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Are Graduate-Students Assistants Employees Under the NLRA? The Answer of the Obama Board Will Not Be the Final Word

By Rob Fisher & Skelly Harper

***Seyfarth Synopsis**: A 2016 decision of the National Labor Relations Board ("Board") finding that the graduate students at Columbia University were employees under the National Labor Relations Act ("NLRA") has been teed up for review by the Court of Appeals. In order to obtain appellate review of the Board's decision, Columbia University has refused to bargain with the union certified to represent its graduate-student assistants.*

In a landmark ruling, *Columbia University*, 364 NLRB No. 90 (2016), the Obama Board reversed prior precedent and held that graduate-student assistants at Columbia University were employees and therefore could vote on whether to form a union. After the Union prevailed at the election in December 2016, Columbia filed objections and requested a rerun election. In a decision issued in December 2017, the current Board rejected those objections and certified the Union as the exclusive bargaining representative of the graduate-student assistants. 365 NLRB No. 136.

Teeing up the issue of whether graduate-student assistants are employees under the NLRA, Columbia has now refused to bargain with the Union. There is no right to a direct appeal of Board decisions in representation cases, and the only way for the University to obtain review of the earlier election determination is by refusing to bargain with the Union. Presumably, the Union will file an unfair labor practice charge against Columbia that will then lead to an adverse Board decision against Columbia. At that point, the University would be able to ask a federal Court of Appeals to assess whether the Board correctly decided the employee issue in the first instance.

While it is not the Board's practice to review representation cases in the context of a refusal to bargain, there is reason to believe that the current Board may revisit whether graduate-student assistants are employees under the NLRA. Both Columbia decisions included vigorous dissents by a Republican Board member. In addition, in a separate December 2017 decision in a case involving Harvard University, another Republican Board member noted his view that Board precedent on the employee-status of students warrants reconsideration. Indeed, the Board had previously gone back and forth on the issue. In *Brown University*, 342 NLRB 483 (2004), the Board held that graduate-student assistants were not employees. Just two years earlier, in *New York University*, 332 NLRB 1205 (2000), the Board had held that graduate-student assistants were employees under the NLRA.

Regardless of whether the Columbia University decision is revisited through the appeals process or by the Board itself, it is unlikely that the 2016 decision will be the last word on the issue. The final outcome will most certainly impact efforts by

unions to organize graduate-student assistants and other students such as residence assistants. The final decision also may impact the cases in which certain college athletes, usually scholarship athletes, are claiming employee status for purposes of state and federal wage-hour laws.

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