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Implications of the NLRB's *Columbia University* Decision for Colleges and Universities

In a decision overturning more than a decade of precedent, the National Labor Relations Board recently ruled 3-1 in *The Trustees of Columbia University in the City of New York* that students who work for compensation as research or teaching assistants at private institutions of higher learning are "employees" protected under the National Labor Relations Act, and have the right to join unions or engage in organizing activity.

The ruling covers graduate and undergraduate students at private institutions who perform paid work directed by the institutions. For the schools that are subject to the decision, the implications are quite significant, and may even negatively affect academic freedom and freedom of speech.

The *Columbia* Case

The case itself is straightforward. For years, organized labor and its political supporters have contended that student assistants are exploited workers who lack necessary protections of the state, local, and federal labor and employment laws. In 2000, the Board ruled in *New York University* that such assistants are employees within the meaning of Section 2(3) of the NLRA.

In 2002, a number of compensated research and teaching assistants, with various titles, at both the graduate and undergraduate levels at Columbia, began seeking representation by the Graduate Workers of Columbia-GWC, affiliated with the United Automobile, Aerospace, and Agricultural Implement Workers of America.

But in 2004, in *Brown University*, a then-Republican-majority Board overruled *New York University* and found that student assistants receiving compensation were not "employees" under Section 2(3) of the NLRA. The Board majority emphasized the fact that the students' relationship with the institution was "primarily educational," and that requiring collective bargaining between students and institutions of higher learning would undermine the fundamental nature of higher education and its purpose. The Board majority in *Brown* found that "there is a significant risk, and indeed a strong likelihood, that the collective bargaining process will be detrimental to the educational process." However, since President Obama took office in 2009, the Board majority has made it clear that it supports the organized labor agenda.

In December 2014, the GWC filed a petition seeking a union representation election at Columbia with the NLRB Regional Office in New York City, Region 2. In February, 2015, the Regional Director administratively dismissed the petition, finding that it was inappropriate based on the *Brown University* decision.

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However, with a more labor-friendly Board, the GWC saw an opportunity, and took the case to the Board in Washington, D.C., and got the *Columbia University* decision, which overrules *Brown University* and returns the legal landscape to where it was before 2004.

The NLRB's Rationale

The Board's rationale for its Columbia University decision was simple: It found that the student assistants are protected as "employees" when "they perform work, at the direction of the university, for which they are compensated," and it found that there was no provision in the NLRA exempting them from "employee" status. The Board found that the student assistants had a "common-law employment relationship" with the institutions, and that the latter had control over the assistants' activities and compensated them for their work.

In overruling *Brown University* and rejecting arguments that a finding of "employee" status under the NLRA would impair academic freedom, the Board majority concluded, "[T]here is no compelling reason – in theory or in practice – to conclude that collective bargaining by student assistants cannot be viable or that it would seriously interfere with higher education."

What Happens Now?

Many commentators have indicated that they expect an appeal. How does that happen? The following discussion summarizes the likely path.

At this point, the *Columbia University* case has been remanded to the NLRB's Region 2, and an election is likely to take place after some remaining issues related to the description of the bargaining unit and voter eligibility are determined by the Regional Director, with a possible hearing. The university and the GWC will have the opportunity to seek votes in a campaign of about three weeks. Then, if the union has a majority of the votes cast in the election, the Board may certify it as the student assistants' representative based on the results of the election. At that point, Columbia will have several options: it can (1) recognize the union and bargain with it regarding wages, hours, and other terms and conditions of employment, or (2) engage in what is called a "technical refusal to bargain," essentially to position the case for an appeal of the NLRB decision.

If Columbia chooses the latter, its refusal to bargain is likely to prompt the GWC to file one or more unfair labor practice charges with the Board. If the Board still has a Democratic majority by the time it has an opportunity to rule, it can be expected to find that Columbia's refusal to bargain violates Sections 8(a)(5) and (1) of the NLRA. The Board can then order Columbia to cease and desist from engaging in unfair labor practices and to bargain. At that point, Columbia can request review of the decision in a U.S. court of appeal, in all likelihood the Second Circuit (which hears appeals from federal courts in Connecticut, New York, and Vermont) or the District of Columbia Circuit. The NLRB would probably cross-petition in the same court for enforcement of its order. After a court of appeals decision, either party could seek review by the full court of appeals, or seek certiorari at the U.S. Supreme Court.

If at any point in this lengthy process the GWC determines that it does not have sufficient support in the bargaining unit group it seeks to represent, by election result or otherwise, it can withdraw its petition and end the case.

What *Columbia University* Really Means for Colleges and Universities

Columbia University means that student assistants who are compensated for their work by private institutions of higher learning are "employees" under the NLRA. This status brings certain rights to student assistants, but it also has potential negative consequences for both the student assistants and their "employer" academic institutions.

For students, in exchange for their new rights under the act as employees, they may face union dues, fees, and disciplinary obligations, may be required to participate in strikes and lockouts, and feel pressure to be bound up in the "group think" and collective activity/group dynamics associated with organized labor activity. In states that do not have right-to-work laws, the students' right to join or not join the union, or to forgo paying union dues and fees, may be limited by the union through agreements with institutions.

For the schools, status as an "employer" under the NLRA with respect to student assistants may have an impact on their view of their academic mission. If student assistants had separate lives as "students" and "workers," this would not be the case. But the reality is that the student assistants' "school" and "work" are not so neatly divided, and mingling the two may adversely affect the academic freedom of the institution.

For example, a college economics department that wants to emphasize free market labor economics as the best system for efficient allocation and use of labor resources may instantly lose credibility if its teaching assistant is a member of a union that espouses the contrary economic philosophy.

Or consider the university political science department that wants its faculty and instructors, including teaching assistants, to refrain from espousing their personal political views to the students they teach in "captive audience" settings. In the view of the Board and its current General Counsel, political discussion by employees and voicing one's viewpoint to customers and clients for support of the viewpoint is likely to be protected concerted activity under the NLRA, and employer restrictions on such activity in employer rules and policies may be found to violate Section 8(a)(1) of the NLRA. But allowing teaching assistants to vocally espouse their personal views in class may very well have an adverse impact on the students they are charged with instructing and encouraging to think for themselves.

These are not idle fears. The Board's General Counsel, with support in countless Board decisions, is currently taking the position that a vast range of employer restrictions on employee conduct constitute unlawful interference with the employees' rights to organize and engage in protected activity.[1] Routine student conduct rules and policies that apply in the academic sphere at colleges and universities across the nation are likely to be found unlawful if subjected to NLRA scrutiny. Common student conduct rules and policies may become unlawful if "employee" is substituted for "student," as the Board has now done.[2]

The list of potential conflicts between institutional academic freedom and the imposition of NLRB jurisdiction on student assistants goes on and on and on. Curricula and credit hour requirements, penalties for student conduct and academic infractions, conflicts in student assistant working time versus academic time, confidentiality of education and health records, thesis and dissertation and homework requirements, and grading and approvals, work for hire and intellectual property rights, all are "thrown up in the air" by the Board's decision.

In short, *Columbia University* could have a dramatic impact on institutions of higher learning, extending far beyond the ivy walls of Columbia. In the current environment of ever-escalating costs of higher education, the decision may take things in a wrong direction. Some studies indicate that unionization typically adds administrative costs of 15 to 20 percent on average.

On the other hand, the NLRB's decision covers only "compensated" student assistants. To avoid coverage, one potential "solution" for academic institutions would be to stop paying student assistants, and converting the system to one based solely on academic credit. This has happened with many internship programs.

Any way you look at it, the *Columbia University* decision presents interesting issues for private institutions of higher learning, students, and even the teaching assistants it was designed to benefit.

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[1] See NLRB General Counsel Memorandum, GC 15-04 (Mar. 18, 2015).
[2] See *Trustees of Columbia University in the City of New York*, supra, at 30-31 (dissenting opinion, Miscimarra, P.); NLRB General Counsel, Division of Advice Memorandum, *Northwestern University*, Case 13-CA-157467 (Sept. 22, 2016) (finding university's "Football Handbook" rules unlawful).