3 Takeaways From The NLRB's Temp Worker Union Ruling

By Vin Gurrieri

As the National Labor Relations Board's blockbuster Browning-Ferris decision nears its first anniversary, the agency issued a complementary ruling Monday making it easier for temp workers to unionize, a one-two combination punch that management-side lawyers fear will open primary employers up to workplace hazard and wage claims.

In a 3-1 decision, the board ditched a standard established in a decision called Oakwood Care Center that both the primary or "user" employer and a staffing supplier must consent before an election covering bargaining units of both temp workers and regular employees can be held.

Instead, the board returned to the standard it set in its 2000 M.B. Sturgis decision, which said bargaining units made up of solely and jointly employed workers didn't require employers' approval. The board's reinstatement of Sturgis had been supported by labor unions, which urged the board to make the change, and opposed by business groups that filed amicus briefs seeking to maintain the Oakwood standard.

"In many ways, it was the other shoe dropping from Browning-Ferris," said Steven M. Bernstein, a regional managing partner at Fisher Phillips LLP. "I don't believe it is a realistic standard."

But Larry Cary, a union-side attorney at Cary Kane LLP, says the ruling could affect millions of workers, particular office workers in white collar jobs, and undoubtedly makes union organizing efforts easier.

"Employers are overreacting to the significance of the ruling," Cary said. "But in cases where this is an issue, it will make things possible that weren't otherwise possible."

The case dates back to 2012, when a sheet metal workers union petitioned to represent construction workers employed by electrical and mechanical contractor Miller & Anderson Inc. and Tradesmen International LLC.

Here, Law360 looks at three impacts the ruling will have on employers and unions.

CBAs in Other Actions

The key issue that could arise out of the Miller & Anderson ruling, according to Bernstein, isn't necessarily its effect on collective bargaining or union organizing efforts, but rather on how any eventual collective bargaining agreements are used.
Those agreements, he says, could potentially be cited in a wide range of proceedings cases to change court precedents or bolster arguments supporting joint employment.

"What's to stop a union from using a CBA as evidence that employers are joint employers?" Bernstein said. "The [ruling] created, with a gun to [employers'] head, a piece of evidence that can be used in other contexts to prove joint employment, like wage-and-hour cases, Occupational Safety and Health Administration complaints and workers' comp claims."

If unions or employees use the CBAs to obtain rulings that a user company is a joint employer, that could potentially expose the employer to liability for things including wage violations by the staffing agency, workplace injuries or any number of other claims that could arise during the course of employment, according to Bernstein.

Meanwhile, McCarter & English LLP partner Hugh Murray says that avoiding unionization is not a primary reason that employers enter into business relationships with suppliers and staffing agencies.

"A bigger driver than unionization is other types of liability than joint employment, like wage-and-hour liability," Murray said. "Very few employers have set up [business] arrangements to make it difficult [for workers] to unionize, although that may be an aftereffect."

**Natural Progression Favoring Bargaining**

The labor board's decision Monday, though important, is merely the latest step in a string of decisions and rules issued by the board in recent years that have stirred controversy, lawyers say.

Those board actions include its Specialty Healthcare ruling, which centered on the concept that an employer challenging a proposed bargaining unit on the basis it improperly excludes certain employees is required to prove the excluded workers share "an overwhelming community of interest" with those in the proposed unit. The board also issued rules last year which sped up the union election process.

But perhaps the NLRB's biggest action was its August 2015 Browning-Ferris ruling, which loosened the standard for determining whether a company is a joint employer.

In that 3-2 ruling, a divided NLRB relaxed the board's test for deeming "user" and "supplier" companies — in that particular case, Browning-Ferris Industries and a staffing firm that provided workers for a BFI recycling plant — to be joint employers, which can be on the hook for potential unfair labor practice liability and bargaining obligations. BFI is currently appealing the looser standard established by the board.

But while BFI made it easier for a company to be deemed a joint employer for bargaining purposes, Monday's decision in Miller & Anderson made it easier for temporary workers to unionize and bargain alongside permanent workers with companies deemed to be joint employers under the broader Browning-Ferris test. Under Oakwood, that bargaining unit couldn't have existed if the user company — or its supplier partner — simply withheld consent.

"Miller & Anderson has a multiplier effect," said Steven M. Swirsky of Epstein Becker Green. "I look at it as BFI on steroids."
Bernstein says that Miller & Anderson, in tandem with BFI, means that different employers could be called upon to sign a single collective bargaining agreement that covers both of them.

"What you have is clearly another avenue for bargaining," Bernstein said. "The board doesn't seem to be shying away from the fact that they are enhancing bargaining options. Clearly the end objective is to enhance organizing."

In a twist, Murray says that employers could also use the Miller & Anderson ruling to their advantage by seeking to add jointly employed workers to a bargaining unit if they think the votes from those jointly employed workers will be against union representation.

**Similarities Between Workers**

In its ruling, the board majority acknowledged that Oakwood allowed temp employees to still seek unionization by naming only the staffing agency in a union petition without needing any employer consent to do so. But such a situation improperly impedes workers' ability to organize, the ruling said.

"Limiting the contingent employees to these options, by definition, deprives them of the full ability to associate for collective bargaining purposes with their co-workers who are solely employed by the user employer," the labor board said. "It also deprives the solely employed employees of their full ability to associate with their contingent co-workers [and] dilutes the bargaining power of both groups."

In short, the board said Oakwood's consent requirement for employers in workplaces that use temp workers hinders their ability to organize as they see fit "even when the contingent workers share a broad community of interest with the user's solely employed employees they work alongside."

But as a result of Monday's ruling, employers will have to bargain with any bargaining unit that includes both permanent and temporary workers as long as those workers share a community of interest, or substantially similar concerns about wages and terms of employment.

"Where there is a community of interest, it may make things more complicated for employers," Murray said.

But situations will dictate whether that community of interests exists, according to Murray.

For example, agencies that supply temp-to-hire workers will make it easier for those workers to bargain because they will likely share of community of interest with a primary employer's regular workers. But closer calls may emerge in situations where agency employees work under different circumstances than regular workers.

Jason Habinsky, a labor and employment partner at Haynes and Boone LLP, said that even though Miller & Anderson is a return to the NLRB's Sturgis standard, "the reality is that the board is likely to apply the 'community of interest' test more frequently than it did under Sturgis because the also recently expanded the concept of joint employment in Browning-Ferris."

But Cary cautions that Miller & Anderson won't do much to actually change the bargaining process, potentially limiting its effect in that regard.

"This board has been open to the recognition that the nature of the workplace has changes and that the
law has needed to change with it," Cary said, but added that the ruling itself "doesn't revolutionize the process of bargaining."

The case is Miller & Anderson Inc. and Tradesmen International LLC and Sheet Metal Workers International Association, Local Union No. 19, AFL-CIO.

--Editing by Katherine Rautenberg and Patricia K. Cole.

All Content © 2003-2016, Portfolio Media, Inc.