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NLRB Continues to Expand Union Influence Over Joint Employment

On July 11, 2016, the National Labor Relations Board overturned its prior position that a joint employer unit of direct and temporary employees required consent from the user and supplier employers before both groups could be included together in an election.

In *Miller & Anderson, Inc.*, a skilled craftsmen staffing company, Tradesmen International, supplied Miller & Anderson, a building trades contractor, with sheet metal workers for a project in Pennsylvania. The Sheet Metal Workers Union attempted to organize all sheet metal workers at the Pennsylvania project, including Miller & Anderson direct employees, Tradesmen International temporary employees, and Tradesmen International direct employees. The Union petitioned the Board for an election with a mixed unit of direct and temporary employees. The NLRB's Regional Director dismissed the petition in accord with prior Board precedent because neither Tradesmen International nor Miller & Anderson consented to the unit.

The Board reversed and held that consent of the user employer and the supplier employer was not required before there could be an election in a mixed bargaining unit of direct employees and temporary employees. In place of the consent requirement, the Board will now apply its traditional community-of-interest test to decide if the unit is appropriate. Under such a test, the Board will look to a number of factors, including whether the employees:

- Work side by side at the same facility;
- Work under the same supervision; and
- Work under common working conditions.

The new rule in *Miller & Anderson, Inc.*, combined with [the Board's 2015 *Browning Ferris* decision](#), could significantly increase the number of joint employer units where temporary workers are used. Before ordering an election involving a mixed bargaining unit, the Board must determine two things: 1) whether the user employer is a "joint employer," and 2) whether the proposed unit of direct and

temporary employees is appropriate. The *Browning Ferris* decision controls the first question and the *Miller & Anderson, Inc.* decision now controls the latter.

Under these two decisions, an employer with temporary workers may, for example, have to bargain with a mixed unit even if it does not exercise direct control over the temporary employees' pay or discipline and has not consented to such a mixed bargaining unit.

Please contact [Raymond Neusch](#), [Steven McDevitt](#), or any member of the [Labor & Employment Practice Group](#) for further information about this matter.

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