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CLIENT ALERT

NLRB Eases Standard for Unionizing Employees Jointly Employed

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The National Labor Relations Board (NLRB or Board) ruled in a 3-1 decision that unions seeking to organize employees in bargaining units that combine both temporary workers supplied by a staffing company and regular employees employed by the user employer are not required to obtain employer consent to proceed to an election for a group of workers employed by two different companies. *Miller & Anderson, Inc*., Case No. 05–RC–079249 (July 11, 2016). In so holding, the Board rejected its 2004 holding in *Oakwood Care Center* and returned to the rule it established in 2000 in *M.B. Sturgis, Inc*.

Miller & Anderson, Inc., dates to 2012, when the NLRB Region 5 Regional Director dismissed a sheet metal workers union's petition to represent construction workers employed by electrical and mechanical contractor Miller & Anderson Inc. and Tradesmen International, a company that specializes in supplying skilled construction workers.

In *Oakwood*, the Board held that bargaining units that combine 1) employees who are solely employed by a user employer, and 2) employees who are jointly employed by that same user employer and an employer supplying employees to the user employer, constitute multi-employer units which are appropriate only with the consent of the parties. *Oakwood* had, thereby, overruled the Board's holding in *Sturgis*, which had held that the National Labor Relations Act (NLRA) permits such units without the consent of the user and supplier employers, provided that the employees share a community of interest.

In *Miller & Anderson, Inc*., the Board majority held that *Sturgis*, rather than *Oakwood*, "is more consistent with [its] statutory charge." The Board determined that the *Sturgis* holding, unlike *Oakwood*, effectuates the fundamental policies of the NLRA. The Board noted that *Oakwood* "imposes additional requirements that are disconnected from the reality of today's workforce and are not compelled by the Act." The Board concluded that in order "to fully protect employee rights," it should return to the standard articulated in *Sturgis*. The majority further explained that it "decided to return to *Sturgis*, not to prevent employers from entering into, or maintaining user-supplier arrangements, but rather to better effectuate the policies of the Act if the employees affected by such arrangements choose to exercise their Section 7 rights."

In reversing to *Sturgis*, the Board ruled that "[e]mployer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer." Instead, the Board ruled that the appropriate test will apply the traditional community of interest factors to determine if such units are appropriate. Additionally, as

outlined in *Sturgis*, a user employer will be required to bargain regarding all terms and conditions of employment for unit employees it solely employs. However, it will only be obligated to bargain over the jointly-employed workers' terms and conditions, which it possesses the authority to control.

The Board thus reinstated the petition and remanded the representation case back to the Region 5 Regional Director for further action.

In dissent, Board Member Philip Miscimarra wrote that the majority's expansion of *Browning-Ferris* "will only make it more difficult for parties to anticipate whether, when or where this new type of multi-employer/non-employer bargaining will be required by the [B]oard, nor can anyone reasonably predict what it will mean in practice." The majority responded to the dissent, claiming that Board Member Miscimarra "repeatedly—but mistakenly—characterizes the bargaining that takes place in a Sturgis unit as 'multi-employer/non-employer bargaining.'" Rather, the majority claimed that it "is not 'multi-employer' bargaining because all the employees in a *Sturgis* unit perform work for the user employer and all the employees are employed (either solely or jointly) by the user employer. By contrast, there is no common user employer for all the employees in a multi-employer bargaining unit."

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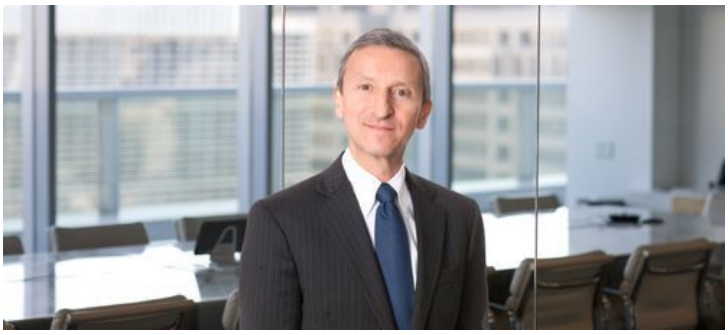

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