SEYFARTH SHAW

# Management Alert

## NLRB General Counsel Issues Report on NLRA Protections For Faculty and Students

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***Seyfarth Synopsis**: In a last minute attempt to leave his mark on the NLRB, the Board's outgoing General Counsel issued a report attempting to expand the rights of university faculty and students, including scholarship athletes, under the National Labor Relations Act.*

Just months before the conclusion of his four-year term, Richard F. Griffin, Jr., the General Counsel ("GC") of the National Labor Relations Board ("Board"), issued a report titled "General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context."

The January 31, 2017 Report was issued with the stated intent to serve as a "guide for employers, labor unions, and employees that summarizes Board law regarding NLRA employee status in the university setting and explains how the Office of the General Counsel will apply these representational decisions in the unfair labor practice arena." The decisions covered by the Report--*Pacific Lutheran University*, *Columbia University*, and *Northwestern University*--all involved efforts of individuals to obtain representation by a union.

### University Faculty

In *Pacific Lutheran*, the Board established a new test for determining when it would take jurisdiction over religious colleges and universities. According to the GC, the Board "will…seek redress for unfair labor practices committed by religious schools against individual faculty member discriminatees who the university does not hold out as performing a specific role in creating and maintaining the university's religious and educational environment."

As a practical matter, this means that the GC believes that the faculty who are able to seek union representation because they were "not hired to advance the school's religious purposes," also are protected by the Act's prohibition against discrimination for engaging in protected concerted activities. By implication, this may mean that faculty who are hired to advance a school's religious purposes are not protected.

The GC also provided his analysis of the standard articulated in *Pacific Lutheran* regarding the managerial status of faculty members. Specifically, the GC distinguished between managerial faculty (those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer") and non-managerial faculty (those whose decision-making is limited to "routine discharge of professional duties in projects to which they have been assigned…").

The GC concluded that, in the unfair labor practice context, a "complaint will not issue against a university if [the Board] determine[s] that an asserted discriminatee is a managerial employee under the Board's *Pacific Lutheran* test." He added, however, that even when the Board refuses to process a certification petition, it will still conduct an individualized analysis of the discriminatee's employment position to determine whether that individual exercised sufficient managerial authority to exempt him from the NLRA.

## University Students

**Student Assistants**. Here, the GC briefly summarized the *Columbia University* decision, stating that the Board "applied the statutory language of the [NLRA] and longstanding common-law principles to settle the issue of statutory coverage for graduate student employees, determining that student assistants are employees under the NLRA." The GC relied on the 2000 *NYU* decision to conclude that graduate students met the common-law test of agency because they "'perform their duties for, and under the control of' their university, which in turn pays them for those services…" Similarly, the GC applied this precedent to the unfair labor practices context, concluding that, in his opinion, student assistants are well within the ambit of the NLRA and can therefore organize and receive its protections.

**Non-Academic University Workers**. The GC stated that, as to university students who are performing non-academic university work (e.g. maintenance or cafeteria workers, lifeguards, campus tour guides, etc.), they are "clearly covered by the NLRA and, as with student assistants, [the Board] will analyze unfair labor practice charges involving non-academic student employees accordingly." In reaching this conclusion, the GC reasoned that the non-academic university worker category presented an easier question than the student assistants in *Columbia* as, in his opinion, under the common law agency test, there is no issue of whether or not the work performed by the student employee is "primarily educational work."

**Hospital House Staff**. With respect to "hospital house staff" (medical interns, residents, and fellows), the GC concluded that they would "continue to be protected as employees under the NLRA, and [the Board] will continue to process unfair labor practice charges involving those employees." In reaching this conclusion, the GC reasoned that, just because certain hospital house staff members also happened to be students did not mean that they were exempt from the coverage of the NLRA. He cited the *Boston Medical* decision, which held that "nothing in the [NLRA] suggests that persons who are students but also employees should be exempted from the coverage and protection of the [NLRA]."

**University Football Players**. Here, the GC admittedly limits his analysis to the application of the statutory definition of employee and the common-law agency test to find that Division I FBS scholarship football players are employees under the NLRA, and therefore have the rights and protections of that Act. Referring to the Board's decision in *Northwestern*, the GC expressly stated that it would be inappropriate for the Report to attempt resolve the sometimes "divisive" questions relating to whether student athletes may organize under the Act.

## Conclusion

With Mr. Griffin's four-year term ending later this year, it is likely that the new GC will want to revisit some or all of the Report. The soon-to-be Trump-appointed majority of the Board likely will revisit not only the Report, but also the decisions in *Pacific Lutheran*, *Columbia* and *Northwestern*.

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