that solely employed and jointly employed workers cannot be members of the same bargaining unit without employer consent.[2] The *Oakwood* decision overruled yet another decision, *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which had held that the National Labor Relations Act permits the formation of such bargaining units without the consent of employers, provided that the employees share a community of interest.

The Board's ruling in *Miller & Anderson* represents another return to the worker-friendly standard it previously set forth in *Sturgis*, and again makes it easier for unions to combine jointly employed temporary workers with an employer's existing workforce to form a union. Employer consent is again no longer necessary for units that combine jointly employed and solely employed employees of a single user employer, so long as the workers share a community of interest as determined under the traditional community of interest factors. The community of interest test examines a variety of factors to determine whether a mutuality of interests in wages, hours, and working conditions exists among the employees involved. A group of an employer's employees working side by side at the same facility, under the same supervision, and under common working conditions, is likely to share a sufficient community of interest to constitute an appropriate unit.

Miller & Anderson follows NLRB's August 27, 2015, decision in *Browning-Ferris Industries*, which substantially broadened the standard for determining whether a joint-employer relationship exists by concluding that a company is a joint employer if it exercises "indirect control" over working conditions or if it has

1 *Miller & Anderson, Inc., et al.*, 364 NLRB No. 39, slip op. at 2 (July 11, 2016).
2 *Oakwood Care Center*, 343 NLRB 659 (2004) [hereinafter *Oakwood*].

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"reserved authority" to do so.[3] In the aftermath of *Browning-Ferris Industries*, it was widely speculated that the decision would have far-reaching consequences on companies, including the potential for those deemed to be joint employers facing collective bargaining obligations and labor disputes between direct employers and labor organizations.[4]

The Board's *Miller & Anderson* decision confirms what many have been speculating since the *Browning-Ferris Industries* decision: A single user employer will not only be required to bargain regarding all terms and conditions of employment for unit employees it solely employees, but also for the joint-employed workers' terms and conditions which it possesses the authority to control.

In his dissent, Board Member Philip Miscimarra expressed his views on the impact of *Miller & Anderson* in further widening the net for joint employment: "My colleagues substantially enlarge[d] that expanded joint-employer platform created by *Browning-Ferris* and require a more attenuated type of multi-employer/non-employer bargaining in a single unit when the multiple business entities do *not* even jointly employ all unit employees." (Emphasis in original.) He further noted that the expansion of *Browning-Ferris* will only make it more difficult for parties to determine whether, when, or where this new type of multi-employer/non-employer bargaining will be required by the Board, or reasonably predict what it will mean in practice.

In light of NLRB's recent decisions expanding the joint-employer relationship, companies must closely examine their work arrangements with temporary service providers to determine whether a community of interest exists among their singly and jointly shared workers. Employers may be able to fight an attempt to combine singly employed and temporary workers into a single bargaining unit to the extent that their workers are separated by facilities, supervision, and common working conditions so as to increase the likelihood of defeating a community-of-interest finding.

3 *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (Aug. 27, 2015).
4 Browning-Ferris Industries has appealed the NLRB's decision to the U.S. Court of Appeals for the D.C. Circuit.