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NLRB Proposes Regulation to Prevent Students From Organizing

HIGHER EDUCATION ALERT | September 20, 2019

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As we discussed in an earlier client alert (available at: https://www.pepperlaw.com/publications/can-student-workers-unionize-nlrb-to-issue-new-rules-on-the-question-2019-05-23/), the National Labor Relations Board announced in May that it would be issuing proposed rules that would establish a "standard for determining whether students who perform services at private colleges or universities in connection with their studies are 'employees'" under the National Labor Relations Act (NLRA). At that time, we predicted the rules would make it more difficult for students to be classified as employees for purposes of forming unions.

On September 20, the NLRB confirmed our prediction by issuing a notice of proposed rulemaking (available at: https://www.federalregister.gov/documents/2019/09/23/2019-20510/jurisdiction---nonemployee-status-of-university-and-col-

lege-students-working-in-connection-with) that would prevent students at private colleges and universities who "perform any services . . . in connection with their undergraduate or graduate studies" from organizing to form unions. The stated justification for the regulation is that the relationship these students have with their institutions is predominately educational, not economic.

The supplementary information accompanying the proposed regulation indicates that the Board intends for the rule to be limited to those "students who perform services at a private college or university *related to their studies*." However, the Board also invited comments on whether the regulation should be expanded to include students who perform services "unrelated to their course of study due to the very tenuous secondary interest" these students have in their employment.

Republicans John Ring, Marvin Kaplan and Bill Emanuel formed the majority that approved the proposed rule. Democrat Lauren McFerran authored a lengthy and strongly worded dissent that chastised the majority for proposing a rule with "no plausible foundation." Member McFerran was among the majority in the 2016 *Columbia University* decision, in which the Board held that graduate and undergraduate teaching assistants, as well as graduate research assistants, are statutory employees covered by the NLRA and can unionize. Near the end of her spirited dissent, Member McFerran encouraged "robust public participation in the comment process" in the hope that it may sway her colleagues in the majority.

In explaining the rationale for the proposed regulation, the Board noted that, as matters have come before it for adjudication, it has reversed its position on this issue three times since 2000. The Board posited that a regulation "will provide greater predictability and certainty than has existed during the recent history of adjudicatory oscillation." In addition, the supplementary information explains that, since the election of President Trump, unions have intentionally chosen not to pursue cases where an institution has refused to recognize a student union, so as to avoid offering a Republican-controlled Board the opportunity to reverse the *Columbia University* holding.

As we suggested in our May alert, colleges and universities are encouraged to submit comments on the proposed regulation, which is scheduled to be published in the *Federal Register* on September 23. Comments are due by November 22, 2019, and any replies to those comments are due by November 29. The comment process may be particularly energized by the fact that both the majority and the dissent encouraged participation by

interested parties. Members of the Pepper Hamilton Higher Education Practice Group regularly assist universities and colleges in commenting on proposed rules (available at: https://www.pepperlaw.com/news/pepper-hamilton-submits-comments-on-proposed-title-ix-regulations-2019-02-01/) and are available to assist colleges and universities that wish to comment, individually or collectively.