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August 2016

National Labor Relations Board Extends Reach of *Browning-Ferris* Joint Employment

On July 11, 2016, the National Labor Relations Board extended the reach of its ground-breaking 2015 *Browning-Ferris* decision, which announced an expansive view of "joint employment," and ruled that "employer consent is not necessary" to require multiple employers to jointly bargain with "units that combine jointly employed and solely employed employees of a single user employer." *Miller & Anderson, Inc.* (NLRB July 11, 2016). In other words, if, for example, an employer has ten workers performing a similar job function, five of whom it employs directly and the other five of whom are provided through a "supplier" agency, the employer can be required to collectively bargain, together with the "supplier" employer, as to all ten employees.

The *Miller* Board majority expressly overruled the NLRB's 2004 *Oakwood Care Center* decision in favor of the Board's 2000 decision in *M.B. Sturgis*, under which the NLRB applies "community of interest factors to decide if such units are appropriate." "In sum," the majority said, "a *Sturgis* unit comprises employees who, working side by side, are part of a common enterprise."

As is often the case, the dissenting opinion (submitted by Board Member Miscimarra) details just how radical a departure the majority's ruling is from established precedent. The dissent observed that the NLRB may now "require two or more businesses to engage in multi-employer bargaining without their consent, even though one of the entities *has no employment relationship* with some of the unit employees, provided that *other* employees in the same unit are jointly employed by the employer entities." Given the uncertainty *Browning-Ferris* creates over which businesses might be joint employers, its expansion in *Miller* "will only make it more difficult for parties to anticipate whether, when or where this new type of multi-employer/non-employer bargaining will be required by the Board, nor can anyone reasonably predict what it will mean in practice."

The dissent also refuted the majority's assertion that it was merely "returning" to the *Sturgis* rule: "Throughout the 4-year period governed by *Sturgis* (and for many years before and after *Sturgis* was decided), the joint-employer landscape was circumscribed by well-known limiting principles that were repudiated, with considerable fanfare, in *Browning-Ferris*. Thus, my colleagues do not 'return' to a legal regime that has ever existed." Member Miscimarra took further exception as "the available evidence indicates no employees of the Employers will be affected by the Board's decision in this case, which means the Board is essentially issuing an advisory opinion that overrules existing precedent."

The *Miller* decision is but the latest instance of the current Board's increasingly liberal and union-friendly interpretation of federal labor law.

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