STANDARD FOR UNIONIZATION OF TEMPORARY WORKERS EASED BY NLRB

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Nearly one year ago, the National Labor Relations Board (the "NLRB") issued its decision in *Browning-Ferris Industries* ("*BFI*"), thereby shifting the landscape of the joint employer standard (the Department of Labor subsequently issued guidance on the same topic, which DSV previously summarized here). Now flash forward to earlier this month when the NLRB issued yet another landmark decision, this one making it easier for temporary workers to unionize.

In the recent case of *Miller & Anderson*, the NLRB overturned a Bush-era standard which had held that a primary or "user" employer and a staffing agency must both consent prior to an election covering bargaining units of both temporary workers and regular employees. In its decision, the NLRB held that proposed bargaining units which combine solely and jointly employed workers of a single-user employer, must share a community of interest in order for a single unit combining the two to be appropriate.

Overview of *Miller & Anderson* Case

Miller & Anderson is a case which dates back to 2012 and involved a petition by Sheet Metal Workers International Association, Local Union No. 19 to represent all construction workers employed by the electrical and mechanical contractor (Miller & Anderson, Inc.) and by Tradesmen International on all jobsites in Franklin County, Pennsylvania. Specifically, the petition sought to represent (1) regular employees solely employed by Miller & Anderson, (2) temporary employees solely employed by Tradesmen, and (3) temporary employees jointly employed by Tradesmen *and* Miller & Anderson.

Initially, the Regional Director of Region 5 of the NLRB dismissed the petition, relying on the standard established in *Oakwood Care Center*, 343 NLRB 659 (2004) – as well as prior precedent in *Greenhoot, Inc.*, 205 NLRB 250 (1973) – which held that bargaining units which combine both temporary employees and regular employees of a sole employer and a joint employer are appropriate only with the consent of all of the employers. Because the employers did not consent to multiemployer bargaining, the petition was dismissed.

However, the NLRB granted review of the case to determine the applicability of the *Oakwood Care Center* case as it pertains to Miller & Anderson. The fundamental issue raised was whether under the NLRA, the employees who work for a user employer – both those employees that the user alone employs (i.e., the Miller & Anderson employees) *and* those employees it jointly employs together with a supplier employer (i.e., those temporary employees jointly employed by Miller & Anderson and Tradesmen) – must obtain employer consent if they wish to be represented for purposes of collective bargaining in a single unit, even if both groups of employees share a community of interest with one another under the NLRB's traditional test for determining appropriate units. In other words, the union petitioned the NLRB to return to a previous test established under *M.B. Sturgis, Inc.*, 331 NLRB 1298, which had held that the NLRA permits such

units *without* the consent of the user and supplier employers, provided the employees share a "community of interest".

In the end, the NLRB overturned *Oakwood Care Center* (and the 40-year old standard which preceded it) and returned to the standard under *Sturgis*, finding that *Sturgis* is more consistent with the NLRB's statutory charge than *Oakwood*. In explaining its rationale, the NLRB reaffirmed its remarks in *BFI* about the rapid increase in industrial and factory staffing and the "massive changes" experienced by the temporary staffing and permanent employee leasing industry, as well as the fact that "blue collar" workers account for the largest single occupational group of temporary and contingent workers. Interestingly, one of the justifications offered by the NLRB for its decision was the fact that employees in an otherwise appropriate unit can pool their economic strength and act through a union freely chosen by the majority, thereby increasing their bargaining power, particularly when compared to the difficulties associated with requiring two groups of employees to engage in parallel organizing drives and then parallel bargaining relationships, despite their shared community of interest. Thus, employer consent is not necessary for units that combine jointly employed and solely employed employees of a single user.

Impact of the Decision on Employers

The NLRB's decision is the latest in a line of cases and rules issued which have created some controversy, be it with respect to joint employment, bargaining units or a number of other subjects. While the *BFI* decision was perhaps the NLRB's biggest action of late by virtue of the fact that it loosened the standard for determining whether a company is a joint employer, *Miller & Anderson* is nevertheless impactful based upon the sheer fact that it is now easier for temporary workers to unionize and bargain alongside permanent workers with companies deemed to be joint employers under the broader *BFI* test. Previously, that bargaining unit would not have existed unless both the primary employer and the staffing agency consented. Now, however, that consent is no longer required.

Regardless of one's political leanings and whether this decision is viewed as representing a more accurate reflection of the "fragmented" workplace or a continued leaning of the NLRB in favor of employees and unions, the impact of *Miller & Anderson* (especially on the heels of *BFI*) is potentially huge. At its core, the joint employment aspect is a threshold issue. Without the joint employment relationship, there cannot be a single unit of temporary employees and user employees. However, to the extent that a company is affected by the broadened joint employer standard of *BFI*, this case could expose an employer to bargain with unions representing both their own employees and employees supplied by a staffing agency in a single unit…and all without consent. Thus, the *Miller & Anderson* case is yet another example of how the joint employment standard impacts business relationships.

As far as what employers can do now given this NLRB decision, the very first thing is to review all prospective and existing business relationships which could potentially give rise to a joint employer determination. If there may be such a determination, it is important to attempt to modify the terms of that relationship in order to alleviate some of the risk. The nature of the relationship may be such that it is not practical to modify the terms; the attention can turn to the community of interest component. Even under the *Miller & Anderson* holding, the combined unit

of the primary employer's employees and the supplying employer's employees will not be permitted if there is no community of interest between the two groups. In other words, is it possible to prevent a community of interest between the two sets of employees?

As this decision was just recently handed down, the true impact remains to be seen. Regardless, it does tilt the playing field even more in favor of organized labor and it will be important to watch the true impact of the holding.