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Collective Bargaining

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New School Year Brings New Bargaining Units—NLRB Rules That Student Teaching Assistants Can Unionize

BY STEVEN KRUZEL AND MICHAEL ALDANA

For higher education institutions, the start of a school year is typically focused on the details and challenges of beginning a new year. However, courtesy of the National Labor Relations Board (NLRB or Board), private higher education institutions now have something else to consider—the potential that student teaching assistants can now organize into unions for collective bargaining purposes. In a landmark decision issued in August, the NLRB ruled that graduate and undergraduate teaching assistants at private higher education institutions have the right to unionize. By a 3 to 1 vote in *Columbia University, 364 NLRB No. 90 (Aug. 23, 2016)*, the Board majority overturned *Brown University, 342 NLRB 483 (2004)*, in holding that student teaching assistants qualify as employees under the National Labor Relations Act (NLRA).

While the Board is known to flip-flop on divisive issues based on its partisan makeup, few topics better demonstrate this than the Board's ever-changing position on the status of student teaching assistants. Indeed, *Columbia University* is the Board's *third* go at the issue in the last 20 years. The Board first directly addressed the status of student teaching assistants in *New York University, 332 NLRB 1205 (2000), (NYU)*. There, the Board reasoned that the broad statutory language of Section 2(3) of the NLRA (i.e., ''the term employee shall include any employee'') led to the conclusion that the university's graduate assistants, although students, were also employees for purposes of the NLRA. Specifically, the Board pointed to the lack of any specific exclusion for graduate assistants in the statute as well as the fact that the assistants qualified as ''common law''

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employees (i.e., they were compensated for services performed at the direction and control of NYU). To that end, the Board stated that: ''ample evidence exists to find that graduate assistants plainly and literally fall within the meaning of 'employee' as defined in Section 2(3) and by the common law.''

Approximately four years later the Board reversed course and reached the opposite conclusion in *Brown University*. In overturning *NYU*, the majority in *Brown University* reasoned that the NLRA was ''designed to cover economic relationships,'' and that the university's relationship with its graduate assistants was ''primarily educational.'' It went on to note that a change in emphasis from quality education to various collective bargaining issues would prove detrimental to both labor and educational policies. Further, the Board stated that: ''collective bargaining is not particularly well suited to educational decisionmaking and that any change in emphasis from quality education to economic concerns will 'prove detrimental to both labor and educational policies.' ''

In August, and more than a decade after *Brown University*, the Board majority spun the opposite direction again in *Columbia University*. The Board flatly rejected the reasoning of *Brown University*, stating that it ''deprived an entire category of workers of protections of the [NLRA].'' The Board also noted that: ''the *NYU* Board and the *Brown University* dissenters were correct in concluding that student assistants who perform work at the direction of their university for which they are compensated are statutory employees. That view better comports with the language of Section 2(3) of the Act and common-law agency principles, the clear policy of the Act, and the relevant empirical evidence.'' The Board went on to readopt the reasoning of *NYU*, and further held that the protections of the NLRA applied to *all* student teaching assistants—including undergraduates and those student teaching assistants engaged in research funded by external grants. Specifically, the Board stated that:

There is no compelling reason—in theory or in practice—to conclude that collective bargaining by student assistants cannot be viable or that it would seriously interfere with higher education . . . Finding student assistants to be statutory employees, and permitting them to seek union representation, does not conflict with any federal statute related to private universities, as far as we can discern . . . . Our conclusion is that affording student assistants the right to engage in collective bargaining will further the policies of the Act, without engendering any cognizable, countervailing harm to private higher education.

As a result of the Board's decision in *Columbia University*, numerous new bargaining units, including micro-units, of student teaching assistants may soon develop at private universities across the country. For example, student teaching assistants working in a private university's Literature department could attempt to form a bargaining unit while student teaching assistants working in the same university's Mathematics department could attempt to form their own bargaining unit. Indeed, it is possible that a private university could experience numerous micro-unit election campaigns across its campus from student teaching assistants working in different departments or by different categories of students (e.g., graduate and undergraduate).

In addition, and as dissenting Board Member Miscimarra noted, the Board's decision will likely lead to universities and student teaching assistants utilizing various economic weapons against one another. Specifically, unionized student teaching assistants will now have the ability to:

• **Participate in strikes.** Student teaching assistants will be able to strike because of issues relating to their wages and other conditions of their employment at the university.

• **Submit unfair labor practice charges to the Board.** Student teaching assistants can also now submit unfair labor practice charges to the Board relating to any actions by a private university that potentially impairs their ability to engage in concerted, protected activity or otherwise potentially violates the NLRA and have the Board investigate the university's conduct. For example, a student teaching assistant could file a charge with the Board regarding how the university's social media policy impacts their ability to engage in protected activity.

• **Request that another student teaching assistant be present during any investigatory interview conducted by the university.** As employees protected by the NLRA, student teaching assistants now have ''Weingarten Rights,'' which provides them the ability to request that another student teaching assistant be present during an investigatory interview conducted by their university that could result in discipline. If a student teaching assistant makes such a request, the university must either: (1) cease the interview until the other requested student teaching assistant arrives; (2) deny the request and cease questioning the individual; or (3) provide the student teaching assistant a choice between proceeding with the interview without representation or having the interview end.

Similarly, private universities will now have the ability to utilize various economic weapons in labor disputes with student teaching assistants, including:

• **Implementing a lockout.** A private university could implement a lockout of a student teaching assistant union (a work stoppage or denial of employment initiated by the private university) wherein the private university could deny student teaching assistants from working.

• **Replacing striking student teaching assistants.** If student teaching assistants struck, private universities would have the ability to hire temporary or permanent replacement employees. As Member Miscimarra noted: ″[if] permanent replacements were hired during an economic strike, this would mean that even if a student unconditionally offered to resume working at the end of the strike, the university could retain the replacements, and the student assistant would not be reinstated unless and until a vacancy arose through the departure of a replacement or the creation of a new position.''

• **Denying tuition assistance/academic credit.** Because tuition assistance and academic credit is typically earned by student teaching assistants based on their work for the university, a university could deny student teaching assistants this form of compensation during any period in which the student teaching assistants are on strike.

There are sure to be issues relating to how the abovementioned tools are utilized in the academic setting and the way in which they would impact students' educational outcomes. Further, the operations of the private

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university and the educational services they are able to provide students will also undoubtedly be affected by the use of these tools.

It is likely that the Board majority's decision in *Columbia University* will be challenged in the Court of Appeals. Nonetheless, private universities should consider the risk of union activity. As an initial step, universities should begin reviewing and potentially revising any student teaching assistant employment policies to ensure their compliance with the NLRA. Specifically, private universities should consider reviewing their social media, electronic communications, and non-solicitation policies (among others) to confirm they do not prohibit student teaching assistants from engaging in protected, concerted activity or otherwise run afoul of the NLRA.

For example, if a private university's current social media policy prohibits student teaching assistants from making ''offensive'' or ''inappropriate remarks'' regarding the university on social media, the NLRB would find that such a policy chills student teaching assistants' Section 7 rights because the Board would perceive it as limiting the student teaching assistants' abilities to freely discuss the terms and conditions of their employment with the university. Similarly, if a private university's electronic communications policy broadly prohibited student teaching assistants from disclosing ''confidential'' information relating to the university, the NLRB would also conclude that such a provision limits student teaching assistants from discussing matters like their salary or tuition reimbursement, which is prohibited by the NLRA.

Along with reviewing their employment policies, private higher education institutions should consider training supervisory employees to help them lawfully address potential union organizing. For example, while supervisory employees can convey their opinions and any past experiences with unions to student teaching assistants, they cannot interrogate student teaching assistants about their union sentiments or attempt to coerce them from voting for union representation. By providing supervisory employees training on this topic, a private university's supervisory employees should be better equipped to engage with student teaching assistants prior to any potential election. Further, it would also be beneficial for a private university to train its supervisory employees on Weingarten rights, student teaching assistants' abilities to engage in protected concerted activity and to file a NLRB charge relating to any conduct that potentially violates the NLRA (even if a bargaining unit has not been established at the university).

Ultimately, *Columbia University* has the potential to significantly impact private universities' operations nationwide. While the effect and permanency of the decision remains to be seen, private universities must begin treating their student teaching assistants as ''employees'' (who are entitled to all of the protections of the NLRA) and not simply students. They should also ensure that their supervisory employees do the same.