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TOPIC:

Labor Law Primer

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INTRODUCTION:

Colleges and universities have been subject to union organizing under the National Labor Relations Act and various public sector enabling legislation for decades. But for many institutions, the onset of union activity comes without warning and immediately raises a multitude of questions and concerns for administrators unfamiliar with labor law basics. The purpose of this NACUANOTE is to delineate the major elements of labor law. It is not designed to explain case law in any depth but rather to provide quick practical guidance for administrations in dealing with union activity.

DISCUSSION:

I. The Law

Labor relations and union organizing in private sector colleges and universities are covered by the National Labor Relations Act (NLRA or the "Act").[2] Passed in 1935, the NLRA established the core principles of labor relations, including: the fundamental protections for employees to engage in concerted, protected activity in the workplace; a process by which employees could unionize; and the legal obligation of management to engage in collective bargaining over wages, hours, and other terms and conditions of employment with unions representing a majority of employees in an appropriate bargaining unit.[3] The Act established the National

Labor Relations Board (NLRB or the "Board") as the administrative agency charged with protecting those rights.[4]

The NLRA does not cover public institutions. Instead, labor relations for public institutions are covered by state enabling legislation and by state constitutional provisions. Most states allow for public sector employees to unionize, but a few still do not.[5] While the private sector is covered by the single federal NLRA, some states have multiple statutes covering different types of public employees (state employees, higher education employees, municipal employees, etc.).[6]

Public sector labor statutes generally follow the core elements of the NLRA, including the right to organize and engage in concerted activity (although such laws, unlike the NLRA, usually prohibit strikes), the prohibition against a public employer engaging in coercive or discriminatory (on the basis of union activity) conduct, the requirement that the parties engage in good faith negotiations over bargainable topics, and the establishment of a board or commission to administer the labor statute.

The NLRB and similar state labor boards handle representation issues (e.g., whether a union shall be certified as the majority representative of a group of employees and related bargaining unit issues); scope of bargaining issues (i.e., over what topics must the parties negotiate); investigation and hearing of unfair labor practice charges; and mediation and related services when the parties are at impasse and cannot reach an agreement on a contract.

II. Union Activity and Institutional Response

Most labor law questions for institutions begin when a union seeks to become the collective bargaining representative of a group of employees. For a union to achieve representational status, i.e., the right to represent a group of employees in collective bargaining, it must secure the backing of a majority of employees in an appropriate bargaining unit. Union campaigns begin with union organizers (who may be employees or professional union organizers who work for the union) seeking to secure signatures on union authorization cards to show support for the organizing union. The cards can then be used to demonstrate majority status to an employer and ask for voluntary recognition; or to secure an election through the labor board to determine the issue; or, under some state labor laws, to serve as the employee's "vote" in favor of the union through a card check method of certification.

In the face of such activity, an administration should be prepared to immediately deal with the following issues:

1. Whether to begin an information campaign against or in response to the union drive and, if so, how aggressive should the campaign be;
2. How to manage union solicitation on campus; and
3. What position to take on possible bargaining unit questions.

Time is of the essence in such matters because supervisors need to know their legal rights and obligations so that unfair labor practices are not committed; employees will want to know the administration's position on unionization and will seek answers to a myriad of questions; and union organizing can take place very quickly. As will be explained below in section VI, once a petition for representation is filed with the NLRB, a private college or university will need to decide upon its unit position in a matter of a few days and may be facing an election in as short a time as three weeks. Public sector petitions may also be processed quite expeditiously.

Thus, determining the institution's legal and political positions should be considered well before a petition is filed, since at that point the institution loses the luxury of time.

III. Whether and How to Respond to Union Activity on Campus

The very first question an administration must answer when union activity begins on campus is what position to take on the activity. Will the administration remain neutral? Will it seek to discourage union activity? Will it send information to employees about unionization? Will it launch an aggressive anti-union campaign? Administrations should consider such questions well in advance of any union activity. Many administrations will sit silent when faced with union activity and simply let employees decide the matter without any interference or campaigning. Others will aggressively campaign against the union. Still others will take one position or another depending on the group being organized. However, it is beyond dispute that staying neutral in a union campaign almost always results in a union victory, as employees will be hearing only one side of the issue.

In addition, many unions will ask the employer to voluntarily recognize the union provided that the union secures enough signed union authorization cards. Or, if an election is to be held, the union may ask the administration to remain neutral and not communicate with employees. Again, an administration should have its position clear on such matters as a matter of institutional policy well in advance of any specific union drive.

IV. Rules on Solicitation

During a union organizing campaign, questions arise as to the extent to which employers must allow union solicitation on their premises. This area of labor law has been developed by the NLRB, state boards, and the U.S. Supreme Court over decades. Generally, in sorting out questions about union solicitation, the case law balances the right of employees to engage in union activity while at work and the right of employers to operate their businesses. The following broad principles generally apply to union solicitation and access to employer property:

1. Employers may prohibit solicitation only during *working time* (as opposed to working hours). When employees are on non-working time (e.g., meal periods, breaks, or before or after work), the employer cannot prohibit solicitation activity.
2. Employees can solicit in work areas, absent special circumstances. (A work area will vary by employee category. For example, for faculty and graduate student worker campaigns, the classrooms and science labs would clearly be work areas; a faculty lounge would not be. Suites of offices for clerical and professional staff would likely be work areas in most settings. Except for dining service workers, the campus' dining halls and cafeterias would not be work areas.)
3. Employers may prohibit distribution of literature both during working time and in working areas (even when employees are on non-working time). However, union authorization cards are not considered "literature" and thus solicitation by means of such cards may occur in work areas, as long as the employees involved are on non-working time.
4. Employers are not required to allow *non-employees* — such as union business agents and organizers — access to their property. However, it generally cannot restrict non-employee union organizers from being in places on campus where members of the general public would normally be allowed to go.

5. In all cases of solicitation, the rules must be applied in a non-discriminatory manner (i.e., union solicitation cannot be barred while other forms of solicitation are approved), and usually non-solicitation policies must be in writing.

State institutions should check with their labor counsel regarding any particular rights of access to unions that the local state labor law may provide, such as access to email, bulletin boards, meeting space, etc.

Legal issues aside, colleges and universities typically have open campuses, numerous buildings with available meeting spaces open and available to the public, and loose policies on restricting solicitation — all of which tends to facilitate solicitation and union organizing.

V. Communication with Employees

An administration is free to communicate with its employees during union campaigns and is free to campaign against the union if it chooses to do so. The administration can continue to run the institution, administer policies, and carry out normal discipline during union campaigns provided it does so in a lawful and non-discriminatory fashion. Some basic guidelines derived from case law should be followed.

A. What Administrations Can Do and Say

1. The administration through its deans, managers, and supervisors can exercise free speech rights to express opinions about the union, including statements that the administration hopes the union is not successful.

2. The administration can discuss anything factual about the union or unionization.

3. Members of the administration can share personal experiences that they or their family members have had with unions.

4. The administration can urge employees to vote in an election and can ask employees to vote against the union or in favor of management.

5. The administration can discuss and emphasize what it has done for employees without a union in terms of wage and benefit gains; responsiveness to employee concerns; how the complaint procedure has worked; etc.

6. The administration can inform employees:

   a. that under the law employees have a choice about unionization, and that they should consider that choice very carefully.

   b. that employees do not have to sign union authorization cards, and they do not have to give in to peer pressure.

   c. that they are not legally required to speak with union representatives.

   d. that they are not required to allow union representatives into their homes.

e. that they are not required to allow union representatives—whether employee organizers or outside union agents—to disturb them at work or to allow fellow workers to disturb them while they are working. (Indeed, as previously noted, the employer may prohibit solicitation during work time, as long as other solicitations are prohibited as well.)

f. that signing a union authorization card does not require that one vote in support of a union in a subsequent election.

g. that the union is not lawfully permitted to threaten or harass an employee into supporting a union or for not supporting the union.

h. that in those states that allow card check certification, that signing a card is tantamount to voting yes and is binding.

i. that the law does not guarantee anything in a union contract.

j. that either side can propose changes to the status quo.

k. that negotiating/bargaining a first contract can take months and point out how long it has taken to negotiate other union contracts.

l. for most public sector institutions, the fact that strikes are illegal and that employees engaging in a strike may be subject to dismissal.

m. that for institutions in the private sector, that a union may call a strike to pressure the administration to accede to its bargaining demands; that the union has engaged in strikes at other institutions (if factual); that employees are not paid if they strike; that there is no guarantee of retroactive pay after a strike; and that strikers may be permanently replaced while on strike.

n. about what provisions are contained in other union contracts at the institution or elsewhere.

o. about what topics are not subject to bargaining under applicable law.

The employer can also inform employees about the disadvantages of unionization, including:

1. the cost of union dues and representation fees, including actual amounts charged to employees in other bargaining units represented by the same union.

2. the meaning of union exclusivity when it comes to negotiating terms and conditions of employment and the potential loss of a direct relationship between management and employees.

3. factual information about unions in general or the specific union on campus, including salaries of union leadership and news about unions from the media.

It is worth underlining that advice of counsel is critical even when the administration is communicating indisputable legal concepts, as the manner of presentation, the context in which the statements are made, and other surrounding circumstances can still result in an unfair labor practice if, in its totality, the institution's message is threatening.

B. What Administrations Cannot Do or Say

1. Threaten - The employer cannot threaten employees with discipline or discharge, or with loss of compensation, benefits, or favorable working conditions because they are considering a union or because they sign a union card. (The employer is not entitled to see who signs a union card and will not know unless the employee or the union discloses this information.)

2. Coerce – The employer cannot treat employees worse because of union activities (e.g., layoff, discharge, suspend, warn, demote, reassign, change duties, introduce tougher disciplinary rules, do away with desirable policies, take away overtime, change shifts or hours, give a poor evaluation, give a lower salary increase, take away benefits, fail to implement scheduled salary increases or improvement in benefits) because of union activities.

3. Discriminate – The employer cannot discriminate against employees because they support (or oppose) a union.

4. Promise – The employer cannot promise improved benefits or working conditions if employees drop their support of a union.

5. Granting of benefits – The employer cannot grant new benefits or better working conditions to influence employees into dropping their support of a union or voting against a union. However, this does not prohibit the institution from moving forward with previously announced salary or benefit programs.

6. Interrogation- The employer cannot question employees about their union activity or union sympathies (pro or con). The employer cannot ask employees if they signed a union card or seek to identify employees who did sign a card. Employers cannot ask who would vote for the union or who goes to union meetings, nor can they ask about the organizing activities of the union or its supporters. However, the employer may listen and respond to employees who raise questions or who wish to talk about unions, the union cards, the union authorization cards, the election process, the card check process, or the institution's policies.

7. Engage in Surveillance - The employer cannot go to union meetings to spy on employees or to see who is supportive of the union.

VI. Union Certification Process

After gaining employee support through card signing, a union can be certified as the representative of a group of employees through one of the following means:

A. Voluntary Recognition

If a union obtains support from a majority of employees, an employer is free to voluntarily recognize the union as the exclusive representative of the employees in the proposed bargaining unit. Majority status may be demonstrated by the signed union authorization cards. An employer who is inclined to voluntarily recognize a union will sometimes have the cards certified as valid by a neutral arbitrator.

B. Election Method

If an employer does not wish to voluntarily recognize a union, the union must then seek an election under the NLRB rules (for the private sector) or a comparable state labor relations commission. To have such an election, the union must first obtain a "showing of interest" in the form of signed union authorization cards from 30% of the employees in an appropriate bargaining unit. Then, the union can file a petition with the NLRB seeking an election.[7] A similar approach is used under most state labor laws as well. Following resolution of any bargaining unit issues, either by agreement of the parties or by decisional action, a secret ballot election will be conducted by the labor board, usually on the employer's site but under certain circumstances by mail.

The outcome of a union election is decided by a majority of valid votes cast, just like a political election. Many employers pay too little attention to this fact and do a poor job in encouraging and facilitating voter turnout. Union supporters always turn out to vote; those opposed may or may not. As a result, with low voter turnout, a small minority can bind all of the other employees in the unit to union representation.

A union victory means the union is certified as the exclusive representative of all the employees in the bargaining unit. Under the NLRA, such certification cannot be challenged for at least one year. If a bargaining agreement is signed, however, it serves as a contract bar to any decertification election for the length of the contract (but not longer than three years).

Unions do not stand for reelection. Employees can attempt to "de-certify" a union they have previously elected, or vote in a different union, but to do so, they must again get at least 30% of the unit to sign cards seeking such a decertification election. Management can play no role in soliciting support for such a movement; this must be entirely employee-led. For this reason, decertifications are extremely rare.

C. Card Check

In some states, a "card check" is an alternative method by which a union can become the certified bargaining representative for public sector employees in an appropriate bargaining unit. There is no election with a card check. Instead, the union secures signed union authorization cards from more than 50% of the employees in an appropriate bargaining unit. The state labor board verifies the number of cards and then certifies the union as the majority representative for that group of public employees. Several states, including New Jersey, Illinois, New Hampshire, Connecticut, and Massachusetts have enacted card check legislation.[8] The NLRA does not recognize the card check method.

VII. Bargaining Unit Positions

A. Who is in the Bargaining Unit? Community of Interest

When a petition for representation is filed with the NLRB or with an equivalent state labor relations board, the initial questions are whether the union is seeking to represent an appropriate unit of employees who share a community of interest with each other and whether certain classifications of employees should be excluded due to possible conflicts of interest. The institution needs to decide quickly whether or not the unit is proper or whether it is inappropriate for a variety of reasons, including the possibility that the union has excluded other groups of employees who share a community of interest with the petitioned unit. It also needs to decide whether certain individuals have been inappropriately added or deleted from the proposed unit (such as supervisors or managers or confidential employees) or whether there are other employees in the proposed unit who do not share a community of interest with each other. For faculty petitions under the NLRA, the institution needs to consider whether it will argue that its faculty are all managerial under the 1980 Supreme Court decision involving *Yeshiva University*.[9] These are complex issues that must be reviewed with labor counsel, if not before the filing of a petition, then immediately thereafter. Petitions are processed extremely quickly under NLRB procedures and many state labor board regulations. For example, under the NLRB regulations, an institution must file its statement of position on the proposed unit within seven days of the petition and must be prepared to litigate any unit issues within eight days of the petition's filing.[10] Elections are usually conducted within a month of the initial filing.

Typical higher education bargaining units will include: service and maintenance workers; clerical/technical/ administrative workers; full time faculty; part time/adjunct faculty; professional employees; security or police units; and student worker units.

As noted, in addition to individual issues of unit inclusion, discussed below, institutions should also examine the scope of the proposed unit to assess whether it is too limited and whether the union, due to the lack of their support, has improperly excluded from the proposed unit other employees who actually share a similar community of interest with the petitioned group.

Where the parties are unable to come to agreement on the appropriate bargaining unit configuration, the labor board decides which unit is most appropriate and which contested positions should be in or out.

B. Exclusions from Bargaining Units: Supervisors, Managers, and Confidential Employees

Labor relations is dichotomous in nature, with individuals either falling in the employer or employee bucket. Under the NLRA, supervisors and managers are not considered employees under the Act and are excluded from bargaining units due to the inherent conflict of interest. Considerable litigation has ensued at the NLRB and state labor boards over decades as to whether disputed individuals should be deemed "supervisors," and thus, excluded as statutory "employees," based on the scope of their authority.[11]

In contrast to the NLRA, supervisors may unionize under many public sector statutes. The definition of a supervisor will vary from state to state, but the definition used in the NLRA is often applied to the public sector as well. In most cases, supervisors in the public sector can form their own bargaining unit but may not be in the same unit as the employees they supervise.

Like supervisors, managerial employees are excluded from coverage under the NLRA.[12] Managerial employees are those who formulate and effectuate management policies. In the

public sector, some statutes will define managerial employees in a different manner than the NLRA or not reference them at all. But oftentimes, high level managers will be excluded from organizing in the public sector as well.

As noted above, the Supreme Court held in *NLRB v. Yeshiva* that the absolute authority of the Yeshiva faculty in academic matters, including grading policies, admission and matriculation standards, curriculum determinations, academic calendars, and course schedules, satisfied the managerial exclusion under the NLRA such that collectively all faculty at the institution were deemed managerial and ineligible to unionize.[13] The Yeshiva faculty essentially represented management interests by taking discretionary actions, or by effectively recommending some, that controlled or implemented University policy. Since that decision, many private institutions have been successful in arguing that their full-time faculty meet the *Yeshiva* standards, but at other private universities where faculty members do not wield such authority and power, they have been permitted to bargain collectively under the NLRA.[14]

The NLRB's more recent decision in *Pacific Lutheran University*, *supra,* in addition to addressing the religious exemption issue (discussed below), also created new tests for determining whether or not petitioned faculty would be found to be managerial under *Yeshiva*. The Board's approach created higher hurdles for institutions to prove managerial status. While this decision may be revisited under the current Republican-dominated Board at some point, an institution seeking to make a *Yeshiva* argument should review the Board's framework in that decision very carefully.

In contrast to the private sector, full-time faculty in the public sector are permitted to unionize and bargain collectively in most jurisdictions. The large majority of unionized full- time faculty in the United States are still in public institutions, including community colleges.

Finally, confidential employees are usually excluded from bargaining units. Such employees are those who work for managerial employees or personnel in labor relations or employee relations, either by being responsible for labor or employee relations or in a confidential supporting role to one who works in these areas. For example, personnel in a human resources department or the administrative assistants to high ranking managers and administrators are generally excluded from bargaining units. The exclusion is designed to avoid inevitable conflicts of loyalties if such individuals were allowed to unionize.

C. Religious Exemption

Institutions that are run by or otherwise affiliated with religious orders may have a threshold argument when a union seeks to organize some of its employees that the NLRB does not have jurisdiction over the employees at issue. In *NLRB v. Catholic Bishop*,[15] the Supreme Court held that the NLRB could not assert jurisdiction over lay teachers at a church-operated school because to do so would create a significant risk that First Amendment rights could be infringed. The Court feared that Board jurisdiction would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the schools' religious mission" and that "[I]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."[16]

Since then, there has been considerable litigation over whether employees of religious institutions can unionize under the NLRA.[17] The NLRB's most recent test to determine whether or not it will assert jurisdiction over a religious institutions in a given case is *Pacific*

Lutheran University,[18] where the Board stated that, to successfully claim that the Board does not have jurisdiction, the institution must first demonstrate that it "holds itself out as providing a religious educational environment" and that once that threshold test is met, it must also demonstrate that it "holds out [the petitioned-for employees] as performing a specific role in creating or maintaining the university's religious educational environment."[19]

Certainly, religious institutions should explore this question when faced with a union petition for any group of its employees.

D. The Special Case of Student Workers

In the private sector, the NLRB has flip-flopped over the years on the question of whether student workers could unionize. The NLRB first ruled in the 1970s that students who work as teaching assistants and research assistants are primarily students with no right to unionize. In 2000, however, in the *New York University* case,[20] the Board found that student assistants were also employees under the Act with the right to unionize. In 2004, in *Brown University*, the Board reverted back to its earlier position that student employees had no right to unionize. However, in 2016, the NLRB reversed course again and ruled that graduate student assistants, whether serving as teaching assistants or research assistants, have the right to unionize under the NLRA.[21]

Graduate students have bargained collectively in the public sector for many years, and in states like New York, New Jersey, California, Massachusetts, and Washington, among many others, graduate assistants have long been represented by labor unions.

VIII. The Union is Certified: What Now?

A. In General

Certification of a union brings with it immediate changes to the workplace, and an administration should promptly educate its supervisors and managers regarding those changes. First and foremost, the administration must understand that the union becomes the *exclusive* representative of the employees on all matters affecting wages, hours, and other terms and conditions of employment. Exclusivity means that the employer can only deal with the certified union on all such matters. In broad strokes, this itself creates two directives:

1. The employer cannot deal unilaterally with bargaining unit employees on bargainable topics, unless authorized by the collective bargaining agreement that the parties may have negotiated or other understandings.
2. The employer cannot deal with any other "labor organization," as defined by law, on such matters.

It does *not* mean that the employer can no longer talk to its employees or assign work or otherwise operate its business in its normal course, nor does it mean that management is restricted in areas that are not mandatory subjects of bargaining, such as selection of supervisors or general business operations. What it does mean is that the employer cannot make any changes in bargainable areas, such as compensation or working conditions, unless the union is notified and has an opportunity to bargain over the proposed change or unless the employer has secured the right to do so through negotiations of the master agreement.[22]

Under the concept of exclusivity, even if the employees affected by a proposed change are in favor of the change, and even if it provides a benefit to the employees (such as a wage increase), the union still needs to be given the opportunity to bargain over the proposed change by virtue of its status as the exclusive representative.

B. Status Quo During Initial Months Following Union Certification

Prior to negotiation and execution of an initial collective bargaining agreement, management is generally required to maintain the status quo. A myriad of issues will arise as to what an administration can do unilaterally as part of the status quo and what must be bargained. Certainly, many of the day to day operations of the institution can continue without change. For example, normal work assignments will continue as will maintenance of benefit programs and current wage and salary levels.

But if an institution wishes to change the status quo, such as by increasing the job responsibilities of a unit member, modifying someone's salary, laying off employees, making major changes in shift assignments, or otherwise move toward a substantial alteration of the status quo, it must first notify the union of its intent to do so and give the union an opportunity to negotiate over the change. However, the employer does not have to bargain with the union on planned changes to the status quo that *preceded* the union's certification, provided an employer can demonstrate, if challenged, that the decision to make the change preceded the union election.

C. *Weingarten* Rights

One rule that immediately kicks in with unionization is the right of an employee to insist on a union representative in any investigatory meeting that might lead to discipline. This is the so-called *Weingarten* right, established by the Supreme Court in 1975 in *NLRB v. J. Weingarten, Inc*.[23] In that case, the Court held that employee insistence on union representation at an employer's investigatory interview, which the employee reasonably believed might result in disciplinary action, is protected concerted activity. Accordingly, the discipline of an employee for refusal to cooperate in such an interview without union representation is a violation of Section 8 (a) (1) of the Act, which forbids employers from interfering, coercing or restraining employees in the exercise of their rights under Section 7 of the NLRA.

Thus, whenever an employer is investigating an employee's possible misconduct, and where it is reasonable for the employee to assume that disciplinary action may follow, the employee may request and be entitled to a union representative before answering questions. It should be noted that there is no obligation on the part of the employer to inform the employee about the ability to request such representation. Instead, the employee must ask for such representation. It also should be noted that the employer does not have to conduct a meeting at all if it so chooses (although this would result in not getting the employee's side of the story).

Many, if not all states, through their labor boards and commissions, have adopted the *Weingarten* principle in their public sector labor relations.

D. Union Request for Data

A union has other rights that flow from its status as the exclusive representative of the employees in a given bargaining unit with respect to wages, hours and working conditions. One of the most important is the right to information and data from the employer that the union needs

to carry out its representative function. The union's right to such information and the employer's obligation to comply is part of the duty to bargain in good faith. In *NLRB v. Truitt Manufacturing Co.*,[24] the U.S. Supreme Court held that employers have an obligation to furnish relevant information to union representatives during contract negotiations.

Employers may object to information requests on grounds that the data or information requested is not relevant or necessary or available. However, the NLRB and courts favor a broad discovery type standard in deciding what should be turned over and what is relevant. Employers also can raise claims of confidentiality or privilege, but these are limited defenses.[25] Employers also have the right to request information from the union, although more often it is the union that is doing the requesting.

IX. The Duty to Bargain and the Nature of Collective Bargaining

A. The Duty to Bargain in Good Faith

The certification of a union means that the union will demand that the employer bargain a collective bargaining agreement that will cover all unit members for an agreed upon length of time, usually one to five years. The employer has a corresponding duty under the NLRA and under state laws to bargain in good faith with the certified representatives of its employees on wages, hours, and other terms and conditions of employment. To bargain collectively means simply to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment with the intent of reaching an agreement. To satisfy the obligation to bargain in good faith, a party must demonstrate a present intention to reach agreement. This implies an open mind and a sincere interest in reaching an agreement. Neither side, however, is required to make concessions. Hard bargaining is lawful.

B. The Scope of Bargaining

Under the NLRA, the duty to bargain and the topics over which management must bargain are defined by the statute in Section 8(d).[26] Bargaining subjects are generally divided into three categories: mandatory, permissive and illegal. The mandatory subjects are those over which an employer must agree to bargain (such as wages and benefits or layoff procedures). The permissive category includes subjects that an employer need not negotiate over, but that it could lawfully agree to negotiate (such as employee input into the evaluation of a dean or manager). Illegal items are not allowable at all for the parties to discuss. (An example of an illegal subject for bargaining would be a union demand that the employer can only hire individuals who are already union members or, in the public sector, that all unit employees pay dues to the union as a condition of employment.)

Mandatory subjects in the public sector can vary. Sometimes the public sector enabling legislation will articulate the precise areas that must be negotiated, or at least include some illustrative examples. But in general, mandatory subjects are often considered to be those that "vitally affect" employees or that "intimately and directly affect" employees. The precise formulation of the test for negotiability may vary from jurisdiction to jurisdiction.

C. Impasse

An impasse in bargaining exists where there are irreconcilable differences between the parties, and after full good faith negotiations, the parties are at a point of stalemate such that further negotiations would be futile. Whether a genuine impasse exists is very much fact-based. Some

factors considered in determining whether the bargaining indeed is at impasse include: the length and history of the bargaining, the fluidity of positions, statements or understandings of the parties concerning impasse, the nature and importance to the parties of the issues, the extent of difference between the parties on particular issues, and others.

In the private sector, if the parties reach an impasse, they will call in the services of a federal mediator. The Federal Mediation and Conciliation Service was formed along with the NLRA to help employers and unions reach settlement and avoid strikes and lockouts. However, mediators have no power to impose an agreement nor may they publicly recommend any particular resolution. The real power in the private sector lies in the union's right to strike (assuming the contract has expired) and management's right to impose its last best offer – something private sector employers can do if an impasse truly exists- or lock out the employees.

If a strike occurs in the private sector, the employer cannot fire the strikers; however, the employer is free to hire replacements, on either a temporary or permanent basis to keep the business operation going. The rights of the strikers to return to their jobs if replaced depends on whether they are engaging in an unfair labor practice strike – a strike to protest the employer's unfair labor practices – or an "economic" strike, the more common strike undertaken to secure a new bargaining contract. With an economic strike, the striker has a right to return to their position provided it has not been filled with a permanent replacement. If permanently replaced, the "economic" striker does not have the right to immediately return to their job and will only have preferential hiring if the replacement should leave. With an unfair labor practice strike, by contrast, the striker has a right to return even if they have been replaced.

In the public sector, where strikes are generally not permitted,[27] the parties are required to pursue impasse procedures prescribed by law. Those procedures can include mediation, advisory fact-finding, binding interest arbitration, and other third-party processes that are designed to assist the parties in reaching an agreement. These procedures vary from state to state.

X. Life with a Union: Handling Disputes

Virtually all collective bargaining agreements contain grievance and arbitration provisions to provide an orderly method of resolving alleged contract violations during the term of the agreement. The grievance and arbitration procedure in collective bargaining agreements is not a system dictated by statute. It is wholly designed by the parties themselves when they negotiate their contract as their own quasi-judicial system. Such provisions can be designed and re-designed to meet the parties' sense of what works best for them. Further, in the private sector especially, it serves as a substitute for the weapons of strike and lockout. That is, a union will normally agree to a "no strike" clause in the collective bargaining agreement in exchange for an employer's agreement to let a neutral third-party resolve contract disputes in a binding fashion. Thus, while not specifically stated as such in writing, the union essentially gives up its statutory right to strike under the NLRA in exchange for a system under which a neutral arbitrator will resolve disputes during the life of the contract.

Decisions by arbitrators under collective bargaining agreements are usually binding and can only be overturned in court if the arbitrator exceeds the authority granted by the contract, or has engaged in fraud, improper partiality, or misconduct as part of the arbitration proceedings. The courts generally favor arbitration as a sensible way of resolving disputes and thus give great deference to the decisions and awards of arbitrators.

CONCLUSION:

College administrators and in-house counsel are well-advised to seek out expert counsel in the area of labor law and to think pro-actively about possible union organizing drives and how the institutions might respond well in advance of any activity. As noted, union organizing can emerge suddenly, and long-range legal and political decisions regarding legal issues on bargaining units and long-range political decisions on how to deal with organizing require deliberate thought and are best considered without the pressure of an actual campaign or labor board petition for representation.

The challenges of negotiating a collective bargaining agreement are beyond the scope of this Note. But suffice it to say that when a group of employees does secure union certification, great attention must be paid to negotiating that initial collective bargaining agreement. First contracts will establish basic contractual principles and concessions that will be difficult to overturn during future negotiations over successor contracts.

RESOURCES:

NLRB WEBSITE (last visited Jan. 9, 2019) (providing extensive information about the rights of employees and employers under the National Labor Relations Act, as well as its rules and regulations and decisional law. Most public sector labor boards and commissions have their own web sites with relevant information).

THE NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION AND THE PROFESSIONS (last visited Jan. 9, 2019) (centralized source for information about academic union organizing and collective bargaining for some 50 years. The Center publishes numerous reports and papers on academic collective bargaining and holds its annual conference in New York City every April).

THE KEEP, (last visited Jan. 9, 2019) (repository of newsletters from the National Center for the Study of Collective Bargaining in Higher Education and the Professions).

Stanley J. Brown and George W. Ingham, *How and Why Colleges and Universities Must Prepare Now for the NLRB's Proposed "Quickie" Elections Rule*, NACUANOTES, Vol. 12, Iss. 4 (May 1, 2014).

Nicholas DiGiovanni, Jr., "Negotiating a First Collective Bargaining Agreement," (NACUA Annual Conference 2002).

Nicholas DiGiovanni, Jr., *The New Focus of Academic Organizing: Private Institutions Now Face Academic Collective Bargaining*, JOURNAL OF COLLECTIVE BARGAINING IN THE ACAD., Vol. 7 (Dec. 2015).

Nicholas DiGiovanni, Jr., *This Much I Know is True: The Five Intangible Influences on Collective Bargaining*, JOURNAL OF COLLECTIVE BARGAINING IN THE ACAD., Vol.3, Issue 1 (Feb. 2012).

Nicholas DiGiovanni, Jr., Sara E. Gross Methner, and Terrance J. Nolan, "Update on Organizing Campaigns: Adjuncts, Graduate Students and Athletes, Oh My!" (NACUA Annual Conference June 2017).

ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 7TH ED. (Kenneth May ed., 2012).

Neil Goldsmith and Kate Hendricks, *Bargaining with Your Students: The Unionization of Student Assistants in the Aftermath of the NLRB's Columbia University Decision*, NACUANOTES, Vol. 15, Iss. 11 (July 21, 2017).

THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT (Patrick Hardin, John E. Higgins, Jr., Christopher T. Hexter, John T. Neighbours eds., 2018).

Daniel Julius and Nicholas DiGiovanni, Jr., *What's Ahead in Faculty Collective Bargaining? The New and the Déjà Vu*, JOURNAL OF COLLECTIVE BARGAINING IN THE ACAD., Vol.4, Article 5 (Feb. 2013).

Richard F. Liebman, "Top 10 Things the General Counsel Should Know about Labor Law" (NACUA Annual Conference 2012).

Robert Zielinski, *Practical Steps to Avoid Joint Employer Liability Under the New National Labor Relations Board Standards* NACUANOTES, Vol 15, Iss. 6 (Apr. 5, 2017).

END NOTES:

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[2] 29 U.S.C. §§ 151-169 (2018).

[3] *Id.* § 157 ("Employees shall have the right to self-organization; to form, join, or assist labor organization; to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities."); § 158 (requiring employers to bargain in good faith over wages, hours, and other terms and conditions of employment and generally setting forth unfair practices by employers and labor organizations).

[4] *Id.* § 155 (establishing the NLRB).

[5] A sampling of state laws that allow public sector collective bargaining include California's Higher Education Employer-Employee Relations Act (HEERA) § 3560 et seq. (2013); Massachusetts General Laws Chapter 150E (2013); Vermont State Employees Labor Relations Act, 3 V.S.A. Section 901 et seq

(2017); New Hampshire Public Employee Labor Relations Act, RSA ch. 273-A (2018); New York Public Employees' Fair Employment Act (Taylor Law), Article 14, Civil Service Law (2018). By contrast, states like North Carolina, South Carolina, Georgia, Texas, and Virginia still do not allow collective bargaining by public employees.

[6] For example, Vermont has a statute covering state employees, including employees of the University of Vermont and the Vermont State Colleges. It has separate –and different – statutes covering teachers and municipal employees. Among the differences between the statutes is that strikes by K-12 teachers in Vermont are legal, but strikes by state employees, including state college and university faculty and employees, or by other state employees, are illegal.

[7] NATIONAL LABOR RELATIONS BOARD, Conduct Elections (last updated: Apr. 14, 2015).

[8] *See, e.g.,* N.J.Admin.Code § 19:11-1.2(a)(10) (2019); Ill. Admin. Code tit. 80, § 1110.105 (2017); Massachusetts General Laws Chapter 150E, Section 4 (2013).

[9] *NLRB v. Yeshiva University,* 444 U.S. 672 (1980). Under the Supreme Court's ruling, if an institution can establish that the faculty collectively controls or effectively recommends decisions in essential managerial functions such as establishing and revising the curriculum; approving major, minors and academic programs; setting degree standards and requirements; and developing student admissions and matriculation standards and other student policies; and academic policies; and that they effectively recommend on decisions involving reappointment, promotion, tenure and other personnel actions, then the institution may have a credible case to argue that its faculty are managerial. The most recent NLRB case involving faculty unionization is *Pacific Lutheran University*, 361 NLRB No. 157 (2014), in which the NLRB articulates its present approach in analyzing *Yeshiva* cases and reviews dozens of past Board decisions interpreting *Yeshiva*.

[10] 29 CFR §§ 102.63-102.67 (2018).

[11] "Supervisor" is defined under the NLRA as "[a]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, 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." *29 U.S.C.* § 152(11) (1978).

[12] *NLRB v. Bell Aerospace Co.,* 416 U.S. 267 (1974).

[13] *NLRB v. Yeshiva,* 444 U.S. 672, 691 (1980).

[14] For example, in the following cases, faculty have been found to be managerial: *Ithaca College*, 261 NLRB 577 (1982); *Thiel College,* 261 NLRB 580 (1982); *Duquesne University,* 261 NLRB 587 (1982); *College of Osteopathic Medicine & Surgery*, 265 NLRB 295, 111 LRRM 1523 (1982); *Trustees of Boston University* 281 NLRB 798 (1986) enf'd 835 F2d 399 (1st Cir. 1985); *Lewis University v. NLRB,* 765 F2d 616 (7th Cir. 1985); *American International College*, 282 NLRB 189 (1986); *Livingstone College*, 286 NLRB 1308 (1987); *University of Dubuque*, 289 NLRB No. 34 (1988); *Lewis & Clark College,* 300 NLRB No. 20 (1990); *Elmira College*, 309 NLRB No. 137 (1992); *LeMoyne-Owen College,* 345 NLRB No. 93 (2005).

Contrast the following cases where managerial status was not found: *Stephens Institute v. NLRB*, 620 F2d 720, 104 LRRM 2493 (9th Cir. 1980*) cert. denied* 449 US 953 (1980); *Bradford College*, 261 NLRB 565, (1982); *Loretto Heights College,* 264 NLRB 1107 (1982) *enf'd* 742 F 2d 1245 (10th Cir. 1984); *Florida Memorial College,* 263 NLRB 1248 (1982) *enf'd* 820 F 2d 1182 (11th Cir.1987); *Cooper Union*, 273 NLRB 1768 (1985) *enf'd* 783 F 2d 29 (2d Cir.) *cert. denied* 479 US 815 (1986); *Marymount College,*

280 NLRB 486 (1986); *St. Thomas University* 298 NLRB No. 32 (1990); *University of Great Falls,* 325 NLRB No. 3 (1997).

[15] 440 U.S. 490 (1979).

[16] *Id.* at 502.

[17] *University of Great Falls*, 331 NLRB 1663 (2000); *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 401 (1st Cir. 1985); *Trustees of St. Joseph's College*, 282 NLRB 65, 67–68 (1986).

[18] 361 NLRB 1404 (2014).

[19] *Id.* at 1404.

[20] *New York University*, 332 NLRB No. 111 (2000).

[21] *Trustees of Columbia University in the City of New York,* 364 NLRB No. 90 (2016).

[22] This latter reference is one of the reasons why bargaining a contract is so difficult; the employer seeks to secure and maintain as much flexibility as possible to continue to deal "unilaterally" with its employees. The union usually seeks to circumscribe as much as possible management discretion as much as possible.

[23] 420 U.S. 251 (1975).

[24] 351 U.S. 149 (1956).

[25] In *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), the Court ruled that an employer did not have to turn over to the certified union certain texts of standardized tests that the employer used to select applicants for promotion on the grounds that the tests, which had been prepared and validated at considerable expense, would become useless in the future if not kept confidential. Cases have also established that employee medical records that may be in the possession of the employer may not have to be disclosed.

[26] **"**For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . . " 29 U.S.C. §158(d).

[27] While illegal strikes do occur, such strikes are often subject to immediate injunctive action and/or termination of the strikers.

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