

Your Undergraduate Students Are Preparing For Unionization. Are You?

In recent months and weeks, undergraduate student union organizing has picked up pace rapidly. On March 22, 2022, Wesleyan University voluntarily recognized a bargaining unit of undergraduate resident advisors following a March 4 demand, and the parties **have already begun bargaining for a first contract**. Also on March 4, the existing Union of Grinnell Student Dining Workers **filed for an election** to expand its unit to more than 750 student workers campus-wide; a mail ballot election was held during April 2022 and votes are scheduled to be counted on Tuesday, April 26. A representation hearing is pending (following a temporary stay in proceedings) on a similar wall-to-wall petition filed in October 2021 at **Kenyon College**, and several categories of student workers there are currently striking. Student workers at Hamilton College's admission's office **prevailed in an October 2021 election** with the National Labor Relations Board ("NLRB"). A union of undergraduate students working in Dartmouth College's Dining Hall facilities (unique in that they are not affiliated with an outside organized labor group) recently prevailed in a mail ballot election, and was **certified as the bargaining representative** for that group on April 7, 2022.

Also looming is the prospect of undergraduate student athlete unionization. On September 29, 2021, the NLRB Office of the General Counsel's **issued a memorandum** opining that "certain Players" at colleges and universities are employees entitled to labor law rights under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq., and that even classifying them as "mere student-athletes" constitutes a violation of the NLRA. Testing this theory, the **National College Players Association has already filed an unfair labor practice charge** against the **NCAA, the Pac-12 Conference, and UCLA** as joint employers.

Undergraduate institutions everywhere – particularly those with little to no lived experience with an on-campus union – should be taking notice and taking steps now to develop a responsive plan of action to potential union organizing activity on campus.

Why Is Undergraduate Student Organizing Suddenly Taking Off?

In 2016, the NLRB fundamentally changed the landscape of labor law in higher education when it upheld a unit consisting of undergraduate and graduate student teaching and research assistants in *The Trustees of Columbia University*, 364 NLRB No. 90 (2016) – reversing precedent that had mostly excluded student employees from union organizing rights under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. Since the *Columbia University* decision, however, the vast majority of formal and significant unionizing has occurred at the graduate student level. Bargaining units of graduate assistants have been formed since then at Harvard, Brown, Columbia, MIT, Tufts, Brandeis, Georgetown, Clark University, The New School, and American University. An election for a similar unit is pending at Fordham. Undergraduate-only groups, by contrast, have been few and far between. To date, units of undergraduate student workers have generally been small and defined subsets of the overall campus workforce.

One explanation for this may be a disparity in the groups' relative interest in their work. In the case of graduate students, their assistantship is critically important to (or even a mandatory condition of) the successful completion of their degree. By contrast, undergraduate students generally are not required to work by their institution, and student jobs are often unskilled positions not tied to their degree of study. The financial awards the graduate students assistants receive in connection with their work significantly defray tuition and costs of living, whereas many undergraduate students only work a handful of hours a week (and few full-time students work more than 20 hours/week) earning minimum or low wages; indeed, many schools even limit the number of hours undergraduates are allowed to work. A Ph.D. program is generally seven years long, whereas undergraduates are only on

campus for 2-4 years – during which time they may transfer, study abroad, or significantly vary their course schedules from semester to semester.

The COVID-19 pandemic, however, seems to have changed the calculus to some degree. Undergraduates who depend financially on their student employment income did not have the luxury of forgoing work during the pandemic – highlighting preexisting class tensions with their wealthier student counterparts. Already disadvantaged by diverting study and socializing time to paid employment, working during the pandemic was riskier and more difficult than before. Paid sick time, paid quarantine time, hazard pay, safety protections, and other benefits became more important. All of these considerations are particularly heightened for international students, who (due to **visa requirements** that vastly complicate the process of working for employers besides their own educational institution) have little feasible employment alternatives besides on-campus work. In some cases, frustration over the lack of an administration's attention to student workers during the pandemic can lead to considerations of unionization.

Social justice issues on campus can also be a factor in motivating student workers to unionize. Progressive campus groups share a natural affinity for union organizing generally, and in many cases are part of national organizations with significant resources and support. These groups may provide an impetus for further organizing by students as a means to advance particular social justice issues.

Most importantly, the election of President Biden brought a new Democratic majority at the NLRB, and consequently renewed opportunities for labor groups seeking to organize undergraduate institutions. During the Trump administration, several undergraduate student organizing attempts stalled, likely anticipating a reversal of the *Columbia* decision by the then-Republican Board – or at least a refusal to extend that reasoning to a unit of exclusively undergraduate students. Indeed, in September 2019, that Republican-majority Board **proposed a regulation** that would have officially excluded student employees from the NLRA.

Following President Biden's inauguration, however, that proposed rule was quickly **withdrawn**. By September 2021, the NLRB was **returned to a Democratic majority**. As such, undergraduate groups are likely seeking to take advantage of a Democratic-controlled Board while they can. (The General Counsel for the NLRB has also signaled a willingness to revisit the question of whether student athletes should be considered employees under the Act.). These groups also find built-in allies in their liberal (and tenured) professors, local labor organizations, elected representatives, and **nationally syndicated pro-labor groups**. And after two years of remote or hybrid learning environments, undergraduates are more adept than ever at connecting with their classmates (and with pro-labor allies from other institutions) virtually, using social media platforms, Zoom, GoFundMe, and other virtual tools to hold online rallies, **share resources**, generate union authorization card signatures, and otherwise garner support. The recent **well-publicized victory of the home-grown Amazon Labor Union** has shown that employees need not be sponsored or affiliated with an established union to successfully unionize – which may particularly resonate with undergraduate students at colleges and universities, who are more likely to lack labor ties or prior experience working in a unionized environment.

Finally, in recent days, the NLRB's General Counsel has formally asked the NLRB to require employers to recognize and bargain with any union that presents evidence of a card majority – without an NLRB election – unless the employer can demonstrate a good faith doubt of the union's majority status. Under current law, an employer is not obligated to recognize and bargain with a union unless and until the union succeeds in an NLRB-conducted secret ballot election, except in extreme circumstances where the employer has engaged in serious labor law violations that would make a fair election improbable. Such a stunning change – if adopted by the Board – would reverse decades of labor law and, in most cases, effectively bar employers from insisting on a Board-overseen secret ballot election.

How to Prepare For Undergraduate Student Organizing On Your Campus

A request to voluntarily recognize a union typically comes with a demand for a very quick response. One week, or less, is common. Between engaging legal counsel, developing a position, articulating that position in writing, getting public communications and social media in place, and pulling together lists of employees, there is much to do and little time to waste. If the request is denied or ignored, the group will file a petition with the NLRB (or relevant public sector labor board) seeking an election, setting in motion a quick series of deadlines for responsive position statements, employee information, and other procedural requirements. (As examples, the employer must file its statement of position within eight business days after the petition is filed and a hearing on the petition is usually held within fourteen business days.) Failing to timely comply with these deadlines (even by a matter of hours) can prejudice, or even completely preclude, the employer from raising important defenses.

As such, undergraduate institutions who employ significant numbers of undergraduate students would be well-served to do the following – *before* a voluntary recognition request shows up at your President's doorstep (or Twitter feed).

- **Pay Attention.** Institutions that ignore, or fail to pay attention to, undergraduate student organizing activities on their campus do so at their peril. Ensure that your human resources, communications, and/or legal team is keeping abreast of working condition complaints and unionization efforts on campus, especially on social media. Where possible, think about improving working conditions for the students, including adjusting pay rates, *before* union organizing activity takes off. In many cases employees above all want to be heard in a meaningful way about their work issues, and the absence of a “voice at the table” can be easily filled by an organizing union.
- **Establish a Response Team.** Senior leadership, trustees, human resources, inside and outside legal counsel, communications staff, and employee-facing senior managers all, at a minimum will need to be informed of and on the same page regarding the school's response to union organizing activity. Establishing a response team in advance, and roughly allocating who will be responsible for what first steps in the course of responding to a union organizing campaign (preparing and reviewing/approving press releases, deciding on and preparing a written response to a union, acting as the school's spokesperson, interfacing with outside counsel, etc.), allows you to hit the ground running.
- **Develop Your Philosophy on Unionization.** There are inherent difficulties in bargaining collectively with an undergraduate-student-only group. From the ever-changing composition of a student bargaining unit, to bargaining issue problems arising from student status (e.g., financial aid, academic requirements, Title IX and other federal requirements), to complicated community-of-interest factors (supervisory status, casual status, existing bargaining units, and many others), there are many issues to consider carefully – and there is little time to do so thoroughly and with input from all key stakeholders.

As such, institutions would be well-served to start thinking through a general philosophy on student unionization now well before receipt of a voluntary recognition demand. Are you open to voluntarily recognizing a union through a card-check process overseen by a third-party arbitrator, or will you insist on an NLRA-overseen election? Will you stay silent in regards to unionization efforts, participate in the conversation neutrally, or actively seek to discourage students from unionizing? Will you want to pursue an informational campaign about what it means to unionize? Will you oppose an expanded (“wall-to-wall”) unit, seek to accrete students into existing bargaining units on campus, or try to exclude certain categories of workers from the unit? Depending on the subset of the student workforce at issue, the institution's familiarity and comfort with labor relations matters, and of course, its overall academic philosophy, institutions will want to think through carefully what approach(es) they are comfortable taking.

- **Train Managers and Supervisors.** All managers and supervisors should already have a

general understanding of their employees' rights under Section 7 of the NLRA or similar public labor statute to engage in protected concerted activity for mutual aid and protection. These rights are of heightened importance, however, during a union organizing campaign. Unwitting or well-meaning supervisors and managers curious about union activities (or opposed to them based on their own experience) can easily engage in unlawful surveillance, interrogation, or other conduct that may violate the NLRA or relevant public sector statute – which may be used as fodder to challenge election results. Immediately after learning of initial union organizing activity on campus, institutions would be well-advised to immediately arrange for labor counsel or an experienced human resources representative to train managers and supervisors on their NLRA obligations and common mistakes. Colleges and universities usually do an excellent job on educating supervisors and managers on issues surrounding sexual harassment, Title IX and discrimination. Instruction on basic labor law should similarly be part of any supervisory training program.

- **Think Through FERPA Issues.** The **NLRB's rules** require employers to, following a union's filing a petition for recognition or the approval of an election agreement, file and serve (on a very quick timeline) extensive data for employees in the petitioned-for unit including names, addresses, shifts, work locations, cell phone numbers, home addresses, and personal email addresses. This requirement, however, arguably conflicts with Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. While FERPA contains various exceptions permitting disclosure in specified circumstances, and while some of the above types of data may be public "directory" information, arguably nothing in FERPA privileges disclosure merely because NLRB regulation requires it.

This conflict places educational institutions in Catch-22: how do they (or can they) comply with both FERPA and the NLRA? Notably, in an **April 19, 2022 decision**, Region 8 of the NLRB rejected an effort by Kenyon College to, on the basis of FERPA concerns, stop processing the union representation petition at that campus. While not disputing that the conflict between FERPA and the NLRA creates "valid" concerns, the Region noted that managing the conflict is "doable," citing a number of other recent representation petitions in undergraduate and graduate student organizing campaigns. In Morgan, Brown & Joy's experience this dilemma can be navigated; but walking through these issues with legal counsel in advance of any demand for union recognition, and developing a position on how best to accommodate FERPA interests in the event of such a demand, can save institutions valuable time (and headaches).

There is significant momentum right now for undergraduate student organizing as well as graduate student organizing on university campuses. Working through the above considerations in advance with experienced labor counsel will place your organization in the best possible posture to respond in a manner that is administratively workable, financially feasible, lawful, and most importantly, consistent with your institutional and academic principles.

MBJ will continue to monitor these ongoing developments. College and university employers are encouraged to contact their MJB labor law attorney about responding to union organizing activities.

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