Can a Union Represent Your Temporary and Permanent Workers without Your Consent?

A Recent Decision by the National Labor Relations Board Says Yes

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Can a union organize the temporary workers used by a company without the consent of the company and hold the company responsible for bargaining with these employees? A recent decision by the National Labor Relations Board held that "Employer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer." Miller & Anderson, Inc. and Tradesmen International and Sheet Metal Workers International Association, Local Union No. 19, AFL-CIO, 364 NRLB No. 39. Under this decision, combining of the temporary workers and permanent workers in a single unit is appropriate if: (1) a company is a joint employer with the staffing agency; and (2) the temporary workers of the staffing agency and permanent workers of the company share a community of interest under the NLRB's traditional test for determining unit appropriateness.

Typically, a bargaining unit is defined as a group of employees for whom a labor union negotiates a collective bargaining agreement and is delineated by the work being performed by the employees' type of work, job classification or location. A determination of a bargaining unit is required under the following two situations: (1) when a union files petitions for investigation and certification of representatives; or (2) when a union complains that an employer refused to bargain in violation of the National Labor Relations Act. Companies assume that temporary workers are classified as a separate bargaining unit solely the responsibility of the staffing agency. The NLRB's expanded rule of determining the appropriateness of an employee's bargaining unit, though, now allows temporary workers holding the same community of interest as the permanent workers solely employed by companies to be included into the bargaining unit of these permanent workers, if the company is a joint employer of these temporary workers. To determine if your company is at risk, you need to evaluate both criteria.

As for whether a company is a joint employer, the NLRB has ruled that exercising "indirect control" over temporary workers or just possessing the "ability to exert such control" over the employment terms and conditions could be used to establish a joint employer relationship. No actual or immediate control is required, and the contract or work arrangement between the company and the staffing agency regarding the borrowing or renting of temporary workers is important evidence to evaluate the company's power of control over these temporary workers.

The NLRB's non-exhaustive list of employment terms and conditions to be considered in the joint employment analysis includes: (1) hire, fire, discipline, supervise, and direct work; (2) determine wages and hours; (3) dictate the number of workers to be supplied; (3) control workers' schedules and overtime; (4) determine seniority; (5) assign work; and (6) determine the manner and methods by which work will be performed.

Second criterion, the community-of-interest doctrine is a fundamental consideration in selecting an appropriate bargaining unit. This test consists of examining and comparing a number of factors so that employees may be grouped in a bargaining unit with other employees who share common interests and concerns in regard to their conditions of employment.

Under the community-of-interest test, factors that the NLRB has delineated as being relevant to a determination that particular employees share a community of interest include: (1) similarity in skills, training, or experience; (2) similarity in job functions or job classifications; (3) similarity in wages, wage scale, or method of determining compensation; (4) similarity in fringe benefits; (5) similarity in work hours; (6) similarity in work clothes or uniforms; (7) similarity of job status or geographical proximity of employees; (8) interchangeability of employees or job assignments; (9) common supervision; (10) centralization of employer's personnel and labor policies; (11) integration of employer's production processes or operation; (12) similarity of relationship to employer's administrative or organizational structures; (13) common history of bargaining with employer; (14) reflection of industry bargaining pattern; (15) expressed desires of employees; and (16) employees' organizational framework or extent of union organization.

The NLRB expressly stated that each employer is obligated to bargain only with the representatives of employees with whom it has an employment relationship and only with respect to such terms and conditions that it possesses the authority control. In other words, the company is obligated to bargain about all the terms of the employees who it solely employs, and only to bargain about its jointly employed employees' terms that it possesses the authority to control. The staffing agency is NOT obligated to bargain regarding any terms or conditions of the employees who are solely employed by the company.