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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Organizing Boom Likely After NLRB Drops Student Union Rule

By **Tim Ryan**

Law360 (March 15, 2021, 9:04 PM EDT) -- A renewed organizing push is likely to arise from the National Labor Relations Board's announcement last week that it is abandoning a proposed rule that would have prevented student teaching assistants at private colleges and universities from unionizing, experts said, as unions anticipate a more sympathetic board under President Joe Biden.

The NLRB **announced Friday** that it is withdrawing the rule on grad student organizing, which would have excluded student teaching and research assistants from the definition of employees under the National Labor Relations Act. First proposed in 2019, the rule **would have meant** those student workers could not unionize, a reversal from an Obama-era board decision involving Columbia University that allowed them to do so.

The board said it was abandoning the rule "in order to focus its limited resources on competing agency priorities, including the adjudication of unfair labor practice and representation cases currently in progress."

Celine McNicholas, the director of government affairs and labor counsel at the Economic Policy Institute, which receives support from unions, said the rule was the "greatest threat" to union organizing on college campuses.

"There's so much energy in that space right now, in organizing, that I think this just sort of solidifies that movement," McNicholas said. "They have one less hurdle to jump through in terms of whether or not they have the act's protections."

A Wave of New Organizing

Organizing among student teaching and research assistants at private universities has taken on a cyclical pattern since a 2000 board decision involving New York University that, for the first time, approved a union of graduate assistants. That decision said the assistants qualified as employees under the NLRA, inviting more unionization efforts.

But once President George W. Bush appointed a Republican majority, the board reversed itself in a case involving Brown University, ruling in 2004 that student teachers don't count as employees because their relationship with their school is focused mainly on education. That holding governed student worker organizing until 2016, when a Democratic board majority under President Barack Obama reversed it and said the assistants at Columbia were employees and could vote on union representation.

Organizing predictably boomed following the 2000 and 2016 decisions and ground to a halt when President Donald Trump came into office in early 2017, according to William A. Herbert, executive director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Hunter College.

Herbert said that with no active petitions in the pipeline that would give the board a vehicle to reverse the precedent before Biden can appoint a Democratic majority as soon as August, the Columbia University decision is likely to survive, **welcoming a new round of organizing.**

Former NLRB Chairman Mark Gaston Pearce agreed that it is likely unions will heat up their organizing efforts again, secure in their legal footing with the rule on the shelf.

"It is my strong prediction that come August when the [Democrats] have a majority on the board, that you'll see a lot of petitions being filed," Pearce, who is now executive director of the Workers Rights Institute at Georgetown University Law Center, told Law360. "I think bargaining units are just waiting."

Michael Bertoncini, an attorney who represents employers at Jackson Lewis PC, agreed that organizing will increase among student teaching assistants in ways not seen since the end of the Obama administration. He noted many schools will likely have relaxed restrictions that they put in place during the COVID-19 pandemic by the fall, helping along the organizing effort by allowing student workers to see each other in person.

"This was a very active and aggressive campaign in the latter part of the Obama administration and then it ground to a halt when President Trump came in," Bertoncini said. "I think it's going to pick up where it left off."

RyAnn McKay Hooper, an Epstein Becker Green attorney who represents employers, said schools whose graduate assistants may have been covered under the proposed rule will need to change course, as the board's decision "puts organizing back on the table."

The Columbia bargaining unit that was the subject of the 2016 precedent-shifting decision still has not come to agreement on a first contract, and on Monday launched a strike seeking to put pressure on the university.

Impact on Future Decision-Making

If the board follows expectations and does not reverse the Columbia University ruling, that means unions will have years to organize before a new Republican majority could take power. Herbert said that if a future Republican board sets its sights back on the issue, it would need to consider the contracts that come out of those efforts before issuing a decision reversing current precedent.

While not binding, Herbert said organizing that takes place over the life of the Biden board will generate evidence that could make overturning the precedent a heavier lift for a future board.

"As a practical matter, the growth in unionization since the Columbia decision may make it more difficult for a future board to overturn it," Herbert said.

Pearce said it would also be particularly difficult for a future Republican majority to go through with the notice-and-comment rulemaking process if organizing at private colleges and universities is successful.

Hooper, who spent a decade as an attorney at the NLRB, said it wouldn't necessarily be difficult for a future board to reverse the Columbia University holding through its normal route of deciding cases, though it would take considerable time. She also said any decision reversing Columbia University would not touch unions that successfully reach contracts in the meantime.

The Future of the Trump Board

The decision to walk back the rulemaking was a nod to the short term the board has left in its current form and an apparent acknowledgment from the Republican majority that it did not have time to complete the rule, McNicholas, of the Economic Policy Institute, said.

"I think given the way the rescission occurred, the rationale focusing on the case processing responsibilities, it seems to me that they balanced the resources that they would spend on continuing with the rulemaking with the likely outcome of the rulemaking just given that timing," McNicholas said.

Rulemaking has not historically been the main tool the board has used to make policy, though the

Trump NLRB under Chairman John Ring made several attempts to do so, notably on its so-called **joint employer test** for evaluating when two associated entities jointly employ the same workers.

Agency rulemaking follows a formalized process and must take into account public comment and certain other considerations to survive challenges in court. Pearce said the board's decision to withdraw the graduate student rule was an indication that the Republican majority wasn't confident in the final product withstanding such scrutiny.

"My view is that the rule probably did not have a good shot at passing muster if it did go through because ... when the board has deigned to issue a rule on what classification should be excluded, that is the province of the legislature," Pearce said.

Jackson Lewis' Bertoncini said rulemaking requires a major investment of time from the board and that the current majority likely views the traditional process of deciding cases as the best use of its time.

"I think it signals an effort by the board to really focus on moving the current docket along and making some decisional precedent," Bertoncini told Law360.

Hooper agreed that the rapidly approaching change in the makeup of the board was a primary driver of the decision. What the move to back away from the graduate student rule might mean for how the Democratic majority wields rulemaking power is difficult to say, she said.

"We don't know what the future board is going to do with rulemaking," Hooper said. "I would like to believe that the historical path of just looking for the right set of facts and changing precedent would be an appropriate route, but if you're looking for a change that's a little harder to undo, rulemaking is there."

--Additional reporting by Braden Campbell. Editing by Abbie Sarfo.

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