CLIENT ALERT: NLRB Proposes New Rule That Would Eliminate Students' Rights Under the National Labor Relations Act – By Nicholas DiGiovanni

On Friday September 20, 2019, the National Labor Relations Board ("the Board") issued its long-awaited proposed rule on student unionization that would effectively remove from the protection of the National Labor Relations Act all students who perform any work for private colleges and universities that are in connection with their studies. Specifically, the proposed rule states that "students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are not "employees" within the meaning of Section 2(3) of the Act."

With the issuance of the rule, the NLRB seeks to end the decades long-pendulum swings on this issue reflected in prior Board rulings. Since the Board first took jurisdiction over private colleges and universities in 1970, the issue of whether student teaching assistants and research assistants who performed work for the institution in connection with obtaining their degree has resulted in inconsistent rulings depending on which party held the White House and the constituency of the NLRB. For years, rulings such as *Adelphi University*, 195 NLRB 639 (1972) and *Leland Stanford University*, 214 NLRB 621 (1974) held that such individuals were primarily students and should not enjoy the protections of the National Labor Relations Act.

In 2000, however, the Board for the first time ruled that there was nothing inconsistent with such students also being considered employees, as they performed services under the direction of the institution and received compensation in varying forms for such service. Consequently, such student workers should be entitled to the protection of the Act. *New York University,* 332 NLRB 1205 (2000)

In 2004, with the Republicans then in control of the Board, the NLRB reversed the NYU decision and ruled that, since teaching assistants and research

assistants were primarily students, they should not be covered by the Act. *Brown University*, 342 NLRB 482 (2004)

This decision held until August 2016, when the Obama Board once again reversed course and granted NLRA coverage to such individuals. *Columbia University*, 364 NLRB No. 90 (2016). Following this decision, teaching assistants and/or research assistants unionized at many institutions, including Harvard, Tufts, Brandeis, University of Chicago, The New School, American University and Columbia University. While some of these schools challenged the Board ruling, and while such challenges were pending, the unions involved in those cases voluntarily withdrew their petitions in a calculated move that was designed to eliminate the possibility that the Trump NLRB might reverse *Columbia.* Thus, there have not been any pending cases before the Board to address *Columbia*. In May of this year, however, the NLRB announced that it would nonetheless address the issue through its rulemaking authority rather than through case adjudication.

The current effort by the NLRB – now controlled by Republicans – to utilize the Board's rulemaking authority was designed not only to reverse the *Columbia* decision but also to put the issue to rest for the immediate future. The NLRB noted in the proposed rule:

> *The Board believes that this proposed standard is consistent with the purposes and policies of the Act, which contemplates jurisdiction over economic relationships, not those that are primarily educational in nature. This rulemaking is intended to bring stability to an area of federal labor law in which the Board, through adjudication, has reversed its approach three times since 2000.*

The Board noted further:

> *…the proposed rule is based on the view that the common-law definition of employee is not conclusive because the Act, and its policy promoting collective bargaining, "contemplates a primarily economic relationship between employer and employee, and provides a mechanism for resolving economic disputes that arise in that relationship."*

Before the rule becomes final, there is a 60-day public comment period from September 23 – the date of publication in the Federal Register; and a 67-day period from September 23 for reply comments. Thus, the end of the comment and reply-to-comment period would be December 1. After that, the Board can issue the proposed rule as a final rule any time it chooses, but there is no date certain for that to occur. Further, the Board can always extend the comment period in its discretion. At the very earliest, then, the final rule would go into effect sometime in December of this year but possibly early in the new year.

The impact of this proposed rule will vary considerably from institution to institution depending on whether they currently have an NLRB-certified bargaining unit; whether they have voluntarily recognized a union as a representative of students; and whether they are in the midst of bargaining a first contract or whether they have a collective bargaining agreement currently in effect.

This rule does not affect in any way public sector institutions, many of whom have had graduate student unions for many years.

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