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NLRB Making America Grate Again

By: Vito A. Gagliardi, Jr.

Late last month, the National Labor Relations Board ruled that students who work as teaching and research assistants at Columbia University are employees of a union. This landmark decision reverses a 2004 NLRB decision and green-lights unionization efforts at private universities throughout the country.

The NLRB rulings on the issue of teaching and research assistants have flip-flopped in recent years, creating a difficult area to navigate for students and private universities alike, and reflecting very clearly the significance of the political makeup of the NLRB.

Back in 2000, in a case involving student assistants at New York University ("NYU"), the NLRB ruled that they were employees eligible to unionize. Only four years later, in a case involving Brown University, the NLRB held that graduate teaching and research assistants were not employees because their role at the university is "primarily educational" and not economic.

Now, the NLRB has ruled, by a 3-1 vote, that the ruling in the NYU case was "on very firm legal ground" when it concluded that student assistants were both employees of the university and students, thereby overturning the Brown University decision. The NLRB's only Republican dissented, questioning whether the NLRB was well-suited to deal with representation issues and unfair labor practice cases involving students: "[T]he sum total [here] is uncertainty instead of clarity, and complexity instead of simplicity, with the risks and uncertainties associated with collective bargaining -- including the risk of breakdown and resort to economic weapons -- governing the single most important financial decision that students and their families will ever make." Of course, the future of this decision probably is linked to the outcome of the presidential election. Generally speaking, the five-member NLRB is comprised of a majority of members of the same party as the president. Based upon the analysis in this

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case and recent history, one can assume that a Republican-led NLRB would be inclined to rule differently on this issue yet again, whereas the decision will survive and perhaps be expanded by an NLRB comprised of a majority of Democrats. Practitioners in this area of the law must again bask in the frustration caused by the fact that an agency is not bound by stare decisis, and therefore need not defer to prior decisions.

In any event, the NLRB now finds that it "has the statutory authority to treat student assistants as statutory employees, who performed work, at the discretion of the university, for which they are compensated. The statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship... ."

The immediate ramifications of the decision beyond the grounds of Columbia University are not clear. How difficult this will be for colleges and universities to administer is a matter of some debate. It should be noted that students at some public universities, covered by state labor laws rather than federal labor laws, already have unionized. State labor laws are not as broad and may not pose the same challenges as the application of the National Labor Relations Act to university employees who happen to be students as well. On a related note, the NLRB's decision to overturn the Brown University case may undermine its decision in the Northwestern University football case, where the NLRB dismissed the petition by the players to unionize for policy reasons based quite heavily on the suddenly disfavored Brown University case.

If you are a college board member or administrator at a private university, the immediate impacts of this case are clear. If you are a college sports fan, the next domino to fall may be the decision stating that college athletes do not have the right to unionize. And beyond that, if you are an employer in any capacity, the NLRB's recent efforts to expand far beyond its traditional role mean that its decisions should be carefully reviewed and its makeup following the presidential election should be a source of great interest.

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