NLRB
FACT SHEET

Are Students at Private Colleges and Universities "Employees" Under the Act?

The National Labor Relations Board has published a Notice of Proposed Rulemaking (NPRM) proposing to exclude from coverage under Section 2(3) of the National Labor Relations Act (NLRA) students who perform services for financial compensation in connection with their studies at private colleges and universities. The basis for this proposed rule is the Board's current position, subject to public comment, that the relationship undergraduate and graduate students have with their school is predominately educational, rather than economic. The NLRA grants employees certain rights, and Section 2(3) of the NLRA defines the term *employee*.

WHY RULEMAKING?

Decades ago, the Supreme Court instructed that the Board should provide employers with "certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

Notice-and-comment rulemaking offers the best vehicle for fulfilling the Court's instruction regarding whether students should be deemed employees under Section 2(3) of the NLRA. In rulemaking, the Board is not limited to the facts of a particular case; rather, it may consider the myriad of services students provide for compensation under a variety of arrangements at private colleges and universities across the nation. Rulemaking thus permits the Board to consider and address the issue in a comprehensive manner and to provide the best possible guidance. And, any final rule that issues at the end of the process will apply prospectively only, further ensuring that affected parties will have "certainty beforehand."

Rulemaking also provides the Board the opportunity to consider input from all individuals interested in this issue, not only those who are party to a pending case or who are able to hire a law firm to submit a brief. The Board's current majority has expressed a strong interest in engaging in more rulemaking on difficult issues like this one, and recently announced an ambitious regulatory agenda.

NLRB STUDENT JURISDICTION TIMELINE

Over time, the predominate view has been that students are not employees under Section 2(3). Since passage of the Act in 1935, there have been only seven years during which students have been considered employees under the NLRA: from 2000 to 2004 and from 2016 to the present.

Over the past 49 years, the Board has reversed its position on this issue three times:

- *Cornell University*, 183 NLRB 329 (1970). The Board first asserted jurisdiction over private colleges and universities.
- *Adelphi University*, 195 NLRB 639 (1972). The Board holds that graduate student assistants are primarily students and should be excluded from a bargaining unit of regular faculty.

- *Leland Stanford Junior University*, 214 NLRB 621, 623 (1974). The Board goes further, holding that graduate student research assistants "are not employees within the meaning of Section 2(3) of the Act."

- *New York University*, 332 NLRB 1205 (2000). The Board reverses course and holds for the first time that certain university graduate student assistants are statutory employees. However, the Board leaves intact the holding of *Leland Stanford* that graduate research assistants are not Section 2(3) employees.

- *Brown University*, 342 NLRB 483 (2004). The Board reconsiders and overrules *New York University*, holding that graduate student teaching assistants, research assistants, and proctors in the petitioned-for bargaining unit are not statutory employees. The Board reasserts the "principle … that graduate student assistants are primarily students and not statutory employees." The Board further notes that "[i]mposing collective bargaining [between graduate student assistants and private universities] would have a deleterious impact on overall educational decisions … includ[ing] broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends." The Board also finds that the collective-bargaining obligation "would intrude upon decisions over who, what, and where to teach or research," all of which constitute "the principal prerogatives of an educational institution."

- *Columbia University*, 364 NLRB No. 90 (2016). The Board reconsiders and overrules *Brown University*. The Board, however, goes beyond merely reinstating the holding in *New York University*. Whereas *New York University* had applied exclusively to certain graduate student assistants and had acknowledged the continuing viability of *Leland Stanford*, the *Columbia* decision overruled *Leland Stanford* and expanded Section 2(3) of the Act and the rationale of *New York University* to cover—for the first time—both externally-funded graduate research assistants and undergraduate student assistants.

ADDITIONAL INFORMATION

The Board seeks public comment on all aspects of its proposed amendments. As specified in the Notice of Proposed Rulemaking, published in the Federal Register, public comments may be submitted electronically or in hard copy.