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NLRB PUSHES SCHOOLS TO RELEASE STUDENT INFORMATION TO UNIONS: NAVIGATING PRIVACY CONSIDERATIONS IN LIGHT OF RECENT GUIDANCE

Insights
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Private colleges and universities employing student workers face the unique challenge of balancing privacy obligations and a growing push from federal labor authorities to release student information to unions. Recent guidance from the National Labor Relations Board's (NLRB) General Counsel has brought these issues to the forefront, particularly as the federal agency offers schools its view about how to satisfy your duties under both the Family Educational Rights and Privacy Act (FERPA) and the National Labor Relations Act (NLRA). What does your college or university need to know about these obligations as students return to campus this fall?

FERPA 101

FERPA is a federal law that protects the privacy of student education records. It applies to all schools that receive federal funds under applicable programs of the U.S. Department of Education. Under FERPA, you must obtain a student's written consent before disclosing personally identifiable information from your education records (unless an exception applies).

Education records under FERPA include those directly related to a student and maintained by an educational institution or a party acting on its behalf. However, not all records related to students are considered education records under FERPA. For example, records related to an individual's employment by the institution are generally not considered education records unless the employment is conditioned on the individual's status as a student.

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Joshua D. Nadreau

Regional Managing Partner
and Vice Chair, Labor
Relations Group

617.722.0044

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The Duty to Furnish Information Under Federal Labor Law

As a reminder, federal labor law exempts public entities. However, private colleges and universities with unions have a duty to provide unions with information that is relevant and necessary for the union to fulfill its representational duties, such as collective bargaining and grievance processing. Information regarding the terms and conditions of employment for bargaining unit employees is considered presumptively relevant, meaning the employer must disclose it without requiring the union to justify its relevance.

If a union requests information that is not obviously related to wages, hours, and terms and conditions of employment, the employer may still have an obligation to provide it if the union can demonstrate its relevance. Similarly, even if the employer believes the requested information is confidential, it must engage in good faith bargaining to reach a disclosure accommodation.

Faced with confidentiality concerns, the Board requires a balance between the union's need for the information and the employer's confidentiality interests. The burden is on the employer to prove that its confidentiality concerns are legitimate and substantial.

Recent NLRB Memos Offer Guidance

An employer's duty to furnish information runs headlong into a college or university's obligations to preserve the confidentiality of information under FERPA. Two recent guidance memoranda from the NLRB have highlighted the complexities involved when FERPA intersects with labor relations obligations under the NLRA.

NLRB General Counsel Memorandum (GC 24-06)

The General Counsel's August 6 memorandum offers guidance on how educational institutions should handle requests from unions for the disclosure of student-employee records under the NLRA.

- When the requested information involves student-employee records, you must carefully assess whether these records are protected by FERPA.
- Even if the records are protected, you must still engage in good faith bargaining with the union to find an accommodation that balances its confidentiality

obligations under FERPA with your duty to provide information under the NLRA. Such an accommodation may include seeking student consent to release the records or providing de-identified information.

- The memorandum goes so far as to suggest that you should include a FERPA release in student-employee onboarding materials, regardless of whether the student-employee is represented by a union.
- According to the General Counsel, you cannot refuse to provide the information but must actively engage with the union to negotiate a solution.
- If the parties cannot reach an agreement, the General Counsel's position is that the NLRB may intervene to force disclosure through the prosecution of an unfair labor practice charge.

NLRB Advice Memorandum on Grinnell College (Case 18-CA-300972)

Last year, the NLRB issued a memorandum after Grinnell College refused to turn over student information (names, contact information, and job titles of all student-employees in the bargaining unit) to the Union of Grinnell Student Dining Workers. The school cited FERPA, arguing that it would need to obtain student consent before disclosing such information.

The Division of Advice concluded that the college violated Section 8(a)(5) of the NLRA by failing to provide the requested information. The memorandum clarified that not all records related to student employment are protected under FERPA. Specifically, it concluded that records are not considered "education records" under FERPA unless the employment is directly tied to the student's status as a student (e.g., work-study positions, graduate assistants).

The memorandum went further in stating that institutions have the affirmative obligation to seek a reasonable accommodation that balances their confidentiality obligation with the union's right to obtain necessary information for collective bargaining even if FERPA did limit disclosure of the requested records. On this point, the Division of Advice recommended institutions to affirmatively seek consent from students covered by FERPA upon receipt of any request for FERPA information and provide de-identified

information for any student-employee who does not consent.

What University Counsels Should Do Now

Given the recent guidance, colleges and universities should take proactive steps to ensure that their institutions are prepared to balance FERPA obligations with those under the NLRA. Here are three recommended actions:

1. Review and Update Policies on Student-Employee Records

- Conduct a thorough review of your institution's policies regarding the classification and handling of student-employee records. Ensure that records related to student employment, which are not contingent on student status, are clearly distinguished from education records under FERPA.
- Consider reviewing your institution's directory information policy to assess whether to include employment information where appropriate, ensuring that such disclosures are in line with FERPA's requirements.

2. Implement a Consent Process

- Consider using the template consent form provided by the General Counsel to streamline the process of obtaining student consent for the disclosure of employment-related records. This may help your institution timely comply with requests from unions without violating FERPA.
- Develop clear communication strategies to inform student-employees about the consent process, including how their information may be used and their rights under FERPA.

3. Prepare to Bargain with Unions over Information Requests

- When faced with information requests from unions, engage in good faith bargaining to find an accommodation that satisfies both FERPA and NLRA requirements. Be prepared to discuss and negotiate options such as de-identified data sharing or seeking consent from student-employees.

- Document all discussions and agreements with unions regarding the handling of student-employee information to ensure clarity and compliance with regulatory obligations.

Conclusion

The intersection of FERPA and the NLRA presents unique challenges for educational institutions, particularly those with unionized student employees. Recent guidance underscores the need for a careful balance between protecting student privacy and fulfilling labor relations obligations as we approach the 2024 school year. By taking the steps outlined above, university counsel can help their institutions navigate these complexities and avoid potential legal pitfalls.

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