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NLRB Revolving Door: NLRB To Reconsider Its Position On Including Temporary Employees In Bargaining Units

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It appears the NLRB may again be poised to "flip flop" on whether temporary employees may be included in a petitioned for bargaining unit of the employer's regular workforce. The issue is pending before the NLRB in the case of *Miller & Anderson, Inc.* (05-RC-079249).

The current NLRB rule does not permit the inclusion of temporary employees in a petitioned for unit of an employer's regular employees absent consent. This has been the law since 2004 when the Board decided *Oakwood Care Center*, 343 NLRB No. 7, and prior to 2000 had been the rule for decades. However, today the NLRB signaled its willingness to upset the status quo and reverse *Oakwood* inviting briefing by parties and interested *amici* on whether it should permit the inclusion of temporary employees and regular employees in the same bargaining unit. The Board's invitation may signal a return to the Clinton Board decision in *M.B. Sturgis*, 331 NLRB 1298 (2000).

Oakwood had reversed *M.B. Sturgis* wherein the Clinton Board (somewhat surprisingly) upset long standing precedent going back to 1973 to the contrary. The Clinton Board's *M.B. Sturgis* decision was roundly criticized at the time and ultimately led to real life anomalous results. In its decision, the Clinton Board held that employees who were solely employed by the user employer (regular employees) and temporary employees who are jointly employed by that same employer through a supplier of temporary labor could be in a single appropriate bargaining unit absent the consent of both employers, provided there also was an adequate community interest showing between the two groups.

In the Board's 2004 decision in *Oakwood,* the Bush Board reversed *M.B. Sturgis* and returned to the prior longstanding precedent holding that Section 9(b) of the National Labor Relations Act only permitted, at its broadest, an "employer unit" and, therefore, did not *per se* permit elections in units encompassing employees of more than one employer, i.e. units of regular and temporary employees. The Board found that regular employees contracted for through another entity (e.g. a temporary agency) were employees of different employers, and, therefore, concluded that including both groups in one unit (as *M.B. Sturgis* permitted) would create a multi-employer unit which, in turn, necessarily required the voluntary consent of both employers.

It now appears that the revolving door on this issue may continue and the NLRB may once again return to the rule in *M.B. Sturgis*. A return to the rule in *M.B. Sturgis* could, however, have significant implications for many

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employers, both regular and those supplying temporary labor. Stay tuned here as we continue to monitor developments in the *Miller & Anderson* case.