The Latest in Labor: NLRB Update, Part One

Mark A. Konkel

July 21, 2016

Most employers know that the National Labor Relations Board (NLRB) has been on a years-long tear to make it easier for workers to unionize and harder for employers to resist those efforts. This post in two parts is the latest from the battlefront, with two key developments that impact unionization campaigns and employers' responses to them.

It's Easier for Temp Workers to Unionize

On July 11, the NLRB overruled longstanding precedent that required an employer's consent for a union to represent a single unit of employees combining employees who only work for that employer with temp employees from a staffing agency who are "jointly employed" by the employer.

That may sound a little technical, but here's what it means:

Under Bush-era NLRB precedents, temporary and permanent workers couldn't be part of a single group of employees represented by a union unless an employer allowed it. That NLRB decision is known as *Oakwood Care Center*.

Fast-forward through eight years of a pro-union Obama administration to the 2015 *Browning-Ferris Industries* decision, which expanded the definition of a "joint employer." Under *Browning-Ferris*, an employer using temporary labor supplied by a staffing agency will be considered a joint employer of the workers (together with the staffing agency) if it exercises "indirect control" over them. Suddenly, the "employer" employed a lot more people, if you counted temporary employees in addition to permanent ones. It also makes employers who use subcontractors, franchisees and staffing agencies more accountable for the employment practices of their business partners.

Then you get to July 11, 2016 and the NLRB's *Miller & Anderson* decision. *Miller* holds that unions do not need an employer's consent to represent temporary and permanent workers in the same bargaining unit. That decision expressly overrules *Oakwood Care Center*, and it means that an employer who, under *Browning-Ferris*, employs a lot more employees now may have to bargain with that larger group. (Under *Miller*, an employer has to bargain over the terms and conditions of employment for the temporary workers if it possesses the authority to control them.) Result: easier to unionize more people, and potentially much, much bigger bargaining units. That fundamentally touches on dynamics like a company's labor costs and efficiency, which has an obvious and profound impact on businesses.

Bottom line: with so many U.S. employers utilizing temporary labor, many more U.S. employers will now confront bigger, more powerful, more unified bargaining units. From organized labor's perspective (and, frankly, from the perspective of employers who aren't opposed to unions), there's probably nothing wrong with that. But, in its typical "overshoot the mark" fashion, the Obama NLRB

has created a situation in which the unionization will outlast the workers who unionized. The whole point of using temporary labor is that it's *temporary*. So now, temporary workers can unionize with permanent ones in the same group, and the employer may be compelled to negotiate with the union representing the temporary workers long after the workers are gone, and new temporary workers take their place. In other words, the employment may be passing in nature, but the union is forever (or almost).

Check back tomorrow for the second part of the latest in labor developments.