PRESENTATION

The NLRB's Assault on Higher Education:

An Analysis of the Supreme Court's Yeshiva University Decision and the NLRB's Columbia University Decision. How to Prepare for Union Organizing.

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EXPAND YOUR EXPECTATIONS℠

National Labor Relations Act

- Supervisors and managerial employees are not covered by the National Labor Relations Act (The Act)

National Labor Relations Act (continued)

Section 7:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining…and shall also have the right to refrain from any or all of such activities…"

NLRB V. Yeshiva University

- The United States Supreme Court's decision in *NLRB v. Yeshiva University* decided in 1980.
  - Yeshiva University was made up of several schools, including: Stern College for Women, Belfor Graduate School of Sciences and Wurzweiler School of Social Work.

- The Supreme Court, relying on prior NLRB decisions in other contexts, said that managerial employees are those who "…formulate and effectuate management policies by expressing and making operative the decisions of their employer".

- Although the NLRB had established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he/she represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

NLRB V. Yeshiva University (continued)

- The Yeshiva case relied on the following factors to find that certain faculty were excluded from the National Labor Relations Act because they were managerial:

  a. the faculty "effectively determine" curriculum, grading systems, admission and matriculation standards, academic calendars and course schedules

  b. some faculty make final decisions regarding the admission, expulsion and graduation of individual students

  c. other faculty have decided questions involving teacher loads, student policies, tuition and enrollment levels, and in one case the location of the schools

Definition of “Supervisor” in the National Labor Relations Act:

- The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

What difference does that make?

As in most situations, documentation is crucial.

The Risk Associated with Managers and Supervisors

- If the employee is truly a managerial employee, they can violate the National Labor Relations Act by saying or doing the wrong thing. It is as if the President or Chancellor of the University or College said or did the same thing.

- Likewise, a member of the faculty who is a manager or supervisor, if they are sympathetic to the union, may violate the law by engaging in conduct in support of the union.

- Training on what can be said or done, as well as what cannot be said or done, by managerial or supervisory employees is critical.

The New York University Experience

- In an NLRB decision involving New York University in 2000, the NLRB decided that graduate student assistants were employees.

- NYU voluntarily recognized a union of student assistants. There are two primary ways a union can be recognized. Either by an NLRB secret ballot election in which a union wins by 50% plus one, or by an employer voluntarily recognizing a union on a showing of support by a majority of the employees.

The New York University Experience (continued)

- The NLRB reversed its NYU decision in Brown University in 2004.
- Now, the NLRB has reversed Brown University in the Columbia University case decided recently.
- NYU, after voluntarily recognizing the union of student assistants in 2000, withdrew that recognition after the Brown University NLRB decision, which said student assistants were no longer considered employees covered by the Act.

The New York University Experience (continued)

- **Why**: Two university committees recommended withdrawing recognition because the union's filing of grievances that the University felt were threatening to undercut NYU's academic decision making.

- Thus, academic decision making would be decided by a neutral arbitrator.

Where We Are Today

- In 2000, the NLRB in New York University said student assistants were employees.
- In 2004, the NLRB held in Brown University that student assistants were not employees.
- On August 23, 2016, in Columbia University, the NLRB said student assistants were employees.

In Columbia University

- In the Columbia University case in 2016, the union was seeking the following group to vote in the NLRB election:

  - **INCLUDED**: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and all Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Neva facilities.

  - **EXCLUDED**: All other employees, guards, and supervisors as defined in the Act.

The Specialty Healthcare NLRB Decision

- *Specialty Healthcare* was an NLRB decision that reversed several years of precedent.
  - In a long term care facility (nursing home) when a union tried to organize unskilled employees, the normal group was CNAs, food service and housekeeping.
  - In the *Specialty Healthcare* case, the NLRB allowed only a group of CNAs to vote.
- In the current case of the Yale University petitions, the University wants one election for all graduate assistants, while the union wants ten separate elections.
  - Can you imagine if the NLRB agrees with the union and the union wins just five of those elections, the chaos that would follow?

The Yale University Petitions

- The union that filed the petition, UNITE-HERE, is a union made up of two unions which merged several years ago.
  - UNITE was a conglomeration of several textile unions, and
  - HERE which is a union in the hotel and restaurant industry.

- This essentially means any union can try to organize graduate assistants.

The Quickie NLRB Election Rules

- The NLRB used to schedule a secret election within 40+/- days.
- Now after a petition is filed the normal time before an election is 20+/- days.
- Thus a university or college has less time to prepare for a campaign.
- Other issues with these new rules include allowing some contested classifications to vote by challenged ballot.
- This is a serious problem for employers because if an employee is later found to be a supervisor then the employer wasn't able to train that person on what can be said, etc.

The Quickie NLRB Election Rules (continued)

- Representation petitions may be filed with the Board electronically.
- Representation petitions (and related documents) must be served by the petitioner.
- At the same time the petition is filed with the Board, the petitioner must also provide evidence that employees support the petition.
- When a petition is filed, the employer must post and distribute to employees a Board notice about the petition and the potential for an election to follow.

The Quickie NLRB Election Rules (continued)

- The pre-election hearing will generally be scheduled to open eight days from notice of the hearing.
- The pre-election hearing will continue from day to day until completed, absent extraordinary circumstances.
- The purpose of the pre-election hearing, to determine whether there is a “question of representation.”

The Quickie NLRB Election Rules (continued)

- Non-petitioning parties are required to state a position responding to the petition in writing 1 day before the pre-election hearing is set to open.

- The statement must identify the issues they wish to litigate before the election: litigation inconsistent with the statement will not be permitted.

- The employer must also provide a list of the names, shifts, work locations and job classifications of the employees in the petitioned-for unit, and any other employees that it seeks to add to the unit.

The Quickie NLRB Election Rules (continued)

- At the start of the hearing, the petitioner is required to respond on the record to the issues raised by the other parties in their statements of position.

- Once the issues are presented, the regional director will decide which, if any, voter eligibility questions should be litigated before an election is held.

- The hearing will conclude with oral argument, and no written briefing will be permitted unless the regional director grants permission to file such a brief.

The Quickie NLRB Election Rules (continued)

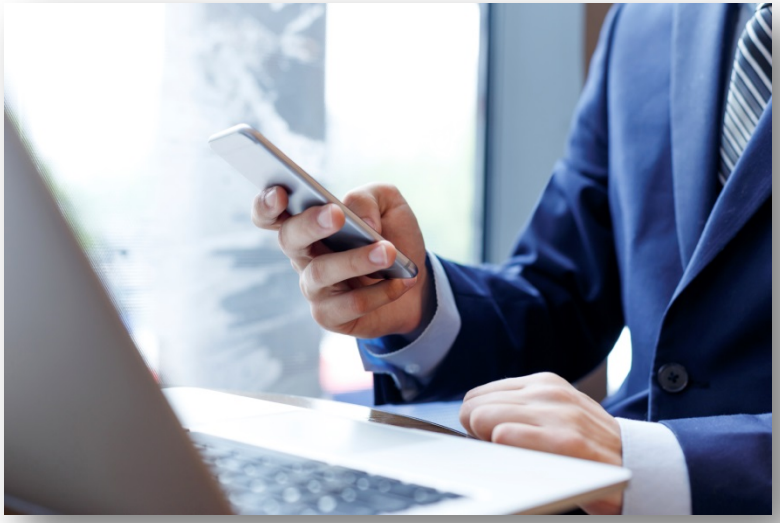
- The regional director must decide the matter, and may not sua sponte transfer it to the Board.

- The regional director will ordinarily specify in the direction of election the election details, such as the date, time, place, and type of election and the payroll period for eligibility. Parties will take positions on these matters in writing in the statement of position and on the record before the close of the hearing.

- The long-standing instruction from the Casehandling Manual that the regional director will set the election for the earliest date practicable is codified.

The Quickie NLRB Election Rules (continued)

- Within two business days of the direction of election, employers must electronically transmit to the other parties and the regional director a list of employees with contact information, including more modern forms of contact information such as personal email addresses and phone numbers if the employer has such contact information in its possession. The list should also include shifts, job classifications and work locations.



Questions?