

# One Minute Memo<sup>®</sup>



## Education Unions Ignore NLRB's Call For "Timeout"

By Mary Kay Klimesh, Bryan R. Bienias and Jeffrey A. Berman

As the National Labor Relations Board ("Board") continues to quietly stockpile cases and solicit briefing on the pressing issues related to the union organization of teaching assistants, adjunct faculty and student athletes, and the assertion of jurisdiction over religious schools, the unions are continuing their push to organize college and university employees.

### NLRB Jurisdiction Over Religious Schools

As we reported previously, in February the Board *invited* interested parties to submit amicus briefs on two issues: (i) whether a religiously-affiliated university is subject to the Board's jurisdiction, and (ii) whether certain faculty members are employees covered by the National Labor Relations Act ("NLRA") or excluded managerial employees.

As of this update, approximately three dozen amicus briefs have been filed in response to the Board's invitation. The apparent interest in this case is well-founded. As we noted in previous updates ([here](#), [here](#), and [here](#)), the principles contained in the Board's ultimate decision are likely to apply to *all* religious schools, not just colleges and universities. For now, religious schools can do little more than sit and wait for the ultimate decision from the Board on this issue.

### The Push to Organize Adjunct Faculty Continues Unabated

Despite the uncertainty surrounding the Board's jurisdiction over religious schools, union organizing efforts among adjunct and part-time faculty at religious and non-religious colleges and universities continues full speed ahead. The SEIU's "Adjunct Action" campaign, bolstered by recent successes at institutions such as Northeastern University, Howard University, Mills College, and San Francisco Art Institute, continues to file petitions across the country.

Most recently, adjuncts at Antioch University in California, Seattle University, St. Thomas University in Minnesota, and Marist College in New York filed their own petitions for union representation. An election already has been held at the University of La Verne in California, but the counting of the ballots has been delayed as the result of unfair labor practice charges filed by the union against the school.

Based on the recent successes and the continuing flood of election petitions, the push for adjunct representation may begin to trickle down to part-time teachers in private primary and secondary schools. Although the Board does not have jurisdiction over public schools, it is possible that the state labor boards that do have jurisdiction may follow the lead of the Board. The latest updates on the activities of the SEIU's Adjunct Action can be found on its website [here](#).

## Graduate Students Unionize

As discussed previously, graduate “employees” at New York University and the Polytechnic Institute of NYU reached a voluntary agreement in November 2013 before a representation election was [conducted](#). Thus, the Board was not required to revisit its decision in *Brown University*, in which the Board held that teaching assistants were not employees because their relationship with the university was primarily education.

Unions are uniformly dissatisfied with the *Brown University* rule, and will continue to push the issue by organizing graduate teaching assistants at other institutions of higher learning, both private and public sector. It is probably for this reason that the Board, as discussed below, has [invited briefing](#) on the continued viability of the *Brown University* rule.

## And What about the Scholarship ~~Athletes~~ Employees?

The most hot-button topic continues to center around the union petition filed by student football players at Northwestern University. Since our last [update](#), the Regional Director of the Board’s Chicago office issued a decision finding that grant-in-aid scholarship football players are “employees” under the NLRA and directed an election to take place. (For more, click [here](#)). While the Northwestern football students’ petition presented many of the same issues and implications raised by the graduate teaching assistants in the NYU case, the Regional Director found *Brown* inapplicable since the players’ football-related duties are unrelated to their academic studies, unlike graduate assistants whose teaching and research duties are “inextricably related to their graduate degree requirements.”

The election proceeded, with the “player-employees” casting their ballots in April. Those votes, however, are currently impounded as the decision to assert jurisdiction over scholarship athletes has been appealed to the Board, which, like in the religion school cases, has [invited](#) interested parties to file amicus briefs.

While the Board ponders the question of whether student athletes can unionize, Congress has entered the fray. In early May the House Committee on Education and Labor held hearings on the issue of the unionization of college athletes. Brad Livingston, the co-chair of Seyfarth’s traditional labor law practice, testified at the [hearing](#). Thus far, the Committee has yet to issue a report.

As of now, nothing stands in the way of other attempts to organize athletes in any number of sports at other colleges or universities, both public and private. While the Board does not have jurisdiction over public institutions, one public employee union in North Carolina has voted to admit student athletes from the state’s seventeen public institutions of higher education. Meanwhile, the Connecticut state legislature is considering a measure to allow athletes at public colleges and universities to join unions. The Ohio state legislature, on the other hand, is considering a measure to bar college athletes from collective bargaining.

With no definitive timeline in place for the Board to ultimately issue a decision on these issues, educational institutions can continue expecting heightened organizing activity as the year rolls on.

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