MILLER CANFIELD

Board Continues Expansion of Joint Employer Doctrine, Allows Unions to Organize Mixed Units of Regular Employees and Staffing Agency Temps

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Employers who rely on staffing agencies for employees must be aware of the significant expansion in the National Labor Relations Board's treatment of the joint-employer doctrine as determined in two major recent decisions. These decisions expand unions' ability to organize across user employers and their staffing agencies, allowing them to combine temporary staffing agency employees with permanent employees in the same bargaining unit.

Most recently, in a 3-1 decision handed down Monday, July 11, 2016 in *Miller & Anderson Construction*, the Board reversed course on existing precedent and held that the consent of a "user employer" (a company that employs temporary workers from a staffing agency) is ***not*** required for the formation of a bargaining unit covering both the employer's regular employees and those supplied by the staffing agency.

As pointed out in the dissent by Member Philip Miscimarra, the decision significantly broadens the expansion of the joint-employer doctrine that began in the NLRB's August 2015 decision in *Browning Ferris Industries of California* ("*BFI*"). As reported by Miller Canfield in a previous e-alert, in the *BFI* case, the Company directly employed approximately 60 unionized employees, but an additional 240 unrepresented individuals from a staffing agency also worked inside the facility. The BFI employees' union sought to represent the other employees in a separate bargaining unit and force BFI and the staffing company to jointly recognize the union. BFI refused to consent and on January 16, 2016, the NLRB found that BFI had unlawfully refused to bargain with the Union (which had won the election).

In *Miller*, the union petitioned to represent in a single bargaining unit both the company's regular full time employees and those who work at the company through a staffing agency. This created a mixed unit of workers *singly* employed (i. e. employed only by the construction company) and *jointly* employed (i.e., employed by both the company and the staffing agency).

Prior to *Miller*, since at least the 2004 decision in *Oakwood Care Center,* the Board had refused to certify a mixed unit of regular and temporary staffing agency employees unless both the user employer and the staffing agency agreed. Such units had been allowed for a brief period from 2000 to 2004 under the 2000 *M.B. Sturgis* case. In *Miller*, the Board expressly rejected *Oakwood* and turned the clock back to *Sturgis*, although it did hold to the requirement that a mixed unit of this kind must meet traditional community of interest factors.

What does this mean for employers?

The practical consequences of this turn by the Board are far-reaching. Under *BFI* and now *Miller*, "employer" status, whether joint or single, fundamentally alters the relationship between a user of contracted-out employees, the agency supplying those services, and the employees engaged to perform the services. Chief among the consequences are: a) a duty to bargain about changes in working conditions if the supplier's employees are represented; b) potential liability for the supplier's unfair labor practices; c) potential direct liability for the user's conduct/statements vis-a-vis the supplier's employees; d) loss of neutral status in the events of strikes or picketing directed at your supplier.

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Employers who contract with staffing agencies should review and look to restructure their relationships with staffing suppliers in a way that minimizes the risks of joint employer liability. While other operational priorities may make it impossible to relinquish the amount of control necessary to avoid joint employer status, fine-tuning provisions relating to indemnity, insurance and other allocation of risk will be key.

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