Published on *The National Law Review* https://natlawreview.com

When Will the Other Shoe Drop? NLRB May Hand Down Second Blow after Browning-Ferris

Article By:

Labor and Employment Law Department

Employers are just beginning to deal with the effects of the NLRB's *Browning-Ferris* decision, but signs indicate that the Board may soon decide a second major case regarding joint employers. *Browning-Ferris* changed the Board's "joint employer" test. Under the new test, it is effectively much easier for the Board to find a company and a staffing agency, for example, to be joint employers with shared liabilities and duties under the NLRA.

The question would remain, however, whether temporary employees would have the same right to organize as those workers employed permanently. The prevailing rule would say 'Not quite,' at least not without the employers' consent. In its 2004 *Oakwood Care Center* decision, the Board held that unions had to obtain employer consent (from both joint employers) in order to organize bargaining units containing both "jointly employed" temporary workers and "solely employed" permanent employees.

The Board has an opportunity to change that rule in *Miller & Anderson*, a pending case with a recently-passed deadline for filing amicus briefs. NLRB General Counsel Richard Griffin has asked the Board to use the case to overturn *Oakwood Care Center*. The General Counsel's Office would have the Board return to a pre-*Oakwood* rule requiring workers who wish to form mixed bargaining units to only be jointly employed and sharing a community of interest.

The ties between *Browning-Ferris* and *Miller & Anderson* are obvious. By taking care of what was a tougher test for determining joint employers, the Board has paved the way for unions to add temporary workers to bargaining units. The fourteen amicus briefs filed in *Miller & Anderson* tell us that both sides are closely watching this case.

This post was written by Jackie Gessner.

National Law Review, Volume V, Number 273

blow-after-browning-ferris