BURR ALERT

Labor Board Expands Unions' Ability To Organize "Bargaining Units" That Include Staffing Agency Employees

By Bryance Metheny, Ronald Flowers, Devin Dolive and Matthew Scully July 2016

On July 11, 2016, the Labor Board released its long-anticipated decision in *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016). This case revives a rule from the Clinton-era Labor Board, namely the rule from *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000) -- previously overruled in 2004 -- and alters Board procedures for handling union-petitions involving employees of staffing agencies (and potentially other on-site contractors). Unless the courts intervene, it may now be possible for staffing agency employees to be part of the same "bargaining unit" as the host employer's own employees, even without the employer's consent.

Some practical effects of this change include the following: (i) "joint employee" union authorization cards may now be used to establish the 30% threshold of the eligible employees needed for the Labor Board to order an election in a prospective "bargaining unit" at an employer's worksite; (ii) "joint employees" may now have the same voting power as employer's own employees to determine whether the workforce becomes unionized; and (iii) if the union wins the election, the employer may now be obligated to bargain with the union over the terms and conditions of employment both for "jointly employed" staffing agency employees and its own employees and will, thus, be severely restricted in its abilities to modify its business relationships with staffing agencies.

To see how this new *Miller & Anderson* decision might work in practice, imagine that ABC Manufacturing Company directly employs 100 employees as part of its production, maintenance, and warehousing operations at a single factory. ABC Manufacturing also contracts with XYZ Staffing Company to provide an additional 20 employees for ABC Manufacturing's warehousing operations at the same factory. Before the Board's *Miller & Anderson* decision, a union could file a petition seeking a representation election either for the 100 ABC Manufacturing employees or for the 20 XYZ Staffing employees, but not for both in same election. Rather, the consent of both ABC Manufacturing and XYZ Staffing would have been required in order to include all 120 ABC Manufacturing and XYZ Staffing employees within the same "bargaining unit." The Board's decision in *Miller & Anderson* changes this rule. After *Miller & Anderson*, if the Board determines that the 20 employees are "jointly employed" by both ABC Manufacturing and XYZ Staffing, then consent from ABC Manufacturing and XYZ Staffing will no longer be required, and a union will be able to file a petition seeking to represent all 120 employees located at ABC Manufacturing's facility (and have all 120 employees vote in the same election), provided the Board also determines there is a sufficient "community of interest" between the 100 and the 20.

The *Miller & Anderson* decision follows other recent Board actions intended to make it easier for unions to organize and to win majorities in union-representation elections. Employers may recall that the Board recently significantly shortened the time period between a union's filing of a representation petition and the holding of an election (often referred to as the "quickie election" rules) and, in *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015), expanded its definition of "joint employment" where a "user employer" contracts with a "supplier employer" (such as a staffing agency). As a result of the *Miller & Anderson* decision, the impact of the quickie election rules and last year's *BFI* decision may become more widely felt. Employers can expect to see more on-site staffing agency employees targeted as part of union-organization drives in their workplaces.

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