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Legal Issues in Higher Education

Richard Griffin
NLRB General Counsel

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OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 17-01

January 31, 2017

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel /s/

SUBJECT: General Counsel's Report on the Statutory Rights of University
Faculty and Students in the Unfair Labor Practice Context

The Board has issued three recent decisions of importance in the representation context regarding the question of whether to certify certain bargaining units of university¹ faculty and/or students under the National Labor Relations Act (the "NLRA" or the "Act"). They are *Pacific Lutheran University*,² *Columbia University*,³ and *Northwestern University*.⁴ Because these decisions were representation cases, they did not directly address the right of the workers in those cases to seek protection against unfair labor practices. Thus, the Office of the General Counsel has begun to analyze how it will apply this precedent to unfair labor practice charges involving individuals performing the kinds of work involved in those cases. This Report is intended as a guide for employers, labor unions, and employees that summarizes Board law regarding NLRA employee status in the university setting and explains how the Office of the General Counsel will apply these representational decisions in the unfair labor practice arena.

As detailed below, the Board issued *Pacific Lutheran* in 2014, which sets forth two new significant tests affecting university employees: (1) a jurisdictional test determining when faculty of religious educational institutions under *NLRB v. Catholic Bishop of Chicago* ("*Catholic Bishop*"),⁵ are subject to the Board's jurisdiction; and (2) a refinement of the test set forth in *NLRB v. Yeshiva*

¹ Throughout this Report, we refer to all institutions of higher education as universities.

² 361 NLRB No. 157 (December 16, 2014).

³ 364 NLRB No. 90 (August 23, 2016).

⁴ 362 NLRB No. 167 (August 17, 2015).

⁵ 440 U.S. 490 (1979).

University (“*Yeshiva University*”)⁶ for determining when faculty members are managerial and not protected by the Act. More recently, the Board issued two decisions concerning students in higher education: *Columbia University*,⁷ in which the Board certified the petitioned-for bargaining unit, thus reaffirming its position in *New York University* (“*NYU*”)⁸ that student assistants in colleges and universities are employees under the NLRA, and *Northwestern University*,⁹ in which the Board declined to exercise jurisdiction to certify the union’s proposed bargaining unit and opted not to decide whether scholarship football players are statutory employees.¹⁰ This Report summarizes this recent precedent, as well as the state of Board law relating to medical interns and other non-academic student employees. This Report also addresses the question left open in *Northwestern University*, and sets forth the General Counsel’s position on whether scholarship football players at NCAA Division I Football Bowl Subdivision (“FBS”) private colleges and universities are employees under the NLRA, and therefore are entitled to the protections of Section 7 of the Act.

I. *Pacific Lutheran*, 361 NLRB No. 157 (December 16, 2014)

In its recent *Pacific Lutheran* decision, the Board announced a new standard for determining when faculty members at a school with an asserted religious mission fall within the Board’s jurisdiction.¹¹ This test is a necessary threshold for determining whether faculty, students, and other workers in religious universities are employees protected by the NLRA. The decision is also significant for its announcement of a revised standard for determining whether a university faculty member is managerial and thus excluded from protection under the NLRA.¹²

The Board’s new standards set forth under *Pacific Lutheran* are important to unfair labor practice case processing. Thus, while the Board will use the standards

⁶ 444 U.S. 672 (1980).

⁷ 364 NLRB No. 90 (August 23, 2016).

⁸ 332 NLRB 1205 (2000).

⁹ 362 NLRB No. 167 (August 17, 2015).

¹⁰ *See id.*, slip op. at 1, 3, 4, 6, 7.

¹¹ 361 NLRB No. 157, slip op. at 5-11.

¹² 361 NLRB No. 157, slip op. at 1, 14.

set forth in *Pacific Lutheran* in representation cases to determine whether a petitioned-for bargaining unit should exclude certain faculty members, *i.e.*, those who maintain the school's religious mission or who are managerial, we will apply those same standards when determining whether we can seek redress for individual faculty members or other employees who are the victims of unfair labor practices.

A. Religious Character of the University and Faculty Positions

Under the Board's new standard, we will examine whether a school's asserted religious identity, and an individual faculty member's specific role in creating and maintaining that identity, prevent us from seeking remedies for unfair labor practices committed against that employee.

Prior to the Board's *Pacific Lutheran* decision, the Supreme Court in *Catholic Bishop* held that Board jurisdiction over labor disputes between church-operated schools and their teaching employees would present "a significant risk that the First Amendment will be infringed."¹³ The Court declined to construe the NLRA in a manner that would require resolution of such difficult First Amendment issues, and therefore held that the Act did not grant the Board jurisdiction over lay teachers in church-operated schools.¹⁴ The Court's decision in *Catholic Bishop* rested in substantial part upon "the critical and unique role of the teacher in fulfilling the mission of a church-operated school."¹⁵

Following the Supreme Court's decision in *Catholic Bishop*, the Board proceeded on a case-by-case basis, applying a multifaceted analysis to decide whether a self-identified religious school had a "substantial religious character" such that exercise of the Board's jurisdiction would present a significant risk of infringing on that employer's First Amendment religious rights.¹⁶ However, in *University of Great Falls v. NLRB*, the D.C. Circuit rejected the Board's analysis and exercise of jurisdiction over a university that had been founded by a Catholic

¹³ 440 U.S. at 502-504. Although the facts in *Catholic Bishop* concerned teachers at church-operated parochial schools, the Board and courts have applied that holding to colleges and universities. See *Pacific Lutheran*, 361 NLRB No. 157, slip op. at 4, n.4 (citing *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 401 (1st Cir. 1985); *Trustee of St. Joseph's College*, 282 NLRB 65, 67-68 (1986)).

¹⁴ *Catholic Bishop*, 440 U.S. at 506-507.

¹⁵ *Id.* at 501.

¹⁶ *Pacific Lutheran*, 361 NLRB No. 157, slip op. at 4 (comparing *Jewish Day School*, 283 NLRB 757, 761-62 (1987) (declining jurisdiction) to *Livingstone College*, 286 NLRB 1308, 1310 (1987) (asserting jurisdiction)).

religious order.¹⁷ In so holding, the D.C. Circuit developed a new three-part test for when the Board may assert jurisdiction over a religious college or university, relying in part on the First Circuit's decision in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1985) (*en banc*).¹⁸ Under the *Great Falls* test, the Board may not assert jurisdiction where a university: (1) holds itself out to students, faculty, and the community as providing a religious environment; (2) is an organized non-profit; and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity whose membership is determined at least in part based on religion.¹⁹ In subsequent cases, the Board neither accepted nor rejected the *Great Falls* test.²⁰

In its 2014 *Pacific Lutheran* decision, the Board reexamined its standard for exercising jurisdiction over faculty members at self-identified religious colleges and universities.²¹ The Board adopted a new two-part test, designed to be faithful to the holding of *Catholic Bishop* and to avoid the potential for unconstitutional entanglement while, to the extent constitutionally permissible, vindicating the rights of employees to engage in collective bargaining.²² As the first step, the Board adopted the first prong of the *Great Falls* test, namely whether the university has demonstrated that it “holds itself out to students, faculty, and community as providing a religious educational environment.”²³ Relevant evidence could include: “handbooks, mission statements, corporate documents, course catalogs, and documents published on a school’s website” and possibly “[p]ress releases or other public statements by university officials.”²⁴ Proof of non-profit status (the second *Great Falls* prong) may also be relevant.²⁵ However, the Board does not require proof of the third prong of the *Great Falls* test concerning the university’s formal

¹⁷ 278 F.3d 1335 (D.C. Cir. 2002).

¹⁸ *Id.* at 1343.

¹⁹ *Id.*

²⁰ *See Pacific Lutheran*, 361 NLRB No. 157, slip op at 5 (citations omitted).

²¹ *Id.*, slip op. at 5-11.

²² *Id.*, slip op. at 5.

²³ *Id.* (quoting *Great Falls*, 278 F.3d at 1343).

²⁴ *Id.*, slip op. at 6.

²⁵ *Id.*, slip op at 7 (citing *Great Falls*, 278 F.2d at 1344).

relationship with a religious organization.²⁶ The university's threshold burden of this first step is not a heavy one, and the Board will "err on the side of being over-inclusive and not excluding universities because they are not 'religious enough'."²⁷

If a school meets this threshold showing that it holds itself out as providing a religious educational environment, the Board then applies the second step of the test and examines: whether "the university holds out its petitioned-for faculty members as performing a specific role in creating and maintaining that environment."²⁸ Unlike the first step, the focus of this prong is on the individual faculty member, rather than the university as a whole. Thus, there must be a "*connection* between the performance of a religious role and faculty members' employment requirements" for an individual to be exempt from the NLRA.²⁹

If the university holds out its faculty members, in communications to current or potential students and faculty members, and the community at large, as performing a specific role in creating or maintaining the school's religious purpose or mission, the Board will decline jurisdiction.³⁰ Examples of when the Board will decline jurisdiction include when evidence shows that faculty members are held out as serving a religious function, such as: integrating the institution's religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training.³¹ The Board will also decline jurisdiction where the university holds itself out as requiring that its faculty conform to its religion or religious beliefs in a way that is linked to their work as faculty members.³²

However, general statements that faculty members are expected to support the goals or missions of the university are not alone sufficient for the Board to decline jurisdiction.³³ Faculty members who are not expected to perform a specific

²⁶ *Id.*

²⁷ *Id.* (quoting *Great Falls*, 278 F.3d at 1343).

²⁸ *Id.*

²⁹ *Id.*, slip op. at 9, n.14 (emphasis in the original).

³⁰ *Id.*, slip op at 9.

³¹ *Id.*

³² *Id.*

³³ *Id.*, slip op. at 8.

role in establishing or maintaining the university's religious educational environment "are indistinguishable from faculty at colleges and universities which do not identify themselves as religious institutions and which are indisputably subject to the Board's jurisdiction."³⁴

Applying that test to the facts in *Pacific Lutheran*, the Board found that the university had met the threshold requirement because it held itself out as creating a religious educational environment.³⁵ However, the university failed to establish the second requirement, *i.e.*, that it held out the contingent faculty members in its petitioned-for unit as performing a religious function.³⁶ In so finding, the Board explained that there was nothing in the school's materials that would suggest to faculty, students, or the community, that its contingent faculty members played a role in advancing the school's identified religion.³⁷ Thus, the Board asserted jurisdiction over the petitioned-for unit.³⁸

The Board applied *Pacific Lutheran* in two recent representation cases, which help define the boundaries of the Board's jurisdiction under the new test. In *Seattle University*, the Board determined that the Jesuit Catholic university met *Pacific Lutheran's* first prong because the school held itself out as providing a religious educational environment but concluded that the majority of its contingent faculty were covered by the NLRA.³⁹ Thus, the Board excluded from the petitioned-for unit only those contingent faculty members who teach in the Department of Theology and Religious Studies and the School of Theology and Ministry.⁴⁰ Unlike the majority of contingent faculty who are not hired to advance the school's religious goals, faculty in the Department and School of Theology are held out as performing a specific role in creating and maintaining the school's religious educational environment.⁴¹ With regard to that faculty, the Board concluded that the school

³⁴ *Id.*

³⁵ *Id.*, slip op. at 12-13 (relying on the university's website, articles of incorporation, bylaws, faculty handbook, course catalog, and other publications).

³⁶ *Id.*, slip op. at 13-14.

³⁷ *Id.*

³⁸ *Id.*, slip op. at 14.

³⁹ 364 NLRB No. 84, slip op. at 2 (August 23, 2016).

⁴⁰ *Id.*, slip op. at 1, 3.

⁴¹ *Id.*, slip op. at 2-3.

met its burden at the second step of the *Pacific Lutheran* test because “a reasonable prospective applicant for a contingent faculty position in either the Department or the School would expect that the performance of her responsibilities would require furtherance of the University's religious mission.”⁴² For the same reasons, the Board in *Saint Xavier University* certified the unit consisting of the Catholic university's part-time faculty, excluding only part-time faculty who teach in the University's Department of Religious Studies.⁴³

Consistent with the Board's new test, we will similarly seek redress for unfair labor practices committed by religious education institutions against individual faculty member discriminatees who the university does not hold out as performing a specific role in creating and maintaining the university's religious educational environment.

B. Managerial Status of University Faculty

The *Pacific Lutheran* decision is also significant for its announcement of a revised standard for determining whether a faculty member is managerial and thus excluded from protection under the NLRA.⁴⁴ This standard is applicable in all cases alleging unfair labor practices against university faculty members to determine whether the faculty members are managerial or employees under the Act.

In *Yeshiva University*, the Supreme Court found that faculty of the university were managerial employees excluded from the right to collective bargaining under the NLRA.⁴⁵ The Court defined managerial faculty as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.”⁴⁶ Such managerial faculty “must exercise discretion within, or even independently of, established employer policy and must be aligned with management.”⁴⁷ However, if faculty members' decision-making is “limited to the routine discharge of professional duties in projects to which they have been assigned,” they would be covered by the NLRA, even if union

⁴² *Id.*, slip op. at 3.

⁴³ 364 NLRB No. 85, slip op. at 1, 3 (August 23, 2016).

⁴⁴ 361 NLRB No. 157, slip op. at 1, 14.

⁴⁵ 444 U.S. at 674, 679.

⁴⁶ *Id.* at 682 (citation omitted).

⁴⁷ *Id.* at 683.

membership “arguably may involve some divided loyalty.”⁴⁸ Applying these standards, the Court found the Yeshiva faculty to be managerial because they: decide what courses will be offered, at what times, and to which students; debate and determine teaching methods, grading policies, and enrollment standards; effectively decide which students will be accepted, retained, and permitted to graduate; and at times have decided the size of the student body, tuition, and school location.⁴⁹ However, the Court expressly left open the possibility that some faculty in future cases could be properly included in a bargaining unit, while others were excluded (for instance, a distinction between tenured and non-tenured faculty) “depending upon how a faculty is structured and operates.”⁵⁰

After *Yeshiva University*, the Board issued nearly two dozen decisions applying a “sweeping” breadth of factors to analyze the managerial status of faculty at universities.⁵¹ In those cases, the Board considered faculty participation in at least 28 areas, ranging from curriculum and teaching methods to admissions and student retention.⁵² The D.C. Circuit criticized this case-by-case approach, particularly the Board’s failure to explain which factors were most and least significant and why.⁵³

Thus, because the *Yeshiva University* Court did not prescribe a precise analytical framework to determine the managerial status of university faculty and left the Board to proceed on a case-by-case basis, the Board in *Pacific Lutheran* stated that it would now apply *Yeshiva University* to develop a “new approach” that is more “workable” and “predictable” to help guide employers, unions, and employees.⁵⁴ The Board’s new approach is “designed to answer the question whether faculty in a university setting actually or effectively exercise control over decision making pertaining to central policies of the university such that they are

⁴⁸ *Id.* at 690.

⁴⁹ *Id.* at 686.

⁵⁰ *Id.* at 690, n.31.

⁵¹ *Pacific Lutheran*, 361 NLRB No. 157, slip op. at 15 & n.30.

⁵² *See id.*, slip op. at 15.

⁵³ *Id.*, slip op. at 16 (citing *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (2004), *denying enforcement* 338 NLRB No. 92 (2003) and *Point Park Univ. v. NLRB*, 457 F.3d 42 (2006), *denying enforcement* 344 NLRB 275 (2005)).

⁵⁴ *Id.*, slip op. at 16.

aligned with management.”⁵⁵ Under this standard, the Board will examine “both the breadth and depth of the faculty’s authority at the university,” giving more weight to those areas of policy-making that affect the university as a whole, and seeking to determine whether the faculty actually exercise control or make effective recommendations over those policy areas.⁵⁶ Specifically, the Board will examine the faculty’s participation in decision-making concerning: academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions.⁵⁷ The Board will put greater weight on the first three areas.⁵⁸

Applying this new standard to the facts, the *Pacific Lutheran* Board concluded that the employer failed to prove that its full-time contingent faculty exercised sufficient managerial authority to justify their exclusion from the petitioned-for unit of contingent faculty.⁵⁹ The Board found “insufficient evidence” that the full-time contingent faculty were substantially involved in decision-making affecting the first three, most significant, areas—academic programs, enrollment, and finances.⁶⁰ Even with respect to the final two areas of academic and personnel policies, the Board found their decision-making “essentially limited to matters concerning their own classrooms or departments.”⁶¹

In the unfair labor practice context, complaint will not issue against a university if we determine that an asserted discriminatee is a managerial employee under the Board’s *Pacific Lutheran* test. However, even where the Board applies *Pacific Lutheran* to refuse to fully process a petition to certify a proposed bargaining unit, we will conduct an individualized analysis of the asserted discriminatee’s employment position to determine whether the individual exercised sufficient managerial authority so as to be deprived of employee status under the Act.

⁵⁵ *Id.*, slip op. at 14.

⁵⁶ *Id.*, slip op. at 16-17.

⁵⁷ *Id.*, slip op. at 14.

⁵⁸ *Id.*

⁵⁹ *Id.*, slip op. at 24.

⁶⁰ *Id.*, slip op. at 25.

⁶¹ *Id.*

II. Columbia University, 364 NLRB No. 90 (August 23, 2016)

Another important representation decision directly impacting unfair labor practice case processing is the Board's decision in *Columbia University*.⁶² There, the Board applied the statutory language of the Act and longstanding common-law principles to settle the issue of statutory coverage for graduate student employees, determining that student assistants are employees under the NLRA. This case is significant for its direct application to student assistants, and also for the implications of the Board's analysis for non-academic university employees and medical interns and residents.

A. Student Assistants

In settling that student assistants are NLRA employees, the Board in *Columbia University* overturned its prior divided holding to the contrary in *Brown University*,⁶³ which itself had overruled its earlier decision in *NYU*.⁶⁴ The *Columbia University* standard will be applied in future unfair labor practice cases involving student assistants at private sector universities.

Prior to *Brown*, the Board in *NYU* found that graduate assistants meet the NLRA definition of "employee" in Section 2(3), which is broadly defined to include "any employee," and contains no exception in the statutory text for graduate students.⁶⁵ Moreover, regardless of the time they spend on their work, graduate students meet the common-law test of agency in that they "perform their duties for, and under the control of" their university, which in turn pays them for those services—a situation "indistinguishable from a traditional master-servant relationship."⁶⁶ Turning to the purpose of the NLRA, the Board in *NYU* found "no basis to deny collective-bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students."⁶⁷ The *NYU* Board also rejected the argument that graduate assistants should be denied the Act's protection because their work is "primarily educational" and instead explained that "obtain[ing] educational benefits from employment is not

⁶² 364 NLRB No. 90 (August 23, 2016).

⁶³ *Brown University*, 342 NLRB 483 (2004).

⁶⁴ 332 NLRB 1205 (2000).

⁶⁵ *Id.* at 1205-1206.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1205.

inconsistent with employee status.”⁶⁸ In that regard, the Board relied upon its decision in *Boston Medical Center Corporation*,⁶⁹ which had found interns, residents, and fellows at a nonprofit teaching hospital to be statutory employees, even though they were also students learning their chosen medical craft.⁷⁰ Finally, the *NYU* Board rejected the argument that recognizing graduate assistants as statutory employees would harm academic freedom, explaining that this concern was “speculative.”⁷¹

In *Brown University*,⁷² a sharply divided Board overturned *NYU* and held that “graduate student assistants are not statutory employees.”⁷³ The crux of the *Brown* majority’s decision was that graduate assistants are not employees because they are “primarily students and have a primarily educational, not economic, relationship with their university.”⁷⁴ The *Brown University* majority stated that, even assuming that “graduate student assistants are employees at common law . . . it does not follow that they are employees within the meaning of the Act.”⁷⁵ Significantly, *Brown University* expressly declined to overturn *Boston Medical Center*.⁷⁶

In *Columbia University*, the Board returned to its position in *NYU*, determining that an employment relationship can exist under the NLRA between a college or university and its employee, even when the employee is also a student.⁷⁷ In overturning *Brown University*, the Board concluded that *Brown’s* “fundamental

⁶⁸ *Id.* at 1207 (internal quotation marks omitted).

⁶⁹ 330 NLRB 152 (1999).

⁷⁰ *See NYU*, 332 NLRB at 1206-1207.

⁷¹ *Id.* at 1208 & n.9.

⁷² *See* n. 63, *supra*.

⁷³ *Id.* at 483.

⁷⁴ *Id.* at 487.

⁷⁵ *Id.* at 488, 491.

⁷⁶ *Id.* at 487.

⁷⁷ *See Columbia University*, 364 NLRB No. 90, slip op. at 1-2, 5-6 (rejecting the *Brown University* holding that graduate students cannot be statutory employees because they are primarily students).

error” was that it had framed the existence of statutory coverage in terms of the employee’s primary role as a student.⁷⁸ The Board explained that “[s]tatutory coverage [under the NLRA] is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.”⁷⁹ Thus, an individual “may be both a student *and* an employee; a university may be both the student’s educator *and* employer.”⁸⁰

The Board concluded that both Section 2(3) of the Act and the common-law of agency support a finding of employee status. The Board explained that the definition of “employee” in Section 2(3) is “strikingly” broad, and, as the Supreme Court observed, “seems to reiterate the breadth of the ordinary dictionary definition of the term, a definition that includes any person who works for another in return for financial or other compensation.”⁸¹ Moreover, that Congress chose not to list student assistants among the NLRA’s enumerated exclusions from the definition of “employee” in Section 2(3) “is itself strong evidence of statutory coverage.”⁸² Student assistants meet the common-law definition of employee that establishes that an employee “relationship exists when a servant performs services for another, under the other’s control or right of control, and in return for payment.”⁸³ The Board explained that in past cases, it has applied the broad language in Section 2(3) to cover categories of workers that included paid union organizers (salts), undocumented workers, and confidential employees.⁸⁴

⁷⁸ *Id.*, slip op. at 5.

⁷⁹ *Id.*, slip op. at 2.

⁸⁰ *Id.*, slip op. at 7 (emphasis in the original). The Board also addressed students’ inclusion in bargaining units, explaining that the mere fact of students’ finite employment tenure does not mean they should be automatically excluded from the unit. *See id.*, slip op at 20-21 & n.130 (overturning cases such as *San Francisco Art Institute*, 226 NLRB 1251 (1976), which excluded student janitors from a bargaining unit of full-time and part-time janitors) and *Saga Food Service of California, Inc.*, 212 NLRB 786 (1974), cited by the *Columbia University* dissent at slip. op. at 32, n.50.

⁸¹ *Columbia University*, 364 NLRB No. 90, slip op. at 4, quoting *NLRB v. Town & Country*, 516 U.S. 85, 90 (1995) (internal quotations omitted).

⁸² *Id.* (citing *Sure-Tan, Inc. v. NLRB*, 353 U.S. 883, 891-92 (1984)).

⁸³ *Id.*, slip op. at 3, quoting *NYU*, 332 NLRB at 1206.

⁸⁴ *See id.*, slip op. at 5.

The Board also stated that asserting jurisdiction over student assistants who meet the common law definition of employee furthers the Act’s policies of encouraging collective bargaining and employees’ freedom to express a choice for or against a bargaining representative.⁸⁵ The Board rejected the theorized claims in *Brown University* that classifying student assistants as employees under the NLRA would detrimentally impact the education process, explaining, *inter alia*, that there is no empirical support for the claim in *Brown* that collective bargaining cannot accompany a student-teacher relationship.⁸⁶

Member Miscimarra’s dissent in *Columbia University* speculated that other problems could arise from the Board exercising its jurisdiction over student assistants, warning, for instance, that NLRA coverage could lead to strikes, lockouts, and other labor strife in higher education.⁸⁷ But as the majority noted, these are common concerns for every workplace and not a reason to deny the NLRA’s protections to student employees.⁸⁸ Member Miscimarra also feared that Board jurisdiction over student employees will harm universities’ confidentiality practices in sexual harassment cases by requiring disclosure of sensitive documents, or require schools to authorize abusive language against the university faculty.⁸⁹ However, as the majority explained, the NLRA’s document production provisions and boundaries of protected conduct “are, and always have been, contextual,” as “[t]he Board evaluates such claims in light of workplace standards and other relevant rules and practices.”⁹⁰ Additionally, the General Counsel has prosecutorial discretion over whether to issue an administrative complaint in any given case, taking into account the legitimate concerns of the university, including, *e.g.*, the need to maintain confidentiality in harassment investigations.⁹¹ Indeed, Regional

⁸⁵ *Id.*, slip op. at 6-7.

⁸⁶ *Id.*

⁸⁷ *Id.*, slip op. at 29-30 (Member Miscimarra, dissenting).

⁸⁸ *Id.*, slip op. at 11.

⁸⁹ *Id.*, slip op. at 30-31.

⁹⁰ *Id.*, slip op. at 11.

⁹¹ *See* 29 U.S.C. § 153(d) (power of the General Counsel includes having “final authority, on behalf of the Board, in respect of the investigation of charges . . . under section 10”); *see also Verso Paper*, Case 30-CA-089350, Advice Memorandum dated January 29, 2013 at p. 3, n.7 (finding rule requiring confidentiality during ongoing investigations of employee misconduct would be lawful as modified); *United Parcel Service*, Case 20-CA-29850, Advice Memorandum dated February 23, 2001

Offices may only issue unfair labor practice complaints that are “well founded in all respects.”⁹²

B. Non-Academic University Workers

As explained above, *Columbia University* settled that undergraduate research assistants are employees.⁹³ However, that case has broader implications beyond just student assistants. Other students, typically undergraduates, often work in non-academic positions for their universities during the school year, for instance as maintenance or cafeteria workers, lifeguards, campus tour guides, or administrative assistants in the campus financial aid or alumni affairs offices.

Non-academic undergraduate work presents a less complicated question than the one that the Board grappled with in *NYU*, *Brown University*, and *Columbia University* concerning what weight, if any, to give the question of whether the work was “primarily educational”—an issue which is not present where students work in non-academic positions. Thus, students performing non-academic work who meet the common-law test of performing services for and under the control of universities, in exchange for compensation, fall within the broad ambit of Section 2(3).⁹⁴ As such, students performing non-academic university work are clearly covered by the NLRA, and, as with student assistants, we will analyze unfair labor practice charges involving non-academic student employees accordingly.

(finding confidentiality rule lawful where employer had substantial and legitimate interest in maintaining confidentiality of employee personnel records); *Walmart*, Case 11-CA-067171, Advice Memorandum dated May 30, 2012 (finding revised social media policy prohibiting disclosure of confidential trade secrets and information lawful); *Werthan Packaging, Inc.*, Case 26-CA-20116-1, Advice Memorandum dated May 31, 2001 (finding rule prohibiting disclosure of confidential business documents and customer information lawful).

⁹² NLRB Unfair Labor Practice Casehandling Manual § 10260.

⁹³ *See Columbia University*, 364 NLRB No. 90, slip op. at 7. *See also id.*, slip op. at 20 n.130 (overruling *San Francisco Art Institute*, 226 NLRB 1251 (1976), and other similar cases to the extent that they hold that the mere fact of being a *student* impairs bargaining rights).

⁹⁴ *See* n.81, *supra*. *Cf. University of West Los Angeles*, 321 NLRB 61, 61 (1996) (finding student law library clerks properly included in the same bargaining unit as non-student clerks).

C. Medical Interns, Residents, and Fellows (Hospital House Staff)

Finally, the Board's *Columbia* decision reinforces the Board's prior conclusion that interns, residents, and fellows (or "house staff") in post-medical school residency programs are employees within the meaning of the Act.⁹⁵ In its 1999 *Boston Medical Center Corporation* decision,⁹⁶ the Board overruled its prior precedent in *Cedars-Sinai Medical Center*⁹⁷ and *St. Clare's Hospital & Health Center*,⁹⁸ which had held that hospital house staff members were not employees because they were primarily students.

The *Boston Medical Center* Board's analysis of Section 2(3) was similar to that of *Columbia University*, noting that the breadth of Section 2(3) is striking, and students are not listed among its exclusions.⁹⁹ Further, the fact that hospital house staff members are also students does not diminish their status as employees because "nothing in the [NLRA] suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act"¹⁰⁰ and their "status as students is not mutually exclusive of a finding that they are employees."¹⁰¹ The Board concluded that hospital house staff members are employees under the common-law master-servant analysis because, *inter alia*, they work for an employer, receive compensation in the form of a stipend and benefits, and provide services for the hospital in the form of patient care.¹⁰²

In 2010, in *St. Barnabus Hospital*,¹⁰³ the Board was asked to reconsider its *Boston Medical Center* decision in light of *Brown University*. The Board declined to do so, stating "*Boston Medical Center* has been the law for over a decade, and no

⁹⁵ 364 NLRB No. 90, slip op. at 11.

⁹⁶ 330 NLRB 152 (1999).

⁹⁷ 223 NLRB 251 (1976).

⁹⁸ 229 NLRB 1000 (1977).

⁹⁹ *Boston Medical*, 330 NLRB at 160.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*, slip op. at 161.

¹⁰² *Id.*, slip op. at 160-61.

¹⁰³ 355 NLRB 233 (2010).

court of appeals has questioned its validity.”¹⁰⁴ The Board further pointed out, *inter alia*, that the *Brown University* Board expressly refused to extend its reasoning to hospital house staffs.¹⁰⁵

Accordingly, because *Boston Medical Center* was never overturned by *Brown University* and its reasoning was applied in the Board’s recent *Columbia University* decision, hospital house staffs will continue to be protected as employees under the NLRA, and we will continue to process unfair labor practice charges involving those employees.

III. *Northwestern University*, 362 NLRB No. 167 (August 17, 2015)

In August 2015, the Board issued its decision in *Northwestern University*,¹⁰⁶ declining to exercise its jurisdiction over a representation petition filed by a union seeking to represent Northwestern University’s football players who receive grant-in-aid scholarships. In so holding, the Board expressly declined to resolve the issue of whether college scholarship football players are employees under the NLRA.¹⁰⁷ As described below, based on: the record developed in *Northwestern University*, which includes information about NCAA rules that significantly control the activities of Division I FBS scholarship football players; other public information; and the Board’s recent decision in *Columbia University*, we conclude that scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act.

Rather than reaching the question of whether scholarship football players are NLRA employees, the Board in *Northwestern* concluded that it would not promote stability in labor relations to assert jurisdiction by certifying the petitioned-for bargaining unit. The Board reasoned that, even if the football players are employees for the purposes of collective bargaining, “such bargaining has never involved a bargaining unit consisting of a single team’s players, where the players for competing teams were unrepresented or entirely outside the Board’s

¹⁰⁴ *Id.* at 233.

¹⁰⁵ *See id.* *See also Icahn School of Medicine at Mount Sinai*, 29-RC-112517, 2014 WL 2002992, at **2, 17-22 (Feb. 25, 2014) (Regional Director concluded that house staff officers are NLRA employees, following *Boston Medical Center*).

¹⁰⁶ *Supra*, n. 4.

¹⁰⁷ *Northwestern University*, 362 NLRB No. 167, slip op at 1.

jurisdiction.”¹⁰⁸ The Board went on to note that “we are declining jurisdiction only in this case involving the football players at Northwestern University; we therefore do not address what the Board’s approach might be to a petition for all FBS scholarship football players (at least those at private colleges and universities).”¹⁰⁹ Finally, in commenting on the suggestion that the Board should use Section 14(c)(1) as a basis for declining jurisdiction, the Board stated that “we are unwilling to find that a labor dispute involving an FBS football team would not have a ‘sufficiently substantial’ effect on commerce to warrant declining to assert jurisdiction.”¹¹⁰ Thus, it is clear that nothing in *Northwestern* precludes the finding that Northwestern (or other private college/university) scholarship football players are employees under the Act and enjoy the protection of Section 7.¹¹¹ Since the issue was raised but left unresolved in *Northwestern*, it is important that these individuals know whether the Act’s protection extends to them, *i.e.*, whether if they engage in concerted activity for mutual aid and protection, such activity is protected by the NLRA.

¹⁰⁸ *Id.*, slip op. at 4.

¹⁰⁹ *Id.*, slip op. at 6.

¹¹⁰ *Id.*, n.28.

¹¹¹ In *Columbia*, explaining the care with which it exercises its discretionary jurisdiction, the Board stated:

In *Northwestern University*, 362 NLRB No. 167 (2015), we denied the protections of the Act to certain college athletes—*without ruling on their employee status*—because, due to their situation within and governance by an athletic consortium dominated by public universities, we found that our extending coverage to them would not advance the purposes of the Act. Here, conversely, we have no reason to believe that extending bargaining rights will not meaningfully advance the goals of the Act.

Columbia University, 364 NLRB No. 90, slip op. at 7, n. 56 (emphasis added). In proper context, this reference to *Northwestern’s* “deny[ing] the protections of the Act,” while explaining that the Board did not rule on players’ employee status, is limited to the Board’s discretionary decision there not to “extend[] bargaining rights” and to decline further processing of a representation case; it does not answer the question of whether, for example, a football player who has been kicked off the team and lost his scholarship because he discussed improving concussion protocols with his teammates in violation of an unlawful team rule would be entitled to the protections of the Act.

The conclusion that Division I FBS scholarship football players in private colleges and universities are employees under the NLRA is supported by the statutory language and policies of the NLRA, and the Board's interpretation of them in *Boston Medical Center* and *Columbia University*.¹¹²

As those two decisions recognized, the Supreme Court has endorsed the Board's broad interpretation of "employee" as defined in Section 2(3).¹¹³ Section 2(3) contains only a few enumerated exceptions, and university employees, football players, and students are not among them.¹¹⁴ As the Board stated in *Columbia University*, the absence of any of these exclusions "is itself strong evidence of statutory coverage."¹¹⁵

In applying the NLRA's expansive language and purpose to specific situations, the Board has long made use of common-law agency rules governing the conventional master-servant relationship, including most recently in *Columbia University*.¹¹⁶ Under those rules, an employee includes any person "who perform[s] services for another and [is] subject to the other's control or right of control. Consideration, *i.e.*, payment, is strongly indicative of employee status."¹¹⁷

¹¹² While the Board in *Northwestern University* observed that the scholarship football players "bear little resemblance to ... graduate student assistants" based on the fact that the football players are undergraduates and their football activities are generally unrelated to their courses of study, *see Northwestern University*, slip op. at 3-4 & n.10, the Board based these distinctions on *Brown University* and its "primarily student" test, which the Board subsequently overturned in *Columbia University*. *See supra* at pp. 11-12. The Board expressly found, in *Columbia University*, that undergraduate teaching assistants are employees. 364 NLRB No. 90, slip op. at 16.

¹¹³ *See Columbia University*, 364 NLRB No. 90, slip op. at 5; *Boston Medical Center*, 330 NLRB at 160.

¹¹⁴ *See Columbia University*, 364 NLRB No. 90, slip op. at 4; *Boston Medical Center*, 330 NLRB at 160.

¹¹⁵ *Columbia University*, slip op. at 4.

¹¹⁶ *See id.*, slip op. at 4-5 (applying common-law to find student assistants to be NLRA employees); *Boston Medical Center*, 330 NLRB at 160 (applying common-law to find house staff to be NLRA employees). *See also Town & Country*, 516 U.S. at 93-95 (finding that the common-law supported the Board's broad interpretation of employee status); *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 12 (Aug. 27, 2015) (providing overview of the common-law agency test).

¹¹⁷ *See Boston Medical Center*, 330 NLRB at 160.

Applying the common-law rules here, it is clear from the evidentiary record established in *Northwestern University* that scholarship football players at Northwestern and other Division I FBS private colleges and universities are employees under the NLRA because they perform services for their colleges and the NCAA, subject to their control, in return for compensation. With regard to the question of whether athletes provide services *for* the college/university, the Northwestern football program, which is part of the NCAA Division I Big Ten conference, generated approximately \$76 Million in net profit during the ten year period ending in 2012-2013, and provided an immeasurable positive impact to Northwestern's reputation, which in turn undoubtedly boosted student applications and alumni financial donations. It is also clear that college scholarship football players receive significant compensation in exchange for that service.¹¹⁸ The players' compensation is clearly tied to their status and performance as football players, since they risk the loss of their scholarships if they quit the team or are removed because they violate their school's or the NCAA's rules. These factors do not seem to be unique to Northwestern, but also appear to be true in the other Division I FBS football private colleges and universities.

With regard to whether services are performed subject to the college/university's *control*, there is substantial evidence that colleges and universities control the manner and means of scholarship football players' work on the field and numerous facets of the players' daily lives to ensure compliance with NCAA rules. The NCAA has the right to control and actually controls the competition among football players and many of their terms and conditions of employment, including the maximum number of practice and competition hours, scholarship eligibility, limitations on compensation, minimum grade point average and other conditions for potential loss of scholarships, restrictions on gifts and benefits players may accept, restrictions on the number of scholarship players, and mandatory drug testing. The NCAA also maintains a "Compliance Assistance Program" to ensure that colleges and student-athletes are in compliance with NCAA rules, including those that regulate terms and conditions of employment,¹¹⁹ and colleges employ staff whose sole function is to ensure compliance with those rules.

Division I FBS colleges and universities impose additional controls over scholarship football players. For example, Northwestern maintains daily itineraries

¹¹⁸ For instance, Northwestern scholarship football players receive up to \$76,000 per year for up to five years, covering the cost of their tuition, fees, rooms, board, and books, and a stipend that began in 2015 covering additional expenses such as travel and childcare above the amount of the original scholarship.

¹¹⁹ See <http://www.ncaa.org/compliance-assistant?division=d1> (last visited January 31, 2017).

regulating players' hourly tasks from the time they wake up until the appointed hour that they go to sleep and requiring full-time hours during training camp and the regular season and the equivalent of a part time job of between 12-25 hours during the off-season. This time requirement is not unique to Northwestern. The NCAA's data, most recently its January 2016 GOALS Study, found that Division I FBS football players "continue to report the highest weekly in-season time commitments," a median of 42 hours per week on football-related activities.¹²⁰ Moreover, players must insure that their grade point averages do not fall below the NCAA-required minimum, while at the same time foregoing classes and courses of study that interfere with scheduled football activities. Finally, coaches can penalize players, including firing them from the football team resulting in the loss of their scholarships, for college and/or NCAA rule infractions, and they also can be penalized separately through the NCAA infractions process.¹²¹

Accordingly, FBS scholarship football players clearly satisfy the broad Section 2(3) definition of employee and the common-law test. This conclusion is not precluded by the Board's *Northwestern University* decision. There, the Board decided not to assert jurisdiction over a representation petition involving only Northwestern college football players because of the nature of the control exercised by the football leagues over individual teams and because of the composition of Division I FBS football, in which the majority of the teams are public universities not subject to the Board's jurisdiction.¹²² However, those difficulties are not relevant to the question of whether the players are employees under the NLRA.¹²³ The preemptive exclusion of a whole category of employees from the NLRA's protection based on the Board's determination not to proceed in one representation

¹²⁰ See

http://www.ncaa.org/sites/default/files/GOALS_2015_summary_jan2016_final_2016_0627.pdf at p.2 (last visited January 31, 2017).

¹²¹ Other examples of control by Northwestern, and potentially other Division I FBS private colleges and universities, include: football players are required to seek permission before living off-campus, applying for outside employment, driving personal vehicles, traveling off-campus, and posting items on the internet.

¹²² 362 NLRB No. 167, slip op. at 3.

¹²³ For example, the Board routinely asserts jurisdiction over unfair labor practices involving employees classified as "guards" even where it would be statutorily precluded from certifying a mixed-guard bargaining unit in a related representation case. See, e.g., *White Superior Div.*, 162 NLRB 1496, 1499 (1967) (rejecting employer argument that it could not violate Section 8(a)(3) by discriminatorily transferring guards because the Board could not certify the unit under Section 9(b)(3)), *enforced as modified*, 404 F.2d 1100 (6th Cir. 1968).

proceeding would undermine the Section 7 protections afforded to all unorganized private sector employees who may never elect to form or support a union. Such employees still have the right to engage in concerted activities for “mutual aid or protection” under Section 7, and their bargaining unit status does not impair such rights.¹²⁴

Thus, for instance, scholarship football players should be protected by Section 7 when they act concertedly to speak out about aspects of their terms and conditions of employment. This includes, for example, any actions to: advocate for greater protections against concussive head trauma and unsafe practice methods,¹²⁵ reform NCAA rules so that football players can share in the profit derived from their

¹²⁴ See, e.g., *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014) (the focus of the “mutual aid or protection” inquiry is on the goal of the concerted activity, primarily “whether the employee or employees involved are seeking to ‘improve terms and conditions of employment or otherwise improve their lot as employees’”) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

¹²⁵ Such advocacy could seek specific changes to the NCAA concussion management guidelines including NCAA penalties, similar to recent NFL reforms, for schools that violate the guidelines (<http://www.cbssports.com/college-football/news/why-the-ncaa-wont-adopt-concussion-penalties---at-least-not-yet/>, last visited January 31, 2017; <http://www.nytimes.com/2016/07/26/sports/football/nfl-concussion-protocol-new-rules.html? r=0>, last visited January 31, 2017); strict uniform contact standards across the NCAA (<http://www.nytimes.com/2016/03/02/sports/ncaafotball/ivy-league-moves-to-eliminate-tackling-at-practices.html? r=0>, last visited January 31, 2017); NCAA-enforced protections against unduly harsh practices (https://www.washingtonpost.com/sports/oregon-football-workouts-sent-players-to-hospital-who-will-stand-up-for-them/2017/01/17/1c0d7fae-dcf7-11e6-918c-99ede3c8cafa_story.html?utm_term=.9bec0fb56ed2, last visited January 31, 2017); or for other reforms advanced by the National College Players Association, a non-profit advocacy organization for Division I athletes (<http://www.ncpanow.org/about/mission-goals>, last visited, January 31, 2017).

talents,¹²⁶ or self-organize, regardless of whether the Board ultimately certifies the bargaining unit.¹²⁷

This conclusion applies solely to the question left open in *Northwestern University* with regard to Division I FBS scholarship football players. There are undoubtedly other sports that provide substantial financial benefit to colleges/universities and that involve scholarship athletes who are under significant control by the schools and the NCAA. However, in the absence of a full Regional investigation, like the one undertaken with respect to the petition filed in *Northwestern University*, we cannot conclusively determine the employee status of other kinds of student athletes in cases that may arise in the future.

Recent history teaches that discussions of whether university football players are “employees” under the NLRA may devolve into disputes focused not on the narrow question of statutory interpretation but rather on whether the status quo is fair and equitable to the players and the universities. Partisans for and against the current system have strongly held, deeply felt positions. The “revered tradition of amateurism in college sports” and the substantial value of a university scholarship are set against the enormous revenue generated by Division I FBS football programs and the substantial salaries paid to university administrators, coaches, and conference officials involved in the sport.¹²⁸ Serious questions about the role of extracurricular activities in a university education and whether football players should be treated differently from equally committed athletes in non-revenue sports or students participating in equally time-consuming non-athletic activities are passionately debated. This memorandum certainly cannot—and it would be entirely inappropriate for it to attempt to—resolve these difficult, sometimes

¹²⁶ See, e.g., <http://www.latimes.com/sports/ucla/la-sp-0525-ucla-under-armour-20160525-snap-story.html> (providing an example of speech that would have been protected by Section 7 were the college subject to the Board’s jurisdiction: the UCLA quarterback sent a social media message in response to UCLA’s \$280,000,000 Under Armor apparel contract, writing “We’re still amateurs though ... Gotta love non-profits #NCAA”) (last visited January 31, 2017).

¹²⁷ See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978) (employees’ exercise of Section 7 rights “necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite”).

¹²⁸ Compare *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984) (recognizing over 30 years ago “a revered tradition of amateurism in college sports”) to *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring) (observing that the economic reality is that this tradition of amateurism is “sometimes frayed” and may not extend to Division 1 men’s basketball and FBS football, which “involve billions of dollars of revenue for colleges and universities”).

divisive, questions. We merely determine here that the application of the statutory definition of employee and the common-law test lead to the conclusion that Division I FBS scholarship football players are employees under the NLRA, and that they therefore have the right to be protected from retaliation when they engage in concerted activities for mutual aid and protection. It is our hope that by making our prosecutorial position known, we will assist private colleges and universities to comply with their obligations under the Act.

IV. Conclusion

Significant recent Board cases have addressed employee status at universities in representation proceedings. The Office of the General Counsel will use the Board's analysis in those cases to process unfair labor practices affecting the rights of individuals performing those types of work to engage in protected concerted activity.