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Once Again, National Labor Relations Board Makes it Easier for Unions to Certify Employers

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In a recent decision, the U.S. National Labor Relations Board ("NLRB") has, once again, significantly changed the way in which it adjudicates Applications for Certification so as to make it easier for unions to secure bargaining rights. The decision has far reaching implications or employers, particularly those that employ the services of temporary agency workers.

Step 1 - Change the Joint Employer Test

In August 2015, the NLRB released its decision *Browning Ferris Industries* ("*BFI*"). In *BFI* the NLRB was faced with a situation where a temporary staffing agency had provided workers to BFI. An Application for Certification was filed and the NLRB had to determine which entity was the employer for purposes of the Application for Certification: the staffing agency, BFI or a combination of both.

Reversing decades of case law, the NLRB applied a new 'indirect control' test, finding BFI and the staffing agency joint employers of the workers supplied by the staffing agency, and subject to the same Application for Certification covering those workers (for more discussion of the *BFI* decision see our firm article).

Step 2 - Include Temporary Agency Workers in a Certification Application

Continuing the trend started in *BFI*, the NLRB has now paved the way for a trade union to certify a bargaining unit which includes workers of a temporary help agency (the 'supplier employer') as part of a larger bargaining unit which also includes workers of the employer using the staffing agency's workers (the 'user employer').

In *Miller & Anderson Inc.* ("*Miller*") the union applied for a bargaining unit which included both direct workers of Miller, as well as workers of a temporary staffing agency which provided services to Miller.

Historically, the NLRB would only certify such a bargaining unit where both the user employer and supplier employer agreed to such a bargaining unit structure. This was because a unit which includes both temporary workers and workers of the user employer is a 'multi-employer unit', and the NLRB would not certify a multi-employer unit without the consent of all parties, including both employers. The reason being, that such a bargaining unit is generally considered to be an unworkable structure that will create tension among the different groups of bargaining unit

members, and ultimately undermine the stability of bargaining. This concern was set out in the NLRB's 2004 decision in *Oakwood Care Centre* ("*Oakwood*") [343 N.L.R.B. No. 76 (2004)].

The question addressed by the NLRB in *Miller* was whether the NLRB ought to overrule *Oakwood* and the cases which followed it in favour an earlier NLRB decision in *M.B. Sturgis Inc.* ("*Sturgis*") [331 NLRB 1298 (2000)]. In *Sturgis*, the NLRB held the *National Labour Relations Act* (the "*Act*") permitted multi-employer bargaining units provided the applying union demonstrated the workers shared a 'community of interest' such that they could viably bargain as a group. In *Miller*, the NLRB held all-party consent to a multi-bargaining unit was not, in fact, required or compelled by the *Act*. As such, the NLRB determined it was open to it to revert back to the *Sturgis* test.

In reaching this decision, the NLRB discussed the history of traditional 'multi-employer' bargaining units noting the consent requirement arose from situations in which the employers were truly, physically and economically distinct entities - as such, they could not be compelled to bargain together without their consent.

By contrast, in *Miller*, the workers of the temporary staffing agency are jointly employed by the supplier and user employers. The NLRB concluded therefore, a single employer was involved – the user employer - which employs both its own workers (as direct employer) and the workers of the temporary staffing agency (as a joint employer with the agency). As such, the *Oakwood* test was not applicable and employer consent was not relevant or required.

Relying on comments made in *BFI* concerning contingent employment and the changing nature of the workforce, the NLRB noted the *Oakwood* approach of requiring employer consent 'imposed additional requirements that are disconnected from the reality of today's workforce and are not compelled by the *Act*'.

The NLRB expressly rejected policy concerns raised by both Miller and allied employer organizations, that bargaining with a combined unit of direct workers and jointly employed workers would create unworkable structures that would undermine the stability of bargaining. Instead, the NLRB noted there would be nothing preventing a union from certifying a bargaining unit comprised of direct workers, as well as a separate unit of workers jointly employed by the temporary staffing agency and the user employer. In such a situation, the user employer would bargain with the union in respect of both groups independently - over all terms and conditions in respect of direct workers, and over those terms and conditions over which the user employer had authority to control with respect to the jointly employed workers. As such, a combined unit would not create a fundamentally more complex situation than would occur with two separate units.

Finally, the NLRB noted the combined bargaining unit structure would not result in any greater tension between the interests of the different worker groups than would be the case if they were part of two separate bargaining units; in both situations trade-offs may have to be made which result in the interests of some employees being advanced more than the interests of others.

Final Thoughts

The NLRB's decision in *Miller* is as predictable as it is disappointing. In Canada, it is common for a change in provincial government to result in amendments to provincial labour relations legislation. However, the NLRB is often prepared to revisit basic jurisprudence through a new lens without any change in the underlying legislation, resulting in a common perception the NLRB's interpretation of the *Act* is even more highly politically charged than its Canadian counterparts.

This may not be the last time we see jurisprudence changed to favour easier access to collective bargaining, and Sherrard Kuzz LLP will keep readers updated as events, and future cases, unfold. In the meantime, if you would like to discuss these or any other labour or employment developments, please contact any member of the Sherrard Kuzz LLP team.

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