NLRB UPDATE: Key Precedents Likely to Fall Under Liebman Board

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Earlier this year, Ford & Harrison began our series *NLRB Update,* analyzing 10 critical decisions issued by the Bush-appointed National Labor Relations Board ("NLRB" or "Board") that likely will be overturned in the next few years if reconsidered by an Obama-appointed Board now chaired by Wilma Liebman. Member Liebman's new position as Board Chair is particularly important, as she issued dissents in most of the critical pro-employer decisions issued under the Bush-era labor Board, challenging the reasoning and conclusions reached by the Board majority. Careful analysis of Liebman's dissenting opinions in these major decisions provides a legal roadmap – charting the likely course the Liebman Board will take if it is able to reconsider these issues.

- Part I of this series analyzed *IBM Corp.*, 341 NLRB 1288 (2004), concerning the representation rights of non-union employees. This analysis is available on the Ford & Harrison web site at: http://www.fordharrison.com/shownews.aspx?Show=5074.

- Part II of this series analyzed *Guard Publishing Co. (Register Guard)*, 351 NLRB 1110 (2007), concerning the employer's right to restrict employee use of company e-mail to preclude union related communications. This analysis is available on the Ford & Harrison web site at: http://www.fordharrison.com/shownews.aspx?Show=5094.

- Part III of this series analyzed *BE&K Construction Co.*, 351 NLRB 451 (2007), in which the Board held that an employer's unsuccessful but reasonably based lawsuit against a union does not constitute unlawful interference of Section 7 rights – even if the lawsuit has a retaliatory motive. This analysis is available on the Ford & Harrison web site at: http://www.fordharrison.com/shownews.aspx?show=5120.

- Part IV of this series analyzed *Dana Corp.*, 351 NLRB 434 (2007), in which the Board overruled forty years of Board precedent to hold that an employer's voluntary recognition of a labor union does not bar a decertification petition or the petition of a rival union filed within forty-five days of the voluntary recognition. This analysis is available on the Ford & Harrison web site at: http://www.fordharrison.com/shownews.aspx?show=5148.

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In Part V of this series, we analyze *H.S. Care, LLC (Oakwood Care Center)*, 343 NLRB 659 (2004), in which the Board determined that outside temporary employees could not be included in a bargaining unit with regular company employees unless both the regular employer and the staffing company consent to include both groups in the same unit.

NLRB UPDATE PART V: CAN UNIONS ORGANIZE OUTSIDE TEMPORARY EMPLOYEES ALONG WITH AN EMPLOYER'S REGULAR WORKFORCE?

HS Care, LLC (Oakwood Care Center), 343 NLRB 659 (2004).

Over the last twenty years, the Board has repeatedly changed its position concerning whether "temporary employees" supplied by a staffing agency employer can be included in the same bargaining unit with an employer's "regular employees." Whether unions can organize contingent or temporary workers together with "regular employees" can be significant because the employer using the personnel agency typically has little control over the wages, benefits, and working conditions of the contingent workers – significantly increasing the user employer's potential vulnerability to union organizing.

Most recently, in *HS Care, LLC (Oakwood Care Center)*, 343 NLRB 659 (2004), the Bush-appointed Battista Board held that temporary employees from a staffing agency **cannot** be included in a bargaining unit with regular employees of the employer without the consent of both the staffing agency and the regular employer.

In *Oakwood Care Center*, the employer operated a long-term residential care facility using both regular employees hired by Oakwood and a group of contingent employees employed through a personnel staffing agency. Although Oakwood determined the wages and benefits of its regular employees, both Oakwood and the staffing agency jointly determined the wages and terms of employment for the contingent employees. Seeking to organize the employees at the Oakwood Care Center, the SEIU filed a petition to represent a single bargaining unit consisting of a combination of "regular" and staffing agency employees. The two employers challenged the appropriateness of the proposed bargaining unit.

In rejecting the petitioned-for unit, the majority in *Oakwood Care Center* first recognized that a bargaining unit that combines employees from two different employers constitutes a multi-employer bargaining unit – requiring the express consent of both employers. Consistent with that rationale, the Board in *Oakwood Care Center* held that a unit composed of both "contingent employees" jointly employed by the user employer and supplier employer and "regular employees" solely employed by the user employer constituted a "multi-employer" unit that requires the consent of both employers. Accordingly, the Board found that the petitioned for unit was inappropriate because both employers did not consent to the combined unit.

The Board's decision in *Oakwood Care Center* overturned a landmark decision issued by the Clinton-appointed Board just four years earlier in *M.B. Sturgis*, 331 NLRB 1298 (2000). In *Sturgis*, the Board had held that bargaining units that combine employees who are solely employed by a user employer and employees jointly employed by the user employer and the temporary agency employer are permissible under the Act. Accordingly, under *Sturgis*, outside temporary employees were eligible to vote along with

the user employer's regular employees in an election to determine union representation. Moreover, if the union prevailed in the combined unit election, the temporary employees would be included in the same bargaining unit as the regular employees for purposes of collective bargaining and coverage of the bargaining agreement.

In overruling *Sturgis*, the majority in *Oakwood Care Center* stated that its *Sturgis* decision was "misguided both as a matter of statutory interpretation and sound national labor policy." Thus, relying on Board precedent first established in *Greenhoot, Inc.*, 205 NLRB 250 (1973) and later applied in *Lee Hospital*, 300 NLRB 947 (1990), the Board in *Oakwood Care Center* determined that the broadest permissible bargaining unit under NLRA Section 9(b) is a single-employer unit, and that any multi-employer bargaining unit is impermissible absent the consent of all the employers involved. Thus, a unit combining employees of both a temporary agency employer and the regular employees of the user employer necessarily required the consent of both employers.

Moreover, the *Oakwood* majority further rejected the *Sturgis* holding on policy grounds – noting that a combined unit of outside temporary employees and regular employees without the consent of both employers would necessarily create conflicts between the two employers and undermine the collective bargaining process. In that regard, the Board expressly noted it would be difficult for the user employer to bargain over the wages, hours, and other terms of employment for the temporary agency employees without the consent of the outside employer – recognizing that the user employer could unwittingly increase the financial obligations of the agency employer, requiring further negotiations between the two employers as well. According to the majority decision:

The bargaining regime posited in *Sturgis* also fails to adequately protect employee rights. It combines jointly employed and solely employed employees in a single unit, with a single union negotiating with two different employers, each of which controls only a portion of the terms and conditions of employment for the unit. Such a structure subjects employees to fragmented bargaining and inherently conflicting interests, a result that is inconsistent with the Act's animating principles.

See Oakwood Care Center, 343 NLRB at 663.

Thus, the Board in *Oakwood Care Center* overruled its decision in *Sturgis* and returned to the Board's "longstanding prior precedent" set forth in *Greenhoot*, 205 NLRB at 250 and *Lee Hospital*, 300 NLRB at 947.

Current Status of the Law: Bargaining units that combine employees who are solely employed by a user employer and employees who are jointly employed by the user employer and by a personnel staffing agency may be appropriate only with the consent of both employers. Thus, if a union attempts to organize a bargaining unit composed of the employees of multiple employers, all the employers involved must agree to be part of the multi-employer bargaining unit.

Liebman Dissent: Members Liebman and Walsh dissented – sharply criticizing the majority's rationale. According to the dissent, by overturning *Sturgis*, the majority in *Oakwood Care Center* effectively barred a sizeable group of employees – contingent workers from staffing agencies – from

organizing labor unions. Ignoring the majority's concerns about forcing a multi-employer unit on single employer, the dissent claimed that Section 9(b) of the Act did not preclude combinations of jointly represented employees. Moreover, the dissent also rejected the majority's policy argument that allowing a multi-employer unit without the consent of all the employers would undermine or hinder collective bargaining. The dissent claimed that such concerns were largely hypothetical and ignored the fact that globalization of the economy forced many poor and unskilled workers into "alternative work arrangements" such as contingent employment relationships.

Significance: If the Liebman Board has the opportunity to reconsider the appropriateness of bargaining units composed of both contingent workers and regular employees, the Liebman Board would likely return to the framework established in Sturgis – allowing such units without the consent of all the employers. For employers that use temporary staffing agencies, this could increase the employer's vulnerability to union organizing – particularly if the contingent workers are subject to wages, hours, and other terms of employment substantially different from the employer's regular employees.

For more information concerning the Ford & Harrison *NLRB Update* and the Board precedents likely to be overturned under the Liebman Board, contact the Ford & Harrison attorney with whom you usually work, or the author of this Alert, John Bowen, a partner in our Minneapolis office at jbowen@fordharrison.com or 612-486-1703.**LOOK FOR PART VI OF NLRB UPDATE NEXT WEEK**