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Top Five Labor Law Developments for May 2019

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The National Labor Relations Board (NLRB) has announced its rulemaking agenda for the coming months.

The Board stated that it plans to engage in additional rulemaking in the following areas: 1) representation case procedures (governing union elections); 2) standards for "blocking charges" (governing when unfair labor practice charges "block" union elections); 3) voluntary recognition (governing when and how employers may recognize unions without the need for an election); 4) the formation of bargaining relationships in the construction industry; 5) the standard for determining whether students employed at private colleges or universities may organize; and 6) access to employer property. The Board also stated that it plans to proceed with its rulemaking regarding the joint-employer standard.

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***The NLRB's Division of Advice has found that Uber drivers are independent contractors, not employees, and therefore were not covered by the National Labor Relations Act (NLRA). Uber Technologies, Inc.,* 13-CA-163062, 14-CA-158833, 29-CA-177483 (Apr. 16, 2019, released May 14, 2019).**

A number of Uber X and UberBLACK drivers filed unfair labor practice charges against Uber, alleging violations of the NLRA. Responding to the charges, Uber alleged its drivers were independent contractors, not employees, and therefore were not covered by the NLRA. Directing that the charges be dismissed, the Division of Advice applied *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (Jan. 25, 2019), in which the Board modified its test for determining whether an individual is an employee or independent contractor. The Division found the Uber drivers were independent contractors, because they had "significant entrepreneurial opportunity" in that they controlled their own work schedules, were free to choose login locations, could work for competitors and other employers, and generally owned and controlled their own cars. For a discussion of the SuperShuttle decision, see our article, Labor Board Returns to Pre-2014 Test for Determining if Individual Is an Independent Contractor.

The U.S. House of Representatives Appropriations Subcommittee approved legislation that would significantly increase NLRB funding for FY 2020.

Under the funding bill, NLRB funding would increase to $341 million, approximately 34 percent higher than the amount budgeted for 2019. The bill now advances to the full House. The large NLRB increase effectively rejects the Trump Administration's proposal to cut NLRB funding. While the bill may pass the House, it is less likely to be approved by the Republican-controlled Senate, or by President Donald Trump.

***The NLRB General Counsel has released a memorandum instructing NLRB regional officials to remove evidentiary requirements on individuals challenging the propriety of fees charged by unions. Beck Case Handling and Chargeability Issues,* Memorandum GC 19-06 (Apr. 29, 2019, released May 3, 2019).**

The memorandum lowers the quantum of proof required from nonmember individuals represented by unions when they challenge the chargeability of union fees. Previously, employees challenging union fees were required to explain why a particular chargeable expenditure was not for a representational purpose and present or point to evidence in support of that claim. Regional officials will no longer require individuals challenging such fees to explain why a particular expenditure should not have been charged. They also no longer will need to present

evidence in support of such assertions. The burden remains on the union to demonstrate the expenses it charges are “representational,” meaning they are germane to collective bargaining.

***In a memorandum, the NLRB’s Division of Advice found an employer did not violate the NLRA when it refused to deduct and remit dues to a union local following the local’s merger into another local. Vistra Energy,* 16-CA-231249 (Apr. 1, 2019, released May 14, 2019).**

The employer’s unionized employees signed dues checkoff authorizations requiring the employer to deduct dues and to remit the dues to the union. After the employer closed one of its plants, the union international merged the local covering that location into another local. The employer required employees to complete new dues authorization cards naming the new local, leading the union to file an unfair labor practice charge alleging the requirement violated the NLRA. The Advice Division found the requirement did not violate the NLRA, since the collective bargaining agreement between the union and the employer contained checkoff language authorizing dues remittance to the original local only.