Title IX Law and Policy, Academic Labor Union Duty to Bargain Rights and the Evidentiary Standard of Proof

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Abstract

This article critically examines the legislative and historical foundations of Title IX law and policy as it relates to academic labor union duty-to-bargain rights on America's college campuses. In particular, this article closely examines the emerging intersection of Title IX, due process, and labor law jurisprudence in higher education. In its totality, and in light of the 2020 U.S. Department of Education Office of Civil Rights (OCR) Final Rule Title IX amendments coupled with established legal precedent, this article firmly establishes that campus labor unions at both public and private educational institutions nationwide may, in fact, have both the statutory right under the National Labor Relations Act (NLRA) (private colleges) and similar rights under the various public sector statutes (public colleges) to collectively bargain the choice of the evidentiary standard of proof in campus Title IX investigations (preponderance of the evidence vs. clear and convincing evidence) as the

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Most notably, the U.S. Department of Education Office of Civil Rights (OCR) cited and quoted Lance Houston and the above article as a source of authority in its May 2020 Title IX Final Rule Regulations in the area of Title IX, the Evidentiary Standard of Proof and Campus Labor Unions. *See* May 2020 Title IX Final Rule Regulations, 85 Fed. Reg. 30378 nn.1424, 1426. The above article, with reasoning, quotes, and recommendations codified by the OCR Title IX Final Rule, introduced a new intersection of Title IX and Labor Law and established an evidentiary standard of proof campus uniformity requirement on all college campuses nationwide. *See* 34 C.F.R. §106.45(b)(1)(vii) (2021). Lance Houston currently serves on the roster of Expert Witnesses with Thomson Reuters Expert Witness Services (Now RoundTable) in the areas of Labor Law and Title IX.

evidentiary standard of proof is, undoubtedly, a "term and condition of employment" and therefore a mandatory subject of bargaining.

Introduction

Does a public college under state statute/Public Employment Relations Board (PERB) or a private university under National Labor Relations Act (NLRA) jurisdiction have an affirmative legal duty to collectively bargain the Title IX evidentiary standard of proof (preponderance of the evidence vs. clear and convincing) with a campus labor union, or may the college decide the evidentiary standard of proof unilaterally? In other words, who chooses the standard: the college administration solely or jointly with campus labor unions?

The answer to this question will have far-reaching legal, financial, academic, political, and evidentiary ramifications. In its totality, the Trump administration's Title IX Final Rule not only redefined, reconstructed, and succinctly challenged past core practices in higher education policy, but, in fact, the Title IX Final Rule regulations also leave open and unanswered for the Biden administration, state lawmakers, and the broader academic community this important, fundamental, yet unexpected legal question. Accordingly, by examining this legally important question through both an historical and modern-day lens, I undertake to explore the (1) academic labor union history in both public and private higher education institutions; (2) the origins of Title IX law and policy from its initial legislative enactment in 1972 to the 2011 Dear Colleague Letter; and (3) the revised 2020 Title IX Final Rule amendments under the Trump administration and the U.S. Department of Education Office of Civil Rights (OCR). In examining this question in its full scope and context, I not only critically analyze the question presented and the substantial law supporting the final conclusions reached, but also recommend solutions and strategies to be considered by the Biden administration, Congress, and state lawmakers that may provide helpful construct, context, and exposition.

I employ three major research strategies in this examination of Title IX and labor law: (1) a qualitative analysis and a nationwide data sample of numerous university position statements on intended choice of Title IX evidentiary standard; (2) select labor union statutory, common law, and contractual "Duty to Bargain" rights under both the NLRA applicable to academic labor employees employed at private institutions and the various state statutory frameworks and public employment board decisions applicable to academic labor employees employed at public institutions; and (3) established legal precedent. Data has been collected from interviews, books, present-day labor contracts between academic labor unions and college administrations, surveys, legal precedent, news articles, case law, and published reports.

Undoubtedly, what's at stake at the core of this research is of utmost legal importance to American higher education institutions, labor unions, Title IX practitioners, lawyers, the courts, the National Labor Relations Board (NLRB), legislators, advocacy groups, and students. In light of the gravity of ubiquitous sexual assault and harassment on college campuses nationwide[1] in addition to the inconsistencies in adjudication of these matters in the courts (and on campus), it makes sense to understand and address this critical issue. That said, American colleges and universities, both public and private, and their respective faculty and students deserve the procedural predictability and legal reliability of a common, uniform, and collectively bargained evidentiary standard of proof in campus Title IX investigations.

This research reveals that the resolution of the Title IX standard of proof decision on each campus between the preponderance of the evidence standard and the clear and convincing evidence standard ultimately may not be answered by way of an expected campus leadership sense of altruism, fairness, and shared governance, but rather (unwittingly) by a likely unknown, overlooked, or perhaps forgotten burden of proof provision often buried among the many pages of an active and binding campus collective bargaining agreement. An examination of this distinct possibility, and in light of the institutions without organized labor, is central to the core research question in this article. Accordingly, and after review of the substantial research and data gathered, however, only one reasonable conclusion is possible: the considerable evidence revealed and analyzed in this research supports the conclusion that campus labor unions (faculty, graduate, clerical, etc.) and America's respective public and private college administrations *must*, in fact, collectively bargain the evidentiary standard of proof decision.

I. The History of Academic Labor Unions

In the United States, academic labor unions endured a difficult and tenuous start.[2] In 1915, for example, academic labor organizations

1. Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. Rev. 1613, 1613–14 (2012); Anya Kamenetz, *The History of Campus Sexual Assault*, NPR (Nov. 30, 2014, 8:03 AM), http://www.npr.org/blogs/ed/2014/11/30/366348383/the-history-of-campus-sexual-assault [https://perma.cc/H4KP-X6J6].

2. *See* G. William Domhoff, *The Rise and Fall of Labor Unions in the U.S., From the 1830s until 2012 (but mostly the 1930s–1980s)*, Who Rules America? (Feb. 2013), https://whorulesamerica.ucsc.edu/power/history_of_labor_unions.html [https://perma.cc/KH4Z-XY27]; *see also* Charles H. Wesley, *Organised Labor and the Negro*, 8 J. Negro Educ. 449, 457 (1939), https://dh.howard.edu/cgi/viewcontent.cgi?article=1212&context=reprints.

began in earnest in the United States when the American Association of University Professors (AAUP) was established.[3]

> The creation of the AAUP was preceded by an incident that had come to epitomize the perils of this state of affairs: the dismissal in 1900 of Stanford University economist Edward Ross at the behest of Jane Lathrop Stanford, the widow of the university's railroad-magnate founder, after Ross had criticized railroad monopolies and the use of immigrant labor.[4]

The Ross case reminded faculty members that their professional autonomy was dependent on the whims of those who ran the institutions that employed them.[5] The American Federation of Teachers (AFT) Local 33 was founded at Howard University in November 1918, becoming the first educational institution in the United States to recognize and bargain with a campus labor union.[6] Before the end of 1920,

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3. *History of the AAUP*, AAUP, https://www.aaup.org/about/history-aaup [https://perma.cc/C2MP-5P7W].

> More proximate to the AAUP's founding was the work undertaken in 1914 by the Joint Committee on Academic Freedom and Tenure, also known as the "committee of nine." This committee, which included three representatives each from the American Economic Association, the American Sociological Society, and the American Political Science Association and was headed by Columbia University economics professor Edwin R. A. Seligman, was charged with examining academic freedom issues and investigating individual cases. The difficulties of undertaking this work through separate disciplinary societies made apparent the need for a more broadly conceived faculty association.

Id.

4. *1915–1920, An Association for the Faculty*, AAUP, https://www.aaup.org/sites/default/files/Banner1_Final2.pdf [https://perma.cc/C92N-3VGH].

5. *History: Timeline of the First 100 Years*, AAUP, https://www.aaup.org/about/history/timeline-first-100-years [https://perma.cc/RSY6-6MWL]. More specifically, the founding of the AAUP involved, in part, the collective desire for greater influence and authority in the academy. For example,

> [i]n 1915, trustees and regents regularly exercised much more direct control over day-to-day operations of the university than they do now. They often viewed professors as their employees, or "hired men," to use a term of derision the founders of the AAUP employed, and treated them accordingly. The founders of the AAUP wanted to establish a role for the faculty in institutional governance that would make them the equals of the trustees rather than their subordinates. Academic freedom was an important part of changing the role of professors, since it directly related to their professional autonomy, but it was only one part in the overarching goal of the AAUP. A term that AAUP co-founder Arthur Lovejoy [a professor of philosophy at Johns Hopkins University] employed to describe his vision of the university was that of a "self-governing republic of scholars." While he saw a role for trustees in oversight, he did not believe that they should have final authority over academic matters.

Colleen Flaherty, *Accidental Activists*, Inside Higher Ed. (Oct. 22, 2015), https://www.insidehighered.com/news/2015/10/22/new-book-details-founding-and-evolution-aaup [https://perma.cc/9SJM-PH8H] (interviewing Hans Joerg Tiede about his book, University Reform: The Founding of the American Association of Law Professors (2015)).

6. Timothy Reese Cain, *The First Attempts to Unionize the Faculty*, 112 Teachers Coll. Rec. 876 (2010).

"faculty organized 20 separate union locals for a variety of social, economic, and institutional reasons before the end of 1920."[7] As Professor Tim Cain noted:

> The first AFT college local at Howard University was founded because of what one member called the "degradation of faculty in university affairs" and also to try to encourage greater federal financial support for the institution. The second at the University of Illinois was formed both to increase faculty salaries and to bridge divides between what were termed by the local papers the "brain workers" and "hand workers."[8]

Yet, prior to 1918, there was little in the way of legislation, academic collective bargaining, or mutual protection for faculty, or the American laborer in the general sense. This standstill mirrored the general absence of legislation regarding unions more generally. As one commentator reported:

> In the absence of such legislation, the Courts generally ruled in favor of business when disputes between business and labor arose. For example, the Cordwainers Case[9] in 1806 and *Commonwealth of Massachusetts v Hunt*[10] in 1842 each applied the Conspiracy Doctrine to rule that workers joining together for their own benefit was harmful to society. As a result, union membership was about six percent of the labor force before 1930 (citation omitted). [Beginning with the founding of AFT Local 33 at Howard University in November 1918, college and normal school faculty organized 20 separate union locals for a variety

7. Phil Ciciora, *College Faculty Unionization Still Contested Territory, Scholar Says*, Ill. News Bureau (Apr. 13, 2010, 9:00 AM), https://news.illinois.edu/view/6367/205660 [https://perma.cc/YKL5-R9X4].

8. Andrew Hibel, *What Does the History of Faculty Unions Teach Us About Their Future?*, Higher Ed. Jobs, https://www.higheredjobs.com/HigherEdCareers/interviews.cfm?ID=315 [https://perma.cc/S2VA-SHTU] (interviewing Timothy Reese Cain, PhD, Assistant Professor, College of Education, University of Illinois at Urbana-Champaign). The societal divide proposing a discernible difference in "brain workers" and "hand workers" was more than just a social construct of the times; it also crossed racial lines. *See* Marie A. Failinger, Yick Wo *at 125: Four Simple Lessons for the Contemporary Supreme Court*, 17 Mich. J. Race & L. 217, 236 (2012).

9. The course of these early labor cases began with the first recorded decision, the Philadelphia Cordwainers Case, (Commonwealth v. Pullis), decided in 1806. The indictment was for a conspiracy to raise wages and charged the journeymen shoemakers with combining and agreeing not to work except at certain rates, and also to prevent others from working at lower ones. There was no statutory condemnation of a combination of workers for the purpose of raising wages, and so judicially-formulated common law principles were required if a criminal conspiracy was to be found. . . . Although the indictment and the charge contained the requirement of a bad end, *i.e.*, the former charged that the combination was for the purpose of not working unless certain rates were given and also to prevent others from working, and the latter held bad a combination to raise wages, still, in the light of the previously quoted "transcendental wrong and outrage," the jury found no difficulty in holding the defendants guilty. Their verdict itself discloses how necessary they considered this bad end: "We find the defendants guilty of a combination to raise their wages."

Morris D. Forkosch, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor*, 40 Tex. L. Rev. 303, 320–21 (1962).

10. Commonwealth v. Hunt, 45 Mass. 111, 123 (1842); *Conspiracy—Parties*, 14A Howard Alperin & Roland F. Chase, Massachusetts Practice: Summary of Basic Law § 7:137 (5th ed. 2014).

> of social, economic, and institutional reasons before the end of 1920.][11] In 1926, Congress passed the Railway Labor Act.[12] While the Railway Labor Act was the first federal law to cover the collective bargaining process, it was not until the Great Depression of the 1930s that labor unions gained political power across industries nationwide. This power resulted in legislation to cover all workers in the private sector. Notably, the Norris-LaGuardia Act was passed in 1932 and the Wagner Act (National Labor Relations Act) was passed in 1935.[13]

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11. *See generally* Cain, supra note 6. Some of the earliest contracts on campuses date back to the 1940s.

> At the end of World War II, when organized labor in the United States was at the peak of its political power and influence, industrial relations units were established at many universities around the nation. In 1945, Governor Earl Warren established two such units at the University of California: one at UCLA, the other at Berkeley.

History, INST. FOR RSCH. ON LAB. & EMP., UCLA (2019), https://irle.ucla.edu/about/history. "In Ohio, the University of Akron in 1942 voluntarily recognized and started negotiating contracts with State County Municipal Workers of America (SCMWA) Local 38, a public sector affiliate of the Congress of Industrial Organizations (CIO), for a unit of maintenance and custodial workers." William A. Herbert, *The History Books Tell It? Collective Bargaining in Higher Education in the 1940s*, 9 J. COLLECTIVE BARGAINING IN THE ACAD. art. 3, at 3 (2017). https://thekeep.eiu.edu/cgi/viewcontent.cgi?article=1734&context=jcba. "An important early example of voluntary institutional embrace of workplace democracy on campus was the creation of a collective bargaining program by the University of Illinois in 1945 for over 2000 non-academic employees." *Id*. at 10.

> Howard University entered into an agreement with United Federal Workers of America, Congress of Industrial Organizations (CIO), in April 1946 for a bargaining unit of non-faculty staff, and United Public Workers of America, Local 555, CIO, negotiated agreements for teachers at vocational schools. CIO unions negotiated faculty contracts at Howard University and Fisk University during the same period . . . . Higher education collective bargaining in that era was the result of voluntary recognition by institutions, rather than by legal mandate. The National Labor Relations Board (NLRB) declined jurisdiction over private nonprofit educational institutions for many years. In the public sector, a long and largely unstudied history of union organizing led to informal agreements and some written contracts without the existence of enabling legislation, primarily with local governments. . . . A procedural framework for unionization and collective bargaining on public college campuses was not established until passage of state public sector collective bargaining laws in the 1960s and 1970s.

William A. Herbert & Jacob Apkarian, *Everything Passes, Everything Changes: Unionization and Collective Bargaining in Higher Education*, 21 PERSP. ON WORK, 30, 30–31 (citation omitted). "Beginning with Wisconsin in 1959, state legislatures began to enact legislation authorizing collective bargaining in the public sector. JOAN WEITZMAN, THE SCOPE OF BARGAINING IN PUBLIC EMPLOYMENT 40–41 (1975). "By 1974, forty states had adopted some kind of collective bargaining for public employees, while twenty-eight states enacted comprehensive statutes of general applicability." Waterloo Educ. Ass'n v. Iowa Pub. Emp. Rel. Bd., 740 N.W.2d 418, 420 (Iowa 2007). "The enactment of *de jure* mechanisms led to unionization and collective bargaining agreements on public sector campuses involving the trades and buildings and grounds workers, as well as clerical, food service, public safety, and academic labor." Herbert & Apkarian, *supra*, at 31.

12. Railway Labor Act, Pub. L. No. 257, 44 Stat. 577 (1926) (codified at 54 U.S.C. § 151).

13. Lynn A. Smith & Robert S. Balough, *Examining the Parallels of the Declines in the Bargaining Power of Faculty Labor Unions in Public Higher Education and*

The NLRA model of collective bargaining has not changed significantly since its inception. The big question confronting academic unions at this time are whether faculty have assumed managerial roles sufficient to take them out of the Act's protections.[14] In addition, the Board has changed its approach to coverage of religious educational institutions.[15] But the essential process of collective bargaining remains the same.

II. The NLRA and the Duty to Bargain

The NLRA of 1935 (also known as the Wagner Act)[16] is a foundational statute of United States labor law that codifies for private-sector employees a fundamental right of association (i.e., to organize). The NLRA firmly establishes a private employer's (including private colleges and universities) affirmative duty to collectively bargain with labor unions over the "terms and conditions of employment."[17]

> The NLRA applies to most private sector employers, including manufacturers, retailers, *private universities*, and health care facilities. The NLRA does *not* apply to federal, state, or local governments, [however, nor does it apply to] employers who employ only agricultural workers;

Industrial Labor Unions in the United States: A Use of the Historical Perspective and Descriptive Statistics, *in* Proceedings of the Pennsylvania Economic Association 2010 Conference (2010). "[W]hen the Wagner and Taft-Hartley Acts were approved, it was [originally] thought that congressional power did not extend to university faculties because they were employed by nonprofit institutions which did not 'affect commerce.'" NLRB v. Yeshiva Univ., 444 U.S. 672, 679–80 (1980). A critical component of the history of academic labor includes not only the history of labor organizations such as the AAUP and the AFT seeking to organize on-campus chapters, but also the issue of misclassification, i.e. determining the line between NLRA protected unionized faculty members and NLRA exempt managers. For example, Gregory Saltzman aptly notes in his 2001 publication, *Higher Education Collective Bargaining and the Law,* in discussing the fits and starts of academic labor that

> [c]lassifying faculty at private institutions as managers not protected by the NLRA began with the U.S. Supreme Court's 1980 *Yeshiva* ruling. *Yeshiva* did not prohibit faculty unionization, but most faculty lacked the militancy and power to win union recognition without legal protection. *Yeshiva*, noted a journalist, "crippled" union organizers at private colleges for 20 years. . . . But two rulings of the Clinton-era National Labor Relations Board (NLRB) eroded the *Yeshiva* doctrine—a 1997 University of Great Falls (UGF) decision and a June 2000 decision not to hear an appeal of the NLRB regional director's Manhattan College decision. Faculty at both institutions sought representation by the American Federation of Teachers (AFT). The NLRB ruled that they had a protected right to organize and bargain since they had insufficient authority to be considered managers under *Yeshiva*.

Gregory M. Saltzman, *Higher Education Collective Bargaining and the Law*, *in* The NEA 2001 Almanac of Higher Education 45, 45–46 (Harold S. Wechsler ed., 2001) (citation omitted).

14. NLRB v. Yeshiva Univ., 444 U.S. 672, 686, 690 (1980).

15. *See* Bethany Coll., 369 N.L.R.B. No. 98 (June 10, 2020) (overruling Pacific Lutheran Univ., 361 N.L.R.B. 1404 (2014)).

16. 29 U.S.C. §§ 151–169.

17. *Id.* § 158(d).

> and employers subject to the Railway Labor Act (interstate railroads and airlines).[18]

Conversely, public employers and, specifically, public universities are covered by state law. "In spelling out the subjects of collective bargaining in the public sector, many state statutes draw heavily upon section 8(d) of the [NLRA] which calls upon employers to bargain over 'wages, hours, and other terms and conditions of employment.'"[19] Ultimately, "[i]t has been left to case law to sort out the line between bargainable issues [mandatory subjects of bargaining] and non-bargainable management prerogatives."[20]

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18. *Frequently Asked Questions*, NLRB, https://www.nlrb.gov/resources/faq/nlrb [https://perma.cc/WH2B-KZSG] (emphasis on "private universities" added). Under the NLRA,

> [t]he term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 152(2). Similarly,

> [t]he term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3).

19. JOHN E. SANCHEZ & ROBERT D. KLAUSNER, STATE AND LOCAL GOVERNMENT EMPLOYMENT LIABILITY § 16:9 (Supp. 2021). Many state statutes draw heavily from 29 U.S.C. § 158(d). *See* MASS. GEN. LAWS ch. 150E, § 2 (2021); 5 ILL. COMP. STAT. 315/7 (2020); CAL. GOV'T CODE § 3543.2 (West 2021); CONN. GEN. STAT. § 31-105 (2021), OHIO REV. CODE ANN. § 4117.08 (LexisNexis 2021); N.Y. CIV. SERV. LAW § 203 (McKinney 2021) ("Public employees shall have the right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder."); FLA. STAT. § 447.309 (2021) ("After an employee organization has been certified pursuant to the provisions of this part, the bargaining agent for the organization and the chief executive officer of the appropriate public employer or employers, jointly, shall bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit."); 43 PA. CONS. STAT. § 1101.701 (2021) "Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. . . .").

20. SANCHEZ & KLAUSNER, *supra* note 19, §16.9; *see also* City of Lynn v. Lab. Rel. Comm'n, 681 N.E.2d 1234 (Mass. Ct. App. 1997) (fire chief's decision to seek involuntary

Under the NLRA, "[o]nce a union has been certified by the NLRB or voluntarily recognized by an employer as the representative of the employees in a bargaining unit, it is an unfair labor practice (ULP) . . . for [a]n employer to refuse to bargain collectively with the union."[21] In *NLRB v. Katz*, for example, the U.S. Supreme Court, held in a landmark decision that

> [t]he duty "to bargain collectively" enjoined by § 8(a)(5) [of the NLRA] is defined by § 8(d) as the duty to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact—"to meet . . . and confer"—about any of the mandatory subjects. A refusal to negotiate in fact as to any subject which is within § 8(d) [mandatory subject of bargaining], and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's *unilateral* change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.[22]

This decision established the unilateral change doctrine (i.e., notice and an opportunity to bargain before any changes to wages, hours, or working conditions could be made). In *Katz*, the question presented to the Supreme Court (considering varying sick leave and merit increase policy changes) was whether it is a "violation of the duty 'to bargain collectively' imposed by § 8(a)(5) of the National Labor Relations Act

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retirement of firefighter deemed matter of exclusive managerial prerogatives); Wash. Metro. Area Transit Auth. v. Local 2, Off. Pro. Emp. Int'l Union, 465 F.3d 151, 155 (4th Cir. 2006) (closing cafeteria run by a public transit authority for its employees was an employment benefit, and thus the issue was a core managerial decision subject to arbitration).

21. John Doran, Ted Scott & Jennifer Mora, Practical L. Lab. & Emp., *Collective Bargaining Under the National Labor Relations Act*, Practical Law Practice Note 5-518-7132 (2022).

22. NLRB v. Katz, 369 U.S. 736, 742–43 (1962).

> In *NLRB v. Katz*, the Supreme Court held that an employer's unilateral change in a mandatory bargaining subject, i.e., wages, hours, and other terms and conditions of employment is a violation of § 8(a)(5). The theory is that such a unilateral change circumvents the duty to negotiate in good faith in much the same way as a flat refusal to bargain. As a general rule, therefore, an employer may not unilaterally impose material changes in terms or conditions of employment that are mandatory subjects of bargaining without first negotiating to impasse. To establish a prima facie case of failure to bargain in good faith in connection with an alleged unilateral change in working conditions, it must be shown that the change: (1) was material, substantial or significant;4 (2) altered an existing practice; (3) affected a mandatory subject of bargaining; and (4) was implemented without prior notice and an opportunity to bargain.
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> Steven C. Kahn, Barbara Berish Brown & Jerry M. Cutler, Legal Guide to Human Resources § 13:73 (2022).

for an employer, without first consulting a union with which it is carrying on bona fide contract negotiations, to institute changes regarding matters which are subjects of mandatory bargaining under § 8(d) and which are in fact under discussion."[23] The Court noted that

> [u]nilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance."[24]

However, the Supreme Court made clear that unilateral change to a non-mandatory subject of bargaining is not an unfair labor practice.[25]

Further the Supreme Court has held that "[t]he unilateral change doctrine of *NLRB v. Katz*, whereby an employer violates the NLRA if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment—extends to cases in which an existing agreement has expired and negotiations on a new one have yet to be completed."[26]

There are two exceptions to the rule that an employer may not unilaterally impose material changes in terms or conditions of employment that are mandatory subjects of bargaining without first negotiating to impasse. First, "[a]n employer may impose unilateral terms if the union engages in dilatory tactics to delay bargaining.[27] Second, "an employer may act unilaterally if faced with an economic exigency justifying the change."[28]

In *El Paso Electric Co. v. NLRB*, for example, the employer unilaterally changed its policy regarding the use of performance improvement plans and employee discipline. The United States Court of Appeals for the Fifth Circuit, in finding the employer in direct violation of section 8 of the NLRA, held that "[t]he employer . . . violates [the NLRA] by unilaterally implementing new *work rules* and subjecting employees to discipline for violating those rules."[29] The Fifth Circuit continued in its exposition of unilateral employer action involving mandatory sub-

23. *Katz*, 369 U.S. at 737.

24. *Id*. at 747.

25. *See* Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 185 (1971) ("[A] 'modification' is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining."). KAHN, BROWN & CUTLER, *supra* note 22, § 13:73.

26. Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 191 (1991).

27. Vincent Indus. Plastics, Inc. v. NLRB, 209 F.3d 727, 734 (D.C. Cir. 2000) (citing Serramonte Oldsmobile, Inc. v. NLRB, 86 F.3d 227, 235 (D.C. Cir. 1996)); *see also* KAHN, BROWN & CUTLER, *supra* note 22, § 13:73.

28. *Vincent Indus. Plastics, Inc.*, 209 F.3d at 734 (citing Visiting Nurse Servs. of W. Mass., Inc. v. NLRB, 177 F.3d 52, 56 (1st Cir. 1999); RBE Elecs. of S.D., Inc., 320 N.L.R.B. 80, 81 (1995)); *see also* KAHN, BROWN & CUTLER, *supra* note 22, § 13:73.

29. El Paso Elec. Co. v. NLRB, 681 F.3d 651, 657 (5th Cir. 2012) (emphasis added) (citing Peerless Food Prods., 236 N.L.R.B. 161, 161 (1978).

jects of bargaining when it held "[f]or a unilateral change to require the employer to bargain with the union, the change must represent a '*material, substantial, and a significant change*' in the terms and conditions of employment."[30]

"Material changes" in policy as explained in *El Paso Electric Co.* implicate both new policy implementation, but also *clarification* of previous policy that impacts the terms and conditions of employment.[31] For example, in *NLRB v. Roll & Hold Warehouse & Distribution Corp.*, the U.S. Court of Appeals for the Seventh Circuit considered the merits of an employer's action in unilaterally amending or clarifying its established attendance policy without bargaining with the local union. In response, the court held that "[w]hile some management decisions may have such slight impact on the 'terms and conditions' of employment that they are not reasonably encompassed by § 8, [the employer's] decision [here] to adopt the new attendance policy is not one of them."[32] The court concluded "so long as the new policy represents a *material and significant change* in working conditions, the union has a right to bargain over it on behalf of its members."[33] Thus, "[a] unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial, and significant change."[34] Thus, to establish a prima facie case of failure to bargain in good faith in connection with an alleged unilateral change in working conditions, it must be shown that the change:

(1) was material, substantial or significant;[35]

(2) altered an existing practice;

(3) affected a mandatory subject of bargaining; and

(4) was implemented without prior notice and an opportunity to bargain.[36]

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30. *Id*.

31. *Id.* at 657–58.

32. NLRB v. Roll & Hold Warehouse & Distrib. Corp., 162 F.3d 513, 517 (7th Cir. 1998).

33. *Id*. at 518.

34. Toledo Blade Co., Inc., 343 N.L.R.B. 385, 387 (2004).

35. *El Paso Elec. Co.*, 681 F.3d at 657; *Roll & Hold*, 162 F.3d at 517; *see also* Miss. Power Co. v. NLRB, 284 F.3d 605, 615 (5th Cir. 2002); Peerless Food Prods., 236 N.L.R.B. 161, 161 (1978) (citing Rust Craft Broad. of N.Y., Inc., 225 N.L.R.B. 327, 327 (1976)); Bureau of Nat'l Affs., Inc., 235 N.L.R.B. 8, 9 (1978) (dismissal of duty to bargain in good faith charge based on failure to establish "significant or substantial" change); Murphy Diesel Co., 184 N.L.R.B. 757 (1970) (duty to bargain is triggered by a "material, substantial, and a significant change"); KAHN, BROWN & CUTLER, *supra* note 22, § 13:73. "The Board has long held that an employer is not obligated to bargain over changes so minimal that they lack such an impact." W-I Forest Prods. Co., 304 N.L.R.B. 957, 959 (1991) (citing Rust Craft Broad., 225 N.L.R.B. 327, 327 (1976)). "[A] unilateral change in a mandatory subject of bargaining is unlawful only if it is "material, substantial, and significant." Flambeau Airmold Corp., 334 N.L.R.B. 165, 165 (2001) (quoting Alamo Cement Co., 281 N.L.R.B. 737, 738 (1986), *modified on other grounds*, 337 N.L.R.B. 1025 (2002)); *see also Toledo Blade Co., Inc.*, 343 N.L.R.B. at 387.

36. *See generally* NLRB v. Katz, 369 U.S. 736 (1962); *see also* Ampersand Publ'g, LLC, 358 N.L.R.B. 1539, *aff'd*, 361 N.L.R.B. 903 (2014), *enforced*, 208 L.R.R.M. (BNA) 3385 (D.C. Cir. 2017) (due to lack of quorum as found in NLRB v. Noel Canning, 573 U.S.

Similar to the Supreme Court line of reasoning in *Katz*, "[u]nder § 8(a)(5) of the NLRA, an employer is required to notify and bargain with a union before changing its disciplinary system, including when beginning to use a more formalized system of discipline."[37] Accordingly, however, without providing notice to the employer about the desire to collectively bargain over a mandatory subject, a labor union may potentially *waive* its right to challenge unilateral policy change. More clearly stated:

> The NLRA provides that a union can waive its right to bargain by failing to request bargaining or otherwise inform the employer that the union wishes to bargain. Shortly after the NLRA was enacted, the U.S. Supreme Court explained [in *Labor Board v. Columbian Co*.] that an employer cannot be held liable when the employees have failed to act:
>
> > Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer—when he has not refused to receive communications from his employees—without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer.[38]

In *NLRB v. Columbian Enameling & Stamping Co.*,[39] after failed contract negotiations and a labor union strike, the union asserted an unfair labor charge against the employer when employees returned to work even though, during the time in question, the union failed to express to the employer an indication to enter into negotiations. The Supreme Court correctly held that "there [was] no evidence that the

513 (2014)); Santa Clara Cnty. Corr. Peace Officers' Ass'n, Inc. v. County of Santa Clara, 169 Cal. Rptr. 3d 228 (Ct. App. 6th Dist. 2014); El Paso Elec. Co., 355 N.L.R.B. 428 (2010), *aff'd*, 681 F.3d 651 (5th Cir. 2012); Teamsters, Local 726, 21 Pub. Emp. Rep. for Ill. ¶ 43; KAHN, BROWN & CUTLER, *supra* note 22, § 13:73.

37. *El Paso Elec. Co.*, 681 F.3d at 662.

38. Serv. Emp. Int'l Union (AFL-CIO) Local 226 v. Douglas Cnty. Sch. Dist. 001, 839 N.W.2d 290, 299–300 (Neb. 2013) (citing NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 297–98 (1939)). Regarding waiver:

> Since the NLRA's enactment, many of the federal circuit courts have similarly recognized the possibility of a waiver by employees or their representatives of the right to bargain on mandatory subjects of bargaining. See, e.g., Intern. Broth. of Elec. Workers v. N.L.R.B., [706 F.3d 73 (2d Cir. 2013)]; N.L.R.B. v. Solutia, Inc., 699 F.3d 50 (1st Cir.2012); N.L.R.B. v. Seaport Printing & Ad Specialties, 589 F.3d 812 (5th Cir.2009); Regal Cinemas, Inc. v. N.L.R.B., 317 F.3d 300 (D.C.Cir.2003); N.L.R.B. v. Oklahoma Fixture Co., 79 F.3d 1030 (10th Cir.1996); N.L.R.B. v. Unbelievable, Inc., 71 F.3d 1434 (9th Cir.1995); Intermountain Rural Elec. Ass'n v. N.L.R.B., 984 F.2d 1562 (10th Cir.1993).
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> *Id.* at 300.

39. *Columbian Enameling & Stamping Co.*, 306 U.S. at 297–98.

[u]nion gave to the employer . . . any indication of its willingness to bargain or that [the] respondent knew that they represented the [u]nion. The employer cannot, under the statute, be charged with refusal [to bargain] of that which is not proffered."[40]

Thus, in light of the binding Supreme Court decisions in *Columbian Enameling & Stamping Co*. and *Katz*, to protect against unilateral policy change, private college and university employee labor unions *must* affirmatively assert with respective colleges an express desire to collectively bargain policy changes that directly impact the "terms and conditions of employment," that is, mandatory subjects of bargaining, in order to trigger statutory duty to bargain rights under the NLRA.[41]

III. Defining "Terms and Conditions of Employment" and Mandatory Subjects of Bargaining

A. The NLRA and a Private Employer's Duty to Bargain

Critical to this discussion is just what is a mandatory subject of bargaining in the university context. The customs and norms at play are unique and largely circumscribed to university life in some shape or form. Notwithstanding this uniqueness, these customs and traditions of university life may inform but do not alter the broad NLRA requirement that employers (including institutions of higher education) collectively bargain the terms and conditions of employment.

> From the beginning of collective bargaining, the question of what subject matters are mandatory subjects of collective bargaining sparked considerable litigation as employers and employee organizations jockeyed for position. In general, the United States Supreme Court has construed the NLRA to provide a relatively broad scope of mandatory bargaining under the phrase "wages, hours, and other terms and conditions of employment." The United States Supreme Court has, however, held that even the expansive NLRA scope-of-bargaining provision has limits. For example, in *Fibreboard Paper Products Corporation v. National Labor Relations Board*, . . . the high court observed that the phrase "other terms and conditions of employment" was a flexible term which would expand to conform with prevailing industry practices.[42]

Similarly, in 1981, and central to the thrust of this research, the U.S. Supreme Court identified three categories of management decisions that largely shape how the employer-unionized employee relationship is presently defined. In *First National Corp. v. NLRB*, the Court held that, in the private sector, "[a]lthough parties are free to bargain about any legal subject, Congress has limited the mandate or

40. *Id.* at 298.

41. *See* Sykel Enters., Inc., 324 N.L.R.B. 1123 (1997).

42. Waterloo Educ. Ass'n v. Iowa Pub. Emp. Rel. Bd., 740 N.W.2d 418, 422 (Iowa 2007) (citation omitted).

duty to bargain to matters of 'wages, hours, and other terms and conditions of employment.'"[43] The Supreme Court took into account the varying scope of the degree of management decisions that may impact a union when it asserted that "[s]ome management decisions, such as [1] choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. Other management decisions, [however] such as [2] the order of succession of layoffs and recalls, production quotas, and *work rules*, are almost exclusively 'an aspect of the relationship' between employer and employee."[44]

This article concerns the Supreme Court's second category, "work rules" as defined in *First National*. The Supreme Court's rationale in *First National* is necessary to contextualize an employer's failure to bargain a mandatory subject of bargaining, as under the NLRA and legal precedent, courts have consistently found that work rules such as employee discipline,[45] anti-discrimination

43. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674 (1981).

44. *Id*. at 676–77 (emphasis added). "Section 8(d) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining. . . . But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and employees." Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971) (citing Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 220–21 (1964); Richfield Oil Corp. v. NLRB, 231 F.2d 717, 723–24 (D.C. Cir. 1956); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (2958)). A third type of management decision [3] (purely financial in nature, although but not applicable to this research), may be a mandatory subject of bargaining under certain circumstances impacting the "scope and direction of the enterprise, is akin to the decision whether to be in business at all, 'not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.'" *First Nat'l Maint. Corp.*, 452 U.S. at 676 (quoting *Fibreboard Paper Prods. Corp.*, 379 U.S. at 223).

45. "An employer's disciplinary system is a mandatory subject." Sec. Walls, Inc. v. NLRB, 921 F.3d 1053, 1057 (11th Cir. 2019); *see* Toledo Blade Co., Inc., 343 N.L.R.B. 385 (2004). It is equally well settled that "[w]ork rules, especially those involving the imposition of discipline, constitute a mandatory subject of bargaining." Cotter & Co., 331 N.L.R.B. 787, 796 (2000); *see Toledo Blade Co., Inc*., 343 N.L.R.B. at 387; Greater Bridgeport Transit Dist. v. State Bd. of Lab. Rel., 653 A.2d 151, 155 (Conn. 1995) (similar); City of Miami v. F.O.P., Miami Lodge 20, 571 So.2d 1309, 1322 (Fla. Ct. App. 1989) (similar), *approved*, 609 So. 2d 31 (Fla. 1992); Univ. of Haw. Prof'l Assembly v. Tomasu, 900 P.2d 161, 170 (Haw. 1995) (similar); Omaha Police Union Local 101 v. City of Omaha, 736 N.W.2d 375, 382 (Neb. 2007) (similar); Union Twp. Bd. of Trs. v. Fraternal Order of Police, Ohio Valley Lodge No. 112, 766 N.E.2d 1027, 1031 (Ohio 2001) (similar); Blackhawk Teachers' Fed'n Local 2308 v. State Emp. Rel. Comm'n, 326 N.W.2d 247, 260–61 (Wis. Ct. App. 1982) (policy provision that referred to sanctions that could be imposed on an employee only because of the employment relationship was held to relate to employment conditions); Denver Firefighters Local No. 858, IAFF, AFL-CIO v. City & Cnty. of Denver, 292 P.3d 1101, 1106 (Colo. Ct. App. 2012), *rev'd*, 320 P.3d 354 (Colo. 2014); Migali Indus., 285 N.L.R.B. 820, 821 (1987) (progressive discipline system held to be mandatory subject of bargaining); Electri-Flex Co., 228 N.L.R.B. 847 (1977) (written warning system of discipline held to be mandatory subject of bargaining), *enforced as modified*, 570 F.2d 1327 (7th Cir. 1978).

policies[46] and grievance procedures[47] are, in fact, mandatory subjects of bargaining.[48]

> Mandatory subjects are subjects that directly impact the union-represented employees' wages, hours, and working conditions. An employer: (1) must bargain about these subjects if the union requests to do so; (2) can insist that the union bargain about these subjects until there is a bargaining impasse; and (3) can unilaterally impose its final offer about these subjects in collective bargaining only after an impasse has been reached.[49]

B. Unilateral Change Standard of Review

One of the most important factors in determining whether unilateral action involving university policy-making that infringes upon campus labor's duty-to-bargain rights is the standard of review. The two standards that are prevailing from one presidential administration to the next is (1) the clear and unmistakable waiver standard and (2) the contract coverage standard. The clear and unmistakable standard, seen as more union friendly (predicated on the union's *waiver* of its right to insist on bargaining),[50] "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply."[51] In other words, if the employer does not have the *specific authority* to take unilateral action, then the employer will have violated the NLRA by doing so, unless there was a clear and unmistakable waiver by the union. Under contract coverage, conversely, seen as more

46. United Packinghouse, Food & Allied Workers Int'l Union, AFL-CIO v. NLRB, 416 F.2d 1126, 1134 (D.C. Cir. 1969); Jubilee Mfg. Co., 202 N.L.R.B. 272, 273 (1973). "[D]iscrimination on the basis of race, color, religion, sex, or national origin is not *per se* a violation of the Act, that is not to say that such discrimination does not directly affect terms and conditions of employment. It clearly does, and concerted activity intended to remedy such discrimination is protected under our Act." *Jubilee Mfg. Co.*, 202 NLRB at 273.

47. Ga. Power Co. v. NLRB, 427 F.3d 1354 (11th Cir. 2005); Wire Prods. Mfg. Corp., 329 N.L.R.B. 155 (1999). It hardly can be doubted that the establishment of grievance procedures constitutes a mandatory subject of bargaining. *See* Hughes Tool Co. v. NLRB, 147 F.2d 69, 73 (5th Cir.1945) ("We take it to be a proper matter for collective bargaining to establish an orderly and just method for presenting and adjusting grievances."). Similarly, the unilateral implementation of a program subject to mandatory bargaining generally will be considered an unlawful refusal to bargain. *See* NLRB v. Katz, 369 U.S. 736, 743 (1962). *Ga. Power Co.*, 427 F.3d at 1358.

48. El Paso Elec. Co., 355 NLRB 428, 453 (2010), *enforced*, 681 F.3d 651, 662–64 (5th Cir. 2012); Pac. Mar. Ass'n v. NLRB, 967 F.3d 878, 885 (D.C. Cir. 2020).

49. John Doran, Prac. L. Lab. & Emp., *Subjects of Collective Bargaining Chart*, Practical Law Checklist 0-507-0182 (2022); *see also Bargaining in Good Faith with Employees' Union Representative (Section 8(d) & 8(a)(5)*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/bargaining-in-good-faith-with-employees-union-representative [https://perma.cc/XR74-J6WB].

50. MV Transp., Inc., 368 N.L.R.B. No. 66, at 35 (Sept. 10, 2019).

51. Provena Hosps., 350 N.L.R.B. 808, 811 (2007)

employer-friendly, the standard is relaxed from an employer needing to have specific authority to a more generalized view that "[d]espite the most diligent bargaining and most careful drafting, there are times during the term of a collective-bargaining agreement that the agreement must be interpreted in order to ascertain the parties' respective rights and obligations."[52]

In a 2007 decision, the National Labor Relations Board noted that "[t]hree courts of appeals have rejected the clear and unmistakable waiver standard in favor of a standard commonly referred to as contract coverage, while a fourth has rejected the clear and unmistakable waiver standard in favor of a framework that embraces contract coverage principles."[53] The D.C. Court of Appeals was the first to adopt this standard.[54] The First and Seventh Circuits have also adopted the contract coverage test.[55] The Seventh Circuit held that "where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say that the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant."[56] Similarly, the First Circuit held that "we adopt the District of Columbia Circuit's contract coverage test to determine whether the Unions have already exercised their right to bargain."[57]

In September 2019, the NLRB adopted the "contract coverage" standard for determining whether a unionized employer's unilateral change in a term or condition of employment violates the NLRB.[58] "Under contract coverage, the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the *compass or scope* of contractual language granting the employer the right to act unilaterally."[59] The NLRB noted that:

> if the agreement does not cover the employer's disputed act, and that act has materially, substantially and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have violated Section 8(a)(5) and (1) unless

52. *MV Transp., Inc.*, 368 N.L.R.B. No. 66, at 1.

53. *Id.* at 8.

54. NLRB v. U.S. Postal Serv., 8 F.3d 832, 836 (D.C. Cir. 1993) ("A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant.").

55. *MV Transp., Inc.*, 368 N.L.R.B. No. 66, at 8.

56. Chi. Trib. Co. v. NLRB, 974 F.2d 933, 937 (7th Cir. 1992).

57. Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 25 (1st Cir. 2007).

58. Press Release, NLRB, Board Adopts Contract Coverage Standard for Determining Whether Unilateral Changes Violate the Act (Sept. 10, 2019), https://www.nlrb.gov/news-outreach/news-story/board-adopts-contract-coverage-standard-for-determining-whether-unilateral [https://perma.cc/7EXR-YEPL].

59. *MV Transp., Inc.*, 368 N.L.R.B. No. 66, at *1–2 (emphasis added).

> it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason. Thus, under the contract coverage test we adopt today, the Board will first review the plain language of the parties' collective-bargaining agreement, applying ordinary principles of contract interpretation, and then, if it is determined that the disputed act does *not* come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver.[60]

Subsequently, in August 2021, the Second Circuit adopted the contract coverage test.[61] While the current national trend is the contract coverage test, there may be an agency reversal under the Biden administration towards the union-friendly "clear and unmistakable" test.[62] Depending on the circuit, a university unilaterally determining the evidentiary standard of proof in all Title IX matters while impacting campus labor union duty to bargain rights will be analyzed under one of these two standards.

C. Colleges and Universities: The Duty to Bargain and Unilateral Policy Change

In light of the several Supreme Court and NLRB decisions on mandatory subjects of bargaining, in addition to the "material and significant change in working conditions" requirement under *El Paso Electric Co.* and *Roll & Hold*, there exists presently numerous leading private colleges and universities nationwide under NLRA jurisdiction, and a substantially greater number of public colleges under state law/binding PERB decisions,[63] where either full union participation or, at a minimum, the evidentiary standard of proof impacting campus labor—clear and convincing or preponderance of the evidence—is collectively bargained with campus labor unions in either disciplinary/termination, anti-discrimination, or grievance procedures.[64] For example, at Harvard

60. *Id.* at *2.

61. Int'l Brotherhood of Elec. Workers, Local Union 43 v. NLRB, 9 F.4th 63, 72–73 (2d Cir. 2021).

62. Paul Salvatore, Steven Porzio & Elizabeth Dailey, *Second Circuit Adopts "Contract Coverage" Standard as Governing Standard for Unilateral Changes*, Proskauer: Labor Relations Update (Aug. 18, 2021), https://www.laborrelationsupdate.com/nlrb/second-circuit-adopts-contract-coverage-standard-as-governing-standard-for-unilateral-changes.

63. For a succinct definition of state PERB authorities and their functions, see the State of California definition, as it is broad enough to be applied nationally: "The Public Employment Relations Board . . . is a quasi-judicial administrative agency charged with administering the collective bargaining statutes covering employees of California's public schools, colleges, and universities, employees of the State of California, employees of California local public agencies (cities, counties and special districts) . . . ." Public Employment Relations Board (PERB), PERB (2022), https://perb.ca.gov [https://perma.cc/E3YP-4E27].

64. While not contained within a current collective bargaining agreement, similar policy language at present use at leading private colleges and universities speaks to the ever-present issue (and potential implied-in-fact contract debate) of campus Title IX

University, enrolling over 20,000 students[65] and employing over 18,000 full-time employees[66] within its recent and much-publicized[67] June 2020 collective bargaining agreement with the HGSU-UAW (graduate student union), guaranteed labor union participation in campus Title IX policy decision-making in establishing "[s]eats for HGSU-UAW representatives on the existing Title IX Policy Review Committee, a University-wide group that includes faculty, staff and students."[68]

A number of universities have bargained for the standard to apply, as evidenced by their collective bargaining agreements. For example, with respect to the evidentiary standard of proof in unionized employee leave of absence requests (and disputes), the collective bargaining agreement between Yale and Local 35, Federation of University Employees, AFL-CIO states that the "[final] decision shall be based upon the *preponderance of evidence* . . . ."[69] In another example, at Hofstra University, the 2016–2021 collectively bargained labor agreement between Hofstra University and the AAUP requires "*clear and convincing evidence*" should the university seek to terminate a faculty member.[70] In pertinent part, the Hofstra-AAUP collective bargaining agreement sets forth:

> In the event that the Administration is seeking a penalty of termination or suspension and/or the Grievance Committee is authorized to

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policies and the evidentiary standard of proof. For example, at Vassar College, a private college located in New York, with respect to faculty/student consensual relationships (which are prohibited under Vassar College policy and punishable by campus discipline up to including termination) the standard of proof is "clear and convincing evidence." *Faculty/Student Consensual Relationships*, VASSAR https://offices.vassar.edu/eoaa/title-ix/policy/faculty-student-relationships (last visited June 25, 2022). Similarly, at Williams College, "termination of an appointment with continuous tenure, or of a non-tenured appointment before the end of the specified term, may be affected by the College upon due notice but only for adequate cause. The burden of proof that adequate cause exists rests with the College and shall be satisfied only by *clear and convincing evidence* in the record considered as a whole." WILLIAMS COLLEGE FACULTY HANDBOOK 79 (2021), https://faculty.williams.edu/files/2021/08/Faculty-Handbook-21-22.pdf.

65. *Student Enrollment Data*, HARVARD U., https://oir.harvard.edu/fact-book/enrollment (last visited June 25, 2022).

66. *University-Wide Faculty and Staff (2021–2022)*, HARV. U., https://oir.harvard.edu/fact-book/faculty-and-staff (last visited June 25, 2022).

67. Colleen Walsh, *Harvard Reaches Tentative Agreement with Graduate Student Union*, HARV. GAZETTE (June 16, 2020), https://news.harvard.edu/gazette/story/2020/06/tentative-agreement-reached-with-graduate-student-union[https://perma.cc/5V7N-4EXM].

68. Press Release, Harv. U., HGSU-UAW Agreement Ratified (July 1, 2020), https://studentunionization.harvard.edu/news/tentative-agreement-reached-HGSU-UAW [https://perma.cc/79V4-W3H2].

69. AGREEMENT BETWEEN YALE UNIVERSITY & LOCAL 35, FUE, UNITE HERE 29 (2002), https://your.yale.edu/sites/default/files/yale_local35_agreement_0.pdf [https://perma.cc/2B7N-HVLG].

70. 2016–2021 COLLECTIVE BARGAINING AGREEMENT BY AND BETWEEN HOFSTRA UNIVERSITY AND THE HOFSTRA CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 120 (2016), http://aaup-hofstra.org/wp-content/uploads/2016/11/Final-2016-2021-AAUP-Collective-Bargaining-Agreement.pdf [https://perma.cc/3GWK-C9H4].

> recommend such penalties, the burden of proof will be satisfied only by *clear and convincing evidence* in the record considered as a whole. In those cases in which the Administration is seeking a lesser penalty and/or the Grievance Committee is advised that it may not recommend termination or suspension, the burden of proof will be satisfied by the *preponderance of the evidence* . . . .[71]

With respect to public colleges and universities, "[t]he scope of bargaining in the public sector has traditionally been narrower than in the private sector for fear of institutionalizing the 'power of public employee unions in a way that would leave competing groups in the political process at a permanent and substantial disadvantage.'"[72] Accordingly, in the public sector, keeping in mind the considerable *Cleveland Board of Education v. Loudermill*[73] procedural due process protections required in public employee discipline, the various state statutes, common law, and binding PERB decisions reflect a similar legislative construct and intent that affirmatively set forth mandatory subjects of bargaining with similar language to that of the NLRA. For example, in the Commonwealth of Massachusetts, public employees (including all eligible state workers employed within the University of Massachusetts system) have rights similar to those protected under the NLRA.[74]

The Massachusetts Supreme Judicial Court has similarly held that

> [n]otwithstanding a public employer's prerogative to make certain types of core managerial decisions without prior bargaining, we have recognized that such decisions may also have impacts or effects that would themselves be the subject of mandatory bargaining. "[I]f a managerial decision has impact upon or affects a mandatory topic of bargaining, negotiation over the impact is required."[75]

Further, *work rules* in Massachusetts related to anti-discrimination and grievance procedures are routinely collectively bargained, as these rules directly impact the thousands of public employees and, more specifically, public university employee's workplace rights, and thus are,

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71. *Id*.

72. Appeal of City of Concord, 651 A.2d 944, 945 (N.H. 1994).

73. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985). An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

74. Mass. Gen. Laws ch. 150E, § 2 (2021) (stating that public employees "shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion").

75. City of Worcester v. Lab. Rel. Comm'n, 779 N.E.2d 630, 637 (Mass. 2002) (citing Boston v. Boston Police Patrolmen's Ass'n, 532 N.E.2d 640, 643 (Mass. 1989)).

in effect, a "term and condition of employment."[76] At the University of Massachusetts (UMass),[77] the UMass campus anti-discrimination and sexual harassment policy is collectively bargained with on-campus labor unions. More specifically, the agreement states:

> The Union and the Employer/University Administration agree that when the effects of employment practices, regardless of their intent, discriminate against any group of people on the basis of race, religion, creed, color, national origin, *sex*, age, veteran status, sexual orientation, or mental or physical handicap, specific positive and aggressive measures must be taken to redress the effects of past discrimination, to eliminate present and future discrimination, and to ensure equal opportunity in the areas of hiring, upgrading, demotion or transfer, recruitment, layoff or termination, and rate of compensation. Therefore the parties acknowledge the need for positive and aggressive affirmative action and are committed to a diverse workforce.[78]

In the State of California, regarding the representation rights of thousands of public employees, "[t]he scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment."[79] Consistent with this statute, in *California State Employees' Ass'n v. Public Employment Relations Board*, for example, the California Court of Appeal held:

> PERB decisions have adopted both the holding and rationale of the *Katz* [NLRB] decision. Thus, under standards established by PERB, to prevail on a complaint of illegal unilateral change, the union

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76. COLLECTIVE BARGAINING AGREEMENT BETWEEN THE COMMONWEALTH OF MASSACHUSETTS AND THE ALLIANCE, AGSCME–SEIU LOCAL 888 UNIT 2, at 9 (2020), https://www.mass.gov/doc/unit-2-collective-bargaining-agreement/download [https://perma.cc/EU73-S4BV].

77. UMASS, FULL-TIME INSTRUCTIONAL FACULTY FALL 1995–FALL 2021 (2021), https://www.umass.edu/uair/sites/default/files/publications/factsheets/employees/FS_emp_02.pdf [https://perma.cc/4GGF-LZCG].

78. AGREEMENT BETWEEN THE BOARD OF TRUSTEES OF THE UNIVERSITY OF MASSACHUSETTS AND THE PROFESSIONAL STAFF UNION/MTA/NEA 7–8 (2017), https://www.umass.edu/humres/sites/default/files/PSU%202017-2020%20CONTRACT.pdf [https://perma.cc/7QTS-59PH] (emphasis added).

79. CAL. GOV'T CODE § 3543.2 (a)(1) (2021). Under this statute,

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other *terms and conditions of employment*. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to former Section 22316 of the Education Code, as that section read on December 31, 1999, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code.
>
> CAL. GOV'T CODE § 3543.2(a)(1) (emphasis added).

> must establish: (1) the employer breached or altered the parties' written agreement, or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy, i.e., the change has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment; and (4) the change in policy concerns a matter within the scope of representation.[80]

Similarly, the 2014–2017 labor contract between the California State University System and the California Faculty Association (CFA) collectively bargains the evidentiary standard of proof.[81] In pertinent part, the California State University System/CFA contract states, upon proposed termination of a faculty member, that "[t]he CSU has the burden of proving the conduct by the *preponderance of the evidence* in all discipline cases."[82] At the University of California, the system-wide labor agreement with the American Federation of Teachers, who represents University librarians, contains the collectively bargained terms of the non-discrimination, sexual harassment, appeals and resolution procedures.[83] Interestingly, with respect to sexual harassment, this agreement also contains collectively bargained provisions concerning the appealability and arbitrability of disputes under this section. The agreement states in pertinent part:

> If the UC-AFT appeals a grievance to arbitration which contains allegations of a violation of this article which are not made in conjunction with the provision of another article that is arbitrable, the UC-AFT's notice must include an Acknowledgement and Waiver Form signed by the affected Librarian. The Acknowledgement and Waiver Form will reflect that the Librarian has elected to pursue arbitration as the exclusive dispute resolution mechanism for such claim and that the Librarian understands the procedural and substantive differences between arbitration and other remedial forums in which the dispute might have been resolved, including the differences in the scope of remedies available in arbitration as compared to other forums.[84]

In Connecticut, "statutes dealing with labor relations have been closely patterned after the National Labor Relations Act. This is particularly evidenced by the phraseology [the] legislature has adopted

80. California State Emp. Ass'n v. Pub. Emp. Rel. Bd., 59 Cal. Rptr. 2d 488, 496 (Ct. App. 1996).

81. Collective Bargaining Agreement Between the Board of Trustees of the California State University and the California Faculty Association 69 (2014), https://www.calstate.edu/csu-system/faculty-staff/labor-and-employee-relations/Documents/unit3-cfa/CFA-CBA-2014-17.pdf.

82. *Id*.

83. American Federation of Teachers (AFT), Professional Librarians Contract 4–6 (2019), https://ucnet.universityofcalifornia.edu/labor/bargaining-units/lx/docs/lx_2019-2024_00_complete-contract.pdf.

84. *Id.* at 6.

to define the scope of negotiations in the various Connecticut acts."[85] Under Connecticut law, for example, "It shall be an unfair labor practice for an employer: to dominate or actually interfere with the formation, existence or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment . . . ."[86] To establish a unilateral change of a condition of employment, the union must establish that the employment practice was "[1] clearly enunciated and consistent, [2] [that it] endure[d] over a reasonable length of time, and [3] [that it was] an accepted practice by both parties."[87]

Accordingly, within the established labor agreement between the Connecticut State University System and the AAUP with respect to termination of faculty, "[t]he burden of proof to sustain an action rests with the university and shall be satisfied only by *clear and convincing evidence* in the record as a whole."[88] The collectively bargained for standard for termination also provides rationale supporting the final determination standard of evidentiary proof in stating that "[i]n weighing the case for dismissal for adequate cause other than falsification of credentials, the Termination Hearing Committee must consider whether there is *clear and convincing evidence* of unfitness of the affected member to discharge professional responsibilities."[89] Interestingly, within the Connecticut State University System, specifically at the University of Connecticut (UConn), UConn collectively bargains with the AAUP over the evidentiary standard of proof and has adopted the preponderance standard. The 2017–2021 University of Connecticut/AAUP contract states:

> The parties agree that, except for serious misconduct, dismissal of a non-probationary employee or non-renewal of an employee following a multi-year appointment should occur only as the final step in a progressive disciplinary system and each instance of misconduct shall be judged solely on its own factual merits. The level of proof shall be a *preponderance of the evidence*.[90]

85. W. Hartford Educ. Ass'n v. Dayson DeCourcy, 295 A.2d 526, 533 (Conn. 1972).

86. Conn. Gen. Stat. § 31-105(3) (2021).

87. Bd. of Educ. of Region 16 v. State Bd. of Lab. Rel., 7 A.3d 371, 378 (Conn. 2010).

88. Collective Bargaining Agreement Between Connecticut State University American Association of University Professors and Board of Trustees for Connecticut State University System 92 (2016), https://csuaaup.org/wp-content/uploads/2018/09/CSU-AAUP-BOR-Contract_Indexed-and-TOC-1.pdf [https://perma.cc/2VJU-U7M7] (emphasis added).

89. *Id.* at 96–97.

90. Identical language applies to untenured faculty on multiyear contracts and to tenure-track/tenured faculty. Collective Bargaining Agreement Between the University of Connecticut Board of Trustees and the University of Connecticut Chapter of the American Association of University Professors 12, 50 (2017), https://hr.uconn.edu/wp-content/uploads/sites/1421/2020/01/AAUP.CBA_.07.01.17.pdf [https://perma.cc/L6ER-JAXU] (emphasis added).

Under Ohio law, "[a]ll matters pertaining to wages, hours, or terms and *other conditions of employment* and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative."[91] For example, at the University of Cincinnati (UC), the 2019–2022 collective bargaining agreement between the AAUP and the university affirmatively states that "[f]or discipline involving dismissal, this burden will be satisfied only by *clear and convincing evidence* in the record considered as a whole. For lesser proposed discipline, the standard shall be *preponderance of the evidence*."[92]

The University of New Hampshire (UNH) is another example of a public university labor contract with the AAUP that contains a collectively bargained for evidentiary standard of proof. Here, under the 2015–2020 Collective Bargaining Agreement with the AAUP, upon proposed termination of a faculty member, the agreement states:

> If the President of the University decides that dismissal or suspension without pay is warranted after either the above procedure has been followed, or the time limit specified in Article 14.2.4.2 has passed without a recommendation from the Professional Standards Committee, s/he shall notify the faculty member in question and the Association in writing of the intent to dismiss or suspend without pay. The faculty member shall have fourteen (14) calendar days to file a grievance under Article 9, Grievance Procedure, of this Agreement, once the President's notice of intent to dismiss or suspend without pay is received. . . . The grievance shall utilize the expedited arbitration process in Article 9.5.6. The burden of proof in a grievance involving a dismissal or suspension without pay shall be on the University, which proof shall be by *clear and convincing evidence*.[93]

The above examples reflect the substantial number of leading public and private colleges nationwide that collectively bargain the evidentiary standard of proof. These examples illustrate existing campus labor agreements arising out of the present legal construct and binding decisions fundamental to the core research question presented in this article. The above campus labor agreement examples and attendant legal construct under both the NLRA and various state law and PERB decisions reflect a clear, defined, and unmistakable public policy

91. Ohio Rev. Code Ann. § 4117.08 (LexisNexis 2021) (emphasis added).

92. Collective Bargaining Agreement Between University of Cincinnati and American Association of University Professors University of Cincinnati Chapter 53 (2019), (https://www.uc.edu/content/dam/refresh/provost-62/faculty/cba-documents/2019-2022%20COLLECTIVE%20BARGAINING%20AGREEMENT%20-%20WORKING%20COPY%20-%208-26-19.pdf [https://perma.cc/NFH9-F2LY] (emphasis added).

93. Collective Bargaining Agreement USNH Board of Trustees University of New Hampshire & University of New Hampshire Chapter of The American Association of University Professors 19–20 (2015), https://cola.unh.edu/sites/default/files/media/2018/09/aauptt-full_executed_pdf_2016-2020.pdf [https://perma.cc/4A7S-F3J7] (emphasis added).

mandate: private colleges under *First National* (duty to bargain work rules), *Katz* (unilateral employer policy change), and *Roll and Hold* (duty to bargain policy clarifications), and public colleges under the various binding state supreme and appellate court decisions, statutes, and PERB decisions must, in fact, negotiate the mandatory subjects of bargaining with on-campus labor unions. What's revealed in this research, however, is that, while the above mandate establishes and articulates the particular areas of the employer-employee unionized relationship that must be negotiated under a collective bargaining agreement, none of the above decisions speaks to the Title IX evidentiary standard of proof decision methodology, grievability, arbitrability, or, ultimately, whether the employer's duty to bargain obligations are reshaped in any way when settled labor law jurisprudence intersects with emerging Title IX law and policy regulatory action under the OCR.

IV. Title IX—Legislative History

In 2019, Harvard University announced the results of a survey regarding the prevalence of sexual assault and other sexual misconduct among its students. Conducted during the spring of 2019, the survey was sent to roughly 23,000 students, of whom 36.1% (about 8,300) responded.[94] The survey revealed that, among undergraduates, similar to the thirty-two different public and private universities that participated in the study, that on-campus sexual assault is a "serious problem."[95] The Harvard study revealed, in particular, that the vast majority of non-consensual sexual contact is student-to-student (82%) and that 79% of incidents involved physical force.[96] This campus sexual assault study is similar in subject matter, scope, and result to the groundbreaking work conducted by sociologist Eugene Kanin[97] in 1957

94. Jonathan Shaw, *Campus Survey: Sexual Assault, Harasment Remain Serious Problems*, Harv. Mag. (Oct. 15, 2019), https://harvardmagazine.com/2019/10/2019-sexual-assault-survey [https://perma.cc/TF62-LFQN].

95. *Id.*

96. *Id.*

97. Anya Kamenetz, *The History of Campus Sexual Assault*, NPR (Nov. 30, 2014, 8:03 AM), http://www.npr.org/blogs/ed/2014/11/30/366348383/the-history-of-campus-sexual-assault [https://perma.cc/5KXC-XTT2].

> In 1957, for example, "sociologist Eugene Kanin posited a model where men used secrecy and stigma to pressure and exploit women." In the 1980s, Mary Koss coined the term "date rape," a term that illustrates the secrecy described by Eugene Kanin. As a professor of psychology at the University of Arizona, over the course of her career, Mary Koss has collected the stories of thousands from campuses and around the world. A national study published in 1987, for example, revealed that "7.7 percent of male students volunteered anonymously that they had engaged in or attempted forced sex." Among those in that 7.7 percent, almost none considered forced sex to be a crime.
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> Houston, *supra* note *, at 324.

that gave rise, in part, to the introduction of legislation that would eventually become Title IX.[98]

> In 1972, Indiana Senator Birch Bayh introduced an amendment on the Senate floor that would later become Title IX. The amendment, as he put it, had the purpose of combatting "the continuation of corrosive and unjustified discrimination against women in the American educational system." Officially, the sponsors of Title IX were Senator Birch Bayh and Representative Edith Green. Title IX, in its infancy, was modeled after Title VI of the Civil Rights Act of 1964 and they both share a common purpose: to ensure that public funds derived from all the people are not utilized in ways that encourage, subsidize, permit, or result in prohibited discrimination against some of the people. Towards that end, both Title VI and Title IX broadly prohibit conduct by a recipient of federal financial assistance that results in a person being "excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination under" a federally-assisted program or activity. Title VI was enacted pursuant to Congress' dual constitutional authority under the spending clause and § 5 of the Fourteenth Amendment. Thus, both Title VI and Title IX trace their roots to common constitutional sources.[99]

On June 23, 1972, Title IX of the Education Amendments was enacted by Congress and was signed into law by President Richard Nixon.[100] Title IX prohibits sex discrimination in an educational program or activity receiving federal financial aid.[101] The Title IX regulations are enforced by the OCR and are codified in the Code of Federal Regulations.[102] Educational institutions that receive federal financial assistance are covered by Title IX.[103] If only one of the institution's programs or activities receives federal funding, all of the programs within the institution must comply with Title IX regulations. Failure to remain in compliance with Title IX may subject an institution to a loss in federal funding.[104] Failure to remain in compliance with Title IX may also subject the institution to civil actions by victims of sexual assault [or the accused].[105] "The U.S. Department of Education as a Federal

98. Title IX is codified at 20 U.S.C. §§ 1681–1688.
99. Houston, *supra* note *, at 325–26.
100. *Id.* at 327.
101. *Id.* (citing 20 U.S.C. §§ 1681–1688).
102. *Id.* at 328 (citing 34 C.F.R. § 106.1 (2016)).
103. *Id.* (citing 34 C.F.R. § 106.11 (2016)).
104. Title IX's only express enforcement mechanism, 20 U.S.C. § 1682, is an administrative procedure resulting in the withdrawal of federal funding from noncompliant institutions. [There is] an implied private right of action, Cannon v. University of Chicago, 441 U.S. 677, 717 [(1979)], for which both injunctive relief and damages are available, Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 76 [(1992)]. . . . Title IX has no administrative exhaustion requirement and no notice provisions. Plaintiffs can file directly in court under its implied private right of action and can obtain the full range of remedies.

Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 247 (2009).
105. Houston, *supra* note *, at 328.

agency has the authority to issue guidance documents and conduct formal rulemaking in order to assist the public in understanding the myriad of federal regulations that the [OCR] is mandated to enforce."[106]

> In April 2011, [however] Vice President Joseph Biden . . . [under the Obama administration] announced that the [OCR] . . . was issuing a "Dear Colleague Letter" ("DCL") on sexual assault on college campuses and schools' Title IX obligations to respond. . . . One significant component of the DCL [was] its specification of the standard of proof schools must use in campus disciplinary proceedings for sexual assault complaints. Prior to the DCL, OCR had not specified that Title IX requires schools to use a particular standard of proof in disciplinary proceedings addressing student-on-student sexual assault. According to the DCL, however, for a school's disciplinary procedures to comply with Title IX, the school [would need to] utilize the "preponderance of the evidence" standard in sexual assault adjudications. Thus, a school's use of a higher standard [at that time], such as "clear and convincing evidence," would constitute a violation of Title IX.[107]

The 2011 Dear Colleague Letter remained as OCR "mandated policy"[108] nationwide in campus sexual assault adjudications until

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106. *Id.* (citing 5 U.S.C. §§ 552 (a)(1), 553). For an examination of legislative versus interpretive agency rules, see Houston, *supra* note *, at 327. This article critically examines and contrasts, inter alia, agency rules versus interpretive rules. In particular:

> The APA [Administration Procedure Act, 5 U.S.C.A. § 553] requires agencies to provide the public with notice and the opportunity to comment before promulgating final rules. After considering all relevant matter, "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." The requirement for notice and comment is "designed to assure fairness and mature consideration of rules of general application." Solicitation of public input for new regulations is more than a bureaucratic courtesy; it ensures that the rulemaking process remains in harmony with the basic tenets of representative government. The APA exempts "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice" from its notice and comment requirement. This exemption recognizes that, in theory, such rules do not impose new obligations but affect only the agency itself or serve simply to clarify existing agency interpretations. . . . In determining whether a rule has binding effect and imposes new legal obligations, courts review the language of the agency statement for imperative language such as must and "will." Courts also assess an agency's intention to bind its own decision-making moving forward as evidence of a substantive rule.

Id.

107. *Id.* at 329–30 (quoting Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1616–17 (2012)).

108. The 2011 Dear Colleague Letter did not meet APA review and comment requirements however. *See* Houston, *supra* note *, at 321.

September 2017 when (after the election of Donald Trump)[109] OCR withdrew the Dear Colleague Letter and issued interim guidance.[110]

V. Proposed Title IX Rules

On November 16, 2018, the OCR, in compliance with the Administrative Procedure Act,[111] issued its Proposed Title IX rules.[112] The proposed Title IX rules, promulgated by Betsy DeVos, Secretary of the U.S. Department of Education, instituted a federal agency formal rule-making policy change that was, for all intents and purposes, an intended due process and evidence-centered policy shift away from the Obama administration's widely criticized 2011 Dear Colleague Letter.[113] The proposed changes set the stage for a fundamental paradigm shift in Title IX law and policy nationwide. One of the more controversial proposed changes from the 2011 Dear Colleague Letter "would require schools to apply basic due process protections for students, including a presumption of innocence throughout the grievance process; written notice of allegations and an equal opportunity to review all evidence collected; and the right to cross-examination, subject to 'rape shield' protections."[114] More importantly, the 2018 proposed changes presented the first public legislative rule suggestion by OCR of a possible intended and recognized intersection of emerging Title IX law and policy change with settled labor law jurisprudence:

> [a]fter investigation, a written determination must be sent to both parties explaining for each allegation whether the respondent is responsible or not responsible including the facts and evidence on which the conclusion is based. . . . The [written] determination must be made by applying either the *preponderance of the evidence standard* or the *clear and convincing evidence standard* . . . . Further, schools must use the same standard of evidence in cases against student respondents that it uses in cases against *employee* respondents, including *faculty*.[115]

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109. Matt Fleganheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. Times (Nov. 9, 2016), https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html.

110. *News Room*, OCR, https://www2.ed.gov/about/offices/list/ocr/newsroom.html#2017 (last visited June 26, 2022); *see also* Off. for Civil Rts., U.S. Dep't of Educ., Q&A on Campus Sexual Misconduct (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/W95K-DZTU].

111. 5 U.S.C. § 553.

112. Press Release, U.S. Dep't of Educ., Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All (Nov. 16, 2018), https://content.govdelivery.com/accounts/USED/bulletins/21bcf5b [https://perma.cc/56EM-LKKJ].

113. Jake New, *Must vs. Should*, Inside Higher Ed. (Feb. 25, 2016), https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance [https://perma.cc/7YUF-HVLZ].

114. *Id.*

115. U.S. Dep't of Educ., Background & Summary of the Education Department's Proposed Title IX Regulation, https://www2.ed.gov/about/offices/list/ocr/docs/background

This proposed Title IX rule signaled to the larger academic and labor law community that there was, in fact, an intended and recognized legislative intersection between emerging Title IX law and policy and settled labor law jurisprudence. For the first time, the Department of Education proposed formal rule-making under the Administrative Procedure Act and articulated clear language speaking to evidentiary standards of proof with respect to campus Title IX adjudications. In summary, the proposed rules were announced and made available for public review and comment as required under the Administrative Procedure Act,[116] and, as such, after expiration of the review and comment period, the Title IX Final Rule has the full force and effect of law.[117]

VI. Title IX Final Rule and Labor Law Implications

On May 6, 2020, the OCR announced its Title IX Final Rule.[118] The implementation date of the final version of this Title IX regulation was set by OCR as August 14, 2020.[119] The final version of the Title IX OCR rules, published in the Federal Register,[120] included distinct language implicating employee and labor law principles that, until this time, did not exist in previous Title IX policy. For example, with respect to the standard of evidence to be used in Title IX adjudications, previous OCR policy mandated that *only* the preponderance of the evidence was available;[121] however, under the revised Title IX Final Rule, recipients

-summary-proposed-ttle-ix-regulation.pdf [https://perma.cc/G55J-VG8G] (emphasis added).

116. 5 U.S.C. § 553; Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, Inside Higher Ed. (May 7, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations [https://perma.cc/MSS4-9WFZ].

117. As the syllabus for *Perez v. Mortgage Bankers Ass'n* explains,

> The Administrative Procedure Act (APA) establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). The APA distinguishes between two types of rules: So-called "legislative rules" are issued through notice-and-comment rulemaking, see 5 U.S.C.A §§ 553(b), (c), and have the "force and effect of law," Chrysler Corp. v. Brown, 441 U.S. 281, 302–303 [(1979)]. "Interpretive rules," by contrast, are "issued . . . to advise the public of the agency's construction of the statutes and rules which it administers," Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 [(1995)], do not require notice-and-comment rulemaking, and "do not have the force and effect of law," *ibid*.

Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 92 (2015).

118. Press Release, U.S. Dep't of Educ., Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students (May 6, 2020), https://content.govdelivery.com/accounts/USED/bulletins/28a2d60 [https://perma.cc/THJ8-AJZ6].

119. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,535 (2020).

120. *Id.* at 30,026.

121. *News Room*, *supra* note 110.

have the *choice* of applying either the (1) preponderance of the evidence standard or (2) the clear and convincing evidence standard.[122]

Here, the Title IX Final Rule "choice" of evidentiary standard that must be made by respective college administrations, however, is in fact a "work rule" as originally contemplated and examined by the U.S. Supreme Court in *First National*. The Supreme Court articulated in *First National* that "work rules" are "an aspect of the relationship between employer and employee"[123] and, as such, require under § 158(d) of the NLRA[124] that an employer collectively bargain them as a "term and condition of employment."[125] Stated more succinctly, "the NLRB has held that [a work rule such as] employee discipline is unquestionably a mandatory subject of bargaining, and any alteration of a disciplinary system is also a mandatory subject of bargaining."[126]

Further, the Title IX Final Rule choice of evidentiary standard is not only a Supreme Court *First National* "work rule" that directly implicates the weight of the evidence to be considered by a decision-maker in campus Title IX live hearings mandated under federal regulations, it is simultaneously a term and condition of employment that, upon a determination of culpability, could reasonably lead to employee discipline,

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122. 34 C.F.R. § 106.45(b)(1)(vii) (2021). Under this rule, recipients must "state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard." *Id.* While scholars may debate the appropriateness of the clear and convincing evidentiary standard vs. the preponderance standard, see generally William C. Kidder, *(En)forcing A Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration's Proposed Standard of Evidence Regulation for Campus Title IX Proceedings*, 45 J. COLL. & U. L. 1 (2020), there is a growing analytical trend towards questioning by empirical study the reliability of the clear and convincing standard. In pertinent part:

> The executive summary to the DeVos/Trump proposed Title IX regulations states the overarching goal of "producing more reliable factual outcomes" in campus Title IX cases, a theme repeated throughout the document. Accuracy should be a paramount consideration in the Title IX context, just as it is more generally. However, the proposed standard of evidence regulation is pulling in the opposite direction and more likely than not it would result in a *net loss* in reliability of campus Title IX outcomes. . . . [T]he consensus view among evidence law scholars is that moving from the POE [preponderance of the evidence] standard to the C&C [clear and convincing] standard has the foreseeable effect, other things being equal, of increasing false negative errors to a greater extent that it reduces false positive errors, thus eroding overall accuracy in Title IX outcomes. *** Expressed as mathematical shorthand, these three standards of evidence are sometimes thought of as representing the following confidence thresholds: POE is at least a 50.1% confidence level; C&C is at least a 67%-80% confidence level (the widest range of the three standards); and beyond a reasonable doubt is at least approximately a 95% confidence level.

Id. at 9.

123. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 677 (1981).

124. *Id.*; *see* 29 U.S.C. § 158(d).

125. *First Nat'l Maint. Corp.*, 452 U.S. at 676–77.

126. McClatchy Newspapers, Inc., 337 N.L.R.B. 1161, 1186 (2002).

up to and including termination.[127] The employee discipline to be determined upon a finding of responsibility by the college or university, while discretionary,[128] will be shaped significantly by the evidentiary standard of proof considered. As such, the Supreme Court explained in *First National* that, "despite the deliberate open-endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place":

> § 8(a) of the [NLRA], of course, does not immutably fix a list of subjects for mandatory bargaining. . . . But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that *settle an aspect of the relationship* between the employer and the employees.[129]

Undoubtedly, the evidentiary standard of proof upon which a college or university determines culpability in a Title IX investigation of a unionized employee (up to and including termination)"settles an aspect of the relationship" between the university and union member because the evidentiary standard applied objectively at the conclusion of a Title IX live hearing will determine whether the university will be justified (or not) imposing discipline, suspension, or termination for the alleged employee conduct. Under a heightened clear and convincing standard, for example, the evidence derived during the Title IX investigation may not necessarily justify to an impartial hearing officer/decision-maker that the unionized employee is culpable. Under a lowered preponderance standard, however, and in consideration of the exact same evidence, the hearing officer may be persuaded that the conduct does, in fact, justify discipline. Thus, the evidentiary standard of proof is not just a mere "work rule" or "aspect of the relationship," with which employee discipline is measured and adjudicated during a Title IX live hearing; rather, it lies at the core of the employee-employer relationship as an essential objective measure of responsibility that is expected to reveal whether there has been a violation of laws, policy, or norms that reasonably warrant employee discipline.

Similar in purpose and effect regarding the evidentiary standard of proof decision, the Title IX Final Rule articulates a further, more comprehensive and intended intersection between emerging Title IX and settled labor law principles by requiring colleges and universities to make the evidentiary standard of proof "applicable to all formal complaints of sexual harassment, including those against *employees* and

127. 34 C.F.R. § 106.45(b)(1)(vi) (2021). Under the Title IX Final Rule, "a recipient may describe the range of possible sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility." *Id.*

128. *See McClatchy Newspapers, Inc.*, 337 N.L.R.B. at 1186.

129. *First Nat'l Maint. Corp.*, 452 U.S. at 676 (emphasis added).

faculty."[130] In other words, it is an evidentiary standard of proof uniformity rule. The Title IX Final Rule states in its rationale that

> [p]ermitting recipients to select between the two standards of evidence allows recipients who face conflicting requirements imposed by contracts or laws outside these final regulations the ability to resolve such conflict in whichever way a recipient deems appropriate. Not all recipients are subject to CBAs that require a different standard of evidence for employee discipline than the recipient uses for student discipline, and not all recipients are subject to State laws that mandate the standard of evidence to be used in student disciplinary cases; such recipients may select a standard of evidence in compliance with these final regulations without the external factors of CBA or State law requirements. For recipients who have CBAs requiring a clear and convincing evidence standard in employee cases but no State law directive requiring a different standard of evidence in student cases, recipients may comply with these final regulations by using the clear and convincing evidence standard in student cases, or by *renegotiating* their CBAs to use the preponderance of the evidence standard for employee cases. For recipients who do have CBAs requiring a clear and convincing evidence standard (in employee cases) and State laws requiring a preponderance of the evidence standard (in student cases), such recipients may find it appropriate to comply with these final regulations by *renegotiating* their CBAs rather than violate State law.
>
> We acknowledge commenters' point that renegotiating a CBA is often a time-consuming process; however, a recipient's contractual and employment arrangements must comply with Federal laws, and recipients of Federal financial assistance understand that a condition placed upon receipt of Federal funds is operation of education programs or activities free from sex discrimination under Title IX, including compliance with regulations implementing Title IX.[131]

Here, under this rule, the OCR mandate to either raise the evidentiary standard of proof for all cases, including students, or renegotiate the current CBA where a provision requires a clear and convincing standard and no state law requires a different evidentiary standard of proof in student cases is, in fact, a *First National* "work rule" that "settles an aspect of the relationship" between the campus labor union and the university because it definitively answers the question of which standard of proof is legally available and appropriate in unionized employee Title IX cases.

This matter has been largely *unsettled* for years on many college campuses across the country as, prior to the implementation of the Title IX Final Rule, numerous colleges routinely allowed a conflicting

130. 34 C.F.R. § 106.45(b)(1)(vii) (emphasis added). Under this rule, recipients must "apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty." *Id.*

131. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,377–78 (2020).

evidentiary standard to exist in faculty Title IX cases. In other words, a unionized faculty member could be investigated for an alleged Title IX violation pursuant to a university-wide policy requiring a preponderance of the evidence standard under the now-withdrawn Dear Colleague Letter from 2011, but, upon further faculty review board action, university president final decision, or arbitration, the same faculty member accused under the same circumstances and set of facts would enjoy the full benefit and greater protections of the heightened clear and convincing evidentiary standard under a campus collective bargaining agreement.[132] A student being investigated by the same college, however, under the same set of facts, allegations, and circumstances within a Title IX investigation could not enjoy the protections of a dual and conflicting evidentiary standard. This conflicting and often confusing procedural occurrence could yield, understandably, widely different culpability findings. This issue was highlighted and critically examined in the 2017 law review article *Title IX Sexual Assault Investigations in Public Institutions of Higher Education: Constitutional Due Process Implications of the Evidentiary Standard Set Forth in the Department of Education's 2011 Dear Colleague Letter*, which posed the central question:

> when collectively bargained labor agreements on American public college campuses call for the heightened "clear and convincing" evidentiary standard in a sexual assault investigation of a unionized employee, but federally mandated Title IX investigations as required [under] the 2011 Dear Colleague Letter requires only the much lower threshold "preponderance of the evidence" standard to discipline the [same] accused public employee, which prevails?[133]

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132. *See generally* Houston, *supra* note *.

133. *Id.* at 323. This article not only examines this issue but also presents a cross-section of leading colleges and universities where the evidentiary standard of proof faculty conflict issue was most prevalent. For example:

> The University of California System, for example, a public higher education system with over 238,000 students and 190,000 faculty and staff members, boasts the most staunch institutional resistance to the preponderance of the evidence standard. Under the UC System, there includes UC Berkeley, UCLA, UC Davis, and many other campuses with thousands of students and employees. Within this massive educational system, whereupon a faculty member is accused of misconduct of any nature, "[t]he hearing panel can only consider evidence presented at the hearing and facts that are commonly known. The administration has the burden of proving the allegations by *clear and convincing* evidence."
>
> Within the University of North Carolina System, a public education institution with over 220,000 students and sixteen university campuses, upon a university faculty member being accused of misconduct, the standard for discipline set forth dictates that: In reaching decisions on which its written recommendations to the chancellor shall be based, the committee shall consider only the evidence presented at the hearing and such written or oral arguments as the committee, in its discretion, may allow. The university has the burden of proof. In evaluating the evidence, the committee shall use the standard of "*clear and*

In exposition of this issue, OCR Title IX Final Rule cited this article in its rationale to create and require the evidentiary standard of proof uniformity.[134] Additionally, within the body of the Title IX Final Rule, among the thousands of comments from the general public, numerous commenters noted this same concern as being a substantial source of conflict nationwide:

> One commenter contended that it is unfair to hold students to the same standard of evidence as employees because students are not parties to the employee union's CBAs and argued that the Department should not bind students to outcomes of negotiations in which the students could not participate. One commenter stated that, unlike students, university employees can lose lifetime employment, a much more serious outcome than being forced to leave one particular university, and this difference justifies using a higher burden of proof in faculty cases. One commenter asserted that the proposed rules' requirement to use the same standard of evidence for cases with student-respondents as with employee-respondents stems from anti-union bias.
>
> One commenter argued that the proposed choice given to recipients in the [proposed rule] could potentially expose recipients to liability for sex discrimination under 34 CFR 106.51 ("A recipient shall not enter into a contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination . . .") . This commenter argued that recipients who currently use the preponderance of the evidence standard in sexual harassment cases involving student-respondents, may be forced by the [proposed rule] to raise the standard of evidence to the clear and convincing evidence standard in order to comply with recipients' CBAs, yet that reason for raising the standard of evidence (and, in the commenter's view, disfavoring complainants by raising the standard of evidence) may constitute violation of 34 CFR 106.51 because raising the standard of evidence to match what the recipient uses in a CBA could be viewed as having entered into a CBA (i.e., a contractual or other relationship) that indirectly has the effect of subjecting students to discrimination (i.e., by "disfavoring" complainants alleging sexual harassment).[135]

Whether raised as a substantial labor relations issue nationally, in public comment under the requirements of the Administrative Procedure Act, or asserted as an issue locally on college campuses, the

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convincing" evidence in determining whether the institution has met its burden of showing that permissible grounds for serious sanction exist and are the basis for the recommended action.

Id. at 347–48 (citation omitted).

134. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,378 nn. 1424, 1426 (codified at 34 C.F.R. § 106.45(b)(1)(vii)).

135. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30376.

issue of the evidentiary standard of proof conflict is addressed, examined and resolved by the Title IX Final Rule.[136] The regulation requiring recipients to set a campus-wide and uniform Title IX evidentiary standard of proof (either preponderance or clear and convincing evidence) is a *First National* "work rule" because it "settles an aspect of the [employer-employee] relationship," as evidenced by its "material, substantial or significant" impact on mandatory subjects of bargaining such as (1) employee discipline, (2) grievance procedures, and (3) workplace anti-discrimination policy, in addition to (4) the volume and significance of the direct accounts of thousands of public commentary statements under the Administrative Procedure Act on present-day conflicting evidentiary standards in higher education collective bargaining agreements. Thus, the regulation, as a *First National* "work rule" requires the evidentiary standard of proof decision on each unionized campus to be collectively bargained (whether a private college under the NLRA or public college under the various public sector statutes) because the evidentiary standard of proof decision, as demonstrated, is a "term and condition of employment"[137] and thus, a mandatory subject of bargaining.

VII. Proposals For Immediate U.S. Department of Education Office of Civil Rights (OCR) Regulatory Action

Respective college administrations both public and private, campus labor unions, legislators, advocacy groups, counselors, lawyers, consultants, and members of the Title IX bar should work jointly to develop policies, agreements, and compliant training strategies that support harmonious relationships on campus to further comply with the Title IX Final Rule. While other serious and equally important legal issues have yet to be examined (or discovered) in the Title IX and labor law context, the following recommendations will serve as a first step to a greater understanding of this emerging intersection in higher education. Specifically:

College administrators should:

- Set university policy to ensure that the evidentiary standard of proof in campus CBAs (under the uniformity rule) matches the standard of proof for students, faculty, and staff as well as non-unionized members of the community (i.e., colleges without a unionized faculty).

136. 34 C.F.R. § 106.45(b)(1)(vii).
137. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674 (1981); 29 U.S.C. § 158(d).

- Incorporate the evidentiary standard of proof issue into all current labor negotiations and with emerging or graduate student union groups attempting to unionize.
- Make publicly available (both college website and for public inspection) all campus labor contracts that contain a collectively bargained Title IX evidentiary standard of proof.
- Consider language in collective bargaining agreements that speaks to the grievability (and finality) of Title IX live hearings involving campus labor union members.

Campus labor unions should:

- Raise the issue of (and bargain over) the evidentiary standard of proof with campus administration in order to trigger NLRA and public sector duty to bargain rights.
- Consider pursuing a declaratory judgment as to whether the Title IX Final Rule preempts state laws that codify either the preponderance or clear and convincing standard.
- Collectively bargain with campus leadership language that directly addresses another emerging Title IX/labor law issue: Title IX live hearing grievability, appellate rights, and arbitrability in campus labor union members cases (i.e., live hearing finality). This issue will be key and will be an important subject for future Title IX/labor law research.

State legislators should:

- Consider lawmaking that requires colleges and universities to make publicly available all collective bargaining agreements between campus labor unions and universities that contain the evidentiary standard of proof. This disclosure will further transparency and public accountability.

The U.S. Department of Education Office of Civil Rights should:

- Consider guidance which speaks to duty to bargain rights, Title IX live hearing grievability, appellate rights, and arbitrability in Title IX cases against campus labor union members—in other words, the finality of the Title IX live hearing. May a labor union member accused of a Title IX violation grieve (or arbitrate) the outcome of a Title IX live hearing? Can a unionized employee at a public college who is alleged to have committed sex-based harassment exercise the right against self-incrimination during

a Title IX investigation (Garrity Rights)?[138] While the evidentiary standard of proof is required to be uniform campus-wide under the Final Rule, the reality is that the available administrative and contractual remedies may not be.

- Consider lawmaking/guidance that requires colleges and universities to make publicly available all CBAs between labor unions and recipients that contain a collectively bargained evidentiary standard of proof. This disclosure will further transparency and public accountability.
- Consider lawmaking/guidance, similar to the Family and Medical Leave Act,[139] Fair Labor Standards Act,[140] and Equal Employment Opportunity poster requirements,[141] that mandate that institutions of higher education post Title IX rights and protections and U.S. Department of Education/Title IX Coordinator contact information in all employee/staff conspicuous locations in the workplace.

Conclusion

Title IX law and its applicable OCR procedures represent a valuable and needed public policy necessary to protect against sexual violence and harassment on campus. Notwithstanding this article's legal contentions, the protection of victims of sexual assault and the process that is due for the accused must remain the paramount concern in this important conversation. The Biden administration will, in fact, have the opportunity to propose rulemaking on this matter in the months and years to come with the hope that campus labor unions will have a

138. Garrity v. New Jersey, 385 U.S. 493, 499–500 (1967).

> In the case of Garrity vs. New Jersey (1966), the U.S. Supreme Court determined that public employees could not be forced, under clear threat of discipline, to violate the principles of compulsory self-incrimination. This decision established what have come to be called Garrity Rights for public employees.
>
> The U.S. Supreme Court ruled in the Garrity vs. New Jersey case that if a public employee is ordered to answer questions by their employer under the threat of discipline about a potential criminal matter, they are not voluntarily waivering their rights against self-incrimination, but are making statements under duress. The police, to further investigation or gather evidence to be used in a criminal investigation, cannot use statements made under these conditions.

Garrity Rights, AFT Conn., https://aftct.org/sector/799/garrity-rights [https://perma.cc/9W8W-RRZM].

139. 29 U.S.C. § 2619(a); 29 C.F.R. § 825.300(a)(1) (2021).

140. 29 C.F.R. § 516.4 (2021); *id.* § 525.14.

141. 29 C.F.R. § 1902.9(a) (2021). States have the ability to craft their own poster similar to and comparable to the federal poster requirement.

seat at the table on all campuses nationwide on this critical matter.[142] As such, the duty to bargain the evidentiary standard of proof issue between campus labor unions and the various public and private campus administrations must be addressed nationwide with all due expediency for the sake of clarity, prudence, and fairness.

142. Mark E. Hanshaw, *Dep't of Education Announces Intent to Issue Notice of Proposed Rulemaking Regarding Title IX by April 2022*, Nat'l L. Rev. (Dec. 15, 2011), https://www.natlawreview.com/article/dept-education-announces-intent-to-issue-notice-proposed-rulemaking-regarding-title [https://perma.cc/8UVC-QREP].