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NLRB Holds Unions Can Force Mixed Bargaining Units of Regular and Temporary Employees

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In a decision which may have a dramatic impact on employers utilizing the services of staffing companies or temporary agencies, the National Labor Relations Board determined in *Miller & Anderson, Inc.*, 364 NLRB No. 19 (July 11, 2016) that a union may seek a mixed bargaining unit consisting both of temporary employees jointly employed by a “user” employer and a staffing company, together with solely employed regular employees of the user employer; and can do so even if either the user employer or the staffing company objects to the combined unit. In so finding, the Board reversed its decision in *Oakwood Care Center*, 343 NLRB 659 (2004), which had held that the consent of both employers was required for what was essentially deemed a multi-employer bargaining arrangement. Under the new NLRB standard, a union may seek to include both individuals jointly employed by a user employer and a temporary agency or staffing company, together with solely employed regular employees, whenever the temporaries and regular employees share a “community of interest”, i.e. similar job functions, supervision, working conditions, etc.

What effect can this decision have on “user employers” in union organizing drives? Previously, an employer jointly employing temporary employees could be assured that the temporaries would not be included in an election unit without the “consent” of both employers, which would likely never be forthcoming. Now, however, under *Miller & Anderson*, a union which is unsuccessful in focusing its organizing activity solely at regular employees can turn to union supporters in the temporary ranks to improve its chances of prevailing in an election. Union promises of permanent employment, seniority rights and regular employee wages and benefits are quite likely to make union representation more attractive to temporary employees. Indeed, significant numbers of temporary employees may tip the scales for a union election victory, even where a user employer has

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taken great pains to pay competitive wages and benefits to permanent, regular employees.

Accordingly, all employers who desire to maintain union-free status and who utilize the services of outside temporary employees, must now take proactive measures to ensure that temporaries do not become a focus and target of union organizing activity. For example, ratios of the number of permanent to temporary employees need to be evaluated, and keeping individual temporary workers in a non-regular status for a prolonged or indefinite period should be avoided, if possible.

Please feel free to contact any member of Butzel Long's Labor and Employment Group to discuss the impact of this decision or its impact on your employee relations strategies.

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