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Schools Move into Union and NLRB Spotlight

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Institutions of higher learning recently have been in the spotlight as unions continue to push to organize and expand representation of teaching assistants, adjunct faculty, and student athletes. Faculty in religiously-affiliated schools have again moved into the spotlight as the National Labor Relations Board ("Board") recently announced that it intends to re-examine when jurisdiction will be asserted over these schools. The Board also announced that it will be re-examining its prior decisions as to the circumstances in which faculty will be precluded from seeking union representation because of the managerial authority.

Although most of the education cases to date involve colleges and universities, the principles in them have the potential for impacting primary and secondary schools, and being exported into state collective bargaining laws that apply to public schools at all levels.

NLRB Jurisdiction Over Religious Schools

As we reported in the past, the Board has been stockpiling cases regarding its jurisdiction over religious schools. [For more, see *here*]. The Board is apparently very interested in acquiring additional information before it issues a decision regarding the extent to which the Board will exercise jurisdiction over religious schools (primary, secondary, and colleges and universities).

Recently, the Board invited interested parties to submit amicus briefs related to two issues: whether a religiously-affiliated university is subject to the Board's jurisdiction; and, whether certain university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act ("NLRA") or excluded managerial employees. [See *Board's invitation for briefs*]. The Board's invitation relates to the case involving *Pacific Lutheran University* (19-RC-102521) in which a union filed a petition to represent a unit of all non-tenure-eligible contingent faculty who taught a certain number of hours. Pacific Lutheran asserted that the Board lacks jurisdiction over it because it is a religious school exempt from Board jurisdiction pursuant to the Supreme Court's *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), decision. Although the case involves a university, the principles contained in the Board's decision are likely to apply to all religious schools.

The Board Reviews Managerial Section of Yeshiva Faculty

The invitation to file amicus briefs in the *Pacific Lutheran* case indicates that the Board intends to review its application of the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). In *Yeshiva*, the Court held that the school's full-time faculty members were exempt from protection under the NLRA because they were managers. Pacific Lutheran University has argued that its faculty are managers and that the managerial exception under *Yeshiva* applies. The Board's question relating to which of the *Yeshiva* factors are most important indicates that the Board may be re-examining its test to determine who meets the definition of "managerial employee."

The Push to Organize Adjunct Faculty Continues On

As we reported in *January*, adjunct and part-time faculty at colleges and universities continue to organize. Although unions have expanded their reach by entering the religious-based education sector, the unions also have continued their push to organize within secular universities. In the last year, higher education has seen attempts to unionize adjunct faculty at the University of La Verne and Loyola Marymount University in Los Angeles, Northeastern University and Leslie University in Boston, Tufts University, and Bentley University. Meanwhile, adjunct faculty at American University, Georgetown, George Washington University, Whittier College in Los Angeles and Montgomery College in Washington, D.C. have already organized.

Based on the recent successes and the continued petitions, it appears that adjunct and part-time faculty will continue seeking union representation. In addition, the push for adjunct representation may begin to trickle down to part-time teachers in primary and secondary schools as well as colleges and universities in the public sector. The latest updates on SEIU's adjunct representation can be found on their website *here*.

Graduate Students Unionize

In 2000, the Board ruled that graduate teaching assistants were employees under the NLRA. In 2004, the Board reversed paths in *Brown University*, 342 NLRB 483 (2004) and determined that teaching assistants at Brown University were not employees because their relationship with the university was primarily educational. After a voluntary agreement in November 2013 at New York University and the Polytechnic Institute of NYU before a representation election was reached, the graduate teaching assistants overwhelmingly supported union representation. As such, the Board was not required to address its decision in *Brown University*. It is likely that the union will consider the NYU representation as a victory and continue to organize graduate teaching assistants at other institutions of higher learning and potentially expand to schools in the public sector.

Northwestern Football Players Get in the Game

Recently, a group of Northwestern University football players backed by the United Steelworkers union and represented by the College Athletes Players Association ("CAPA") filed a petition for union representation. Although Northwestern football students' petition is the first of its kind, it presents many of the same issues and implications considered in the petitions by graduate teaching assistants. Furthermore it is likely that the Board will revisit *Brown University* in deciding the Northwestern petition. Notably, in *Brown University*, the Board emphasized the nexus between teaching assistants and the educational component of the "work" they performed. Here, the football players' connection to education arguably is far more tenuous than the teaching assistants.

On February 12, 2014, the Board held a hearing on the football players' petition. Represented by CAPA, the football players and Northwestern counsel each provided an opening statement outlining a summary of their respective positions. CAPA asserted that football players receiving scholarships are employees under the NLRA. Further, CAPA maintains that these students are under control of the university, receive "payment" in the form of scholarships and generate millions of dollars for the university. CAPA also argued that while football players are still students, their athletic responsibilities place them in a separate and distinct group appropriately considered "employees."

In response, Northwestern maintained that football players are not employees under the NLRA and that *Brown University* contains the appropriate test. In addition, Northwestern questioned CAPA's status as a labor organization and whether the scope and composition of the proposed unit is appropriate given that many players may or may not be eligible to vote. Specifically, Northwestern expressed concern over players who already have completed their final year of athletic play but who still receive scholarship benefits, players who receive need-based scholarships, and players who are "walk-on" athletes who do not receive any scholarship to play football. Lastly, Northwestern asserted that even if these players are "employees" they can only be considered temporary employees under the NLRA.

The football players' petition is the first of its kind but it is not likely to be the last. Athletes of various sports from other colleges or universities may follow in the Northwestern students' footsteps, including those playing for public colleges and universities that generate significant sums of money from their athletic programs.

The Northwestern petition hearing will continue on February 18, 2014 at 9:00 a.m. CST during which witnesses will testify. Stay tuned, as we will continue to provide updated coverage on this issue.

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