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Legal Update

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Annual Legal Update[1]
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I. Introduction

This was a year when not much substantial or unusual happened, in the courts. However, the election of Donald Trump as President is a different matter. There is the likelihood of substantial changes in several significant areas impacting collective bargaining in higher education: the rulings of the National Labor Relations Board ("the Board" or "NLRB") on unionization of faculty and graduate students in the private sector; the constitutionality of agency fee in the public sector; and the interpretation and enforcement of Title IX and the Fair Labor Standards Act (FLSA).

In the private sector, the coming change in the makeup of the Board will likely bring into question the future of the Board's rulings in a number of important cases. On January 23, 2017 member Phillip Miscimarra was appointed as Acting Chairman of the Board. Miscimarra, and other Republican appointees, authored or joined in vigorous dissents in a number of recent Board rulings, which may portend future rulings of a Board dominated by Republican appointees. In the Board's seminal 2014 decision in *Pacific Lutheran University*, Miscimarra and then member Harry Johnson III dissented from the portion of the Board's decision that clarified the test for whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities, and the dissents have continued as the test has been applied in particular cases. (*See Pacific Luther University, infra* section VII, A, 2.) Miscimarra generally agreed with the Board's framework for determining whether faculty members are exempt managerial employees, though both he and Johnson disagreed with some of the elements and burdens of proof used in that framework. (*See Pacific Lutheran University, infra* section VII, B, 1). In addition, the Board's 2016 ruling in *Columbia University* that graduate student employees have the right to unionize in the private sector drew a significant dissent and its future is questionable.

At the Supreme Court a new appointee may also yield a change in Constitutional jurisprudence. In 2016 the Supreme Court accepted a case challenging whether agency fee was constitutional in the public sector. (*Friederichs)* The Court appeared poised to find agency fees unconstitutional when Justice Antonin Scalia died. Left with only eight justices, the Court issued a one sentence 4-4 decision that upheld the lower court's decision, and the status quo on agency fee. A Trump appointed justice will likely adopt a position comparable to Scalia's, which could result in the Court ruling that the collection of agency fees in the public sector is unconstitutional. (*See Friedrichs* infra section VII, B, 1). While no case raising this issue is currently pending before the Supreme Court, there are currently several that are making their way through the lower courts and that could be before the Court in the 2017-2018 term.

In the *Fisher II* case, the Supreme Court surprised observers by taking up the question of affirmative action for the second time in this case alone. While there had been expectations of a significant change in the law on affirmative action, the 4-3 decision reaffirmed and clarified the *status quo*. Since only 3 justices dissented, one new appointment is unlikely to change the Court's position on this issue.

The change in administration also raises questions regarding federal government actions in the employment context. In particular, the Department of Labor Rule raising the minimum salary for employees exempt from overtime payment under the FLSA may be in danger, both due to a decision enjoining enforcement of the rule, and due to new leadership at the Department. Similarly, the Department of Education's interpretation and enforcement of *Title IX* by could be subject to change.

II. First Amendment and Speech Rights

A. Garcetti / Citizen Speech

Lane v. Franks, 189 L. Ed. 2d 312 (U.S. 2014)

In this Supreme Court case the Court held unanimously that a public employee's speech that may concern their job, but is not ordinarily within the scope of their duties, is subject to First Amendment protection. The Court reversed the Eleventh Circuit's holding that Lane did not speak as a citizen when he was subpoena'd to testify in a criminal case, finding that Eleventh Circuit relied on too broad a reading of *Garcetti. Garcetti* does not transform citizen speech into employee speech simply because the speech involves subject matter acquired in the course of employment. The crucial component of *Garcetti* then, is, whether the speech "is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."

Edward Lane was the director of Community Intensive Training for Youth (CITY), a program operated by Central Alabama Community College (CACC). Lane in the course of his duties as director conducted an audit of the program's expenses and discovered that Suzanne Schmitz, an Alabama State Representative who was on CITY's payroll, had not been reporting for work. As a result Lane terminated Schmitz' employment. Federal authorities soon indicted Schmitz on charges of mail fraud and theft. Lane was subpoenaed and testified regarding the events that led to the termination of Schmitz at CITY. Schmitz was later convicted. Steve Franks, then CACC's president, terminated Lane along with 28 other employees under the auspices of financial difficulties. Soon afterward, however, "Franks rescinded all but 2 of the 29 terminations—those of Lane and one other employee". Lane sued alleging that Franks had violated the First Amendment by firing him in retaliation for testifying against Schmitz.

The District Court granted Franks' motion for summary judgment, on the grounds that the individual-capacity claims were barred by qualified immunity and the official-capacity claims were barred by the Eleventh Amendment. The Eleventh Circuit subsequently affirmed, holding that Lane spoke as an employee, not a citizen, because he acted in accordance to his official duties when he investigated and terminated Schmitz' employment.

The Supreme Court granted certiorari to resolve the disagreement among the Courts of Appeals as to "whether public employees may be fired—or suffer other adverse employment

consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities".

The Court held that Lane's speech was entitled to First Amendment protection. The Court explained that under *Garcetti*, the initial inquiry was into whether the case involved speech as a citizen, which may trigger First Amendment protection, or speech as an employee, which would not trigger such protection. In *Lane* the Court provided a more detailed explanation of employee versus citizen speech, and expanded the range of speech that is protected. The Court explained that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee--rather than citizen--speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." And the Court found that "Lane's sworn testimony is speech as a citizen."

The Court further determined that Lane's speech was protected under the First Amendment. First, Lane's speech about the corruption of a public program is "obviously" a matter of public concern and further that testimony within a judicial proceeding is a "quintessential example" of citizen speech. Second, the employer could not demonstrate any interest in limiting this speech to promote the efficiency of the public services it performs through its employees or "that Lane unnecessarily disclosed sensitive, confidential, or privileged information".

The Court held that Franks could not be sued in his individual capacity on the basis of qualified immunity. Under that doctrine, courts should not award damages against a government official in their personal capacity unless "the official violated a statutory or constitutional right," and "the right was 'clearly established' at the time of the challenged conduct." Because of the ambiguity of Eleventh Circuit precedent at the time of the conduct, the right was not "clearly established" and thus the test unsatisfied to defeat qualified immunity. Lane's speech is entitled to First Amendment protection, but Franks is entitled to qualified immunity. As a result of this case the right is clearly established and is now the standard.

B. Faculty Speech

Demers v. Austin, 746 F.3d 402 (9th Cir. 2014)

In this important decision, the U.S. Court of Appeals for the Ninth Circuit reinforced the First Amendment protections for academic speech by faculty members. ***(Important note, a previous opinion by the Ninth Circuit in this case dated September 4, 2013 and published at 729 F.3d 1011 was withdrawn and substituted with this opinion.)*** Adopting an approach advanced in AAUP's amicus brief, the court emphasized the seminal importance of academic speech. Accordingly, the court concluded that the *Garcetti* analysis did not apply to "speech related to scholarship or teaching," and therefore the First Amendment could protect this speech even when undertaken "pursuant to the official duties" of a teacher and professor.

Professor Demers became a faculty member at Washington State University (WSU) WSU in 1996 and he obtained tenure in 1999. Demers taught journalism and mass communications studies at the university in the Edward R. Murrow School of Communication. Starting in 2008, Demers took issue with certain practices and policies of the School of Communication. Demers began to voice his criticism of the college and authored two publications entitled *7-Step Plan for Improving the Quality of the Edward R. Murrow School of Communication* and The Ivory Tower of Babel. Demers sued the university and claimed that the university retaliated against him by lowering his rating in his annual performance evaluations and subjected him to an unwarranted internal audit in response to his open criticisms of administration decisions and because of his publications.

The district court dismissed Demers' First Amendment claim on the ground that Demers made his comments in connection with his duties as a faculty member. *Garcetti v. Ceballos,* 547 U.S. 410 (2006). Demers appealed to the Ninth Circuit. The AAUP joined with the Thomas Jefferson Center for the Protection of Free Expression to file an *amicus* brief in support of Demers. The *amicus* brief argued that academic speech was not governed by the *Garcetti* analysis, but instead was governed by the balancing test established in *Pickering v. Board of Education,* 391 US 563 (1968). The Ninth Circuit agreed and issued a ruling that vigorously affirmed that the First Amendment protects the academic speech of faculty members.

On January 29, 2014, the Ninth Circuit expanded held that *Garcetti* does not apply to "speech related to scholarship or teaching" and reaffirmed that "*Garcetti* does not – indeed, consistent with the First Amendment, cannot – apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."

The Ninth Circuit held specifically that the 7-Step plan was "related to scholarship or teaching" within the meaning of Garcetti because "it was a proposal to implement a change at the Murrow School that, if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it." The court thus considered whether the Demers pamphlet was protected under the *Pickering* balancing test. Academic employee speech is protected under the First Amendment by the *Pickering* analysis if it is a (1) matter of public concern, and (2) outweighs the interest of the state in promoting efficiency of service. The court held that the pamphlet addressed a matter of "public concern" within the meaning of *Pickering* because it was broadly distributed and "contained serious suggestions about the future course of an important department of WSU." The case was remanded to the district court, however, to determine (1) whether WSU had a "sufficient interest in controlling" the circulation of the plan, (2) whether the circulation was a "substantial motivating factor in any adverse employment action, and (3) whether the University would have taken the action in the absence of protected speech.

C. Union Speech

***Meade v. Moraine Valley Cmty. College*, 770 F.3d 680 (7th Cir. 2014), and No. 13 C 7950 (N.D. Ill. Oct. 17, 2016)**

This case arose from the termination of Robin Meade, an adjunct professor and active union officer at Moraine Valley Community College, was summarily dismissed after she sent a letter criticizing her college's treatment of its adjunct faculty. The case resulted in several substantive decisions from the district court and one from the Seventh Circuit Court of Appeals. In the appeals court case, the Seventh Circuit greatly enhanced constitutional protection for outspoken critics of public college and university administrators. It reinforced and enhanced recent and congenial decisions in two other federal circuits in cases from Washington (*Demers*) and North Carolina (*Adams*). The court specifically relied on a sympathetic view of the Supreme Court's judgment in the *Garcetti* case, expressly invoking the justices' "reservation" of free speech and press protections for academic speakers and writers. The three-judge panel unanimously declared that an Illinois community college could not summarily dismiss an adjunct teacher for writing a letter criticizing the administration, at least as long as the issues she had raised publicly and visibly constituted "matters of public concern."

The federal appeals court also noted that even a contingent or part-time teacher had a reasonable expectation of continuing employment at the institution and therefore a protected property interest. The appellate court ruled that Robin Meade, the outspoken critic and active union officer, was "not alone in expressing concern about the treatment of adjuncts." The panel added that "colleges and universities across the country are targets of increasing coverage and criticism regarding their use of adjunct faculty." In this regard, the court broke important new ground not only with regard to academic freedom and professorial free expression, but even more strikingly in its novel embrace of the needs and interests of adjuncts and part-timers.

On remand, the district court initially denied motions for summary judgment by both the College and Meade. 2016 U.S. Dist. LEXIS (N.D. Ill. March 3, 2016). However, on October 17, 2016 in an unpublished decision the district court vacated this ruling, granted Plaintiff's motion for summary judgment, and denied Defendant's motion for summary judgment. *Meade v. Moraine Valley Community College*, No. 13 C 7950 (N.D. Ill. Oct. 17, 2016). The court ruled in Mead's favor on both First Amendment and Due Process grounds, and explained.

> In regard to the First Amendment retaliation claims, the Seventh Circuit made it clear that the letter in question (Letter) involved a matter of public concern. The Seventh Circuit indicated that this court need only address the remaining two issues of "whether the speech was a substantial or motivating factor in the retaliatory action, and whether the defendant can show that it would have taken the same action without the existence of the protected speech." Meade v. Moraine Valley Cmty. Coll., 770 F.3d 680, 686 (7th Cir. 2014). . . . . The undisputed facts in this case clearly show that the Letter was the motivating factor behind the actions taken against Meade, and the College has not pointed to sufficient evidence for a reasonable trier of fact to conclude that the College would have taken the same action without the existence of the protected speech. The

> College admits that it took action against Meade because of her statements in the Letter. The College has not pointed to other evidence showing that it had an alternative basis to terminate Meade's employment. . . .Therefore, Meade's motion for summary judgment on the issue of liability on the First Amendment retaliation claim is granted.
>
> In regard to the due process claim, the Seventh Circuit has found that Meade has shown that she has a protected property interest. Once again, after discovery and the filing of dispositive motions, the undisputed facts show that Meade did not waive any right to due process, and that she was not accorded a proper hearing. Meade justifiably declined to appear at a prospective hearing that did not afford Meade an opportunity to obtain counsel. The undisputed facts show that Meade was deprived of her protected interest and that the deprivation was done is a way that violated due process standards. . . . Therefore, Meade's motion for summary judgment on the issue of liability on the due process claim is granted.

After this decision was issued Moraine settled with Professor Meade.

***Meagher v. Andover Sch. Comm.*, 94 F. Supp. 3d 21 (D. Mass. 2015) and 2016 U.S. Dist. LEXIS 1100 (D. Mass. Jan. 26, 2016)**

In this case, a U.S. District in Massachusetts ruled that speech made by a teacher as a union representative was protected under the First Amendment finding that the *Garcetti* test did not apply because speech was not a part of her normal employment duties as clarified in *Lane v. Franks*.

This case arose out of the September 2012 termination of the plaintiff, Jennifer Meagher ("Meagher"), from her employment as a tenured teacher at Andover High School ("AHS") in Andover, Massachusetts. Prior to her termination, Meagher and other members of the teachers' union, the Andover Education Association ("AEA" or "Union"), were involved in contentious negotiations with the Andover School Committee over a new collective bargaining agreement. In addition, AHS was engaged in the process of seeking re-accreditation pursuant to the standards established by the New England Association of Schools and Colleges ("NEASC"). The accreditation process centered on a self-study, which required teachers and administrators at AHS to conduct evaluations of the school's programs, prepare separate reports addressing one of seven accreditation standards, and present the reports to the faculty for approval. Under the NEASC guidelines, each report required approval by a two-thirds majority vote of the faculty. It was undisputed that Meagher was discharged from employment, effective September 17, 2012, because she sent an email to approximately sixty other teachers in which she urged them to enter an "abstain" vote on the ballots for each of the self-study reports as a means of putting the accreditation process on hold and using it to gain leverage in the collective bargaining negotiations. Meagher alleged that the decision to terminate her for writing and distributing the email to her colleagues constituted unlawful retaliation for, and otherwise interfered with, the exercise of her First Amendment right to engage in free speech.

The fundamental issue was whether Meagher's email to her colleagues is entitled to protection under the First Amendment. Pursuant to *Garcetti v. Ceballos*, her speech would be protected if she were speaking as a citizen on a matter of public concern rather than pursuant to her duties as a teacher when she distributed the communication, and if the value of her speech was not outweighed by the defendants' interest in preventing unnecessary disruptions to the efficient operation of the Andover public schools.

In reviewing the facts, the court found that Meagher was speaking as a citizen.

> The record on summary judgment establishes that Meagher was speaking as a citizen, and not an employee of the Andover School Department, when she distributed the June 10, 2012 email at issue in this case. There is no dispute that Meagher wrote the email on her personal, home computer, and distributed it to her colleagues using her personal email account. Moreover, there is no dispute that she sent the communication during non-working hours, that she contacted the recipients using their personal email accounts, and that the email concerned issues that were addressed in the press and triggered considerable discussion among members of the local com-munity. The substance of the email, in which Meagher advocated use of the "abstain" option on the ballots for the self-study reports as a means of delaying the NEASC re-accreditation process and gaining leverage in the contract dispute between the Union and the ASC, would not have given objective observers the impression that Meagher was representing her employer when she communicated with her colleagues. . . . Accordingly, the record demonstrates that Meagher was working in her capacity as a Union activist rather than in her capacity as a high school English teacher, when she distributed the communication in question.

94. F Supp. 3d at 38.

The court also found that the value of Meagher's speech outweighed any interest that the defendants had in preventing unnecessary disruptions and inefficiencies in the workplace. Therefore, the court found that Meagher’s speech was protected and that her termination violated her rights under the First Amendment.

The suit and many of Meagher’s claims were ultimately adjudicated or resolved. While the First Amendment lawsuit was pending the Commonwealth Employment Relations Board ("CERB" or "Board") issued its decision in connection with an unfair labor practices charge filed by the union, finding Meagher's termination was in response to protected concerted activity and that her employer had discriminated against her based on her union activity in violation of Massachusetts law. The School Committee was ordered to reinstate Meagher to her teaching position at AHS and to compensate Meagher for all losses she had suffered, if any, as a result of the unlawful action. In addition, before the trial in the First Amendment lawsuit, the parties settled Meagher's claim for $100,000.00, leaving to the court the issue

of reasonable attorneys' fees and costs, which it assessed at $183,691.97. *Meagher v. Andover Sch. Comm.*, 2016 U.S. Dist. LEXIS 1100 (D. Mass. Jan. 26, 2016)

D. Exclusive Representation

D'Agostino v. Baker, 812 F.3d 240 (1st Cir., 2016) *cert denied* (June 13, 2016); *Jarvis v. Cuomo*, 660 Fed. Appx. 72, 2016 U.S. App. LEXIS 16638 (2d Cir. N.Y. 2016) *cert denied* (Feb. 27, 2017).

These cases involved lawsuits in which anti-union plaintiffs challenged the long established rights of unions to exclusively represent employees in public sector bargaining. In a decision written by former Supreme Court Justice David Souter, the First Circuit firmly rejected the plaintiffs' claims. The court explained, that non-union public employees have no cognizable claim that their First Amendment associational rights were violated by the union acting as an exclusive bargaining agent with the state. The court explained,

> . . . that result is all the clearer under *Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984)*, which ruled against *First Amendment* claims brought by public college faculty members, professional employees of a state education system, who challenged a legislative mandate that a union selected as their exclusive bargaining agent be also the exclusive agent to meet with officials on educational policy beyond the scope of mandatory labor bargaining. The Court held that neither a right to speak nor a right to associate was infringed, *id. at 289*; like the appellants here, the academic employees in Knight could speak out publicly on any subject and were free to associate themselves together outside the union however they might desire. Their academic role was held to give them no variance from the general rules that there is no right to compel state officials to listen to them, *id. at 286*, and no right to eliminate the amplification that an exclusive agent necessarily enjoys in speaking for the unionized majority, *id. at 288*.

The court also rejected the Plaintiffs attempts to use the recent Supreme Court decision in *Harris v. Quinn*, 189 L. Ed. 2d 620 (U.S. 2014) to justify their claims. Plaintiffs sought review by the Supreme Court, which was rejected on June 13, 2016. *D'Agostino v. Baker*, 195 L. Ed. 2d 812 (U.S. June 13, 2016).

Similarly, in *Jarvis v. Cuomo* the National Right to Work Legal Defense Foundation asserted that the state and public sector unions violated plaintiffs First Amendment rights in enacting and enforcing legislation allowing home child-care providers within a state-designated bargaining unit to elect an exclusive representative to bargain collectively with the state. On September 12, 2016, the Second Circuit soundly rejected this argument, explaining, "The argument is foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S.

271, (1984), in which the Supreme Court held that a state law requiring public employers to "meet and confer" with a bargaining unit's exclusive representative did not infringe the First Amendment rights of nonunion unit members." *Jarvis v. Cuomo*, 660 Fed. Appx. 72, 2016 U.S. App. LEXIS 16638 (2d Cir. N.Y. 2016). Plaintiffs sought review by the Supreme Court, which was rejected on February 27, 2017. *Jarvis v. Cuomo*, 580 U.S. ____ (Feb. 27, 2017)

These cases were just some of the cases claiming that exclusive representation in the public sector was unconstitutional. To date these challenges have been rejected with the district courts similarly reading *Knight* as confirming that exclusive representation by a union does not infringe non-members' associational rights. *See Hill v. SEIU*, 2016 U.S. Dist. LEXIS 62734 (N.D. Ill. May 12, 2016); *Mentele v. Inslee*, 2016 U.S. Dist. LEXIS 69429 (W.D. Wash. May 26, 2016); *Jarvis v. Cuomo*, 2015 U.S. Dist. LEXIS 56443 (N.D.N.Y Apr. 30, 2015)(Addressed in the 2015 Legal Update); *Bierman v. Dayton*, No. 14-3021, 2014 U.S. Dist. LEXIS 150504, 2014 WL 5438505 (D. Minn. Oct. 22, 2014).

E. Agency Fee

Harris v. Quinn, 189 L. Ed. 2d 620 (U.S. 2014)

In *Harris* plaintiffs requested that the Supreme Court rule unconstitutional the charging of agency fees in the public sector. The Court rejected these attempts to alter the agency fee jurisprudence as it has existed in the public sector for over 35 years since the Court issued its seminal decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In a 5 to 4 opinion issued by Justice Alito, the Court questioned the foundation of *Abood*, but specifically stated that it was unnecessary for the Court to reach the argument that *Abood* should be overruled. Instead, the Court ruled that agency fees could not be imposed on certain "partial-public" employees, a category that likely has little applicability to faculty members at public institutions. (See 2015 Legal Update for further details regarding the Court's decision in *Harris.)* However, the Court's majority decision questioned the underlying validity of *Abood*, and prompted lawsuits and appeals directly challenging whether the charging of agency fees in the public sector is constitutional, leading to the *Friedrichs* case as well as others currently pending in the lower courts.

Friedrichs v. California Teachers Association, 136 S. Ct. 1083 (March 29, 2016)

This case involved a claim that charging agency fees to non-members to support union representation in the public sector is unconstitutional. The case started when the plaintiffs, sponsored by organizations seeking to weaken unions, sued the California Teachers Association and a local California school district seeking to invalidate agency fee provisions in the collective bargaining agreement, arguing that agency fee clauses in the public sector violate the First Amendment. On June 29, 2015 the Supreme Court granted certiorari, and thereby agreed to hear the appeal. The AAUP amicus brief argues that collective bargaining, supported by the agency fee system, significantly benefits the educational system, and that removal of the ability to

charge agency fees would upset the balance set by the states and burden the rights of union members.

Agency fee has been deemed constitutional since the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*. In *Harris v. Quinn*, the Supreme Court declined to overrule *Abood*, although the Court raised questions regarding its vitality. Anti-union groups brought the *Friedrichs* case in California and pushed it through the courts. In the Supreme Court, the *Friedrichs* plaintiffs advanced the argument that all agency fee arrangements in the public sector violate the First Amendment as they compel non-members to pay for activities that they believe address matters of public concern. The plaintiffs also argued in the alternative that even if some agency fee system is constitutional, the current opt-out system of charging agency fee payers in unconstitutional.

On March 29, 2016, the Supreme Court issued a 4-4 decision that upheld an appellate court decision that found agency fee constitutional without addressing the substantive arguments in the case. Rather the Supreme Court decision stated in full, "The judgment is affirmed by an equally divided Court." A 4-4 split vote leaves the lower court decision intact – in this case, the federal appellate court decision that ruled against the constitutional challenge, based on the 1977 Supreme Court precedent of *Abood v. Detroit Board of Education*, which upheld the constitutionality of agency/fair share fees in the public sector workplace. The appellants in *Friedrichs* filed a petition with the Supreme Court to have the case reheard, which the Court denied on June 28, 2016.

While this case is concluded, the issue is far from over. Since it appears that four justices may have been willing to find agency fee unconstitutional, one new justice could tip the balance. Therefore, if a conservative nominee is appointed to the seat formerly filled by Justice Scalia, the Court could be primed to issue a decision finding agency fee unconstitutional. While there are now cases currently on the Court's docket raising the issue, there are cases in the lower courts that could be at the Supreme Court within the next year.

One case that may be such a vehicle is a challenge to agency fee for Illinois public sector employees. On September 16, 2016 the district court ruled in favor of the unions. *Janus v. AFSCME Council 31*, Dist. Ct. Case No. 15-cv-01235 (N.D. Ill.) The plaintiffs appealed to the Seventh Circuit and oral argument is currently scheduled for March 1, 2017. *Janus*, Seventh Circuit Case No. 16-3638. A decision may be issued as soon as the spring or summer of 2017. It is anticipated that the circuit court will rule in favor of the unions based on *Abood*. Plaintiffs in *Janus* would almost certainly appeal to the Supreme Court. If the Supreme Court takes the case, the earliest the case could be heard and decided by the Supreme Court would be in the October 2017 term, which expires in June 2018. There are other pending cases raising the same issue, which could be heard at the earliest during the October 2017 term.

***Jarvis v. Cuomo*, 660 Fed. Appx. 72, 2016 U.S. App. LEXIS 16638 (2d Cir. N.Y. 2016).**

This case involved disputes regarding the refund of agency fees collected from non-union members who were partial public employees under the Supreme Court's decision in *Harris v. Quinn*, 189 L. Ed. 2d 620 (U.S. 2014). The plaintiffs were individuals operating home child care businesses. They are covered by the Supreme Court's decision in *Harris* which ruled that collection of agency fees from these individuals violated to the First Amendment.

After the *Harris* decision was issued, the Union and the employer negotiated a new collective bargaining agreement that did not require the deduction of agency fees. The union also rebated to the plaintiffs agency fees that were collected after the Supreme Court issued its decision in *Harris*. The plaintiffs continued to prosecute their suit arguing that the Union was obligated to rebate them for agency fees paid prior to the Court's decision in *Harris*.

The court found that the Union was not obligated to make such a reimbursement as the union relied in good faith when it collected the agency fees prior to *Harris*. The Court explained, "In obtaining the challenged fair share fees from plaintiffs, CSEA relied on a validly enacted state law and the controlling weight of Supreme Court precedent. Because it was objectively reasonable for CSEA "to act on the basis of a statute not yet held invalid," defendants are not liable for damages stemming from the pre-Harris collection of fair share fees." *Jarvis v. Cuomo*, 660 Fed. Appx. 72 *76, 2016 U.S. App. LEXIS 16638, 2016 WL 4821029 (2d Cir. N.Y. 2016). Similarly, the district court in Illinois rejected a claim for payment of agency fees collected for services performed before the *Harris* decision was issued on June 30, 2014. *Winner v. Rauner*, 2016 U.S. Dist. LEXIS 175925 (N.D. Ill. Dec. 20, 2016).

III. FOIA/Subpoenas and Academic Freedom

***Energy & Environment Legal Institute v. Arizona Board of Regents,* Case No. 2CACV-2015-0086 (Ariz. App. Ct., Second App. Div., Dec. 3, 2015) (unpublished); and No. C2013-4963, (Arizona Superior Court, Pima County, June 14, 2016)**

As previously reported, the Arizona Court of Appeals remanded a dispute involving a request for climate scientists' research records so that the trial court could weigh *de novo* the University's "contention that disclosure of the records would be detrimental to the best interests of the state against the presumption in favor of disclosure." The case arose from a public records request for extensive material from two climate scientists submitted by a legal foundation seeking to use records requests in an attempt to "put false science on trial." The AAUP filed an amicus brief with the Arizona Court of Appeals, and earlier with the trial court, arguing that academic freedom to conduct research is essential to a vital university system, and to the common good, and warranted protecting certain research records from disclosure.

This case arose from a lawsuit filed by Energy & Environment Legal Institute, a "free market" legal foundation using public records requests in a campaign against climate science. E & E, previously known as the American Tradition Institute, brought similar cases involving public records requests of faculty members, including in the case of *American Tradition Institute*

v. Rector and Visitors of the University of Virginia, 756 S.E.2d 435 (Va. 2014), in which the AAUP filed an amicus brief successfully opposing the ATI records request.

E & E submitted public records requests that targeted two University of Arizona faculty members, climate researchers Professors Malcolm Hughes and Jonathan Overpeck. E & E sought emails authored by or addressed or copied to them. The emails were, in turn, linked to eight other individuals, each of whom is or was then a professor or researcher at another private or public university. As E & E counsel has stated, the suit is supposedly intended to "put false science on trial" and E & E vows to "keep peppering universities around the country with similar requests under state open records laws." The case was originally heard by the Superior Court in Pima County Arizona in late 2014.

The AAUP filed an amicus brief in the lower court on September 25, 2014. The brief argued, "when public records requests target information that implicates principles of academic freedom, courts must balance the public's general right to disclosure against the significant chilling effects that will result from forcing scholars and institutions to disclose collegial academic communications and internal deliberative materials." On March 24, 2015, the court ruled that the University did not have to disclose the records. The decision noted that the argument regarding the potential chilling effect of the disclosures was key to the decision.

E &E appealed this decision to the Arizona Court of Appeals. On October 23, 2015, the AAUP filed a brief in support of the University and the scientists. The brief was drafted by AAUP General Counsel Risa Lieberwitz, with input from AAUP Litigation Committee members, local Arizona Counsel Don Awerkamp and others. The brief argued that academic freedom warranted protecting the research records from disclosure. One key consideration under Arizona law is whether disclosure is "in the best interests of the state." The brief explained that "Courts should consider the best interests of the state to maintain a free and vital university system, which depends on the protection of academic freedom to engage in the free and open scientific debate necessary to create high quality academic research. Where the requests seek prepublication communications and other unpublished academic research materials, as in the case at bar, compelled disclosure would have a severe chilling effect on intellectual debate among researchers and scientists."

In its decision, the Court of Appeals focused solely on the burden of proof applied by the trial court and did not address the substantive question regarding whether the release of the records was appropriate. The trial court had ruled that the issue was whether the University had abused its discretion or acted arbitrarily or capriciously in refusing to disclose the records. The Court of Appeals determined that this was not the appropriate burden of proof. The Court of Appeals held "the trial court was required *de novo* to weigh the [University's] contention that disclosure of the records would be detrimental to the best interests of the state against the presumption in favor of disclosure." Therefore, the court remanded the case to the trial court.

In its decision on remand the trial court ruled that the requested records should be released. The court explained, "[T]he Court does not ignore the repeated 'chilling effect' concerns raised in the affidavits and in the pleadings. However, the Court concludes that this

potential harm is speculative at best, and does not overcome the presumption favoring disclosure of public records containing information about a topic as important and far-reaching as global warming and its potential causes. As noted in the previous ruling, the affidavits/arguments of AzBOR are compelling. However, they go beyond championing academic freedom and, in effect, promote the creation of an academic privilege exception to ARS §39 – 121. This is a proposition more properly made to the legislature rather than the courts."

The University has again appealed the case to the Arizona appellate court and AAUP anticipates filing an amicus brief in support of the scientists.

***Highland Mining Company v. West Virginia University School of Medicine,* 774 S.E.2d 36 (W.V. 2015)**

The Supreme Court of Appeals of West Virginia shielded from disclosure a former West Virginia University researcher's records of his work concerning the health effects of mountaintop-removal mining. The order the granting in part and denying in part Highland Mining Company's (Highland) request for documents related to several articles co-authored by a professor from the West Virginia University School of Medicine (WVU). The scholar, Michael Hendryx, led a research project that found that people living near mountaintop-removal mines faced higher risks of cancer and premature death. A mining company had sued the university for access to records of Mr. Hendryx's research.

The court held that pursuant to the West Virginia Freedom of Information Act (FOIA), WVU may use FOIA's "internal memorandum" exemption to withhold documents that reflect the professor's deliberative process. The court explained that the "involuntary public disclosure" of the professor's research documents "would expose the decision-making process in such a way as to hinder candid discussion of WVU's faculty and undermine WVU's ability to perform its operations". However, the court also ruled that the University could not invoke FOIA's "personal privacy" exemption to protect documents containing anonymous peer review comments of the draft articles (although those documents would be exempt from disclosure under the "internal memoranda" exemption). Finally, the court concluded that WVU may not claim an "academic freedom" privilege to avoid the plain language of FOIA because the state does not have an academic-freedom exemption to its public-records law.

IV. Tenure, Due Process, Breach of Contract, and Pay

A. Tenure – Breach of Contract

***Langenkamp v. New York University,* Case 14-3861 (2nd Cir. Oct. 15, 2015).**

A professor was terminated and she argued that the university's offer of employment including an agreement to abide by all university policies including the faculty handbook constituted a breach of contract. The faculty handbook specified procedures for the university to follow before terminating an employee. Although New York has a well-established at-will

employment doctrine, the court narrowly ruled that the professor's breach of contract claim be remanded for further proceedings. The policies in a personnel manual specifying the employer's practices with respect to the employment relationship, including procedures or grounds for termination, may become part of the employment contact IF (i) an express written policy limiting the employer's right of discharge exists, (ii) the employer made the employee aware of this policy, and (iii) the employee detrimentally relied on the policy in accepting or continuing employment.

***Salaita v. Kennedy,* 118 F. Supp. 3d 1068 (N.D. Ill. Aug. 6, 2015)**

Professor Salaita was offered, and accepted, a tenured position at the University of Illinois, to begin in August 2014, but on August 1, in response to angry tweets by the professor, he was notified by the university's chancellor that she would not take the ordinarily routine step of submitting the appointment to the board of trustees for approval. Professor Salaita sued arguing that the refusal to appoint him to the tenured position was a breach of contract and violated his constitutional rights. The court denied the university's motion to dismiss and ruled that the professor's contract was not negated by the "subject to approval by the Board of Trustees" language in his letter. The court reasoned that this language was simply a part of the university's performance, since everything else about the letter, and the university's subsequent conduct, indicated that a binding contract had been made once the professor signed a form at the bottom of the letter indicating his formal acceptance. The court noted that, "the University's argument, if applied consistently, would wreak havoc" in academia: "the entire American academic hiring process as it now operates would cease to exist, because no professor would resign a tenure position, move states and start teaching at a new college based on an 'offer' that was absolutely meaningless until after the semester already started." The court also ruled that the professor had a viable claim for violation of his due process rights, since the contract gave him a "property interest" in his job. The decision is a victory for the AAUP, who censured the university in June 2015.

***Matter of Monaco v. New York University,* 145 A.D.3d 567, 43 N.Y.S.3d 328, 2016 N.Y. App. Div. LEXIS 8323; (Dec. 16, 2016)**

Professors Marie Monaco and Herbert Samuels, New York University Medical School, had their salaries significantly slashed after NYU arbitrarily imposed a salary reduction policy. The Professors believed that this policy violated their contracts of employment, as well as NYU's handbook which, in its definition of tenure, "guarantees both freedom of research and economic security and thus prohibits a diminution in salary." NYU argued that it was not even bound by the Faculty Handbook. On December 15, 2016, the Supreme Court of the State of New York, Appellate Division, First Department found that Professors Monaco and Samuels sufficiently alleged that the policies contained in NYU's handbook, which, "form part of the

essential employment understandings between a member of the Faculty and the University have the force of contract." NYU has appealed this decision to the New York State Court of Appeals.

***Beckwith v. Penn State Univ. dba Penn. St. Univ., Coll. of Med.*, 2016 U.S. App. LEXIS 21402 (3d. Cir., Nov. 30, 2016)**

Plaintiff, a tenure track faculty, brought suit against the university and alleged that the university breached her employment agreement when the university terminated her before the end of her employment agreement. Plaintiff's offer letter described her position as "tenure-eligible" with tenure being a six-year process although consideration for earlier tenure was possible based on performance yet was also subject to the universities' policies regarding faculty appointments. The United States Court of Appeals for the Third Circuit held that Plaintiff failed to overcome Pennsylvania's presumption of at-will employment because she failed to show that there was "an express contract between the parties for a definite duration or an explicit statement that an employee can only be terminated "for cause.'" The court emphasized that because Plaintiff's employment agreement (nor any other document that was incorporated by reference) failed to establish a term of years, Plaintiff did not meet her burden on the breach of contract claim.

B. Tenure – Constitutionality

***Vergara, et al. v. State of California, et al. and California Teachers Association and California Federation of Teachers*, 246 Cal. App. 4th 619 (May 3, 2016 Calif. App. Ct., Second App. Dist.)**

This case involves an appeal to the California Court of Appeal contesting a ruling by a California state court judge that found that California statutes providing tenure protections to K–12 teachers violated the equal protection provisions of the California constitution. The case arose from a challenge, funded by anti-union organizations, to five California statutes that provide primary and secondary school teachers a two-year probationary period, stipulate procedural protections for non-probationary teachers facing termination, and emphasize teacher seniority in reductions of force. The trial court judge held that the statutes unconstitutionally impact students' constitutional right to equality of education and disproportionately burden poor and minority students. The amicus brief contesting this decision argued that the challenged statutes help protect teachers from retaliation, help keep good teachers in the classroom by promoting teacher longevity and discouraging teacher turnover, and allow teachers to act in students' interests in presenting curricular material and advocating for students within the school system.

The challenged statutes in the California Education Code establish: a two-year probationary period during which new teachers may be terminated without cause, due process protections for non-probationary teachers facing termination for cause, and procedures for implementing budget-based reductions-in-force. After an eight-week bench trial, Los Angeles

Superior Court Judge Rolf Michael Treu, in a short sixteen-page opinion containing only superficial analysis, adopted the plaintiffs' theories in full, striking down each challenged statute as unconstitutional. In doing so, Judge Treu improperly used the "strict scrutiny" standard and failed to adequately consider the substantial state interest in providing statutory rights of tenure and due process for K–12 teachers in the public schools.

The State Defendants and Intervenors California Teachers Association and California Federation of Teachers appealed to the Court of Appeal of the State of California for the Second Appellate District.

The AAUP filed an *amicus* brief in support of tenure. The AAUP has a particular interest in defending the due process protections of tenure at all levels of education. The brief, primarily authored by Professor Charlotte Garden, an expert in labor law and constitutional law and litigation director of the Korematsu Center for Law & Equality at Seattle University, advanced two substantive arguments. First, the brief explained that by helping to insulate teachers from backlash or retaliation, the challenged statutes allow teachers to act in students' interests in deciding when and how to present curricular material and to advocate for students within their schools and districts. In so doing, the brief recognized the distinction between the academic freedom rights of primary and secondary school teachers and those of professors in colleges and universities. Second, the brief argued that students are better off when good teachers remain in their classrooms, and the challenged statutes promote teacher longevity and discourage teacher turnover.

A three judge panel in the Court of Appeal reversed the earlier judgment, finding that the tenure, dismissal, and layoff statutes themselves did not cause equal protection violations, so they are not unconstitutional. The court reasoned that the negative evidence related to inexperienced teachers and poor and minority students was the result of external factors such as administrative decisions, and were not directly caused by the text of the statutes. In other words, the problems were caused by how people are implementing the statutes, not by the system the statutes create. Additionally, the court decided the evidence showing that ineffective teachers can adversely affect students did not demonstrate that the tenure, dismissal, and layoff system itself creates this problem or leads to an unfair distribution of ineffective teachers. Plaintiffs filed a petition for review with the Supreme Court of California, and this petition was denied on August 22, 2016, ending the case.

C. Due Process

Wilkerson v. University of North Texas, et. al., 2016 U.S Dist. LEXIS 164852 (E.D. Tex., Dec. 16, 2016)

Plaintiff, a non-tenured professor, had a one-year appointment per a contract that included a five-year commitment to renew at the option of the university. Plaintiff was informed by a university representative that the renewal provision was only included for the university's convenience and would only be invoked if there was a reduction in workforce that necessitated

non-renewals. Plaintiff was terminated and alleged that he had a property interest in his continued employment. The question before the court was not whether the university was within its right to terminate Plaintiff but rather was Plaintiff reasonable in expecting, based on rules and expectations, the university to employ him for the fourth year of a five-year contract? The United States District Court for the Eastern District of Texas followed the reasoning in *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), and held that Plaintiff had a reasonable expectation of his continued employment based on the university's assurances and the context of his contract that it would exercise its option to renew each year, absent serious violations or a reduction in force.

D. Faculty Handbooks

Report of the NLRB General Counsel Concerning Employer Rules, NLRB GC 15_04, (NLRB General Counsel March 18, 2015)

The General Counsel for the National Labor Relations Board recently published a guidance memorandum that provides specific examples of lawful and unlawful employee handbook rules in the areas of confidentiality, professionalism and employee conduct, use of company logos, copyrights and trademarks, conflicts of interest, photography and recording, and interaction with the media and other third parties.

The NLRB and its General Counsel have aggressively scrutinized many frequently used employee handbook provisions for potentially infringing on the right of employees to engage in concerted activity protected under Section 7 of the National Labor Relations Act (NLRA). In addition to the right to engage in union organizing, Section 7 activity includes the right to discuss, challenge, question, and advocate changes in wages, hours, and other terms and conditions of employment in both unionized and non-unionized work environments. The NLRB will deem an employee handbook provision to violate the NLRA if it specifically prohibits Section 7 activity or if "employees would reasonably construe" the rule as prohibiting such activity. It is this "reasonably construe" language that has resulted in many common employee handbook provisions being declared unlawful by the NLRB.

The guidance section that may be most applicable to faculty members is one that addresses the legality of employer rules regarding the conduct of employees towards the University and supervisors or management. The General Counsel explained.

> Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. *See Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec.

> 16, 2014). Moreover, employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited. Id. at 4. On the other hand, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found lawful, because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, employer business partners, and other third parties.

Similar language may be used in University policies or handbooks, particularly in relation to "civility clauses." However, employees should be cautious as this is a complicated area, and simply because it appears a portion of the manual may be covered by the above does not mean that a faculty member can avoid termination for violating the manual.

E. Overtime Pay

***Final Rule; Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales and Computer Employees,* Federal Register, Vol. 81, No. 99 at 32391 (Dept. of Labor May 23, 2016)**

On May 23, 2016 the Department of Labor, Wage and Hour Division, issued its Final Rule, primarily setting the minimum salary which an employee must be paid to be considered "exempt," and therefore not entitled to overtime pay, under the Fair Labor Standards Act. The Final Rule's impact on higher education is limited as many of the changes are not applicable to large classes of employees, such as faculty, academic administrative employees, students, and graduate teaching assistants or research assistants. The rule was scheduled to be effective on December 1, 2016. However, a federal district court in Texas issued a preliminary injunction preventing the enforcement of the rule, and the Trump administration may be opposed to the rule, thus the future of the rule is unclear.

Under the FLSA in order to be exempt and not entitled to overtime most employees must be paid a minimum salary at a level established by the Department of Labor. The Final Rule focuses primarily on updating the salary and compensation levels needed for workers to be exempt.

The Department of Labor has explained that the Final Rule,

- Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South ($913 per week; $47,476 annually for a full-year worker);
- Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally ($134,004); and
- Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.
- Additionally, the Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level.

The Department of Labor also issued guidance for Higher Education: a Fact Sheet and a lengthy Guidance for Higher Education Employers. (Available at https://www.dol.gov/whd/overtime/final2016/) As the Guidance for Employers explains, the new rules will have little impact on faculty members (including adjuncts), and on academic administrative personnel, students, and graduate student assistants.

> Existing (and unchanged) regulatory provisions specific to higher education mean that the Final Rule may have limited impact on teachers [and faculty members] and academic administrators. The salary level and salary basis requirements for the white collar exemption do not apply to bona fide teachers. *See* 29 CFR 541.303(d), .600(e). Additionally, academic administrative personnel that help run higher education institutions and interact with students outside the classroom, such as department heads, academic counselors and advisors, intervention specialists, and others with similar responsibilities, are subject to a special alternative salary level that does not apply to white collar employees outside of higher education. These academic administrative personnel are exempt from the FLSA's minimum wage and overtime requirements if they are paid at least the entrance salary for teachers at their institution. *See* 29 CFR 541.600(c).
>
> To the extent that higher education institutions employ workers whose duties are not unique to the education setting, like managers in food service or at the bookstore, those employees will be covered by the new salary level, just like their counterparts at other kinds of institutions and businesses.

The Department of Labor noted that the changes would apply to a limited number of higher education specific workers: postdoctoral researchers who do not engage in teaching; non-academic administrative employees, such as admission counselors and recruiters; and to coaches who are not engaged primarily in instruction. *See* Guidance for Higher Education Employers.

On November 22, 2016, U.S. District Court Judge Amos Mazzant granted an Emergency Motion for Preliminary Injunction and thereby enjoined the Department of Labor from implementing and enforcing the Overtime Final Rule on December 1, 2016. (*State of Nevada ET AL v. United States Department of Labor ET AL*, No: 4:16-CV-00731) (E.D. Texas).

On December 1, 2016, the Department of Justice on behalf of the Department of Labor filed a notice to appeal the preliminary injunction to the U.S. Circuit Court of Appeals for the Fifth Circuit. The Department has moved to expedite the appeal, which was approved by the Court. However, the Department of Labor requested an extension until May 1, 2017 to file their reply brief to "allow incoming leadership personnel [primarily a Trump Department of Labor appointee] adequate time to consider the issues." It is uncertain at this time what impact appointments made by the Trump administration will have on the future of the Final Rule.

V. Discrimination and Affirmative Action

A. Affirmative Action in Admissions

***Fisher v. University of Texas at Austin*, 576 U.S. ___ (June 23, 2016)**

The US Supreme Court upheld the constitutionality of University of Texas at Austin's affirmative action program in *Fisher II*, in which the AAUP joined an amicus brief. The brief argued that consideration of race in the admissions process is appropriate and advanced the AAUP's longstanding view that diversity is essential not only for students but for the entire academic enterprise. In its second consideration of *Fisher's* challenge to UT's program, the Court confirmed that universities must prove that race is considered only as necessary to meet the permissible goals of affirmative action. In particular, the university must prove that "race-neutral alternatives" will not suffice to meet these goals. In *Fisher II*, the Court held that since UT had sufficient evidence that its "Top Ten" admissions policy based on class rank was not adequate, by itself, to meet its diversity goals, it could permissibly consider a student's race as one factor in a broader assessment of qualifications. This opinion now enables universities to adopt affirmative action programs that meet constitutional requirements.

The case arose when Abigail Fisher, a white student, challenged the university's consideration of race in the undergraduate admissions process when she was denied admission. Fisher argued that UT Austin's use of race in admissions decisions violated her right to equal protection under the Fourteenth Amendment. In 1996, the Texas Legislature adopted the Top 10 Percent Law. Under this law, seniors in the top 10 percent of their high school class were guaranteed admission to any Texas state university. The primary objective of the law is to draw in the best students from each Texas school, including students from predominantly black or Hispanic areas, in order to achieve higher levels of diversity. Following the Supreme Court upholding a race-conscious admissions program at the University of Michigan Law School

in *Grutter v. Bollinger*, 539 U.S. 244 (2003), UT Austin reinstated a consideration of race in admissions decisions for those who didn't fall within the Top 10 Percent Law.

Fisher filed a lawsuit challenging UT Austin's decision to deny her admission. The case was first heard by the Fifth Circuit Court of Appeals in 2010, and the AAUP signed onto the American Council on Education (ACE) amicus brief submitted to the Fifth Circuit. The Fifth Circuit ruled in favor of UT Austin and the Fifth Circuit's first decision was appealed to the Supreme Court in 2012. In that appeal, the question presented was whether the Supreme Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter*, permitted UT Austin's use of race in undergraduate admissions decisions. Fisher claimed that either this use of race did not fall into the constitutional parameters of *Grutter* or that *Grutter* must be overturned. In August 2012, the AAUP signed onto an amicus brief authored by ACE with 37 other higher education groups. The brief argued that the educational benefits that come from a diverse student body are a compelling state interest and second, colleges and universities must be allowed to make autonomous decisions when determining the composition of their student bodies.

On June 24, 2013, by a vote of 7 to 1, the Supreme Court followed longstanding precedent and recognized that colleges and universities have a compelling interest in ensuring student body diversity, and can take account of an individual applicant's race as one of several factors in their admissions program as long as the program is narrowly tailored to achieve that compelling interest. *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013)*(Fisher I)*. The Supreme Court, however, ruled that the court below had not properly applied the "strict scrutiny" standard and remanded the case back to the Fifth Circuit. In November 2013, the AAUP again signed onto ACE's amicus brief to the Fifth Circuit, which reiterated the arguments enumerated above. In July 2014, for the second time, the Fifth Circuit upheld the UT Austin admissions plan. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014). Fisher petitioned to have the Supreme Court review the case (again) and that request was granted on June 29, 2015 the AAUP joined the amicus brief in *Fisher II*, authored by ACE and joined by thirty-seven other higher education organizations.

In 2016, the US Supreme Court upheld the constitutionality of the UT Austin's affirmative action program in *Fisher II*. Due to Justice Kagan's recusal from the case and with the death of Justice Scalia, only seven justices took part, resulting in a 4-3 decision. Justice Kennedy's opinion for the Court is significant in taking a realistic and reasonable approach that should enable universities to adopt affirmative action programs that meet constitutional requirements.

The Court applied the three key criteria from its earlier decision in this case (*Fisher I*): (1) a university must show that it has a substantial purpose or interest in considering race as a factor in its admissions policy and that considering race is necessary to achieve this purpose; (2) courts should defer, though not completely, to a university's academic judgment that there are educational benefits that flow from diversity in the student body; and (3) the university must prove that race-neutral alternatives will not achieve its goals of increasing diversity.

The Court's decision recognizes that judges should give due deference to universities in defining educational goals that include the benefits of increasing diversity in the student body, such as the promotion of cross-racial understanding and the preparation of students for an increasingly diverse workforce and society.

The Court confirmed that universities must prove that race is considered only as necessary to meet the permissible goals of affirmative action. In particular, the university must prove that "race-neutral alternatives" will not suffice to meet these goals. This was the most controversial aspect of the *Fisher I* decision. In *Fisher II*, though, the Court takes a reasonable approach, finding that UT had sufficient evidence that its "Top Ten" admissions policy based on class rank was not adequate, by itself, to meet diversity goals. By adding a "holistic" evaluation of applicants who were not admitted in the "Top Ten" program, UT was able to consider race as one factor in a broader assessment of qualifications.

The Court noted that the "prospective guidance" of its decision is limited to some extent by the particularities of the UT case. Despite this, the Court's decision does provide important guidance to universities concerning the criteria that will be applied in evaluating affirmative action programs. The Court also emphasizes that universities have "a continuing obligation" to "engage [] in periodic reassessment of the constitutionality, and efficacy, of [their] admissions program[s]." While this requires ongoing study and evaluation by universities, the Court's decision creates a significant and positive basis for universities to adopt affirmative action programs that meet constitutional requirements.

B. Sexual Misconduct – Title IX

Letter from Office of Civil Rights, Department of Education, (Feb. 17, 2016)

This letter from the Office of Civil Rights (OCR) responded to an inquiry from Congressman James Lankford who posed several questions regarding OCR's position and the status of its 2010 and 2011 "Dear Colleague" letters. In addressing one important issue, the OCR confirmed that these Dear Colleague letters do not have the force of law or regulation. OCR explained "it is Title IX and the regulation, which has the force and effect of law, . . . not OCR's 2011 (or any other)" Dear Colleague letter. "Instead, OCR"s guidance is issued to advise the public of its construction of the statutes and regulations it administers and enforces." The fact that these "Dear Colleague" letters do not have the force of law could have significant consequences if colleges and universities seek to use the letters to justify abrogating prior agreements or established policies.

Article: Constitutional Due Process and Title IX Investigation and Appeal Procedures at Colleges and Universities, **120 Penn State Law Review 963 (Spring 2016)**

Over the last several years, the federal government has been pressing universities and colleges to strengthen the processes used for the investigation, discipline, and appeal of sexual

harassment and assault cases arising under Title IX of the Education Act Amendments. Public sector universities and colleges are also obligated to provide to employees and students disciplined for sexual harassment or assault procedural protections under the Due Process Clause of the U.S. Constitution. These disparate legal obligations have led to lawsuits alleging that universities have failed to comply with the Due Process Clause when discipline has been instituted as a result of Title IX investigations or when instituting discipline. This article provides an overview of Constitutional Due Process rights and their application to public sector universities and colleges and will review recent judicial decisions addressing these rights in cases arising from investigations, discipline and appeals under Title IX. It also includes recommendations for balancing need to address sexual misconduct on campus with the due process rights of students and employees.

VI. Intellectual Property

A. Patent and Copyright Cases

***Digital Millennium Copyright Act ("DMCA"), Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention* (Libr. of Congress Oct. 30, 2015)**

Section 1201 of the Copyright Act, which was part of the Digital Millennium Copyright Act (DMCA) of 1998, bars the "circumvention" of "technological protection measures" that control access to copyrighted works. Every three years the Librarian of Congress (advised by the Copyright Office) issues a set of exceptions to the 1201 rules to allow for lawful uses that might otherwise be discouraged by the law. Educators have participated in this process, which began in 2000, for many years, and have successfully obtained exceptions that have grown incrementally over time to encompass more uses, more types of media, and more users.

AAUP signed onto Public and Reply Comments submitted to the U.S. Copyright Office authored by the Glushko-Samuelson Intellectual Property Clinic at the American University Washington College of Law, and the Intellectual Property, Arts, and Technology Clinic, University of California, Irvine School of Law, which support faculty use of excerpts of certain audiovisual material and research for educational purposes.

On October 30, 2015, the Library of Congress announced its exemptions to DMCA---the new rules allow documentary filmmakers and authors offering film analysis to access encrypted content from DVDs, Blu-ray discs and digitally transmitted video in order to criticize or comment on that content in their works. The previous version of this rule did not permit these creators to access Blu-ray; and the new rules also allow faculty and in some cases students to copy short portions of protected works for use in criticism or commentary where close analysis of the clip is necessary for the following formats: DVD, streaming video delivery and BLU-RAY. The prior rules allowed use of DVD and streaming for these purposes, but BLU-RAY is new to this cycle.

***Authors Guild, Inc. v. HathiTrust,* 755 F.3d 87 (2d Cir. N.Y. 2014)**

In this case the Second Circuit recently ruled that various universities (collectively referred to as "HathiTrust") did not violate the Copyright Act of 1976 when they digitally reproduced books, owned by the universities' respective libraries, as the doctrine of "fair use" allowed them to create a full-text searchable database of copyrighted works and to provide those works in formats accessible to those with disabilities. (See 2014 Legal Update for further details regarding the Court's decision.)

VII. Collective Bargaining Cases and Issues – Private Sector

A. NLRB Authority

1. Religiously Affiliated Institutions

***Pacific Lutheran University*, 361 NLRB No. 157 (2014)(With subsequent decisions.)**

In *Pacific Lutheran University*, the Board modified the standards used to determine two important issues affecting the ability of faculty members at private-sector higher education institutions to unionize under the National Labor Relations Act: first, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities; and second, whether certain faculty members are managers, who are excluded from protection of the Act. *See infra*.

The question of whether faculty members in religious institutions are subject to jurisdiction and coverage of the Act has long been a significant issue, with the Supreme Court's 1979 decision in *Catholic Bishops* serving as the foundation for any analysis. In *Pacific Lutheran University*, the Board established a two-part test for determining jurisdiction. First, whether "as a threshold matter, [the university] holds itself out as providing a religious educational environment"; and if so, then, second, whether "it holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school's religious educational environment."

The employer and its supporters argued that only the threshold question of whether the university was a bona fide religious institution was relevant, in which case the Act would not apply to any faculty members. The Board responded that this argument "overreaches because it focuses solely on the nature of the institution, without considering whether the petitioned-for faculty members act in support of the school's religious mission." Therefore, the Board established a standard that examines whether faculty members play a role in supporting the school's religious environment.

In so doing, the Board recognized concerns that inquiry into faculty members' individual duties in religious institutions may involve examining the institution's religious beliefs, which

could intrude on the institution's First Amendment rights. To avoid this issue the new standard focuses on what the institution "holds out" with respect to faculty members. The Board explained, "We shall decline jurisdiction 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 university's religious purpose or mission."

The Board also found that that faculty must be "held out as performing a *specific religious function*," such as integrating the institution's religious teachings into coursework or engaging in religious indoctrination (emphasis in original). This would not be satisfied by general statements that faculty are to support religious goals, or that they must adhere to an institution's commitment to diversity or academic freedom.

Applying this standard, the Board found that while Pacific Lutheran University held itself out as providing a religious educational environment, the petitioned-for faculty members were not performing a specific religious function. Therefore, the Board asserted jurisdiction and turned to the question of whether certain of the faculty members were managerial employees.

The Board members Miscimarra and Harry Johnson III dissented from the Board's ruling on the religious exemption. Both concluded that the test used should be the one articulated by the DC Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). As Miscimarra later explained, "Under that test, the Board has no jurisdiction over faculty members at a school that (1) holds itself out to students, faculty and community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion." *Seattle University*, 364 NLRB No. 84 (2016) (Member Miscimarra, dissenting); *Saint Xavier University*, 364 NLRB No. 85 (2016) (Member Miscimarra, dissenting).

The Board has addressed the religious exemption in subsequent two cases. *Seattle University*, 364 NLRB No. 84 (2016); *Saint Xavier University*, 364 NLRB No. 85 (2016). In both cases, the Regional Director's found that the bulk of the faculty were not excluded from Board jurisdiction due to the religious nature of the institution. The Universities sought review of these decisions. The Board denied the request to review as to the Regional Director's decision regarding most of the faculty, but granted review of the Regional Director's determination to include in the unit faculty who teach in the University's Department of Religious Studies (at Saint Xavier) and in the University's Department of Theology and Religious Studies and its School of Theology and Ministry (at Seattle University.) Applying the *Pacific Lutheran* test, the Board found that the Universities held out these faculty members "as performing a specific roll in in maintaining the university's religious educational environment" and therefore excluded those faculty members from the bargaining unit. *Saint Xavier*, at 3; *Seattle University*, at 3. In both cases Miscimarra dissented, arguing that the Board should have granted review in its entirety to consider whether the University and all of its faculty were exempt from coverage, explaining, "when determining whether a religious school or university is exempt from the Act's

coverage based on First Amendment considerations, I believe the Board should apply the three-part test articulated by the D.C. Circuit in University of *Great Falls v. NLRB." Seattle University*, 364 NLRB No. 84 at 6 (2016); *Saint Xavier University*, 364 NLRB No. 85 at 5 (2016).

B. Faculty, Graduate Assistants and Players Coverage as Employees Entitled to Collective Bargaining Representation

1. Faculty as Managers

***Pacific Lutheran University*, 361 NLRB No. 157 (2014)(With subsequent decisions.)**

In *Pacific Lutheran University*, the Board also modified the standards used to determine whether certain faculty members are managers, who are excluded from protection of the Act. This question arises from the Supreme Court's decision in *Yeshiva*, where the Court found that in certain circumstances faculty may be considered "managers" who are excluded from the protections of the Act. The Board noted that the application of *Yeshiva* previously involved an open-ended and uncertain set of criteria for making decisions regarding whether faculty were managers. This led to significant complications in determining whether the test was met and created uncertainty for all of the parties.

Further, in explaining the need for the new standard, the Board specifically highlighted, as AAUP had in its amicus brief, the increasing corporatization of the university. The Board stated, "Indeed our experience applying *Yeshiva* has generally shown that colleges and universities are increasingly run by administrators, which has the effect of concentrating and centering authority away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself. Such considerations are relevant to our assessment of whether the faculty constitute managerial employees."

In *Pacific Lutheran University*, the Board sought to create a simpler framework for determining whether faculty members served as managers. The Board explained that under the new standard, "where a party asserts that university faculty are managerial employees, we will examine the faculty's participation in the following areas of decision making: academic programs, enrollment management, finances, academic policy, and personnel policies and decisions." The Board will give greater weight to the first three areas, as these are "areas of policy making that affect the university as whole." The Board "will then determine, in the context of the university's decision making structure and the nature of the faculty's employment relationship with the university, whether the faculty actually control or make effective recommendation over those areas. If they do, we will find that they are managerial employees and, therefore, excluded from the Act's protections."

The Board emphasized that to be found managers, faculty must in fact have actual control or make effective recommendations over policy areas. This requires that "the party asserting

managerial status must prove actual—rather than mere paper—authority. . . . A faculty handbook may state that the faculty has authority over or responsibility for a particular decision-making area, but it must be demonstrated that the faculty exercises such authority *in fact*." Proof requires "specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision making area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed." Further, the Board used strong language in defining "effective" as meaning that "recommendations must almost always be followed by the administration" or "routinely become operative without independent review by the administration.

In *Pacific Lutheran* Miscimarra generally agreed with the Board's framework for determining whether faculty members are exempt managerial employees, though both he and Johnson disagreed with some of the elements and burdens of proof used in that framework. (See Pacific Lutheran University, infra section VII, B, 1).

The Board has addressed the issue of faculty as managers is several subsequent cases. In a case involving the University of Southern California, Miscimarra dissented from the Board's decision, and articulated how his perspective on the test for managerial status differed from that applied by the majority of the Board. *Univ. of S. Cal.*, 365 NLRB No. 11 (N.L.R.B. Dec. 30, 2016).

2. Graduate Assistants Right to Organize

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

Echoing arguments made by the AAUP in an *amicus* brief, the National Labor Relations Board held that student assistants working at private colleges and universities are statutory employees covered by the National Labor Relations Act. The 3–1 decision overrules a 2004 decision in *Brown University*, which had found that graduate assistants were not employees and therefore did not have statutory rights to unionize. The AAUP filed an *amicus* brief with the Board arguing that extending collective bargaining rights to student employees promotes academic freedom and does not harm faculty-student mentoring relationships, and instead would reflect the reality that the student employees were performing the work of the university when fulfilling their duties. In reversing *Brown*, the majority said that the earlier decision "deprived an entire category of workers of the protections of the Act without a convincing justification." The Board found that granting collective bargaining rights to student employees would not infringe on First Amendment academic freedom and, citing the AAUP *amicus* brief, would not seriously harm the ability of universities to function. The Board also relied on the AAUP *amicus* brief when it found that the duties of graduate assistant constituted work for the university and were not primarily educational.

The AAUP decided to file an *amicus* brief in this case in keeping with its long history of support for the unionization of graduate assistants. The AAUP has previously filed numerous

amicus briefs arguing the graduate assistants are employees with rights to unionize under the NLRA, has issued statements affirming the rights of graduate assistants to unionize, and has an active committee on graduate students and professional employees that represents the interests of graduate students.

The AAUP brief in this case addressed the two questions involving the *Brown* decision. The brief argued that graduate assistants, including those working on federal grant funded research, are employees with the right to unionize under the NLRA and it refuted the *Brown* decision's speculative claims that collective bargaining would compromise academic freedom and the cooperative relationships between faculty mentors and their graduate student mentees.

The brief cited three reasons why graduate student assistants perform work in return for compensation and are thus employees under the Act. First, when graduate students work as teaching and research assistants, their work is similar to that performed by university faculty. Second, graduate students teach because they are paid, not because it is at the core of graduate education. Third, universities generally treat any stipend as payment for teaching or supporting the professor's research, not as general financial support to enable the graduate student to attend class or conduct his or her own dissertation research.

In its decision, the Board held that graduate assistants, and other student teaching and research assistants, are employees with a right to unionize. In doing so the Board echoed arguments made by the AAUP and specifically cited the AAUP *amicus* brief. First the Board found, as AAUP had argued, that the unionization of graduate students would not infringe upon First Amendment academic freedom. The Board explained that "there is little, if any, basis here to conclude that treating employed graduate students as employees under the Act would raise serious constitutional questions, much less violate the First Amendment." *Id.* at 7.

The Board next found that experience with graduate student unions, primarily in the public sector, had demonstrated that unionization did not seriously harm the ability of universities to function. The Board stated, "As AAUP notes in its *amicus* brief, many of its unionized faculty chapters' collective-bargaining agreements expressly refer to and quote the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure*, which provides a framework that has proven mutually agreeable to many unions and universities."*Id.* at 10, footnote 82. Therefore, the Board found that "there is no compelling reason—in theory or in practice—to conclude that collective bargaining by student assistants cannot be viable or that it would seriously interfere with higher education." *Id.* at 12.

Finally, the Board also found that the duties of teaching assistants constituted work for the institutions. The Board noted that "teaching assistants frequently take on a role akin to that of faculty, the traditional purveyors of a university's instructional output." In doing so, the Board again cited to the AAUP's *amicus* brief. "As the American Association of University Professors, an organization that represents professional faculty—the very careers that many graduate students aspire to—states in its brief, teaching abilities acquired through teaching assistantships are of relatively slight benefit in the attainment of a career in higher education." *Id.* at 16, footnote 104.

In *Columbia*, Miscimarra filed a vigorous dissent arguing that the Board's earlier decision and reasoning in *Brown* were correct. *Id.* at 24-25. Miscimarra explained his broader disagreement with the Board's decision.

> I disagree with my colleagues' decision to apply the Act to college and university student assistants. In my view, this change is unsupported by our statute, and it is ill-advised based on substantial considerations, including those that far outweigh whether students can engage in collective bargaining over the terms and conditions of education-related positions while attempting to earn an undergraduate or graduate **[*112]** degree.
>
> The Supreme Court has stated that "the authority structure of a university does not fit neatly within the statutory scheme" set forth in the NLRA. *NLRB v. Yeshiva University, 444 U.S. 672, 680, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980)*. Likewise, the Board has recognized that a university, which relies so heavily on collegiality, "does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world." *Adelphi University, 195 NLRB at 648*. The obvious distinction here has been recognized by the Supreme Court and the Board: the lecture hall is not the factory floor, and the "industrial model cannot be imposed blindly on the academic world." *Syracuse University, 204 NLRB 641, 643 (1973)*; see also *Yeshiva, 444 U.S. at 680*.

Id. at 24. Miscimarra then expressed his disagreement with several particular aspects of the Board's decision. Miscimarra concluded, "For these reasons, and consistent with the Board's prior holding in Brown University, I believe the Board should find that the relationship between Columbia and the student assistants in the petitioned-for unit in this matter is primarily educational, and that student assistants are not employees under Section 2(3) of the Act." *Id*. at 34.

C. Bargaining Units

Yale Univ. & Unite Here Local 33, 365 NLRB No. 40 (N.L.R.B. Feb. 22, 2017)

In Yale University, the NLRB approved an election for graduate students in nine separate units. Yale contended both that the graduate students were not employees, asserting both that the Board's earlier Columbia University decision was wrongly decided, and alternatively even under that standard the graduate students were not employees.

At Yale, the union "filed nine petitions, each of which seeks to represent separate bargaining units composed of all teaching fellows, discussion section leaders, part-time acting instructors (PTAIs), associates in teaching, lab leaders, grader/tutors, graders without contact, and teaching assistants (referred to collectively as teaching fellows) who teach in each of nine departments at Yale University (Yale or the University). The nine separate units would include

teaching fellows in the following departments: English, East Asian Languages and Literature, History, History of Art, Political Science, Sociology, Physics, Geology and Geophysics, and Mathematics." *Yale University*, (01-RC183014) Boston MA (Reg. 1 Jan. 25, 2017).

As of the fall 2016 semester, the petitioned-for units included approximately the following numbers of teaching fellows: 26 in English, 29 in East Asian Languages and Literature, 66 in History, 22 in History of Art, 64 in Political Science, 18 in Sociology, 61 in Physics, 21 in Geology and Geophysics, and 20 in Mathematics. The university-wide unit proposed by Yale would include over 800 teaching fellows.

The Regional Director summarized the standard used to determine whether a proposed unit was appropriate.

> In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6thCir. 2013), the Board set forth the standard to be applied when an employer contends that the smallest appropriate unit contains employees who are not in the petitioned-for unit. When a petitioned-for unit consists of employees who are readily identifiable as a group, and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the group could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit. Id. at 945-946.

Id. at 28-29.

Applying these standards, The Regional Director found that nine proposed units were appropriate. The Regional Director rejected Yale's argument that individual units were not appropriate, and instead a university wide unit would be appropriate, explaining, "while a university wide unit might also be appropriate, I find that Yale has failed to meet its burden of demonstrating that there is such an overwhelming community of interest among all of the teaching fellows at the University that there is no rational basis for approving units based on academic departments." *Id.* at 36.

Yale filed a request for expedited review of the Regional Director's Decision and Direction of Election, a request to stay the elections. *Yale Univ. & Unite Here Local 33*, 365 NLRB No. 40 (N.L.R.B. Feb. 22, 2017). The Board denied these requests. Miscimarra filed a dissent which highlighted several disagreements with the Board's current rulings and procedures. Miscimarra addressed the issue of the appropriateness of the unit expressing his disagreement with the *Specialty Health* care standard in general, and his view that "the instant case also gives rise to questions regarding the appropriateness of applying the Board's *Specialty Healthcare* standard in a university setting." Miscimarra also noted his disagreement with Board's decision in *Columbia University*, and questioned some of the Board's new election rules.

D. NLRB Elections

NLRB Election Rules, 29 CFR Parts 101, 102, and 103*; Guidance Memorandum on Representation Case Procedure Changes Effective April 14_ 2015*, NLRB GC 15_06, (NLRB General Counsel April 6, 2015).

In December 2015 the NLRB issued revisions to union election rules that should vastly simplify and expedite the election process. Previously, the results of elections could be tied up for years in pointless litigation, delaying the results of a democratic process, a situation that would be intolerable in any other context. Specifically, the rule includes the following: Provides for electronic filing and transmission of election petitions and other documents; Ensures that employees, employers and unions receive timely information they need to understand and participate in the representation case process; Eliminates or reduces unnecessary litigation, duplication and delay; Adopts best practices and uniform procedures across regions; Requires that additional contact information (personal telephone numbers and email addresses) be included in voter lists, to the extent that information is available to the employer, in order to enhance information sharing by permitting other parties to the election to communicate with voters about the election; and Allows parties to consolidate all election-related appeals to the Board into a single appeals process. Cumulatively, these changes will likely reduce the time from the filing of a representation petition to the holding of an election to between 10 and 20 days.

Some of the new provisions are particularly important for faculty members. For example, the new election rules also require that employers provide the union with personal email addresses and phone numbers for employees. This is particularly important for reaching out to contingent faculty, who often perform most of their work off campus. Also, parties must be aware that the NLRB representation hearing and election process is extremely fast paced and the NLRB will rarely grant requests for extensions of time. Therefore, parties should be fully aware of the revised rules and prepared for the hearing and election process prior to filing any election petition with the NLRB.