Bond

INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

JULY 2016

NLRB Holds That Unions Can Organize Temp/Contract Workers Together With Host Employer's Workers

Temporary, contracted-for, or leased employees who are employed by a "supplier," but are assigned to work at another employer's premises, currently comprise as much as 5% of American workers, and are among the fastest growing sectors. Noting this trend, the National Labor Relations Board, in its *Miller & Anderson, Inc.* decision this week, announced a new standard that makes it much easier for unions to organize these temporary employees working at another employer's facility; and further, allows them to be organized in a single bargaining unit together with the host employer's employees who perform similar functions, if both groups share a "community of interest."

The case addressed a petition by the Sheet Metal Workers for a union election among a group of (a) Miller & Anderson's workers at its Pennsylvania construction site, together with (b) a second group of sheet metal workers employed by a separate company, Tradesmen International, who had supplied additional workers at the site on a contract basis.

Under the Board's newly-liberalized "joint employer" standards promulgated in its recent *Browning-Ferris* decision, Miller & Anderson was deemed to be the joint employer of its own sheet metal workers on the site and also those provided by contract with Tradesmen International. By contrast, however, Tradesmen International had no employment relationship at all with the Miller & Anderson employees. Both groups — and both employers — were included by the Board in a single unit, on the ground that they shared a "community of interest" since they worked side-by-side under common working conditions.

Thus, the Board's decision allowed a single bargaining unit of employees even where there would be two different employers at the bargaining table — with potentially differing interests — without the consent of both employers. Further, it authorized for the first time a bargaining unit with two employers, where one (the "supplier" of temporary help) employed only a portion of the unit, but had no employment relationship with the remainder. The Board's majority, however, brushed aside concerns raised by dissenting Board Member Miscimarra that this result would be "unworkable" and lead to "confusion and instability," holding instead that each employer will be expected to bargain over "jointly employed workers' terms and conditions which it possesses the authority to control."

This decision should be viewed together with the Board's newly-expanded joint-employer standards articulated in *Browning-Ferris* (holding that "indirect" or "potential" control over terms and conditions suffices to show joint employer status; "actual" or "immediate" exercise of control are no longer required). Together, these cases allow proliferation of combined units including not only employees directly employed by an employer, but also temps performing similar functions, in circumstances that may involve only indirect control by the host company, or incidental collaboration with the temp agency. The decision appears to be yet another element of the Board's program to broaden opportunities for unionization.

At a minimum, employers who are supplied by agencies with temporary, contract or leased personnel — and agencies who supply these personnel — must be wary that these arrangements are now targets for union organizing, and that the user of these personnel is more likely to be viewed as jointly employing both groups. Employers using these personnel, and agencies who supply them, should closely review their contractual arrangements, and the level of control assigned to each employer in practice, with these issues in mind.

If you have any questions about this Information Memo, please contact David E. Prager, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

BOND SCHOENECK & KING ATTORNEYS

Commitment · Service · Value · Our Bond