Insight

IN-DEPTH DISCUSSION

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The NLRB is Primed to Change How Unions Organize Temporary Employees

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Under current National Labor Relations Board rules, a union can organize a bargaining unit of temporary employees, and the user employer's solely employed regular employees, only if both employers consent. However, the Board is primed to change this rule in *Miller & Anderson, Inc.*[1] On May 18, 2015, the NLRB granted review of a Regional Director's 2012 decision to dismiss a union election petition. By granting review of the Regional Director's decision, the Board appears to be on the verge of including jointly employed temporary employees in a single unit with employees solely employed by one of the joint employers.

Three years ago, NLRB Region 5's Regional Director dismissed a petition filed by Sheet Metal Workers International Association, Local Union No. 19 to represent all sheet metal workers employed by Miller & Anderson, Inc. and Tradesmen International on all jobsites in Franklin County, Pennsylvania. The petition sought to represent regular employees solely employed by Miller & Anderson, temporary employees solely employed by Tradesmen International, and temporary employees jointly employed by Tradesmen International and Miller & Anderson. The Regional Director determined that under *Greenhoot, Inc.*, 205 NLRB 250 (1973) and *Oakwood Care Center*, 343 NLRB 659 (2004), the unit combining temporary employees and regular employees of a sole employer and a joint employer is appropriate only if all employers consent. Under this precedent, the Regional Director dismissed the petition because the employers did not consent to multiemployer bargaining.

In its grant of review, the Board noted it planned to invite amicus briefs on the applicability of *Oakwood Care Center.*[2] In *Oakwood Care Center*, the unit of employees the union wanted to represent was solely employed by Oakwood or jointly employed by Oakwood and a staffing agency. The Board concluded that a unit of solely employed regular workers and jointly employed temporary workers created a multiemployer unit.

In *Miller & Anderson*, the union is urging the Board to overrule *Oakwood Care Center* and adopt a test asking: "what work is being done and who is the work being done for?" Essentially, the union wants the Board to return to its previously overturned decision in *M.B. Sturgis*, 331 NLRB 1298

1 Case No. 05-RC-079249 (May 18, 2015).

2 In recent years, the Board's solicitation of *amicus* briefs before issuing a decision has often signaled a controversial change in the law.

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(2000). In *Sturgis*, the Board found that the scope of the bargaining unit should be delineated by the work being performed for a particular employer. The Board reasoned a unit combining temporary employees with the user's solely employed regular employees would be appropriate because all the work is being performed for the user employer.

In *Oakwood Care Center*, relying on 40-year-old precedent, the Board overturned *Sturgis* because its rationale led to an unworkable system of collective bargaining. Neither *Sturgis*, nor the union's proposed test, requires a finding of joint employment for all the employees. Under the union's proposed test, once the Board finds joint employment between the staffing company and the user employer, even solely employed regular employees will be included in the unit. This proposed rule would lead to the same unworkable system the Board explicitly rejected in *Oakwood Care Center*. As the Board noted in that case, the "bargaining structure contemplated [by *Sturgis*] . . . gives rise to significant conflicts among the various employers and groups of employees participating in the process."

Joint employment is a threshold issue. Without a joint employment relationship, there is no single unit of temporary employees and user employees. Similar to the Board's approach to franchise cases, the Board may use this case to extend liability among joint employers. However, this case reaches even further. Overturning *Oakwood Care Center* would allow unions to organize temporary employees, and employees not employed by both joint employers, into a single unit when at least some of the impacted employees are jointly employed.

The Board already loosened the joint employer test last year in *CNN America, Inc.* and *Team Video Services, LLC*, a case that had been pending for a decade. In *CNN*, the Board injected factors of indirect control into the traditional joint employer standard.[3] Prior to this case, the NLRB found businesses joint employers only when they shared direct and immediate control over essential terms and conditions of employment including hiring, firing, discipline, supervision and direction. In *CNN*, the Board found that the company controlled the "hiring, supervision, and direction" of the subcontractor's employees by setting terms in its labor agreement for staffing levels, reimbursements and training costs. The Board also considered "additional factors," including that employees worked in CNN facilities, CNN paid for employee training and equipment, and the employees performed work at the core of CNN's business. Based on these factors, the majority found CNN and TVS joint employers. This loosened standard makes it easier for unions to overcome the threshold test for joint employment of the temporary employees, which leads to the inclusion of the solely employed user employees in the same unit.

This case is another example of how the joint employment standard impacts business relationships. If *Oakwood Care Center* is overturned, a threshold joint employment finding allows the union to expand the unit to include the user company's solely employed regular employees. This arrangement benefits only labor organizations by increasing their membership numbers. Overturning *Oakwood Care Center* would result in a system of competing interests, within the same bargaining unit, between employers and between competing groups of employees with different terms and conditions of employment.

If the NLRB overturns *Oakwood Care Center*, the agency will again inject itself into complex business relationships across multiple industries without any regard for the conflicting interests of employers or employees. This case shows that the Board's joint employer focus extends far beyond franchises. Employers should be concerned about the Board's continued efforts to attempt to link separate, independent businesses.

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3 *See CNN America, Inc. and Team Video Services, LLC CNN America, Inc. and Team Video Services, LLC*, 361 NLRB 47 (2014).The unfair labor practice charges in *CNN* were originally filed on March 5, 2004. The case was tried over 82 days from 2007 to 2008. The administrative law judge issued his decision on November 19, 2008. The Board's decision was issued almost six years after this decision and over ten years after the filing of the original charges. The Board's decision in this case is currently on appeal to the D.C. Circuit. However, the NLRB continues to cite the case for its joint employment standard. *See* NLRB Office of the General Counsel Advice Memorandum, *Nutritionality, Inc. dba Freshii*, Case No. 13-CA-134294 (Apr. 28, 2015) at p. 6.

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