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ALERTS

Labor And Employment Law Alert - The Other Shoe Has Dropped: NLRB Removes Consent Requirement For Temp Workers' Inclusion In Bargaining Units

July 12, 2016 | Atlanta | Chicago | Columbus | Dallas | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | South Bend

Since the National Labor Relations Board (NLRB) issued its now infamous decision in *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015) last summer that significantly relaxed the NLRB's standard for "joint employers," companies have been waiting for the "other shoe to drop" in terms of what the NLRB would do regarding temporary employees' inclusion in bargaining units. On July 11, that shoe dropped – hard. The NLRB rendered its long-awaited opinion in *Miller & Anderson, Inc.* that, as many business groups feared, makes it easier for temporary employees (e.g., employees provided by staffing companies) to be placed *in the same bargaining units* as permanent employees.

This is an issue that has ping-ponged at the NLRB over the years. For decades, the rule was that if a union petitioned to represent direct/permanent employees at a work site along with temporary employees provided by an outside entity, both of the employers (the company and the temporary agency) would have to consent. During the Clinton NLRB era, the NLRB changed that rule in its *M.B. Sturgis, Inc.,* 331 NLRB 1298 (2000), decision, which eliminated the consent requirement. That was quickly overturned by the George W. Bush-era NLRB, however, in its 2004 *Oakwood Care Center*, 343 NLRB 659 (2004) decision, as *Oakwood* reinstated the consent requirement. In *Miller & Anderson*, the NLRB reversed itself yet again and returned to the Clinton-era standard.

Now, employer consent is *no longer required* for potential bargaining units that combine jointly employed and solely employed employees of a single user employer. In other words, regular employees (employed directly by the owner of the business) and temporary employees (supplied by an outside temporary staffing agency) can be in the same bargaining unit – and therefore vote together on representation. The NLRB noted it will apply the traditional community of interest factors (i.e., factors related to similarity of terms and conditions of employment) to decide if such units are appropriate.

Prior to the *Miller & Anderson* decision, many organizations and business groups filed briefs with the NLRB strenuously arguing against a return to *M.B. Sturgis*. Those groups argued that allowing jointly and solely employed employees of a single user employer to be in the same bargaining unit would cause a myriad of problems because two different employers would be responsible for bargaining over terms and conditions of employment. Unfortunately, the NLRB apparently found those arguments unavailing and has yet again issued a decision that poses significant consequences for any company that uses a staffing agency to supply or augment its workforce. Between this decision and the "quickie

RELATED PEOPLE

Kenneth J. Yerkes
Partner
Indianapolis

P 317-231-7513
F 317-231-7433
ken.yerkes@btlaw.com

William A. Nolan
Partner
Columbus

P 614-628-1401
F 614-628-1433
bill.nolan@btlaw.com

Mark S. Kittaka
Partner
Fort Wayne, Columbus

P 260-425-4616
F 260-424-8316
mark.kittaka@btlaw.com

Robert W. Sikkel
Of Counsel (Retired)

P 616-742-3978
robert.sikkel@btlaw.com

election rules" issued in 2015, companies using temporary labor should consider staying vigilant with respect to union avoidance efforts.

To obtain more information, please contact the Barnes & Thornburg Labor & Employment attorney with whom you work, or a leader of the firm's Labor & Employment Law Department in the following offices:

Kenneth J. Yerkes
Department Chair
(317) 231-7513

John T.L. Koenig
Atlanta
(404) 264-4018

David B. Ritter
Chicago
(312) 214-4862

William A. Nolan
Columbus
(614) 628-1401

Mark S. Kittaka
Fort Wayne
(260) 425-4616

Robert W. Sikkel
Grand Rapids
616-742-3978

Peter A. Morse
Indianapolis
(317) 231-7794

Scott J. Witlin
Los Angeles
(310) 284-3777

Teresa L. Jakubowski
Washington, D.C.
(202) 371-6366

Janilyn Brouwer Daub
South Bend/Elkhart
(574) 237-1130

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John T.L. Koenig
Partner
Atlanta

P 404-264-4018
F 404-264-4033
john.koenig@btlaw.com

Peter A. Morse, Jr.
Partner
Indianapolis, Washington, D.C.

P 317-231-7794
F 317-231-7433
pete.morse@btlaw.com

Scott J. Witlin
Partner
Los Angeles

P 310-284-3777
F 310-284-3894
scott.witlin@btlaw.com

David B. Ritter
Partner
Chicago

P 312-214-4862
F 312-759-5646
david.ritter@btlaw.com

Teresa L. Jakubowski
Partner
Washington, D.C.

P 202-371-6366
F 202-289-1330
teresa.jakubowski@btlaw.com

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