Publications

Troubling New NLRB Decision Concerning Temporary Staffing Employees

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In what may be the first decision of its kind, the National Labor Relations Board's (NLRB) Regional Director in Baltimore determined on June 20, 2013 that a staffing firm's temporary employees constituted an appropriate unit for collective bargaining and ordered an NLRB election to be held to determine whether the temporary employees wanted to unionize. In reaching his decision, the NLRB Regional Director found that workers supplied by a temporary staffing agency to its clients on a short-term temporary basis were employees of the staffing firm and, thus, were eligible for unionization. He rejected arguments of the staffing company that its employees were merely temporary since they do not have any expectation of continued employment.

The Regional Director's decision appears to be consistent with the current Obama administration's efforts to broaden rights under the National Labor Relations Act. According to the Regional Director, determining that the temporary employees constitute an appropriate bargaining unit "affords the employees the greatest opportunity to exercise the rights guaranteed by the National Labor Relations Act." To reach his decision, the Regional Director disregarded prior NLRB precedents, dating back to 2004.

The employees in question generally worked on projects that lasted between one week and two-and-a-half weeks, although some of the jobs, were as short as a few hours. According to the decision, the staffing company recruited workers in a variety of ways. Once the temporary employee was found to be qualified, they signed a standards of performance agreement with the staffing company that

stated that they would not accept employment directly from the staffing company's clients until the employee completed working 120 days or 688 hours through the staffing company.

The agreement also stated that the employee was an employee of the staffing company, and, as a condition of the employment, the employee must contact the company for available work by reporting to the staffing company within 24 hours of the conclusion of each work assignment.

The staffing company also had an agreement with its clients prohibiting them from hiring any of the staffing company's employees directly or through a competing staffing agency. The NLRB Regional Director noted that if the staffing company did not immediately have work for the temporary employees when their projects ended, they were not fired but were laid off until there was more work.

According to the Regional Director, "if the tenure of the disputed individual is undefined and they are otherwise eligible, they are permitted to vote in the NLRB's election for a union." Noting that the record showed that "all of the unit employees are permanent employees of the employer's 'staffing agency' even though they may work fluctuating and inconsistent hours," it was concluded that the individuals' employment was only temporary vis-a-vis the employer's clients and that while the employees worked for the employer's client for a specific project or set time, their employment with the employer was indefinite. In light of that, it was held that the employees have a "reasonable expectation" of employment on future jobs as the staffing agency used its employment database to fill future client orders.

Part of the rationale in finding that the employees were eligible to be members of a union bargaining unit was that "even assuming a labor organization can file a petition [for a union election] simultaneously with the employer securing the project from its client, it is unlikely that the NLRB would be able to conduct an election before the project was complete, let alone for the parties to engage in meaningful bargaining. According to the decision, this would render the results of any election and the possibility of bargaining "illusory".

If the foregoing were not troubling enough, the union in this case has now filed a petition to review, asking the full NLRB in Washington to overrule the longstanding precedent that a union election may only be held for jointly employed employees where both employers consent. (i.e., the staffing company and its client would have to consent to the union election.)

While there is no indication that the Regional Director's decision has been followed in other jurisdictions, this troubling decision may foretell things to come and additional risks staffing companies will face in the future as unions and the current administration become more active in the labor area.

While it might be difficult for temporary employees to orchestrate a union, this decision makes protecting the confidentiality of a staffing

company's candidate list even more crucial. Accordingly, staffing companies may wish to review the steps and measures taken to protect the confidentiality of such information.

If you have any questions regarding this article, please do not hesitate to contact Richard L. Steer of Tarter Krinsky & Drogin's Labor and Employment Practice Group at rsteer@tarterkrinsky.com or 212-216-8070.

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Richard L. Steer is a Partner in the Labor and Employment Practice Group and heads the firm's Employment Practices Liability Insurance practice. He often counsels clients in the staffing industry. He has acted as trial counsel in a number of important employment discrimination cases for Fortune 500 companies and public sector jurisdictions. Rich is an Adjunct Professor of Law at Pace University School of Law, where he teaches courses in employment discrimination law and employment law.