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Employment Law Alert

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NLRB Relaxes Requirements for Single User Bargaining Units

The National Labor Relations Board ("Board") has issued a union-friendly decision that will make it easier for temporary employees supplied by agencies to organize with an employer's existing workforce, so long as the two groups of employees share a "community of interest." In so holding, the Board eliminated a decade-old standard that required employer consent to such "single user" bargaining units that consist of solely and jointly employed workers. The new case is *Miller & Anderson, Inc. and Tradesman Int'l and Sheet Metal Workers Int'l Assn., Local Union No. 19, AFL-CIO, 364 NLRB No. 39 (July 11, 2016)*. Here is an overview of the new decision and how it impacts businesses that use agency workers.

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New Standard for Single User Bargaining Units

The Board may determine that two companies are a "single user employer" when one company supplies employees to another company. The companies are referred to as the "supplier" employer and the "user" employer.

In *Miller & Anderson*, the Board held that employees who work for a user employer, whether the user alone employs them or whether they are jointly employed by the user and supplier employers, may combine to be represented by a union in a single user bargaining unit – and the employers' consent is not necessary. Since 2004, employers could block formation of a single user bargaining unit by withholding consent. As a result of this new decision, that is no longer the case.

Now, the Board will apply traditional "community of interest" factors to decide if units combining solely and jointly employed workers are appropriate. Those factors include the type of work performed by the employees, the operational integration of that work, whether the employees have common supervision and come into contact with each other, the interchange between and among their positions, and whether they have similar wages, benefits, and other terms and conditions of employment.

This change in the law follows on the heels of the Board's August 2015 *Browning-Ferris* decision that created a new standard for determining when companies are "joint employers." Prior to *Browning-Ferris*, the Board's determination of joint employer status

depended on the companies' exercise of control over the employment relationship. After *Browning-Ferris,* the Board relies upon the right to control terms and conditions of employment, even if that right is not exercised.

The combined impact of the Board's decisions in *Miller & Anderson* and *Browning-Ferris* presents potential problems for both user and supplier employers. If the companies are found to be joint employers, they could face a single user bargaining unit comprised of both jointly employed workers and workers who are employed solely by the user employer. In that situation, the two separate employers would be required to join together to bargain over the employees' terms and conditions of employment, even though the supplier employer would not have an "employer" relationship with everyone in the bargaining unit. Thus, at the bargaining table the supplier employer will not play any role in negotiating employment terms of a portion of the new bargaining unit – that is, the employees who are employed solely by the user employer.

Miller & Anderson was decided by a three to one majority as the five-member Board currently only has four sitting members. The dissenting Member stated that the majority did not provide any clear answers to: (1) how the employers will determine between themselves who is required to bargain over which subjects regarding what employees; (2) how disputes will be resolved when the employers cannot agree; (3) what obligations will exist for the employers to disclose information to a union when the same information may never have been shared between them; (4) how contracts between the user and supplier employers will affect the rights and obligations of the respective companies, and whether the outcome of bargaining will control what must be negotiated (or renegotiated) in those contracts; and (5) how the Board will address jurisdictional problems when it has jurisdiction over one employer but not the other.

What to Do Now

If your company uses temporary employees supplied by an agency, immediately review your contract with the agency to determine whether your company would be considered a joint employer (under the *Browning-Ferris* standard) based on whether your company has the right to control the terms and conditions of employment for the temporary/contingent workers. You should also evaluate whether your employees and the agency employees share a community of interest. You can then determine whether or not your company should take measures to change the nature of the relationship, if possible, and evaluate

the risk of being a single user employer and the risk of workers joining together to form a single union.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, wage and hour class actions, trials, appeals, compliance advice and counseling. If you have questions about these developments or other workplace obligations, please contact us at (415) 464-4300 or (310) 943-8500.

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