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Top Five Labor Law Developments for June 2019

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1. An employer violated the National Labor Relations Act (NLRA) by maintaining a mandatory arbitration policy, making arbitration the exclusive forum for resolving all employment claims because it ***denied employees access to the National Labor Relations Board*** *(NLRB), the Board has ruled. Prime Healthcare Paradise Valley, LLC,* 368 NLRB No. 10 (June 18, 2019). The Board held that "such provisions significantly impair employee rights, the free exercise of which is vital to the implementation of the statutory scheme established by Congress in the [NLRA]. No legitimate justification outweighs, or could outweigh, the adverse impact of such provisions on employee rights and the administration of the Act." For a full discussion of *Prime Healthcare,* see our article, Labor Board Revisits Arbitration Agreements after Supreme Court's 'Epic' Decision.

2. The NLRB announced that it will propose rules on the standard for determining whether ***students who perform services at private colleges or universities*** *in connection with their studies are "employees" covered by the NLRA.* Some say the Board's decision to tackle this issue through rulemaking likely will result in the reversal of a controversial 2016 Board decision issued in a case involving graduate students. There, the Board significantly changed federal labor policy by ruling that such students may be treated as employees under the Act and eligible to unionize. *See Columbia Univ.,* 364 NLRB No. 90 (2016). However, even if rulemaking results in a return to the Board's pre-*Columbia Univ.* position, graduate student unionization still may occur, if such students pressure universities to voluntarily recognize their unions, a tactic used in many recent graduate student organizing efforts.

3. The Board found an employer did not violate the NLRA by ***restricting union representatives*** *from accessing the employer's store, after the representatives failed to follow longstanding visitation*

ground rules. Fred Meyer Stores, Inc., et al., 368 NLRB No. 6 (June 18, 2019). Claiming a right under a visitation provision in the collective bargaining agreement, eight union representatives visited the employer's store to speak with employees. Only some of the representatives checked in with the employer before meeting with employees outside the employee breakroom. The employer directed the representatives to meet employees only in the breakroom. The employer also said too many union representatives were present. The union filed an unfair labor practice charge alleging these restrictions violated the Act. On remand from the U.S. Court of Appeals for the D.C. Circuit, the NLRB found the employer did not violate the Act because, although union representatives were permitted to visit the store under their collective bargaining agreement's visitation provision, they acted outside the scope of that provision and past practice.

4. NLRB Chairman John Ring filed a formal complaint against the Board's Inspector General (IG), a move many interpreted as an attempt to push out the IG over his role in the evolving debate in the Board's joint-employer standard. Ring's complaint concerns IG David Berry's allegedly harsh treatment of Board employees and Equal Employment Opportunity Commission (EEOC) complaints filed against him over the past few years. Some have said Ring's complaint was motivated by Berry's February 2018 report concluding Board Member William Emanuel should have recused himself from participating in the Board's decision in *Hy-Brand Indus. Contractors,* 365 NLRB No. 156 (Dec. 14, 2017), because of an alleged conflict of interest. In *Hy-Brand,* the Board reversed its standard for determining when two employers are joint employers jointly liable for, among other things, unfair labor practices committed by the other. Member Emanuel voted with the majority. The Board subsequently vacated *Hy-Brand,* based, in part, on IG Berry's report. A majority of the Board's four sitting members (three are Republicans) would have to agree to terminate and remove the IG.

5. The NLRB General Counsel's (GC) office has recommended that the Board limit the use of "Scabby the Rat," a giant inflatable balloon rat used for decades by labor unions during labor disputes, and similar inflatable animals. Summit Design + Build, LLC, 13-CC-225655 (Adv. Mem. Dec. 20, 2018, released June 2019). Federal labor law strictly regulates "secondary" activity by unions, including protests against "neutral" businesses with whom a union has no direct dispute. Under the Board's standards, picketing a neutral employer is almost always unlawful, while informational handbilling is not. The Obama-era Board had ruled that use of Scabby (and other inflatable animals) is more like handbilling than picketing (and therefore is generally lawful). The current GC's Office took a different position in *Summit.* Evaluating a union's use of an inflatable "Fat Cat" against a neutral employer, the GC's Advice Division held the "Fat Cat" created a "symbolic, confrontational barrier to anyone seeking to enter or work." It found the use of the animal more like picketing than handbilling. As a result, the Advice Division recommended the Board return to its pre-Obama-era position, interpreting such tactics as unlawful when targeted at neutral employers.

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