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RESIDENT ASSISTANT UNION CASE PUTS FERPA AND STUDENT-WORKER EMPLOYEE STATUS BEFORE NLRB: 5 TAKEAWAYS FOR HIGHER ED

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Resident Assistant Union Case Puts FERPA and Student-Worker Employee Status Before NLRB: 5 Takeaways for Higher Ed

A closely watched organizing drive involving Stanford University's undergraduate residential student assistants may tee up two federal labor law issues private colleges and universities commonly face: when students qualify as "employees," and how educational privacy laws may run into union election rules. On September 29, the National Labor Relations Board (NLRB) declined Stanford's request to pause a union election but partially granted the university's request for Family Educational Rights and Privacy Act (FERPA) relief. The order permits Stanford to withhold non-public information for any student who timely objects to an NLRB subpoena under FERPA. The Board will consider additional FERPA objections as part of Stanford's forthcoming request for review. The case provides a high-profile example of how student privacy and labor law can collide, all while raising questions about the scope of the Board's 2016 *Columbia University* decision that found certain student-workers were employees. Here's everything your educational institution needs to know.

How We Got Here

A union representing student resident assistants (RAs) at Stanford University filed an election petition in May. Following a hearing, an NLRB Regional Director called for an

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election finding that the RAs are statutory employees under Section 2(3) of the National Labor Relations Act.

The Regional Director determined that the student assistants were employees by pointing to the RAs' \$12,400 stipends, substantial residence-life duties, and the 15 to 25 hours spent per week completing those duties. The decision also found that Stanford exercises control over RAs through role requirements, supervisory oversight, and the ability to discipline or remove students from the position.

Applying *Columbia*, the Regional Director asked whether the students perform services for the university, under its control or right of control, in return for payment. She concluded that all three common-law elements were met and ordered an election.

The FERPA Problem Is No Longer Theoretical

The election process created a separate problem that has [plagued universities](#) in the context of student-worker organizing for years. NLRB rules ordinarily require an employer to provide a voter list containing names, work locations, shifts, job classifications, home addresses, personal email addresses, and personal telephone numbers. For student-workers, much of that information may be maintained in records subject to FERPA.

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 US Department of Education. Under FERPA, colleges and universities must obtain a student's written consent before disclosing personally identifiable information from their 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.

Here's where it gets tricky: 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.

Stanford argued that the ordinary election timetable (which requires production of an employee list seven days after the

petition is filed and again within two business days of a direction of election) did not provide enough time to give affected students the notice and opportunity to object as required by FERPA. Instead of requiring Stanford to send the list directly to the union, the Regional Director's decision directs the Region to subpoena the information, receive it from Stanford, and then provide it to the union. The Regional Director concluded that this process fit within FERPA's subpoena exception. However, the Board's September 29 order added another protection by excluding non-public information for students who timely object to the disclosure.

***Columbia* Is the Bigger Issue to Watch**

Stanford also challenged the premise that its RAs should be treated as employees at all. Its Motion to Stay argued that *Columbia* should not automatically extend from graduate teaching and research assistants to undergraduates participating in a residential peer-leadership program. Stanford alternatively argued that *Columbia* should be overruled and that the Board should decline jurisdiction over the RAs entirely. While the Board refused to stay the election, it urged Stanford to file any request for review "promptly."

Columbia's **framework focuses** on the common-law relationship rather than whether the relationship is primarily educational. *Columbia* led to a deluge of organizing by student-workers at institutions across the country. More recently, *Columbia* has been cited favorably in the student-athlete context, with a Regional Director applying its services, institutional control, and compensation test to find basketball players at Dartmouth to be employees. Though the Dartmouth case **was abandoned** at the start of the Trump administration, student-athlete employment status remains a hotly contested issue nationwide.

4 Steps Colleges and Universities Should Take Now

1. Inventory student roles. Identify undergraduate and graduate positions available to students and the level of institutional supervision, required hours or availability, and stipends or other compensation.

2. Build FERPA into election readiness. Develop a rapid-response process involving labor counsel, the registrar, student affairs, HR, and IT for voter-list subpoenas, student notices, objections, and production deadlines.

3. Know where the records live. Determine whether student-worker information is maintained as ordinary employment information or within education records, particularly where eligibility for the role depends on student status.

4. Document the actual relationship. Appointment letters, training materials, supervision practices, disciplinary authority, academic-credit rules, and payment structures may all become evidence in an employee-status dispute. Written documents should accurately reflect how the program operates.

Conclusion

We will continue to monitor the Stanford case and other developments involving student-worker organizing. Make sure you are subscribed to [Fisher Phillips' Insight System](#) for the most up-to-date information. If you have questions about student-worker status, FERPA, or union organizing on campus, contact your Fisher Phillips attorney, the author of this Insight, or any member of our [Labor Relations Group](#) or [Higher Education Team](#).