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NLRB Says Grad Students Can Unionize

In a closely watched case with potentially broad ramifications for higher education, the NLRB ruled that student assistants at Columbia University are statutory employees and have the right to organize. In a 3-1 decision, the board reversed its long-standing rule that graduate teaching and research assistants at private colleges and universities were not employees since their relationship with the institutions was primarily academic rather than economic. Educational institutions will want to review their labor relations strategies in light of potential organizing activity on their campuses.

Background

The National Labor Relations Act (NLRA or Act), which applies to private — but not public — sector employers, protects the rights of "employees" to self-organize, form or join a union and bargain collectively through representatives of their own choosing. The National Labor Relations Board (NLRB or "board") enforces the NLRA and has broad statutory jurisdiction over private employers — including private and nonprofit colleges, universities and other schools whose activity in interstate commerce exceeds $1 million annually.

With the exception of a four-year period, the board has consistently declined to recognize student teaching assistants at colleges and universities as employees within the meaning of Section 2(3) of the Act. Reversing more than 25 years of board precedent, it ruled in 2000 that graduate student assistants are statutory employees with collective bargaining rights. Four years later, the board reversed itself. In its 2004 *Brown University* decision, the Board held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees under the Act because they "are primarily students and have a primarily educational, not economic, relationship with the university." Since *Brown*, graduate assistants have been considered primarily students and not university employees.

Organizing Effort

Columbia University is a private, nonprofit post-secondary educational institution with its main campus in New York City and gross annual revenues in excess of $1 million. On December 17, 2014, the Graduate Workers of Columbia-GWC, UAW filed a petition with the NLRB to represent graduate and undergraduate

student assistants who are enrolled as students at the university and provide instructional services. The petitioned-for unit:

- INCLUDED: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Law Associates, Preceptors, Instructors, Listening Assistants, Course Assistants, Readers and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.
- EXCLUDED: All other employees, guards and supervisors as defined in the Act.

Because the NLRA entitles "employees" to choose or reject union representation, the university moved to dismiss the petition based on the board's decision in *Brown* that graduate student assistants are not employees within the meaning of the Act.

Petition Dismissed Twice

On February 6, 2015, the NLRB regional director in Manhattan agreed with the university and dismissed the petition. The board later reinstated the petition and sent the case back to the regional director for a hearing and issuance of a decision. Relying on *Brown*, the regional director again dismissed the petition, holding that graduate assistants who provide teaching and research-related services at Columbia are not employees within the meaning of Section 2(3) of the Act. Again, the board agreed to review.

College Student-Athletes

In another closely watched case, the NLRB declined to exercise jurisdiction over a union petition to represent Northwestern University's scholarship football players. In a unanimous 2015 decision, the board dismissed the petition without deciding whether student-athletes are "employees" within the meaning of the NLRA, but left the door open to someday reconsider the issue. (See our **August 28, 2015** *For Your Information*.)

Board Decision

In a much anticipated decision, the NLRB by a 3-1 vote ruled on August 23 that Columbia graduate and undergraduate students who teach and perform research in connection with their studies are employees and can unionize. Notably, the Act does not define the term "employee." Rather, it says the term includes any employee not specifically excepted by the Act.

Relying on the absence of an enumerated exception for students, student assistants or any private university employees, the majority concluded that "student assistants who perform work at the direction of their university for which they are compensated are statutory employees." Finding "no compelling reason" to deny the Act's protections to student assistants, the board overruled *Brown*, saying it "deprived an entire category of workers of the protections of the Act without a convincing justification."

> **Comment.** Public universities are covered by state labor laws rather than the NLRA. Where applicable state law allows graduate students at those institutions to organize, some have formed unions.

Having found that student assistants — including assistants engaged in research funded by external grants — who "have a common-law employment relationship with their university are statutory employees under the Act," the board considered whether the petitioned-for bargaining unit was an appropriate one. Applying its "community of interest" test, the board determined it was an appropriate unit despite differences in the students' roles, duties and

responsibilities, and pay. The board found the proposed unit was a “readily identifiable grouping of employees” of all student employees who provide instructional services and all research assistants at the university’s campuses, work in similar settings (labs and classrooms), and serve similar functions within the university setting.

Technically, the case is not yet over. Noting that questions remain over which student assistants will be eligible to vote in the union election due to intermittent semester appointments, the board sent the case back to the regional director to develop an appropriate formula.

In Closing

In a sweeping decision, the board reversed long-standing precedent and gave graduate and undergraduate teaching and research assistants at private colleges and universities the right to organize and engage in collective bargaining. Whether the ruling will be challenged in court remains to be seen. For now, educational institutions will want to ensure that they have appropriate labor relations strategies in place to address any potential organizing activity on their campuses.

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