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NLRB proposal would block student assistants from organizing

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In a proposed rule with broad potential ramifications for higher education, the NLRB said that undergraduate and graduate students who perform services for compensation in connection with their studies are not "employees" under federal labor law. Reversing the board's current position, the proposal would exclude teaching and research assistants at private colleges and universities from coverage under the NLRA, preventing them from organizing.

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.

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

For more than 25 years, the board consistently held that student teaching assistants at private colleges and universities were not employees within the meaning of Section 2(3) of the Act. In 2000, it ruled for the first time in *New York University* that graduate student assistants are statutory employees with collective bargaining rights. The board reversed itself in 2004, holding in *Brown University* that graduate student assistants who perform services at a university in connection with their studies "are primarily students and have a primarily educational, not economic, relationship with the university." The board again reversed course in 2016, concluding in *Columbia University* that "student assistants who perform work at the direction of their university for which they are compensated are statutory employees" and can unionize. (See our August 25, 2016 *FYI Alert*.)

Proposed rule

On September 23, the NLRB issued a proposed rule "intended to bring stability to an area of federal labor law in which the Board, through adjudication, has reversed its approach three times since 2000." Reversing the *Columbia* decision through substantive rulemaking, the board proposes to exclude student assistants, including, but not limited to, teaching or research assistants, from coverage under the Act.

According to the board, the Act contemplates jurisdiction over economic relationships, not those that are primarily educational in nature. Under the proposed rule, both undergraduate and graduate students who perform services at a private college or university related to their studies would be held to be primarily students with a primarily educational — not economic — relationship with their college or university. Without a sufficient economic nexus, the student workers would not be statutory employees who enjoy collective bargaining rights and protections under the Act.

Further, the board said that declining jurisdiction over relationships that are primarily educational protects academic freedoms — including free speech rights in the classroom and several matters traditionally in the domain of academic decision-making. Noting that teaching and research assistants' activities are vital to their education, the NLRB concluded that the funding students typically receive while they are enrolled as students — regardless of the amount of time they spend researching or teaching — "are better viewed as financial aid than as 'consideration' for work."

In addition to soliciting comments on the proposed rule, the board invited comments on whether the rule should also exempt students employed by their educational institution in a capacity unrelated to their course of study from coverage under the Act.

In closing

The NLRB's proposed rule is intended to provide greater predictability and certainty with respect to the status of student workers under federal labor law. Comments regarding the proposed rule must be received by the board on or before November 22, 2019. Reply comments must be received by the board on or before November 29, 2019.

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