

PUBLICATION

Biden Administration Rollback: Are Collegiate Students Employees?

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On March 15, 2021, the National Labor Relations Board (NLRB) issued a Notice of Withdrawal in the Federal Register withdrawing the proposed rule related to undergraduate and graduate student employment classification (the Proposed Rule) under the National Labor Relations Act (the Act). The NLRB will retain jurisdiction over undergraduate and graduate student labor complaints and employers of such labor will need to be wary of the effects of the NLRB's withdrawal of the Proposed Rule.

Withdrawal of the Proposed Rule is one of the first rescissions of yet-to-be promulgated Trump-era Notice of Proposed Rule Makings from the NLRB by Biden Administration appointee, Acting General Counsel Peter Sung Ohr. Citing allocation of the NLRB's resources and competing NLRB priorities, the Biden Administration makes its initial stamp on NLRB-related, Trump-era rollbacks.

Where the Proposed Rule Was, Is, and What to Expect

This issue is no stranger to political tug-of-war; the withdrawal of the Proposed Rule is the third of its kind since 2000, each time reflecting the political party of the newly-elected presidential administration. Most recently, however, in the 2016 NLRB decision, *Columbia University*, the NLRB ruled that an employment relationship could exist, under the Act, between a private college or university and its student when the student is simultaneously an employee. The NLRB reasoned that the Act covered student-employees irrespective of the employee's status as a student. The NLRB said an individual "may be both a student and an employee; a university may be both the student's educator and employer." A copy of the *Columbia University* decision can be found [here](#).

Introduced September 23, 2019 and corrected on October 16, 2019, the Proposed Rule posited a regulation establishing that students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies, are not "employees" within the meaning of Section 2(3) of the National Labor Relations Act. If promulgated, the Proposed Rule would have foreclosed university students' ability to unionize for purposes of collective bargaining. Private universities, however, would have retained the right to collectively bargain with such organized students, at universities' discretions. As with prior rejections, the NLRB's withdrawal of this iteration will affect university-student relations for, at least, the next four years.

Chief among university employer concerns will be the immediate organization of undergraduate and graduate students. Unions that withdrew their petitions during the Trump administration are expected to renew and continue their efforts to unionize. New student unionization will create challenges in university-student-employee relations. Issues that will surface include, but are not limited to, standard wage payment practices, health insurance coverage, and leave benefits. Certainly, the complications that COVID-19 present will also be considered.

What Colleges and Universities Can Do Now

As colleges and universities prepare for the more robust return of students and student-employees, institutions will need to consider taking specific steps to prepare for student organizing. Some such steps include:

- Review policies, procedures, and terms and conditions of student teaching assistants, researchers, and other qualified employees;
- Evaluate additional or amended processes for qualified student-employees to raise concerns over any issues that surface as a result of the Proposed Rule rescission;
- Implement updated policies and procedures commensurate with the potential impact of the current administration's labor agenda; and
- Teach, retrain, train, and designate college and university academic leaders on how they can enforce newly revised policies and procedures to ensure uniform and consistent reaction to potential student organizations.

While the landscape related to NLRB enforcement of student-employee rights has, once again, taken a diametric shift, in student-employees' favor, prompt and prudent university employer action can effectively limit potential liability. We continue to follow this shifting legal landscape closely. Please contact the authors or your Baker Donelson [Labor & Employment](#) attorney to discuss how we can work with you in developing a plan to address these issues.