Proposed rule could end push for graduate student unions

On Sept. 23, 2019, the National Labor Relations Board published a Notice of Proposed Rulemaking that addresses the longstanding issue of whether undergraduate and graduate students who perform services for compensation (including teaching or research) at private colleges and universities can form a union under the National Labor Relations Act.

Under the proposed rule, student workers would not be able to organize based on the NLRB's position that such individuals do not meet the definition of "employee" under Section 2(3) of the NLRA, because their relationships with their colleges and universities are predominantly educational, not economic.

Primarily students

The definition of "employee" under Section 2(3) does not expressly include or exclude student workers. As a result, the NLRB has been responsible for interpreting this definition as it relates to the inclusion of student workers.

The board has changed course on this issue several times. In 1972, it held that graduate student assistants at Adelphi University were "primarily students" and that they should be excluded from a bargaining unit of regular faculty. Two years later, the NLRB similarly held that graduate student research assistants at Leland Stanford Junior University were not employees within the meaning of Section 2(3) because—as with the students at Adelphi University—they were primarily students.

The board's rulings in *Adelphi University* (195 NLRB 639) and *Leland Stanford* (214 NLRB 621) remained intact until 2000.

Shifting definitions

That is when the NLRB decided *New York University* (332 NLRB 1205), holding that certain NYU graduate student assistants were statutory employees under Section 2(3) because those students were performing services at the direction of the university and were compensated for such services.

Only four years later, the board overruled its decision in *New York University* and held that graduate student teaching assistants, research assistants, and proctors at Brown University were not statutory employees because they were primarily students who "have a predominantly academic, rather than economic, relationship with their school." In that decision—*Brown University* (342 NLRB 483)—the board further noted that allowing collective bargaining between private universities and graduate student assistants would have a detrimental impact on educational decisions.

In 2016, the NLRB decided *Columbia University* (364 NLRB 90) and overruled *Brown University*. The board, however, did not only reverse its prior decision by reinstating its position in the NYU decision.

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Rather, it expanded its interpretation of Section 2(3) to cover both externally-funded graduate research assistants and undergraduate university student assistants. In reaching this conclusion, the board held that an employment relationship can exist between a private college or university and its employee, even if the employee is also a student. The board rejected its prior reasoning in *Brown University* that allowing collective bargaining would have a negative impact on the educational environment, stating that no empirical support existed for that proposition.

The proposed rule

Under the new proposed rule, it will become a matter of regulation that students who perform services at a private college or university that are related to their studies will be considered primarily students with an educational, not economic, relationship with the institution, excluding them from coverage under Section 2(3).

In stating this position, the Notice of Proposed Rulemaking notes, “students who assist faculty members with teaching or research generally do so because those activities are vital to their education …” and the teaching or research “is often a prerequisite to obtaining the student’s degree.”

The proposed rule also references the limited amount of time that students perform these additional duties because students are primarily devoted to their coursework and studies, and that the remuneration paid to students for these services is more akin to financial aid than consideration for work.

Finally, the proposed rule notes that the goal of faculty in advancing students’ education is much different than the relationship between employers and employees in collective bargaining, and that the Board’s long-standing position that it will not exercise jurisdiction over relationships that are primarily educational “advances the important policy of protecting traditional academic freedoms.”

Seeking stability

Needless to say, this has been an area of inconsistency for the NLRB. As stated by NLRB Chairman John Ring, the reason behind seeking this change through the rulemaking process is to bring a certain measure of stability to this controversial issue. One member of the NLRB, who had supported the *Columbia* decision in 2016, issued an extensive dissent, opposing the proposed rule as lacking any empirical basis.

The proposed rule is subject to change following a 60-day public comment period that closed Nov. 29, 2019.

Online resource Read the proposed rule online at www.regulations.gov/document?D=NLRB-2019- 0002-0001.