Legal Update Article

Labor Board Withdraws Proposed Bar to Student Workers Unionizing at Private Colleges, Universities

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March 12, 2021

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The National Labor Relations Board (NLRB) has withdrawn the rule it proposed in September 2019 to exclude student workers at private colleges and universities from coverage under the National Labor Relations Act (NLRA).

The proposed rule provided:

> Students who perform any services, including, but not limited to, teaching or research assistance, at a private college or university in connection with their undergraduate or graduate studies are not employees within the meaning of Section 2(3) of the [National Labor Relations] Act.

In its withdrawal notice, the NLRB stated:

> The Board has decided to withdraw this rulemaking proceeding based on its judgment respecting the most effective allocation of the Board's limited resources at this time. In light of competing agency priorities, the Board has determined to focus its time and resources on the adjudication of cases currently in progress.

Further, as President Joe Biden will be appointing a majority of the NLRB after Member William Emanuel's term expires in August 2021, the NLRB's *Columbia University,* 364 NLRB No. 90 (2016), decision treating student workers as employees will continue to be the key precedent in organizing efforts among graduate students, resident assistants, and other student workers.

Review of NLRB's Treatment of Student Workers

The NLRB has repeatedly shifted its position on the status of student workers under the NLRA. The NLRB first asserted jurisdiction over private colleges and universities in *Cornell Univ.,* 183 NLRB 329 (1970). Shortly thereafter, in *Adelphi University,* 195 NLRB 639 (1972), the NLRB held that graduate student assistants are primarily students and should be excluded from a bargaining unit of regular faculty. Later, in *The Leland Stanford Junior University*, 214 NLRB 621, 623 (1974), the NLRB went further, holding that graduate student research assistants "are not employees within the meaning of Section 2(3) of the Act." It found the research assistants were not statutory employees because, like the graduate assistants in *Adelphi University,* they were "primarily students."

The NLRB continued to hold that student workers were not employees within the meaning of the NLRA until 2000. Then, in *New York University,* 332 NLRB 1205 (2000), the NLRB reversed course and held for the first time that certain university graduate student assistants were statutory employees. It stated, "[A]mple evidence exists to find

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that graduate assistants plainly and literally fall within the meaning of 'employee' as defined in Section 2(3)."

Just four years later, the NLRB reverted to its prior position. It held in *Brown University,* 342 NLRB 483 (2004), that graduate student teaching assistants, research assistants, and proctors in the petitioned-for bargaining unit were not statutory employees. The NLRB reasoned that "graduate student assistants, who perform services at a university in connection with their studies, have a predominately academic, rather than economic, relationship with their school" and therefore, "[are] not employees within the intendment of the Act."

Twelve years later, the NLRB again changed its position on the status of student workers. In *Columbia University,* the NLRB overruled *Brown University* and determined that an employment relationship can exist under the NLRA between a private college or university and its employee, even when the employee is simultaneously a student. The NLRB observed, "Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the [NLRA] does not reach." Thus, the NLRB said an individual "may be both a student and an employee; a university may be both the student's educator and employer."

Columbia University is the current law on the status of student workers as "employees" under the NLRA.

Implications

A new wave of student organizing is expected. Some unions had withdrawn their petitions during the Trump administration, rather than risk the NLRB overturning *Columbia University.* Those unions may resume their efforts, which began before the 2016 presidential election but largely went dormant after the inauguration of President Donald Trump.

After *Columbia University,* many schools examined their relationship with student assistants. Some noted significant variations in the treatment of student assistants across different disciplines and began exploring whether such variations should continue. Others revisited their position on health insurance coverage, guaranteed stipends, and student housing. Some schools looked to creating new lines of communication and opportunities for student assistants to interact with faculty and administrators. The COVID-19 pandemic introduced another layer of complexity to these relationships.

As schools prepare for a return to a more traditional academic setting in the fall, they may want to consider the following steps to address concerns student workers often raise and prepare for potential union organizing:

- Review policies, procedures, and the terms and conditions of student assistant teaching, research, and administrative functions;
- Review or consider implementing an internal process for student assistants to raise issues of concern and for the institution's response to those concerns; and
- Train deans and other academic leaders to ensure they understand the legal parameters of the NLRA.

Please contact Jackson Lewis attorneys in the Labor Relations Group or Higher Education Industry Team about issues concerning the NLRA and its application to student workers.