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TEMPORARY STAFFING AGENCY WORKERS NOW ELIGIBLE TO VOTE IN UNION ELECTIONS

Overruling a precedent established in 2004, the National Labor Relations Board ("NLRB") has ruled that workers supplied by temporary employment staffing agencies to other employers may be included in a bargaining unit with the employees who are employed only by the other employer. Until this ruling, a union's representation of the employees of the "supplier" employer and the "user" employer could only occur if both employers consented. Now, employers using temporary workers supplied by a temporary agency may have to recognize the temporary workers and bargain with a union over their wages, hours and working conditions. This 3 to 1 ruling is particularly significant for any employer who uses one or more temporary staffing agencies to supplement its workforce.

This ruling comes on the heels of the NLRB's ruling in 2015 that substantially broadened the definition of "joint employment." That ruling overturned 30 years of precedent and held that workers supplied under a temporary labor services agreement are jointly employed. For more information, see our article "Joint Employment – NLRB Broadly Redefines the Standard."

PREVIOUS RULINGS REQUIRED CONSENT OF ALL EMPLOYERS

In the past, the consent of all affected employers was required before there was an obligation to recognize and bargain with a union. For example, where separate "user" employers obtained employees from the same "supplier" employer and a union sought to represent the employees of the "user" and "supplier" employers in a single bargaining unit, the union could not do so without the consent of all of the affected employers. The consent of the "user" employer and the "supplier" employer was also necessary where there was only a single "user" employer who obtained employees from one or more "supplier" employers.

THE NEW RULING

The NLRB now holds that employer consent is not required when a union seeks to represent a unit of employees who are jointly employed by the "user" employer and the "supplier" employer.

The NLRB also addressed the situation where a union seeks to represent only employees of the "supplier" employer. Now, in such cases, the consent of the "user" employer will not be required.

To summarize:

> **Consent of all employers IS required** – when a union seeks to represent the employees of several "user" employers and a "supplier" employer in a single bargaining unit.
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> **Consent of employers IS NOT required** – (1) when a union seeks to represent only the employees of a "supplier" employer; or (2) when a union seeks to represent employees who are jointly employed by a "supplier" employer and a single "user" employer.

COMMUNITY OF INTEREST STILL CONTROLS

Even with this new ruling, it is not yet certain whether the temporary agency workers provided by the "supplier" employer will always be subject to union representation when working at a "user" employer's location. The NLRB will continue to apply the established "community of interest" analysis to determine whether the temporary workers truly share a community of interest with the employees of the "user" employer. Among the factors that the NLRB will consider when determining whether the employees share a community of interest are similarities in job duties, wages, hours, fringe benefits, skills, training, working conditions and common supervision. If there is a community of interest, the temporary workers will be part of an appropriate bargaining unit. In other words, the temporary workers will then be eligible to vote in union elections along with the "user" employer's employees, and if a union is chosen, it will be entitled to engage in collective bargaining through their union representatives.

The NLRB's decision is significant and raises numerous practical and legal issues.

- **Potential voters.** Temporary agency workers must be considered as potential voters in any organizational drive or union election.

- **"Quickie election" logistics.** Under the new "quickie election" procedures employers may be hard pressed to meet the very short deadlines relating to the appropriateness of the bargaining unit and the contact information of the temporary employees. For more on this topic, see our article "NLRB Finalizes Quickie Election Rule."
- **Joint negotiations.** Temporary agency workers' wages, hours and working conditions may have to be negotiated jointly in connection with their temporary agency employer.
- **Contract review.** Contractual relationships and documents between the "user" employer and the temporary agency must be carefully reviewed to assign ultimate responsibility for changes resulting from collective bargaining.
- **Potential job actions.** Picketing, strikes and job actions targeting temporary agency workers and their employer may spill over and affect the user employer's operations.
- **Creating a community of interest.** The community of interest between the temporary workers and the "user" employer's regular employees can be increased or reduced depending on the degree of control and supervision exercised by either employer.
- **Potential unfair labor practices.** Actions by "user" employers to thwart union organizing aimed at temporary agency workers and their employer can constitute unfair labor practices. This may include terminating the contractual relationship with the temporary agency.
- **Potential liability for refusal to bargain.** The unlawful refusal to bargain by the temporary agency employer over the terms of employment of its employees could have significant adverse consequences for the "user" employer. Employers using staffing agencies will need to carefully consider the ramifications of this new ruling. Contracts and agreements with staffing agencies will need to be reviewed to ensure that the potential joint bargaining obligations are addressed and responsibility assigned to the appropriate parties.

HEADS-UP FOR EMPLOYERS

Employers using staffing agencies will need to carefully consider the ramifications of this new ruling. Contracts and agreements with staffing agencies will need to be reviewed to ensure that the potential joint bargaining obligations are addressed and responsibility assigned to the appropriate parties.

Reference: *Miller & Anderson, Inc. and Tradesmen International and Sheet Metal Workers International Association, Local Union No. 19, AFL–CIO., (NLRB July 11, 2016)*.

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