BARNES & THORNBURG LLP

NLRB Ruling: Temps Can Be Part Of Bargaining Units

July 11, 2016 | | National Labor Relations Board,Labor And Employment

John T.L. Koenig
Partner

In a move foreshadowed on this blog for some time (see posts from July 7, 2015, and Sept. 30, 2015), the National Labor Relations Board (NLRB) released a decision today that will make it much easier for temporary employees to be included in bargaining units. This issue has ping-ponged back and forth over the years. For decades, the rule was that if a union petitioned to represent direct 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 board era, the board changed that rule in its decision *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000). That was quickly overturned in the George W. Bush era board decision in *Oakwood Care Center*, 343 NLRB 659 (2004). However, in a 3-1 decision announced July 11, 2016, in the case *Miller & Anderson, Inc.*, the NLRB reversed itself again and has essentially returned to the Clinton-era standard. The board specifically overturned *Oakwood*, and returned to its previous holding in *Sturgis*. As such, employer consent is not necessary for potential 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 board noted it will apply the traditional community of interest factors to decide if such units are appropriate. Employer groups argued that forcing employers to bargain with a unit that includes both temps and regular employees was fraught with potential problems. But, the NLRB dismissed these arguments, saying that each employer is obligated to bargain only over the employees with whom it has an employment relationship and only with respect to such terms and conditions that it possesses the authority to control. This means that a company (a so-called “user employer”) could be obligated to bargain with temp employees over some terms and conditions of employment while the temp agency who supplies those temps would bargain with those same temp employees over other terms and conditions of employment. The board had earlier issued a notice of invitation to file briefs on this issue, and large employer organizations such as the Associated Builders and Contractors, Inc., the Chamber of Commerce of the United States of America, National Association of Manufacturers, and the National Right to Work Legal Defense Foundation, Inc. filed briefs urging the NLRB to adhere to *Oakwood*. A copy of the full decision can be found here. Please stay tuned to this blog for further developments, including whether the employer in this case chooses to further appeal this decision to a federal court of appeals.

RELATED PRACTICE AREAS

Labor and Employment
Labor Relations
National Labor Relations Board (NLRB)

RELATED TOPICS

bargaining unit