

## *Latest Developments on Collective Bargaining and Unionization*

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### **I. Employee Free Choice Act (H.R. 1409 and S. 560)**

#### **Current Status of the Bill:**

The number one legislative priority for organized labor in 2010 remains what it was in 2009: the passage of the Employee Free Choice Act.

The Employee Free Choice Act significantly amends the National Labor Relations Act (29 U.S.C. Section 151 *et seq.*) by changing the method by which unions can be certified as the representative of employee groups; altering the process for negotiations of first contract and increasing penalties for employer unfair labor practices.

The most recent version of the Employee Free Choice Act was introduced on March 10, 2009 in both the House and Senate (H.R. 1409 and S.560) That version was identical to the bill filed in Congress in 2007.<sup>1</sup> At the time of its filing, many on the labor side were optimistic that the law would pass in whole or in part. But as spring turned into summer, some moderate senators voiced enough concern about the bill's provisions, that the bill could not clear committee. Then, all eyes turned to health care and EFCA was placed on the back burner for months. Now a year after its initial filing, the bill remains the core plank of the labor platform that is supported by the Democrats and President Obama and his Labor Secretary Hilda Solis but still remains labor's hope rather than its victory.

Millions of dollars have been and will continue to be spent by supporters and opponents of the bill. The American Rights at Work, a labor policy and advocacy organization, is in the

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<sup>1</sup> EFCA was previously introduced in Congress in 2007 by Senator Ted Kennedy, (D-Mass) and Representatives George Miller (D-CA) and Peter King (R-NY). It passed the House as H.R.800 on March 1, 2007 by a vote of 241-185. In the Senate, S. 1041 was supported by a vote of 51-48, but fell nine votes short of the 60 necessary to foreclose Senate debate and proceed to final consideration. However, final passage was blocked by a Republican filibuster.

midst of a \$3 million campaign to push Congress to approve the bill. This effort supplements the ongoing efforts of the AFL-CIO, SEIU and other labor organizations and other left-wing liberal interest groups. On the other side, the Coalition for a Democratic Workplace is vigorously lobbying against the bill, along with the U.S. Chambers of Commerce and business groups and many interest groups around the country.

### **Summary of Key Provisions**

The bill has several key provisions:

1. **Majority Card Check.** The proposed act would require that when a majority of employees in an appropriate bargaining unit have signed authorization cards designating a union as its representative, the union will be certified as the exclusive bargaining representative of such employees by the National Labor Relations Board *without a secret ballot election*. The option will remain for a secret ballot election when, as now, 30% of the employees in an appropriate unit sign authorization cards.
2. **First Contract Negotiations.** For first contract negotiations, when an employer and a newly formed union are unable to bargain a first contract within 90 days, either party can request mediation by the Federal Mediation and Conciliation Service. If no agreement has been reached after 30 days of mediation, the dispute is referred to *binding arbitration*. The decision of any arbitrator would be binding on the parties for up to two years.
3. **Penalties increased over current law.**
  - a. **Civil penalties of up to \$20,000 per violation** will be in place for employers who have willfully or repeatedly violated employees' rights during an organizing campaign or first contract negotiations.
  - b. **Treble back pay.** Increases to three times back pay the amount an employer is required to pay when an employee is discharged or discriminated against during an organizing campaign or first contract negotiations.
  - c. **Mandatory Applications for Injunctive Relief.** Requires the NLRB to seek a federal court injunction when there is reasonable cause to believe an employer had discharged or discriminated against employees, threatened to do so, or engaged in conduct that significantly interferes with employee rights during an organizing campaign or first contract negotiations.

## **Impact and Effect: The Card Check**

As potentially the most sweeping modification of the National Labor Relations Act in over 60 years, EFCA would make unionization easier on a dramatic scale. In simple terms, the secret ballot election would be replaced as a practical measure by the card check. Unions would no longer have to endure the unpredictability of a final secret ballot election, but instead, on its own terms and pursuant to its own calendar, they could quietly and methodically approach individual employees in the workplace or at their homes, persuade them to sign an authorization cards and, when 50% plus one had signed such cards, simply present them to the employer and NLRB and become instantly certified.

While technically the option for a secret ballot election would still be on the books, it is unlikely in most settings that a union would ever bother with it. Conventional wisdom is that unions currently never file petitions for elections unless they already have well over 50% of an appropriate bargaining unit signed up with authorization cards. It is a rare situation for a union to file with the minimum of 30%, since union strength rarely increases after the petition is filed and before the election. Thus, under EFCA, most unions will wait until they achieve a majority level of support through the cards and then simply demand recognition. Why go through the hassles of an election? <sup>2</sup>

While unions will cite its virtues, EFCA carries with it troubling implications for employers and for employees alike.

### **1. Lost opportunity for communication.**

Obviously, what is lost to employers – and employees – is the opportunity for concentrated debate and communication about what unionization means. While early union activity might be visible and known to an employer, it might also be taking place under the surface for a long time, as union organizers can work off site and visit employees at their homes. With EFCA, scores of employees may wake up one morning in a unionized setting without ever having a chance to vote on such a crucial issue, and in some cases never even knowing the activity was taking place!

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<sup>2</sup> Perhaps the only exception might be adjunct faculty bargaining units, which are currently very difficult to organize and where it is rare for an organizing union to be able to reach all those who fall into that category. In adjunct situations, the key for a union is usually to just try to get to the magic 30% so an election petition can be filed. In most adjunct faculty elections – unlike full time employee elections – the turnout tends to be very low, and that favors a union, since only a majority of those voting secures the outcome. Unions can, and have, achieved election victories with small minorities of eligible voters casting votes.

## **2. Anti-democratic bill.**

Most importantly, this is an anti-democratic bill that takes away the time-honored secret ballot election from employees. Here are some salient points in this regard.

- a. Secret ballot elections are at centerpiece of both federal and almost all states labor policies**
  - i. Elections are always to be favored in a democracy
  - ii. NLRB has run secret ballot elections since the mid-1930s with remarkable success, and unions still win the majority of these elections, with a win rate of 55-60% in recent years.
  
- b. Employees currently enjoy the privacy of the voting booth, free from the face to face pressure of union supporters or agents as well as supervisors and managers.**
  
- c. If certification is determined by card accumulation, then potentially thousands of employees may never be able to vote on whether or not they want a union.**
  - i. Many employees would not even know a union is organizing. A union can organize where it wants, who it wants and when it wants. It does not have to reach out to all employees if it believes that it has a sufficient critical mass of support that can take them over the top.
  - ii. Employees could literally wake up one morning and be represented by a union without any voice
  - iii. With a secret ballot election, all employees affected are fully engaged in the process, can hear the arguments on both sides and are free to vote in their own interest. With the card check, many employees will not even know that a union is about to claim certification until the day it happens.
  
- d. Elections of unions provide clarity for all. A card check system will raise questions.**
  - i. People willingly accept the results of a democratic decision-making process such as a secret ballot election, even if the vote is very close. With elections, for better or worse, all employees can respect the results because everyone had a chance to participate and express their points of view. With a card check, there is less ownership of the result..

- ii. Election process provides a clear voting list and eligibility date, a secret ballot and a process for challenging coercive conduct
- iii. A certification via card check, by contrast, will not provide such clarity. People will wonder about the validity of cards, when they were signed, whether quiet strong arm tactics were utilized, whether it is a real majority number, etc.

**e. Denial of an election takes away a full and fair debate on the issues**

- i. Currently, the election period focuses the mind's eye on what it means to vote for a union. This is a critically important decision for all employees. While the employer has obvious interests, an employee does, too. Knowing what union dues are, what the pros and cons of collective bargaining might be, what the union has done at other institutions, what the political interests of the union are – these and many other questions should be debated and considered before an employee decides to support a union.
- ii. Under the current system, voters can assess arguments pro and con, seek further information, ask questions and then on election day, cast their vote.
- iii. EFCA does not meet this test. All this bill does is make it easier for unions and harder for employees. EFCA will shield unions from having to publicly defend itself in a campaign. In some cases, unions can get employees to sign cards telling them untruths and making promises and never allow management or anti union employees to have a chance to rebut those claims. The current system forces that debate – and that's a good thing for employees.

**3. Card collection process is inherently suspect**

**a. Employees may feel pressured to sign cards**

- i. To get an organizer off their back
- ii. To not displease friends at work
- iii. To not be singled out as the only person in their department not signing a card

- iv. While the same pressures exist under the current system, they are not as odious because, in the end, the employee always has the final call at the ballot box. He or she will ultimately be able to vote in private, regardless of whether a card was signed or not. With this bill, signing the card is indeed the final vote, no matter what

**b. The card check approach exposes the employee as to his or her opinion about the union**

- i. With a secret ballot, no one knows how you vote. With a card check approach, everyone does.
- ii. With a card check system, everyone knows if you signed a card or didn't sign a card. The union can keep track of their supporters- and their detractors. If the union secures a majority and is certified, it will forever be aware of who supported them and who didn't. Under the current election system, the union will never know that for sure – and the sanctity and privacy of the employee's choice is secured.

**c. Union card collection can be done under the radar screen.**

- i. Union can do it whenever it wants
- ii. Union can visit homes to do so (management can't)

**d. People may be concerned about fraudulent signatures.**

Since certification under EFCA will hinge on signature cards, it is important to note that there may not be any way to check authenticity of signatures. As the law stands now, and as it may be interpreted with EFCA. The employer only submits list of employees to the NLRB in order to allow that agency to check whether the union has 30% showing of interest..

Again, this can happen now with a forged signature on a showing of interest card, but if it does happen, the consequence is small. Now, it only results in an election being scheduled and the person whose name was forged obviously has the right to vote “no” in the election. However, with the new bill, the card is the final indicator of union support and may lead to a final certification of the union. The authenticity of the card becomes vital and there is no quality control on the signing of a card the way there is on the quality control of the secret ballot (with elections carefully run by the labor board)

- 4. Unit issues. The current system allows employees to know what unit they are in before they vote for a union. A card check system would take away that right.**
  - a. Not clear how unit issues would be resolved.
  - b. Employees would sign cards with no idea what the unit would be
  - c. If the unit that the Union seeks is later found to be improper, what then? Can the union use the same cards to amend their petition?
  
- 5. Loss of choice is compounded by the fact that employees would not be able to decertify a union by a simple collection of cards. Employees seeking to decertify a union would have to use the traditional current method of a petition supported by a 30% showing of interest and then a secret ballot election.**

### **Impact and Effect: Binding Arbitration**

Of potentially even greater concern are the provisions in EFCA for dealing with a first contract. EFCA ultimately would force disputed issues in a first contract into the decision-making hands of private arbitrators, who could make binding decisions for an institution or company. This is problematic enough with money issues, but if one considers what is at stake in first contract negotiations, with contentious issues like the role of seniority, evaluation procedures, layoff and retrenchment provisions, management rights and other language items of importance, these arbitration provisions are particularly frightening.

While many public sector labor statutes provide for advisory or in some cases binding arbitration, such provisions were inserted by state legislatures as an alternative to the right to strike. Under the NLRA, of course, unions are free to strike, and thus the binding arbitration provisions of EFCA serve a totally different purpose, namely, the advancement of a union agenda of securing a first contract under all circumstances. The one thing that binding arbitration does is guarantee that a union that has just run a successful organizing campaign will actually secure a first collective bargaining agreement within a few months.

But the problems with this system are obvious.

#### **1. Dilutes the collective bargaining process**

With the opportunity for binding arbitration available, and within a short time span, the likelihood of good faith, active bargaining is actually diminished, not enhanced. This is because one side or the other may very well hold out in the bargaining process, knowing that an arbitrator may be more inclined to be sympathetic to its position.

#### **2. No guidance on how the arbitration process will be set up**

EFCA does not provide any guidance on how this binding arbitration process will work, except for the provisions on timing and selection by FMCS. Beyond that, there are no clues as to

what factors the arbitrator is supposed to consider in making his or her decision. While many public sector statutes provide a listing of relevant factors for factfinders to consider, such as industry trends, cost of living, comparability within the employer unit, and ability to pay, EFCA provides none of those. While arbitrators may very well adopt public sector factors in fashioning a report, that remains unclear, and it is equally unclear which ones they will pick. Moreover, if it is left to the NLRB to issue such factors through its rulemaking authority, a labor-friendly Board may be more inclined to emphasize factors such as “comparability” rather than “ability to pay.”

### **3. The danger of uniformity in the business world.**

Indeed, in public sector interest arbitration, “comparability” is often considered by factfinders to be a central factor in deciding how to rule in a given labor dispute. That, of course, is in the non-profit public sector. But how would such a factor play out in the private sector? Over-emphasis on such a factor could be highly detrimental in the business world. As one commentator has said:

One key advantage of competition is to allow different businesses to experiment with different business models to satisfy their customers’ concerns. Labor arbitration will degenerate into a branch of industrial policy if it is construed to require uniformity in these matters. Quite simply, interest arbitration will make it difficult for each firm to keep its preferred method of business operations in place no matter what its competitors do. The crippling effects of this system seem evident.<sup>3</sup>

Even in higher education, however, which is predominantly non-profit, this emphasis on comparability could be detrimental to an institution trying to chart its own course; finding its own educational niche; experimenting with summer school and continuing education models; considering variations on degree programs and ruminating over admissions policies. The leveling effect of uniformity in labor relations and the predominance of “comparability” as the operative economic factor could be ruinous.

### **4. Second contract negotiations will be highly contentious**

The binding arbitration provisions only apply to the initial collective bargaining agreement. Thus, the *second* round of bargaining promises to be much more contentious, as each side seeks to recoup what was lost to the arbitrator’s decision. In this regard, EFCA is unprecedented even by public sector factfinding standards. *No labor statute* has ever imposed an arbitration process on a first contract alone, but not in subsequent rounds of bargaining. This odd arrangement may produce consequences for the long term labor management relationship that are entirely unknown and unique.

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<sup>3</sup> Richard Epstein, “The Case Against the Employee Free Choice Act,” *The Alliance to Save Main Street Jobs*.

Not surprisingly, EFCA has provoked the most vigorous lobbying efforts in years. Some of the groups that back EFCA – in addition to every labor organization -- include the aforementioned American Rights at Work, the Sierra Club, the National Organization for Women, People for the American Way, the National Partnership for Women and Families, the National Resources Defense Council, the National Baptist Convention of America, the National Consumers League, and the National Association of Consumer Advocates.

In addition, President Obama, the new Chair of the NLRB, Wilma Liebman, and the new Secretary of Labor, Hilda Solis, are strong supporters.

Opposition to legislation providing workers with card check organizing rights has been led by the U.S. Chamber of Commerce and includes the National Association of Manufacturers, Coalition for a Democratic Workplace, the Center for Union Facts, the National Right to Work Committee, the Heritage Foundation, and the HR Policy Association.

However, given President Obama's strong support, it is likely some form of EFCA will pass. Whether or not it includes the binding arbitration provision is debatable as some have suggested that there are constitutional barriers to allowing an arbitrator to force a private employer to pay compensation and benefits at particular levels.

## **II. PREPARING FOR EFCA - A MANAGEMENT CHECKLIST**

### **A. Prior to any Union Activity: Steps Employers Can Take**

Employers can wring their hands over the possibility of EFCA passing, but there are a myriad of constructive things that an employer can do in preparation for EFCA. And even if EFCA does not pass, these items are worth doing in general and will assist that employer in many ways down the road.

#### **1. Review of policies directly related to union organizing**

A number of employer policies will have a direct bearing on the extent to which employees and union organizers can solicit for unions on institutional property. Most of these fall under the general heading of "solicitation policies" but they also can include such areas as email and social networking policies, bulletin boards and related areas. Now is the perfect time for unorganized employers to review whether it has appropriate policies in these areas and/or whether it should revise such policies or develop additional policies. The ground rules for establishing when and how unions and employees can engage in organizing activity on campus can be determined by the employer *provided* they are in writing and provided further that they are consistent with NLRB and judicial rulings. Because the institution of new solicitation policies is suspect if done at the onset of union activity, an employer needs to have such policies in place in advance of any such activity. If the institution does not have clear directives in this area, this is an excellent time to promulgate and/or revise such policies.



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- a. Promulgate and/or revise to conform to the law
- b. Cannot do this lawfully once union activity begins
- c. Be sure your policy covers both employees and non-employees
- d. Consider policies that restrict the use of email for solicitation purposes
- e. Apply the policies in a non-discriminatory manner

2. Educating Supervisors

Most institutions will train their managers and supervisors on developments in the law, appropriate conduct in the work place and other important areas where they are the face of the institution and must act in a legal manner. This is no less true in labor law and particularly true today. Institutions should educate all supervisors on the current state of labor law, what they are allowed to do and what they are prohibited from doing.

- a. Review your no-solicitation policies
- b. Review EFCA provisions
- c. Review dos and don'ts
- d. Explain and review tell-tale signs of union activity.

3. Educating the employees:

- a. Consider training of all employees as part of a legal update series.
- b. Consider placing statements of company or institution policy on unionization on your web sites or other communication vehicles. Consider taking a strong stand on the democratic principles of free union elections and free speech rights and a declaration against neutrality agreements (often pursued by unions during organizing campaigns) as antithetical to the interests of employees.
- c. Consider establishing a labor relations web site with continual information about the NLRA and employee rights, especially the threshold significance of union cards under the new law.

4. Consider your bargaining unit positions in the event some future union petition is filed. Bargaining unit issues will remain in play as before, and they may become the central battleground for challenging the validity of the proposed card check majority petition since the inclusion of additional employees may directly affect

whether or not the union has signed up a majority of employees in an appropriate unit. Similarly, the exclusion of certain individuals may also affect the majority numbers.

- a. Scope of the unit and community of interest contentions
  - b. Expansion of proposed unit to include other departments, divisions or schools
  - c. Exclusion of professional schools, e.g medical school
  - d. Single campus v. multiple sites
  - e. Professional and non-professional employee issues
  - f. Individual exclusions:
    - i. Supervisors, including status of department chairs
    - ii. Managers, including in private sector the implications of *Yeshiva University* and full time faculty
    - iii. Confidential employees
    - iv. Temporary workers
    - v. Guards/Non-guards
    - vi. Others
5. Develop and tell your story. Communicate with employees as to what you are doing for them, including compensation statements tailored to each employee that underlines how much the employer is spending on them for total compensation.
6. Since union cards will take on larger significance under EFCA, establish a “signature bank” on employees that may be used to challenge union cards if necessary. This may be useful in cases where employees suggest fraud in the procurement of cards.
7. Review all written policies for compliance with the NLRA and relevant employment laws. Don’t allow yourself to become the easy target of a “corporate campaign” in which you are accused of wage and hours violations, acts of employee discrimination, health and safety violations, etc. Unions often launch such artillery bombardments in the press as a prelude to on-the-ground organizing at the company or institution.

8. Review written employment policies for clarity and consistency between departments and divisions.
9. Review all employee relations in general and assess your vulnerability to union activity. Making improvements in areas of compensation and working conditions prior to union activity is not only good business but will be extremely helpful. However, once activity starts, it may be hard to legally improve working conditions or compensation. In particular, examine these and other areas of your enterprise:
  - a. Appoint effective supervisors and managers
  - b. Train your supervisors well
  - c. On the NLRA as well as all other laws affecting the employment relationship
  - d. On the ways to be an effective supervisor
10. Provide competitive compensation and keep employees fully informed on your efforts in this area
11. Establish a strong communications system and carefully review the methods of employer communication with employees.
  - a. Governance bodies
  - b. HR communications
  - c. Newsletters
  - d. Meetings
  - e. E-mail
  - f. Open door policies
  - g. Surveys
12. Establish and/or strengthen effective dispute resolution procedures
13. Demonstrate transparency in terms of where your institution is heading
14. Maintain strong Human Resources departments that are seen as employee advocate centers
15. Promote and encourage good workers
16. Focus on professional development of staff

17. Be alert to workplace inequities in pay, assignments, promotional opportunities, etc
18. Consider periodic employee opinion surveys to gauge employee relations climate within the enterprise. Be sure they are conducted in conformance with the law and do not intrude into areas protected from management interrogation.

**B. After union activity begins**

1. Immediately communicate with employees by letter as to what signing a card really means
2. Immediately call your supervisors and managers together for a refresher course, especially on solicitation issues and information on union drives and the dos and don'ts of campaigns
3. Card challenges
  - a. Possibility that signatures may not valid – prepare the use of signature bank if NLRB permits such information
  - b. Be alert to possible claim that supervisors solicited union cards creating a coercive atmosphere for employees
  - c. Pay attention to employee reports of efforts to return cards or questions on how to do it – provide legal information to employees on how to get the cards back.
4. Follow this up with a variety of communications on the nature of exclusive union representation; collective bargaining; union dues and the costs of unions; the nature of union promises; the possibility of strikes and many other areas that are typically covered in successful educational communication campaigns
5. Immediately revisit your earlier work on unit determination questions and update. Consider what your unit positions will be before the NLRB should a petition be filed
6. Consider establishing a web site where employees can obtain up to the minute information and the company's or institution's position on the union drive

7. Depending on the politics, consider statements that challenge the union to forego the card check route and follow the more democratic approach of seeking an election, not a card check majority approach to certification
8. Exercise fully your section 8 (c) rights to speak freely about unions and the campaign, regardless of whether or not the union asks you to commit to a neutrality agreement
9. Review your historical record as an employer and emphasize to employees the steps made by the company or institution to improve employee working conditions and compensation without a union.

### **III. Board Decisions Favorable to Employers in Jeopardy**

#### **A. The Climate**

While labor has not achieved any of its significant goals as yet, change remains in the air. The Employee Free Choice Act has not disappeared, merely gone on hiatus while health care took center stage. The constituency of the National Labor Relations Board will be revamped in time and, with it, the possible reversal of significant decisions favoring management, from the status of graduate teaching and research assistants to issues involving supervisory speech during union campaigns to issues surrounding collective bargaining.

For some time the Board has operated with only two members, Wilma Liebman (D), who serves as Chair, and Peter Shaumber (R), instead of its normal complement of five members. They have thus far largely avoided controversial decisions in light of that fact. . President Obama's nominees are in place, but, as of this writing, they have not been confirmed as yet by the Senate, primarily because of one of his choices, Craig Becker (D), has been attacked by Republicans as too far out of the mainstream when it comes to labor relations policy.<sup>4</sup> Eventually, however, a 3-2 Democratic majority will be seated on the Board, and when it is, many pro-employer decisions from the past decade will likely be reviewed again and possibly reversed. A sampling of those decisions follow.

#### **B. Decisions in jeopardy**

##### ***a. Brown University and the fate of graduate teaching assistants***

Of particular interest to higher education institutions will be the fate of graduate teaching and research assistants. Among the decisions in jeopardy of being reversed is *Brown University*.

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<sup>4</sup> Becker is a strong EFCA supporter and in earlier academic writings has suggested that employers should remain neutral during union campaigns.

342 NLRB No. 42, 175 LRRM 1089 (2004) where the Board, in a 3-2 decision, reversed its decision in *New York University*, 332 NLRB No. 111 (2000) and held that graduate students working as teaching assistants or research assistants are *not* employees covered by the Act. The Board majority held that such individuals “have a predominantly academic rather than economic relationship with their school.”<sup>5</sup>

*Brown University* involved approximately 450 teaching assistants, research assistants and proctors. In pressing its case to the Board, the University argued that *New York University*, was wrongly decided, contending that it had reversed 25 years of precedent “without paying adequate attention to the Board’s role in making sensible policy decisions that effectuate the purposes of the Act.” Brown contended that the Board “did not adequately consider that the relationship between a research university and its graduate students is not fundamentally an *economic* one but an *educational* one.”

In deciding this case, the Board analyzed the statutory history of the National Labor Relations Act, and noted that the Board and the courts have often made meaningful distinctions based on the nature of the relationship between the employees at issue and the employer. For example, in some cases, the Board has found that the technicality of employee status did not force a right to collective bargaining. Thus, managerial employees have been traditionally excluded by the Board from collective bargaining, not only in the industrial world but in higher education itself. *Yeshiva University*, 444 U.S. 672 (1980) In these cases and others, the Board analyzed the nature of the relationship. In reviewing this history, the Board underlined that it has traditionally focused on the economic relationship involved, and, with such a guide in hand, it would not assert jurisdiction over relationships that were “primarily educational” in nature.

In applying that principle to the facts of the Brown University case, the Board emphasized several key factors:

1. All of the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a TA, RA, or proctorship.
2. Even students who have finished their coursework and are writing their dissertation must be enrolled to receive these awards.
3. Further, students serving as graduate student assistants spend only a limited number of hours performing their duties; their principal time commitment at Brown is focused on obtaining a degree and, thus, being a student.

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<sup>5</sup> In a similar ruling, the Board also issued *Brevard Achievement Center, Inc.*, 342 NLRB No. 101, 175 LRRM 1329 (2004), a decision which involved disabled workers at a vocational program who were paid for providing janitorial services. The Board ruled 3-2 that the workers were not covered by the Act because their relationship with the nonprofit company was “primarily rehabilitative,” not economic.

4. Their service as a graduate student assistant is part and parcel of the core elements of the Ph.D. degree. 21 of 32 departments required teaching in order to get the Ph. D degree; 69% of the students involved were in such departments
5. The money received by the TAs, RAs, and proctors is the same as that received by fellows. Thus, the money is not “consideration for work.” It is financial aid to a student.

The Board went on to note that over 25 years ago, in *St. Clare’s Hospital*, 229 NLRB 1000 (1977), the Board clearly and cogently explained the rationale for declining to extend collective-bargaining rights to students who perform services at their educational institutions, that are directly related to their educational program, i.e.,

The rationale . . . is a relatively simple and straightforward one. Since the individuals are rendering services which are directly related to—and indeed constitute an integral part of—their educational program, they are serving primarily as students and not primarily as employees. In our view this is a very fundamental distinction for it means that the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective-bargaining process. It is for this reason that the Board has determined that the national labor policy does not require—and in fact precludes—the extension of collective-bargaining rights and obligations to situations such as the one now before us. 229 NLRB at 1002 (footnote omitted).

The Board had further explained in that decision, “[i]t is important to recognize that the student-teacher relationship is not at all analogous to the employer-employee relationship.” Thus, the student-teacher relationship is based on the “mutual interest in the advancement of the student’s education,” while the employer-employee relationship is “largely predicated on the often conflicting interests” over economic issues. Because the collective-bargaining process is fundamentally an economic process, the Board concluded that subjecting educational decisions to such a process would be of “dubious value” because educational concerns are largely irrelevant to wages, hours, and working conditions. In short, the Board determined that collective bargaining is not particularly well suited to educational decision-making and that any change in emphasis from quality education to economic concerns will “prove detrimental to both labor and educational policies.”

The Board noted that “the educational process—particularly at the graduate and professional levels—is an intensely personal one.” The Board emphasized that the process is personal, not only for the students, but also for faculty, who must educate students with a wide variety of backgrounds and abilities. In contrast to these individual relationships, collective bargaining is predicated on the collective or group treatment of represented individuals. The Board observed that in many respects, collective treatment is “the very antithesis of personal individualized education.”

The Board then applied this thinking to the case at hand:

Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution like Brown. Although these issues give the appearance of being terms and conditions of employment, all involve educational concerns and decisions, which are based on different, and often individualized considerations.

Based on all of the above-statutory and policy considerations, the Board concluded that the graduate student assistants were not employees within the meaning of Section 2(3) of the Act, and declined to extend collective bargaining rights to them.

The vigorous dissent launched by Member Wilma Liebman and the Member Dennis Walsh criticized the majority for never coming to terms with the argument that graduate teaching assistants and research assistants meet the common law definitions of “employee” and should be treated as such. The dissent believed that the Board majority was out of touch with the now-corporate elements of higher education and how such graduate students have become part and parcel of the delivery of instruction to thousands of students each year. In addition, the dissent saw nothing that would infringe on the traditional prerogatives of the university to determine the nature of the curriculum and its delivery; that academic freedom would not be compromised and that thousands of graduate teaching assistants have bargained effectively in the public sector for many years without any significant problems.

While the *Brown* case effectively ended the unionization of private sector graduate teaching assistants and research assistants, the dissent of Member Liebman – now NLRB Chair – could serve as the template for a majority decision reversing *Brown*.

#### **b. *Yeshiva* and the managerial exclusion**

Because it is a Supreme Court decision, and not an NLRB case, it is unlikely that *Yeshiva University*, 444 U.S. 672 (1980) will be reversed anytime soon, given the current constituency of the Court. However, *Yeshiva* never stood for the proposition that all private sector faculty members are banned from collective bargaining. The issue of whether faculty members at any particular institution are managerial employees or not is still dealt with on a case by case basis. And, while the Supreme Court gave guidance to all as to what to examine to establish managerial status, a pro-labor board may hold colleges to a subtly higher standard of proof simply in its interpretation of the rich fact patterns that these cases present.

#### **c. Who is a supervisor? Supervisory status under the NLRA**

In *Oakwood Healthcare Center, Inc.*, 348 NLRB 686 (2006), the NLRB clarified its stance on when an individual is deemed a “supervisor” and thus excluded from the coverage of the Act. The definition of “supervisor” is contained in Section 2(11) of the Act:

Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

To be a supervisor, then, the individual had to hold the authority to do any one of the stated functions; their exercise of such authority was not to be of a routine or clerical nature but required independent judgment; and it must be done in the interest of the employer. In *Oakwood*, the Board found that certain charge nurses at a hospital were supervisory because of their delegated authority to assign employees using independent judgment. The dissent argued that the definition of supervisor was being too broadly interpreted by the majority opinion. A reversal, or modification, of this opinion may center on how much time an individual spends supervising employees and possibly require a higher percentage of time on supervisory functions before the Board would exclude.

#### **d. *Weingarten* extension to non-unionized employees**

One issue that has flipped-flopped many times over the years based on the political make up of the Board is the question of whether a non-unionized employee has a right to have a fellow employee accompany him or her when called to an investigatory meeting by management that may lead to discipline. Obviously, unionized employees have had the right to a union representative at such meetings for almost 40 years since the Supreme Court’s decision in *NLRB v. Weingarten*.

This right was first extended to *non-unionized employees* by a pro-labor Board in 1982<sup>6</sup> when it ruled that even in a non-union setting, an employee who is brought into an investigatory interview may have a coworker present.

But then, only three years later, the Board reversed itself in 1985<sup>7</sup> and held there was no such right to a coworker presence. This remained the law of the land for fifteen years. However, in 2000, in the case of *Epilepsy Foundation*, 331 NLRB 676 (2000), *enfd* in relevant part, 268 F. 3d. 1095 (D.C. Cir., 2001), *cert. denied* 536 U.S. 904 (2002), the Board again reversed fields and held that an employee did have a right to request the presence of a coworker during any investigatory interview that may reasonably lead to discipline. These ping pong rulings over the years were directly linked to the Board majorities and the political climate of the day, with the

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<sup>6</sup> *Material Research Corp.*, 262 NLRB 1010

<sup>7</sup> *Sears, Roebuck*, 274 NLRB 230 (1985)

predominantly Democratic Boards ruling in favor of such a right and the predominantly Republican Boards ruling the other way.

In 2004, the Board did its latest flip in *IBM Corp.*, 341 NLRB No. 148 (June 9, 2004), where the Board reversed *Epilepsy Foundation*. In *IBM Corporation*, the Board decided that the precedent of *Epilepsy Foundation* should be overruled, and, by a 3-2 majority, the Board concluded that the *Weingarten* rights do not extend to a workplace where employees are not represented by a union.

With a new Democratic Labor Board, this issue could turn again.

**e. Email systems and union solicitation**

In *The Register Guard*, 351 NLRB 1110 (2007), the Board held that employees have no statutory right to use an employer's email system, and thus, an employer could regulate its use by prohibiting employee use of the system for non-job related solicitation. In that case, even though employees used the email system for personal communication, a rule banning its use for *solicitation* was still deemed appropriate as long as it was not discriminatorily enforced.

The dissent argued that email was the virtual lunch room of the 21<sup>st</sup> century and that any restrictions on employee use of the system for union solicitation especially when personal use was allowed should be presumptively discriminatory and illegal under the long line of cases dealing with employee solicitation.

**f. Supervisor support for a union**

An important election decision decided by the Board was *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), where the Board held that when supervisory pro-union activity is objectionable conduct when it interferes in the freedom of choice so as to materially affect the election outcome. It also held that supervisory solicitation of union authorization cards is inherently coercive absent mitigating circumstances. The majority opinion said that the Board would look to whether the supervisory conduct was generally interfering with employee free choice, and, secondly, whether such conduct interfered with freedom of choice to the extent it materially affected the election outcome.

The dissent contended that supervisory solicitation of union cards should not be *inherently* coercive, even when the person is unaware that he or she is a true statutory supervisor or where that status is unclear. Also, the dissent would look at such cases in the total context of the employer's anti-union campaign.

A reversal of this decision could mean a greater involvement by supervisors, especially first line supervisors, in soliciting for a union. It would mean that supervisors might actively campaign for a union and not be found to be violating the Act.<sup>8</sup>

**g. Election statements about collective bargaining**

In *Medieval Knights*, 350 NLRB 194 (2007), the Board found that statements by a labor consultant hired by the employer during a union organizing campaign did not violate the Act when he said that hypothetically an employer could give in to lesser terms in collective bargaining and not agree to a full union contract thereby stalling negotiations. The majority considered this statement lawful because there was no evidence that the employer would engage in the practice he described. The dissent felt that the employer was consciously trying to deliver that message to the employees and viewed the statements as threatening.

A reversal could signal tighter restrictions on the free speech rights of employers during union campaigns.

**h. Work Rules**

There are numerous Board cases in which employer work rules are scrutinized to determine whether or not they interfere with employees' Section 7 rights to engage in collective activity. At issue in *Tradesmen International*, 338 NLRB 460 (2002) was whether the following employer rules would "reasonably chill employees in the exercise of their Section 7 rights": (1) prohibition of disloyal, disruptive, competitive or damaging conduct; (2) prohibition of slanderous or detrimental statements; (3) requirement that employees represent the employer in a positive manner.

The Board held that these rules did not violate the Act because they serve a legitimate business purpose and reasonable employees would not construe such rules as intended to proscribe Section 7 activity. The dissent thought otherwise, arguing that such rules do chill employees in organizing and coming together for collective action to improve the workplace. The dissent would require an employer to specifically state that such rules do not include Section 7 activity.

These and many other cases will be ripe for review once the full Obama Board is constituted.<sup>9</sup>

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<sup>8</sup> It should be remembered that under the NLRA supervisors have no rights to organize. Under many public sector labor laws, by contrast, supervisors do have an independent right to organize, usually in a separate unit of their own. However, the rationale of *Harborside* still might apply even in the public setting if employees feel coerced by supervisors who they perceive to be acting on behalf of the employer in soliciting union support.

<sup>9</sup> An excellent summary of these and other cases can be found in the U.S. Chamber of Commerce's report, "*The National Labor Relations Board in the Obama Administration: What Changes to Expect.*" (Sept., 2009), by Harold Coxson and Christopher Coxson of Ogletree, Deakins, Nash, Smoak and Steward, P.C.

#### **IV. Adjunct/Part time and Contingent Faculty**

Around the country, there are more contingent faculty bargaining units being formed, as part time and adjunct faculty as well as non-tenure track consider unionization as the means to respect, enhanced job security and better compensation.<sup>10</sup> For such faculty in the private sector, the *Yeshiva* arguments will not work. Such faculty members are not typically the managers of the institution in the same manner and to the same degree as tenure-track faculty, and thus administrations are faced with more traditional unit issues when petitions for adjunct or contingent faculty bargaining units are filed. For example, petitions to represent part time faculty may very well include questions of unit eligibility in terms of frequency of assignments, longevity with the institutions and the overarching question of whether and when a given adjunct faculty member has enough connection to the institution to be considered eligible for collective bargaining.

Part-time faculty units are being formed with regularity around the country in both the public and private sector. (See Appendix A for a listing of free-standing units as of 2006. In addition, the part time faculty at the University of Rhode Island, some 450 of them, unionized in 2007 by a winning percentage of 93%). As contingent and part time faculty members grow in number and continue to now teach the majority of credits around the country, administrations confronted with organizing efforts and successful unionization drives will have to consider not only the particular issues raised in negotiations but the broader issues of what the future of contingent faculty at their institution will be and how the institution sees this resource.

At the bargaining table itself, to no one's surprise, the central issues driving part timers continue to include:

- A. Access to benefits, especially health insurance
- B. Pro-rated salary and salary keyed to service
- C. Access to governance rights
- D. Job security via commitments to annual contracts and multi-year contracts
- E. Seniority protections
- F. Professional development
- G. Promotional opportunities
- H. Status perks, such as email connections, office space and equipment, access to facilities, recognition symbols such as listing of names in the directory.

Adjunct units have made slow but steady progress in these areas. For example, at The New School, the adjunct union, an affiliate of the United Auto Workers, recently secured a pledge in their 2009-14 contract that part timers could participate on curriculum committees; that they

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<sup>10</sup> See my earlier paper on "Adjunct and Part Time Faculty Issues," given at the 2008 NACUA Higher Education Employment Law CLE Workshop, March 6, 2008, for more detail on issues at the bargaining table.

could get family leaves for those who did not work enough to qualify for federal benefits; and differential titles to reflect levels of experience.

At Suffolk University in Boston, the adjunct AAUP union signed their first CBA last year and recently achieved an agency fee provision now that its membership had reached 55%. At Emerson College, an AAUP local of adjunct faculty secured a professional development fund for the first time.

The first adjunct contract at Syracuse University established full benefits for those adjuncts on multi-year contracts that teach 62.5% load (5 courses a year).

At Keene State College in New Hampshire, adjuncts who reach their 20<sup>th</sup> semester of work are eligible for annual contracts for the first time under the most recent agreement signed between the NEA and the University System of New Hampshire.

It is likely that these trends will continue with each new round of bargaining as adjunct unions continue to make progress on these essential areas of concern to them.

On the institution side, there are significant considerations in facing a part time unit. For example, if the administration digs in its heels that it will not concede to the union on benefits, it is likely that it will have to spend more money in salary. This will drive up the per credit rate, as the college or university may consider it more sensible to add an extra \$50 per credit to the adjunct rate than to go down the road of access to the institution's health plan, with all the long term consequences that may entail

However, the per credit rate may have ripple effects on other groupings of faculty and other bargaining units. For example, full time faculty may see the higher adjunct per credit rate as a sensible one to use for their overload rate, or their summer rate, if those are lower. If the institution concedes to benefit coverage, it will fight the usual never-ending battle to increase accessibility and increase employer contributions.

The job security issue is most important. Adjuncts who are used to semester contracts but who have been with the college for many years will see no reason why they cannot have annual contracts, or even multi-year contracts. Administrations with precious little flexibility in reducing tenure track or tenured faculty will not want to encumber themselves any more than they have to, and may want to hold fast to semester contracts as long as they can. This can be a divisive but pivotal issue at the table.

An administration will also have to judge how detailed and involved it wants its evaluation system to be.

An administration will have to weigh what exactly it wants its part timers to do. For example, does the administration want to have adjuncts do anything other than teach? Is there a role for adjuncts to serve as student advisors? Should they be involved in governance activities?

Perhaps more importantly, to what extent should an administration shift away from the use of adjuncts and towards full time faculty? Especially with the growing cost that adjunct unionization brings in terms of increased pay rates and possible benefits, is it time for an administration to “downsize” this category? As accrediting agencies and others also criticize the overuse of part time faculty, the time may be coming when the pendulum begins to turn back to the increased use of full time faculty.

## **APPENDIX A**

### **Free Standing Adjunct/Part time faculty units<sup>11</sup>**

*NOTE: The following institutions are only those that have bargaining unit that are confined to adjunct/part time faculty only. Many other institutions have mixed units of full time and contingent faculty.*

#### **Alaska**

University of Alaska

#### **California**

Citrus College  
Coast CC  
College of the Canyons  
College of the Desert  
College of the Sequoias  
Long Beach City College  
Mendocino College  
Mira Costa College  
Mt. San Jacinto College  
North Orange County CC  
University of California (PT lecturers unit)  
University of San Francisco (PT faculty unit)  
Victor Valley CC  
Yuba CC

#### **Illinois**

Black Hawk College  
City Colleges of Chicago  
College of DuPage  
Columbia College  
East Illinois University  
Heartland CC

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<sup>11</sup>As of January 2006 as reported by National Center for the Study of Collective Bargaining in Higher Education and the Professions

Illinois State University  
John A. Logan CC  
Moraine Valley CC  
Oakton CC  
Parkland College  
Roosevelt University  
Sauk Valley CC  
South Suburban College  
Southern Illinois University –Edwardsville  
Southwestern Illinois College  
Trident College  
William Rainey Harper College

**Maine**

University of Maine System

**Massachusetts**

Emerson College  
Division of Continuing Education CC System  
Division of Continuing Education State College System  
Suffolk University

**Michigan**

Bay de Noc CC  
Macomb CC  
University of Michigan

**Montana**

Flathead Valley CC

**New Hampshire**

Keene State College (University System of New Hampshire)

**New Jersey**

Camden County College  
Hudson County CC  
Mercer County CC  
Middlesex County CC

New Jersey State College System  
Passaic County CC  
Raritan Valley CC  
Rutgers University  
Sussex CC  
Union County College

**New York**

Cornell- NY State School of Industrial and Labor Relations  
Dowling College  
Dutchess CC  
Fulton Montgomery CC  
Long Island University –C.W. Post  
Long Island University – Southampton  
Nassau CC  
New School University  
New York University  
Pace University  
Rockland CC  
Syracuse University

**Oregon**

Chemeketa CC  
Clackamas CC  
Clatsop CC  
Mt. Hood CC  
Portland State University

**Pennsylvania**

City College of Philadelphia

**Rhode Island**

RI School of Design

**Vermont**

Goddard College  
Vermont State Colleges  
University of Vermont

## **Wisconsin**

### Madison Area Technical College

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