

Unionization of Private Colleges' And Universities' Graduate Students

A union affiliated with the UAW, the Graduate Student Organizing Committee, is seeking to overrule current federal labor law that private colleges and universities are not required to recognize and bargain with unions if a majority of their graduate students vote for them because graduate students are not “employees” for purposes of the National Labor Relations Act. This became federal labor law in 2004, when a majority of the Bush NLRB (“Board”) so ruled in *Brown University*, 342 NLRB 483, thereby overruling the Clinton Board’s prior decision to the contrary in *New York University*, 332 NLRB 1205 (2000). Now, only one member of the *Brown* majority, Peter Schaumber, remains on the NLRB. The current Chairman of the Board, Wilma Liebman, dissented in *Brown*, in a strongly worded opinion that accused the majority of “overlook[ing] the economic realities of the academic world” in finding graduate students to be primarily students rather than “employees”. While nothing is guaranteed, it is expected that two other current members of the Board, Obama appointees Craig Becker and Mark Pearce, will side with Chairman Liebman on this issue given that the former was in-house counsel for a union and the latter was a union labor lawyer. Thus, it is likely that the Graduate Student Organizing Committee will succeed in overruling *Brown*, with a dissent by member Schaumber if this is decided before his term is up in August, and a possible dissent by newest Board member Brian Hayes. The result will be organizing drives by the Graduate Student Organizing Committee and other unions at colleges and universities. If successful and upheld by the NLRB, the private institutions affected would be required to bargain over the terms of their graduate students’ “employment” and would be subject to strikes and other protected concerted activity by graduate students.

As indicated, there would be two prerequisites for this to occur: (1) a union succeeding in organizing so that either the institution of higher education voluntarily recognizes the union or a majority of the graduate students vote yes in a union election and (2) the NLRB upholding the union success by certifying the union. Even if the Obama Board were to overrule *Brown*, private institutions could do much to preclude one or both of these prerequisites. However, quick action needs to be taken, starting now, before union organizing begins. Working with labor counsel experienced with higher education and well versed in NLRB matters, private institutions could begin to take steps now that would make unionization of graduate students more difficult. Depending on an institution’s individual circumstances, it may be possible to create a factual record now that would minimize if not preclude an Obama NLRB that were to overrule *Brown* finding your graduate students to be “employees”, and thus subject to unionization. We are well prepared to analyze your individual circumstances and advise you in helping achieve your goals.

Labor & Employment
July 2010



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