SEYFARTH SHAW

Management Alert

Back to School: NLRB Takes Aim at Colleges and Universities

*By **Jeffrey Berman, Christopher Kelleher, Mary Kay Klimesh***

***Seyfarth Synopsis**: The National Labor Relations Board issued three important decisions this week which will significantly impact private colleges and universities.*

Student Assistants Eligible to Unionize

By a vote of 3 to 1, the Board held that college and university student assistants -- including undergraduates -- who perform services in connection with their studies, are "employees" under Section 2(3) of the NLRA, and therefore have the right to bargain collectively. *Columbia University*, 364 NLRB No. 90. In doing so, the Board overruled *Brown University*, 342 NLRB 483 (2004), which held that student assistants are not statutory employees. The ruling directly contradicts the Board's treatment of students under the Act for nearly all of its 80-year history.

Because Section 2(3) does not adequately define the term "employee," the Board looked to common law agency principles to determine whether student assistants are covered. The Board thus found that even when the economic relationship "may seem comparatively slight" relative to the academic relationship, "the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship[.]" The Board found no compelling statutory or policy considerations to hold otherwise.

Member Miscimarra, the Board's lone dissenter, argued that the relationship between the students and the university is "primarily educational," and thus does not fit "the complexities of industrial life." The dissent warned that the Majority disregarded "what hangs in the balance when a student's efforts to attain [a] … degree are governed by the risks and uncertainties of collective bargaining and the potential resort to economic weapons" such as strikes, slowdowns, lockouts, and litigation.

Religious Universities Covered by NLRA

The issue in *Seattle University*, 364 NLRB No. 84 and *Saint Xavier University*, 364 NLRB No. 85 was whether these religiously affiliated institutions should be exempted from the Board's jurisdiction based on First Amendment guarantees against entanglement between church and state. The universities argued that as religious institutions, their faculty members are not covered by the National Labor Relations Act. At the very least, they argued, teachers in religious studies departments should be excluded from the proposed bargaining units, which comprised part-time and contingent faculty.

In both cases, the Regional Director determined that the university's faculty members generally were covered by the NLRA and that the unit appropriately included religious studies faculty. On review, the Board applied its test set forth in *Pacific Lutheran*, 361 NLRB No. 157 (2014), which permits Board jurisdiction unless: (1) the university or college holds itself out as providing a religious educational environment; and (2) it holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school's religious educational environment. (For more about the Board's decision in *Pacific Lutheran University*, 361 NLRB 157 (2014), see here). The Board found that both universities met this test when it came to faculty in the religious studies departments, thereby excluding them from the bargaining units.

While this might sound like good news, the Board denied review of the Regional Director's determination that faculty in other departments were covered. The Board thus continues to ignore the Supreme Court's mandate in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) that the NLRA must be construed to exclude teachers in church-operated schools. The Board is not entitled to base jurisdiction on the conclusion that certain teachers perform a role in creating or maintaining the school's religious educational environment. However, that is exactly what happened in these two cases. According to the Supreme Court, this type of inquiry by itself may impermissibly impinge on rights guaranteed by the Religion Clauses of the Constitution.

Conclusion

The Board continues to broadly exercise its authority in order to maximize the number of employers and employees covered by the Act, this time in cases involving three universities. We can expect challenges to all three decisions.

If you want futher information, please contact Jeffrey Berman at jberman@seyfarth.com, Christopher Kelleher at ckelleher@seyfarth.com, or Mary Kay Klimesh at mklimesh@seyfarth.com.