

TEMPORARY EMPLOYEES AND UNIONIZATION: NLRB RETURNS TO CERTAINTY BY REQUIRING EMPLOYER CONSENT

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Temporary employees constitute a significant portion of the nation's workforce. Their efforts produce great benefits but can trigger important legal issues and liabilities. This is particularly true in the context of labor law where temporary employees' eligibility to vote in a union election can be crucial to whether a company becomes unionized. Four years ago, the National Labor Relations Board (NLRB) made it easier to combine and unionize temporary employees and their "regular" employee counterparts. That recently and dramatically changed, however, when the NLRB announced the end of this four-year detour. The NLRB returned to the previous long-standing rule requiring that, in joint employment situations, the temporary agency and

the employer must agree before combining temporary and regular employees in the same unit for union elections.

The underlying facts of the NLRB's new decision, H.S. Care LLC d/b/a Oakwood Care Center (November 19, 2004), reveal a fairly typical example of an employer/temporary employee relationship. Oakwood operated long-term residential care facilities, employed a number of its own employees, and contracted with a staffing firm to supply the remainder of its workforce through temporary employees. Both groups of employees worked closely together. They worked in the same area, performed the same work, and wore the same identification tags. Oakwood supervised both groups of employees, set their schedules, and assigned their work. With facts like

these, the NLRB concluded that the temporary employees were jointly employed by Oakwood and the staffing agency.

"Joint Employment" is a loaded legal term that can have a far-reaching impact on two employers, such as a temporary staffing firm and the company using temporary employees. It can trigger liability for employers arising out of anti-discrimination laws and employee benefit laws, among others. In the context of labor law, the existence of joint employment is a cornerstone of whether temporary employees may be combined with regular employees in the same unit during a union election or collective bargaining.

In 2000, the NLRB made it easier to combine temporary employees and regular employees.

Through its M.B. Sturgis decision, the NLRB held that employees who are jointly employed may be combined, without their employers' consent, into the same bargaining unit, provided they shared a "community of interest." In doing so, the NLRB changed the long-standing rule requiring employer consent and, thereby, increased the possibility of unionizing a collection of temporary and regular employees.

On November 22, 2004, the NLRB issued its Oakwood decision and reversed course in favor of the pre-2000 rule. Flatly describing the earlier M.B. Sturgis decision as "wrongly decided," in a close three to two vote, the NLRB affirmed and restated the pre-2000 rule as being the current standard: jointly employed tempo-

rary employees can be combined with regular employees in the same unit only if the staffing agency and the employer consent. Applied to the employers in Oakwood, the NLRB held that the two groups of employees could not be combined because their employers had not consented.

Although the Oakwood decision marked a return to the long-standing rule, unions sharply criticized it as disenfranchising temporary employees.

Contrary to union criticisms, the NLRB has returned to a centrist path and renewed stability and certainty as to whether and when groups of employees of different employers may be combined for purposes of unionization or collective bargaining. In light of the decision, employers that utilize workers from staffing firms should carefully evaluate such factors as:

- The extent of employers' ability to directly control the temporaries' work;
- The similarity of the working conditions of the two groups of employees in terms of such

things as pay, benefits, policies, supervisors, or schedules;

- The benefits or consequences of combining the two groups into the same unit for voting or collective bargaining;
- The duration of a temporary employee's placement at the same company; and
- The possible legal implications of being a joint employer under other laws such as those prohibiting harassment or discrimination.

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