

Proposed Rule Would Preclude Undergraduate and Graduate Students from Union Organizing

On September 23, 2019, the National Labor Relations Board (NLRB) published a Notice of Proposed Rulemaking that addresses the long-standing issue of whether undergraduate and graduate students who perform services for compensation (including teaching or research) at private colleges and universities can form a union under the National Labor Relations Act (NLRA). Under the proposed rule, student workers would **not** be able to organize based on the Board's position that such individuals do not meet the definition of "employee" under Section 2(3) of the NLRA because their relationships with their colleges and universities are predominantly educational, not economic.

The definition of "employee" under Section 2(3) does not expressly include or exclude student workers. As a result, the Board has been responsible for interpreting this definition as it relates to the inclusion of student workers. As discussed in the proposed rule, the Board has changed course on this issue several times. In 1972, the Board held that graduate student assistants at Adelphi University were "primarily students" and that they should be excluded from a bargaining unit of regular faculty. Two years later, the Board similarly held that graduate student research assistants at Leland Stanford Junior University were not employees within the meaning of Section 2(3) because—as with the students at Adelphi University—they were primarily students.

The Board's rulings in *Adelphi University* (195 NLRB 639) and *Leland Stanford* (214 NLRB 621), remained intact until 2000 when the Board decided *New York University* (332 NLRB 1205), holding that certain university graduate student assistants were statutory employees under Section 2(3) because those students were performing services at the direction of the University and were compensated for such services. Only four years later, the Board overruled its decision in *NYU* and held that graduate student teaching assistants, research assistants, and proctors at Brown University were not statutory employees because they were primarily students that "have a predominantly academic, rather than economic, relationship with their school." In that decision, the Board further noted that allowing collective bargaining between private universities and graduate students assistants would have a detrimental impact on educational decisions.

In 2016, the Board decided *Columbia University* (364 NLRB No. 90) and overruled *Brown University*. The Board, however, did not only reverse its prior decision by reinstating its position in the *NYU* decision. Rather, the Board expanded its interpretation of Section 2(3) to cover both externally-funded graduate research assistants and undergraduate university student assistants. In reaching this conclusion, the Board held that an employment relationship can exist between a private college or university and its employee, even if the employee is also a student. The Board rejected its prior reasoning in *Brown University* that allowing collective bargaining would have a negative impact on the educational environment, stating that no empirical support existed for that proposition.

Under the current proposed rule, it will become a matter of regulation that students who perform services at a private college or university that is related to their studies will be considered primarily students with an educational, not economic, relationship with the institution, excluding them from coverage under Section 2(3). In stating this position, the Notice of Proposed Rulemaking notes, "students who assist faculty members with teaching or research generally do so because those activities are vital to their education ..." and "is often a prerequisite to obtaining the student's degree."

The proposed rule also references the limited amount of time that students perform these additional duties because students are primarily devoted to their coursework and studies, and that the remuneration paid to students for these services is more akin to financial aid than consideration for work. Finally, the proposed rule notes that the goal of faculty in advancing students' education is much different than the relationship between employers and employees in collective bargaining, and that the Board's long-standing position that it will not exercise jurisdiction over relationships that are primarily educational, "advances the important policy of protecting traditional academic freedoms."

Needless to say, this has been an area of inconsistency for the Board. As stated by NLRB Chairman John Ring, the reason behind seeking this change through the rulemaking process is to bring a certain measure of stability to this controversial issue. One member of the NLRB, who had supported the Columbia decision in 2016, issued an extensive dissent, opposing the proposed rule as lacking any empirical basis. The proposed rule, however, is subject to change following the 60-day public commenting period, which began on September 23rd. Individuals who would like to submit a comment either in favor or against this rule may do so electronically at www.regulations.gov.

This proposed rule has the potential to impact private colleges and universities where students workers are currently subject to a collective bargaining agreement, are currently engaged in bargaining a first agreement or are actively seeking to organize. We will provide updates on any new developments regarding this proposed rule.

For more information on issues facing colleges and universities, we invite you to subscribe to [Bond's Higher Education Law Report](#).



Bond has prepared this communication to present only general information. This is not intended as legal advice, nor should you consider it as such. You should not act, or decline to act, based upon the contents. While we try to make sure that the information is complete and accurate, laws can change quickly. You should always formally engage a lawyer of your choosing before taking actions which have legal consequences. For information about our firm, practice areas and attorneys, visit our website, www.bsk.com. • Attorney Advertising • © 2019 Bond, Schoeneck & King PLLC

CONNECT WITH US ON LINKEDIN: [SEARCH FOR BOND, SCHOENECK & KING, PLLC](#)

FOLLOW US ON TWITTER: [SEARCH FOR BONDLAWFIRM](#)