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National Labor Relations Board Grants Student Assistants the Right to Unionize at Private Colleges and Universities

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In a setback to private colleges and universities, the National Labor Relations Board **ruled** on August 23, 2016 that student assistants have unionization and collective bargaining rights under the National Labor Relations Act. In so ruling, the Board reversed its 2004 decision in *Brown University*, in which it held that graduate students are not employees under the NLRA, and therefore do not have unionization rights. The immediate effect of the new *Columbia University* holding is that graduate and undergraduate student assistants will be able to unionize. The far-reaching decision has the potential to transform the student assistant-university relationship, as well as the collegiate learning environment.

While graduate student unions are commonplace at many public colleges and universities (as students' unionization and collective bargaining rights at public institutions are governed by state law), the *Columbia* decision expands unionization and collective bargaining rights to student assistants at private colleges and universities, including to undergraduate student assistants and to student assistants who receive research funding from external grants. This decision – which fundamentally injects NLRA considerations into the relationship between student and university – has important implications for private colleges and universities and their employment of student assistants.

Legal Background

At its core, the question of whether student assistants have unionization and collective bargaining rights under the NLRA depends on whether such student assistants are "employees" under Section 2(3) of the NLRA. Section 2(3) of the NLRA broadly states that "[t]he term 'employee' shall include any employee.'" This lack of precision has spawned conflicting Board decisions and debate over whether student assistants are "employees" under the NLRA.

In 2000, the Board answered in the affirmative, holding that graduate teaching assistants at NYU were eligible for collective bargaining and could be considered employees. The *NYU* decision was based in part on the Board's finding that Section 2(3)'s broad definition of "employee" encompassed a relationship where "a servant performs services for another, under the other's control or right of control, and in return for payment." Since the undisputed facts in *NYU* established that the graduate assistants performed services under the control and direction of the university, for which they were compensated, they were "employees" under the NLRA and under common law definitions.

The Board's *Brown* decision in 2004, however, reversed the *NYU* decision, holding that graduate students could not be considered "employees" with unionization and collective bargaining rights because they were "primarily students and have a primarily educational, not economic relationship with their university." According to the Board in *Brown*, a prerequisite for statutory coverage is that the relationship is primarily economic in character, regardless of whether it would technically be considered an employment relationship under common law tests. In essence, the *Brown* Board found that graduate assistants could not simultaneously be students and employees; their status as students precluded them from also being employees within the meaning of the NLRA.

In the *Brown* decision, the Board propounded several broad policy reasons for why "student" and "employee" status were mutually exclusive as applied to graduate assistants:

- The student-teacher relationship is based on mutual academic interests, in contrast to the conflicting economic interests that inform the employer-employee relationship;
- The educational process is a personal one, in contrast to the group character of collective bargaining;

- The goal of collective bargaining – promoting equality of bargaining power – is "largely foreign to higher education"; and
- Collective bargaining would unduly infringe upon traditional academic freedoms.

Accordingly, "collective bargaining is not particularly well suited to educational decision-making and that any change in emphasis from quality education to economic concerns will prove detrimental to both labor and educational policies." The Board in *Brown* further relied on its "longstanding rule" that it should not exercise jurisdiction over relationships that are primarily educational.

The *Columbia* Decision Overrules *Brown*

In its 2016 *Columbia* decision, the Board reversed course again by explicitly overruling *Brown* and granting graduate assistants (among other potential classes of university employees, as explained below) collective bargaining and unionization rights under the NLRA.

The *Columbia* action began in December 2014 when the Graduate Workers of Columbia-GWC, UAW, petitioned the NLRB to represent a unit of graduate teaching and research assistants and undergraduate teaching assistants at Columbia University. The NLRB's Regional Director in New York rejected the petition, finding that the *Brown* ruling precluded the students from unionizing.

The NLRB then granted review of the Regional Director's decision and reversed the decision. In so ruling, the Board majority in *Columbia* rejected its earlier ruling in *Brown* that the NLRA's definition of "employee" was not meant to cover relationships that are primarily educational. Indeed, in *Columbia* the Board held, it "has statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they are compensated. Statutory coverage is permitted by virtue of the employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach." Additionally, "the fact that a research assistant's work might advance his own educational interests as well as the university's interests is not a barrier to finding statutory-employee status." Said differently, the statuses of "employee" and "student" are no longer mutually exclusive; an individual may be both a student and an employee with rights under the NLRA.

The Board also rejected the policy-based concerns underlying the *Brown* decision. For one, it stated that the *Brown* Board's belief that imposing collective bargaining on the graduate student-university relationship would "improperly intrude into the educational process" was "unsupported by legal authority, by empirical evidence, or by the Board's actual experience."

As a result, students who have a common law employment relationship with their university are statutory employees under the Act. Importantly, the Board found that all of the student-assistants in the petitioned-for bargaining unit were "statutory employees" covered by the NLRA, which included graduate students, terminal Master's degree students, and undergraduate students, as well as assistants who were engaged in research funded by external grants.

Implications for Private Colleges and Universities

The *Columbia* decision could have wide-ranging consequences on the relationship between students and their respective universities. Several of these concerns were highlighted by Board Member Miscimarra's dissenting opinion in *Columbia*. At the heart of these potential consequences is the possibility that the NLRA will intrude into, and fundamentally alter, the relationship between students and universities solely because some students also hold teaching and research assistant positions in connection with their education. The *Columbia* decision also affects student assistants at both the graduate and undergraduate level, meaning that the effect of an impasse in labor negotiations could be fairly extensive.

As Member Miscimarra noted, the decision to attend college is the most important investment decision that most individuals will ever make. The contours of that decision may now be influenced by bargaining leverage, the potential resort to economic weapons, and the threat or infliction of economic injury by or against students and universities alike.

Moreover, as highlighted by Member Miscimarra, student-assistant strikes could hamper students' academic development in a number of potential ways:

- Strikes or lockouts could potentially suspend all remuneration to teaching and research assistants;
- Graduate assistants' service as teaching assistants are often tied to completion of their degree; if a student assistants were unable to work due to a strike or lockout, they may not be able to complete their degrees in a timely fashion;
- A detrimental change in career opportunities and overall student welfare due to adverse budgetary impact from collective bargaining;
- Student assistants on strike could be temporarily or permanently replaced, which could require the replaced students to pay full tuition (*e.g.*, if their financial assistance was tied to their work as student assistants) and could impede students' abilities to fulfill degree requirements (*e.g.*, if credit was based on work or research performed as a student assistant).

In addition to potential impacts on students' formal academic development, the *Columbia* ruling could also change the fundamental nature of the collegiate learning environment by, for example, permitting

disrespectful and profane actions by students against faculty, raising questions as to the legality of rules promoting civility, and prohibiting "confidential" investigations into student conduct.

Employer Takeaways

While the *Columbia* decision gives students the right to unionize, it does not necessarily mean that students will exercise that right, and indeed students have previously rejected unionization efforts at several schools. Colleges and universities should work to ensure that their infrastructure, policies, and atmosphere support open communications between the administration and students so that students' concerns are heard and taken into account in university decisions. If students do attempt to unionize, colleges and universities should work with counsel to help establish the lines and boundaries of the parties' rights.

Finally, it is important to recognize that the *Columbia* decision could potentially be overruled by future Board decisions, as the Board's position on key issues can change. For example, the Board's stance may vary depending on the President who appointed it – the *NYU* decision was issued by a President Clinton-appointed Board, the *Brown* decision was issued by a President Bush-appointed Board, and the *Columbia* decision was issued by a President Obama-appointed Board. Additionally, it is unclear whether the *Columbia* decision will withstand judicial scrutiny – many commentators expect private colleges and universities to challenge the *Columbia* decision in federal courts, and it is entirely possible that certain federal courts will refuse to follow the Board's decision.

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