Legal Update Article

Labor Board to Revisit Right of Graduate Students to Unionize

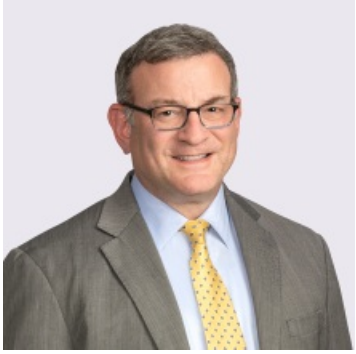
By Jonathan J. Spitz, Michael R. Bertoncini & Susan D. Friedfel

June 3, 2019

Meet the Authors

Jonathan J. Spitz

(He/Him • Jon)
Principal
(404) 586-1835
Jonathan.Spitz@jacksonlewis.com



Michael R. Bertoncini

Principal
(617) 305-1270
Michael.Bertoncini@jacksonlewis.com

Susan D. Friedfel

The National Labor Relations Board (NLRB) has 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" within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. Sec. 153(3)), with the right to form unions and engage in collective bargaining.

Current Standard: 2016 *Columbia University* Decision

In a controversial decision issued in August 2016 in a case involving graduate students at Columbia University, the NLRB significantly changed federal labor policy by ruling that student-assistants may be treated as employees under the National Labor Relations Act (NLRA).

Prior to that decision, the NLRB consistently held that student-assistants whose degree programs included supervised teaching or research as an integral component of their academic development were not statutory employees within the meaning of the NLRA, because they are primarily students who have a predominantly academic relationship with the school, rather than employees with a predominantly economic relationship. Furthermore, the NLRB stated, since student assistants generally receive the same money as fellows who performed no work, the funds associated with the assistantships constituted student financial aid, not compensation for work performed. These factors, the NLRB said, showed student-assistants have a predominantly non-economic relationship with their schools.

In *Columbia University,* the Board noted that the NLRA's definition of "employee" is broad, that there is no statutory language excluding student-assistants, and that the NLRB "has the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they are compensated." The NLRB then overruled its previous case law and concluded that graduate assistants are primarily students in educational relationships. The Board declined to establish a bright-line ruling for all student-assistants, but, importantly, it rejected the assertion that the student-teacher relationship is incompatible with what the NLRB concluded is an employer-employee relationship between compensated student-assistants and their universities. The Board said, "In other words, a graduate student may be both a student *and* an employee; a university may be both the student's educator *and* employer."

The NLRB's *Columbia University* decision sparked a national wave of graduate student union-organizing at private colleges and universities. While several graduate student unions were certified through the NLRB election process, many schools refused to bargain with those unions.

After Senate confirmations resulted in a 3-2 Republican majority at the NLRB, several

Principal
914-872-8027
Susan.Friedfel@jacksonlewis.com

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unions withdrew their petitions to avoid giving the NLRB an opportunity to review and overturn *Columbia University.*

The NLRB's announcement that it will tackle this issue through rulemaking may frustrate this union strategy, because it could result in a change to graduate student rights to organize even if no case makes its way to the NLRB to review *Columbia University.*

Limited Effect of Rulemaking

While rulemaking may result in a return to the NLRB's prior position that student-assistants are not employees under the NLRA, it would only mean graduate students have no right *under the NLRA* to form a union. Student-assistant unionization still may occur because graduate students (and other student workers) may continue to press *private* colleges and universities to voluntarily recognize their unions. Over the last two years, one strategy in many organizing efforts among graduate students involves using "corporate campaign"-style pressure tactics to push schools to voluntarily recognize unions.

What Schools Can Do Now

In the wake of the *Columbia University* decision, many schools have taken a closer look at their relationship with student-assistants. Some have noted significant variations in the treatment of student-assistants across different disciplines and begun to explore whether such variations should continue. Others have revisited their position on health insurance coverage, guaranteed stipends, and student housing. And some schools have reviewed whether to create new lines of communication and opportunities for student-assistants to interact with faculty and administrators.

There is no one-size-fits-all approach to improving relationships with student-assistants, but other steps schools can consider include:

- Reviewing their policies, procedures, and the terms and conditions of student-assistant teaching, research, and administrative functions;
- Reviewing or considering implementing an internal process for student-assistants to raise issues of concern and for the institution to respond to those concerns; and
- Training deans and other academic leaders to ensure they understand the legal parameters of the NLRA.

This sort of analysis often provides an opportunity to improve the relationship between the institution and their students. Please contact the Labor and Preventive Practices Group or the Higher Education Group about issues concerning the NLRA and its application to student-assistants.