



# Grad Students Cannot Unionize Under Proposed NLRB Rule

Insights

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The National Labor Relations Board took the latest step in the long-simmering debate over whether college teaching and research assistants could unionize when it released a proposed rule on Friday that would once again block such efforts. Declaring that university students should not qualify as employees under federal labor law, the Board took the first step to reverse a 2016 ruling by the Obama-era NLRB that opened the door for certain graduate and undergraduate students to form unions. The proposed rule still has a way to go before it is finalized and adopted, but you will want to familiarize yourself with this development to the extent it may soon upend the current state of the law and your campus practices.

## **Brief Background: Federal Labor Law Has Flip-Flopped Several Times**

Colleges and universities had, for over a decade, felt comfortable knowing that graduate students were considered to be primarily students and not university employees for the purposes of federal labor law. This is an important distinction because the National Labor Relations Act (NLRA) only empowers workers to form unions if they are considered to be “employees.” In 2004, in fact, the National Labor Relations Board (NLRB) ruled that graduate students could not organize into unions, pointing out that their relationship with their employer was “primarily educational” and that collective bargaining among the students would undermine the nature and purpose of graduate education.

Over the next decade, however, labor advocates argued that graduate students were being exploited by higher education institutions, required to do work without being protected by the full complement of workers’ rights. They wanted the nation’s laws to revert to the period of time between 2000 and 2004 when the Clinton-era Board had first extended union organizing rights to student-workers. Their renewed challenges to the model culminated in an attempted organizing drive at Columbia University, which was upheld by the Board in 2016.

The NLRB, at that time, said that there was nothing in the NLRA preventing teaching assistants from being treated like employees, including the right to organize into a union and engage in collective bargaining. Nothing in the statute carves out a special category for workers whose relationship to the employer is “primarily educational,” it said. Instead, the Board found it determinative that the students had a “common-law employment relationship” with their school, meaning that the school had control over the teaching and research assistants and paid them for their work. The Board held

that the students deserved such protections when “they perform work, at the direction of the university, for which they are compensated” (which could include aid packages).

### **Dawning Of A New Day?**

Observers began to believe that the Trump Labor Board would reverse course once again when it released [its Spring 2019 regulatory agenda](#), noting that it intended to take up rulemaking to revisit the standard “for determining whether students who perform services at private colleges or universities in connection with their studies are employees” under the NLRA. Late last week, the Board followed through on that promise by [releasing its proposed rule](#).

According to this proposal, student workers are not considered employees under federal labor law because their relationships with their schools are “primarily educational” rather than economic – despite the fact that they receive compensation in the form of wage or financial aid packages. “The basis for this proposed rule is the Board’s preliminary position, subject to revision in light of public comment, that the relationship these students have with their school is predominately educational rather than economic,” last week’s release stated.

The Board pointed out several rationales for its proposal. Among them:

- Students who assist faculty members with teaching or research generally do so because those activities are vital to their education, and not primarily for compensation. Through this work, “they gain knowledge of their discipline and cultivate relationships with faculty...In fact, performing such services is often a prerequisite to obtaining the student's degree.”
- Students generally spend a “limited amount of time” performing these additional duties, as their principal time commitment is focused on their coursework and studies.
- Students typically receive funding regardless of the amount of time they spend researching or teaching, and only during the period that they are enrolled as students. That leads the Board to view their funding more like financial aid than wages.
- Faculty and students are engaged in an individualized learning experience, which doesn’t comport with the traditional notion of collective bargaining. The goal of university faculty in advancing their students’ education differs from the interests of employers and employees typically engaged in collective bargaining, who “proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.”

### **Next Steps**

It appears that the NLRB has decided to tackle this issue via rulemaking to put an end to the back-and-forth we have seen with case law over the past two decades, settling the law for good. “In the past 19 years, the Board has changed its stance on this issue three times,” said Board Chairman John Ring. “This rulemaking is intended to obtain maximum input on this issue from the public, and then to bring stability to this important area of federal labor law.”

Friday's announcement was the first phase in a multistep process to once again reshape the law. The Notice of Proposed Rulemaking (NPRM), actually published today, is a necessary first step to formally enact a new regulation by the Labor Board. The NLRB will now accept public comments regarding the proposal for the next 60 days.

The Board will be required to review and address all of comments it receives and demonstrate that it took all of the relevant comments into account before adopting a final version of the rule. It is possible that the regulation will be tweaked or overhauled before finalization, or it could be adopted in its current proposed form.

If adopted in relevant part, however, it will have a dramatic impact for universities and private colleges. No longer would student-workers have the right to form unions and collectively bargain with their schools. An open question would exist about the now-formed unions that have emerged in the wake of the 2016 decision and the collective bargaining agreements that have either been approved or are currently being negotiated.

We will continue to monitor further developments from the NLRB as they become available, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. For further information or guidance, contact your Fisher Phillips attorney or any member of the firm's Labor Relations Practice Group or Higher Education Practice Group.

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