Student-Employee Unions: Should Universities Expect a Double U-Turn?

Insights
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Until recently, the National Labor Relations Board (NLRB) long held that private university student-employees were not considered "employees" under the National Labor Relations Act (NLRA) because the relationship with their respective institutions is "primarily educational" in nature. Consequently, the student-employees could not form or join unions.

Late last year, however, the Board overruled that long-standing precedent and found student graduate assistants to be statutory employees, and therefore eligible to organize. Another domino fell earlier this year when the Acting Regional Director for Region 5 of the NLRB found that resident advisors are also statutory employees and similarly permitted to form unions. A complete reversal in the law governing student-employees seemed inevitable.

However, now that President Trump is in office and has the power to fill seats on the NLRB with individuals more sympathetic to management causes, Republican appointees will soon have a majority on the Board for the first time in years. This shift has invited speculation that the Board will make yet another U-turn in this area of the law.

Background: U-Turn After U-Turn
For the better part of 50 years, the Board found that student-employees at private universities and colleges were not "employees" under the NLRA. In 1972, it ruled that graduate student teaching assistants and research assistants at Adelphi University were "primarily students" and consequently did not share a community of interest with a proposed bargaining unit of faculty. Two years later, the Board expanded on that decision and found that research assistants at Stanford University were not "employees" under the NRLA.

The Board followed this standard for 25 years, until it ruled in 1999 that the house staff at Boston Medical Center, a teaching hospital, were considered employees. A year later, it found that teaching assistants, graduate assistants, and research assistants at New York University were paid to perform services under the direction and control of the university, and were therefore also considered employees under the NLRA.

The precedent was short-lived, however. In 2004, the Board reversed course again and found that graduate assistants at Brown University were not employees, reasoning that "the imposition of collective bargaining on graduate assistants would improperly intrude into the educational process

collective bargaining on graduate assistants would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act." The *Brown University* decision remained law until late last year.

The *Columbia University* Decision

In a case involving student assistants at Columbia University, the Board concluded in August 2016 that the *Brown University* case was wrongly decided, and that "student assistants who are common-law employees are covered by the Act, unless compelling statutory and policy considerations require an exception." The Board found that there was "no empirical support" to show that "collective bargaining between a university and its employed graduate students cannot coexist successfully with student-teacher relationships, with the educational process, and with the traditional goals of higher education." Notably, then-Member, now-Chairman, and soon-to-be-retired Philip Miscimarra dissented, arguing that Congress never intended the NLRA and collective bargaining to apply to student assistants, whose relationship with the university is primarily educational.

The *Columbia University* decision opened the door wide for student-employees to unionize. Under the new standard, any student found to be a common-law employee of a university will be an "employee" under the NLRA, with all of the rights that encompasses. While the Board's decision left open the possibility for exceptions to this general rule, it systematically addressed and rejected the most common arguments made by universities as to why student assistants, graduate assistants, resident advisors (RAs), and other student-employees should not be treated as "employees." Consequently, it is not apparent where exceptions will lie. The Board did not address the appropriate scope of bargaining units involving students, saying that the issue should be decided on a case-by-case basis.

Less than a year later, relying on the *Columbia University* decision, the Acting Regional Director for Region 5 of the NLRB ruled that RAs at George Washington University are also considered employees under the NLRA. The director noted that the RAs are common law employees because they perform services for the university, for which they receive compensation, and are subject to the university's control. The director found "the record evidence to be insufficient to establish that serving as an RA is an integral aspect to the education of the undergraduate students who apply and who are selected to serve the Employer as RAs."

Implications of the *Columbia University* Decision

As the *George Washington* decision demonstrates, the implications and potential impact of the *Columbia University* decision are far reaching. At the most basic level, student-employees now have Section 7 rights to engage in concerted activity. Moreover, as Chairman Miscimarra argued in his dissent, universities with unionized student-employees not only will have to bargain over the terms and conditions of employment, but also over the impact of some academic decisions. For some student-employees, such as research assistants, bargaining may touch on academic matters (e.g., the hours required in the lab). Further, student-employees and universities will have the full arsenal of economic weapons at their disposal, including strikes, lockouts, and replacement "workers."

Universities will have difficult decisions to make about, among other things, academic credit and financial aid for student-employees who go on strike or are locked out.

The wild cards in this situation, of course, are the incoming Board members seated by the Trump administration. Chairman Miscimarra has obviously made clear that he disagrees with the Board's Columbia University decision, but he recently announced he will leave the Board in December 2017. It remains to be seen whether Trump's new appointees will share Miscimarra's view, although they will no doubt be more aligned with management interests than the members appointed by President Obama. For this reason, the *Columbia University* decision could very well be relatively short-lived.

The Waiting Game: What to Do Now

While the *Columbia University* decision may (or may not) be short-lived, colleges and universities cannot afford to wait and see. As an initial step, you should conduct a self-audit to ensure you have a solid grasp on the types and number of student-employees on campus. You should also consider whether to change any of your practices to minimize the chances of student-employee unionization.

At this stage, you should formulate your position on union organizing, and decide when and how to communicate that position. Develop a strategy for responding to any organizing efforts, and educate administrators and faculty about the plan as well as "do's and don'ts" when faced with organizing. Furthermore, you should review your student policies to make sure none run afoul of the NLRA. For example, common policies promoting civility may be illegal under the Act. Finally, you should keep a close eye on developments in this area. Under the new administration, the Board may quickly make yet another U-turn on its recent U-turn.

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