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Employees or not Employees —That is the Question Regarding Student Teaching and Research Assistants, which the NLRB Proposes to Answer (Again)

September 30, 2019

We know that employees have the right to join or form a labor union to represent their interests pursuant to the National Labor Relations Act (“the Act”). We also know that college and university students are not employees and cannot unionize. But what about students who also work as teaching or research assistants in return for stipends or other compensation? Are they employees or students?

The National Labor Relations Board has played ping-pong with this issue for nearly 50 years and appears poised to return the ball to the other side of the net yet again. The Board issued a Notice of Proposed Rulemaking (“NPRM”) on September 23, 2019 seeking to resolve the issue.[1] Through the proposed rule, the NLRB would determine that private college and university students who perform services related to their education there will no longer be considered “employees” under the Act.[2] These students would include graduate students who are hired by their private universities as teaching and research assistants.

The proposed rule would overrule current precedent and, according to the NLRB, “bring stability” to the back and forth stance the NLRB has had on the student worker-status issue.[3] According to the NLRB, its “proposed standard is consistent with the purposes and policies of the Act,” which reflect power over economic relationships, not ones which are “primarily educational in nature.”[4] The NLRB invited comments on the proposed rule.

1. The NLRB’s Flip-Flopping on the Issue

The proposed rule would be the fifth time since 1972 that the NLRB has changed its stance on the status of student workers. In its seminal 1972 decision of *Adelphi University*, the NLRB ruled that graduate students who are in the roles of teaching and research assistants were not “employees”, but “primarily students” who should be excluded from a bargaining unit of regular faculty.[5] In 2000, the NLRB reversed itself in its *New York University* decision when it concluded for the first time that graduate student assistants were “employees” within the meaning of the Act.[6] A short four years later, in *Brown University*, the NLRB once again shifted its stance finding that student workers were not “employees” because the relationship between student assistants and their

private universities was "primarily educational" as opposed to economic.[7] In its most recent decision in 2016, *Columbia University*, the NLRB overruled itself yet again ruling that student workers, including teaching and research assistants, were "employees" within the meaning of the Act.[8]

2. The Proposed Rule

Under the proposed rule, all students, both undergraduate and graduate, who perform services at a private college or university related to their studies will not be subject to the Act. The NLRB has promulgated its proposed rule relying on *Brown,* rejecting the *NYU* and *Columbia* decisions. The current NLRB has indicated its position that such student workers are not statutory "employees" because they will be held to be in a primarily educational, not economic, relationship with their private university.[9] The NLRB specifically noted that under the proposed rule, students who perform "any services" including but not limited to teaching or research assistance at a private college or university in connection with their studies are excluded from the ambit of the Act.

In its reasoning, the NLRB concluded that "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 the employer and employee, and provides a mechanism for resolving economic disputes that arise in that relationship.'"[10] The NLRB formulated various other grounds on which it based its proposed rule.[11] Further, the NLRB invited comments on whether the proposed rule should also apply to exclude from the Act's ambit students employed by their educational institutions, but in a capacity unrelated to their studies.[12]

3. Next Steps

The period to comment on the NLRB's proposed rule will last for 60 days starting from Wednesday, September 23, 2019, the date the proposed rule was published in the Federal Register. The NLRB will then review all of the comments submitted and determine whether the proposed rule should be revised. Finally, the NLRB will issue a Final Rule with an effective date.

Since the *Columbia University* decision, student workers have worked towards organizing. Therefore, it is likely that private universities will see student workers across the country fighting to stop adoption of the proposed rule.[13]

If you or your institution would like assistance in submitting a public comment to the NLRB or have any questions or concerns regarding this issue, please contact Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenanddykman.com, Kevin McDonough at (516) 357-3787 or via email at kmcdonough@cullenanddykman.com, or Hayley Dryer at (516) 357-3745 or via email at hdryer@cullenanddykman.com.

[1] 84 F.R. §§ 49691-49699; 29 C.F.R. § 103; *Jurisdiction-Nonemployee Status of University and College Students Working in Connection With Their Studies*, Federal Register, https://www.govinfo.gov/content/pkg/FR-2019-09-23/pdf/2019-20510.pdf (last visited Sept. 27, 2019).

[2] 29 U.S.C. §§ 151-169.

[3] 84 F.R. §§ 49691-49699.

[4] *Id.*

[5] *Adelphi Univ.*, 195 NLRB 639, 640 (1972).

[6] *New York Univ.*, 332 NLRB 1205 (2000).

[7] *Brown Univ.*, 342 NLRB 483 (2004).

[8] *Columbia Univ.*, 364 NLRB No. 90 (2016).

[9] 84 F.R. §§ 49691-49699.

[10] *Id.* (citing *Brevard Achievement Ctr.*, 342 NLRB 982, 984-85 (2004).

[11] *Id.* (these include the fact that the services students perform are "vital to their education," the limited amount of time students spend performing such services, the goal of faculty in advancing their students' education in comparison to the interests of employers and employees engaged in collective bargaining, and the NLRB's "important policy of protecting traditional academic freedoms" by not asserting its judicial power over relationships that are "primarily educational").

[12] *Id.*

[13] *See, e.g.*, Jeff Schuhrke, *Graduate Workers Are Going to Fight Like Hell to Stop the Trump NLRB's New Rule*, Today's Workplace, http://www.todaysworkplace.org/2019/09/26/graduate-workers-are-going-to-fight-like-hell-to-stop-the-trump-nlrbs-new-rule/ (Sept. 26, 2019).

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