

Management Alert



NLRB General Counsel Rescinds Controversial Memo Regarding Section 7 Rights of University Faculty, Student Assistants, and Student-Athletes

By Robert A. Fisher, Jeffrey A. Berman, and Mary Kay Klimesh

Seyfarth Synopsis: On December 1, 2017, the newly-confirmed General Counsel of the National Relations Board, Peter Robb, issued a memorandum to the NLRB regional offices listing legal issues that should be submitted for review to the Division of Advice prior to the issuance of an unfair labor practice complaint. Among other responsibilities, the Division of Advice provides guidance to the General Counsel and the regional offices with respect to significant legal issues arising in the processing of unfair labor practice charges.

The memorandum also listed seven different legal memoranda, commonly known as “GC Memos,” issued by Mr. Robb’s predecessor that were being rescinded. Of significant importance to colleges and universities is that among the seven rescinded GC Memos was the Memorandum entitled “General Counsel’s Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context” (“the Report”). This Report set out then-General Counsel Richard F. Griffin Jr.’s views as to the applicability of three election cases previously decided by the NLRB -- *Pacific Lutheran University*, *Columbia University*, and *Northwestern University* -- to unfair labor practice cases involving the Section 7 rights of faculty, student assistants and student-athletes. Our prior description of the Report can be found [here](#). The rescission of the Report signals that the new General Counsel intends to depart from his predecessor on these issues.

NLRB Jurisdiction Over Religious Colleges and Universities and Managerial Status

In *Pacific Lutheran University*, 361 NLRB No. 157 (December 16, 2014), the NLRB, departing from well-established case law, including decisions of the United States Supreme Court, announced a new test to determine when jurisdiction would be asserted over religious colleges and universities in representation cases. The test established in *Pacific Lutheran* increased the instances in which jurisdiction would be asserted. Also breaking with a prior decision of the Supreme Court, the *Pacific Lutheran* decision narrowed the circumstances in which faculty involved in school decision-making would be deemed to be managerial and thus excluded from protection of the National Labor Relations Act (“the Act”). Analysis of the decision can be found [here](#).

As specifically intended, Griffin’s Report extended the holdings of *Pacific Lutheran* beyond representation cases to the unfair labor practice context. The positive effects of the new General Counsel’s rescission of the Report should be felt in both unfair labor practice and representation cases.

Student Assistants

In *Columbia University*, 364 NLRB No. 90 (2016), the Board, departing from years of decision-making, held that students who performed services for the university in connection with their studies, specifically teaching and research assistants, were employees within the meaning of the Act for the purposes of organizing. The Report extended this conclusion to the unfair labor practice context. Moreover, and although the Board in *Columbia University* did not address the status of non-academic student workers such as those who work in cafeterias and bookstores, the Report also concluded that such student workers have rights under the Act.

Taken together, the Report meant that prior General Counsel Griffin believed that student assistants and non-academic student workers not only could unionize under the Act, but that they also were protected from actions being taken against them because of their efforts to unionize. Colleges and universities should expect positive effects in both areas as a result of Robb's rescission of the Report.

Student-Athletes

Lastly, Griffin's Report addressed the Board's decision in *Northwestern University*, 362 NLRB No. 167 (2015), in which, based on public policy considerations, it declined to exercise jurisdiction over a representation petition relating to the University's scholarship football players. In doing so, the Board specifically left unresolved the question of whether college scholarship football players are employees subject to the Act. Undaunted by the fact that the Board would not decide the employee status issue, former General Counsel Griffin concluded that, based on the record in *Northwestern University*, Division I scholarship football players are employees under the Act and left open the possibility of a similar determination as to scholarship athletes in other sports.

The Report already had been used by plaintiffs in wage-hour litigation to support their position that certain scholarship athletes are employees for purposes of state and federal wage-hour laws, including the Fair Labor Standards Act. The rescission of the Report should prevent that in the future.

Conclusion

General Counsel Robb's recession of the Report is not surprising. After the Report was issued by former General Counsel Griffin, Congressional Committee Head Virginia Foxx (R-NC) and Subcommittee Chair Tim Walberg (R-MI) asked Griffin to either immediately rescind the Report or "step down." We reported on this [here](#). Although the Report is only directed toward unfair labor practice cases, it would not be surprising if the Board decided to revisit its underlying holdings in *Pacific Lutheran* and *Columbia University*. Indeed, on December 12, 2017, Board Member Emanuel noted in an unpublished decision that the Board's precedent regarding the status of students as employees under the Act "warrants reconsideration".

If you would like further information, please contact [Robert A. Fisher](mailto:rfisher@seyfarth.com) at rfisher@seyfarth.com, [Jeffrey A. Berman](mailto:jberman@seyfarth.com) at jberman@seyfarth.com, or [Mary Kay Klimesh](mailto:mklimesh@seyfarth.com) at mklimesh@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | December 13, 2017

©2017 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.