

Practice Update

What Every College and University Should Know About the National Labor Relations Act and its Impact on Campus Life

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Colleges and universities continue to experience increased union organizing activity, strikes, and other protests from its workers, outpacing similar activities by workers in other industries. Although these activities were once dominated by part-time and non-tenured faculty on college campuses, several recent decisions by the National Labor Relations Board (NLRB) have cleared a pathway for more union organizing among undergraduate and graduate students. As a result, students are engaging in union organizing, strike, and protest activities at record rates, with no sign of slowing down. In the midst of this shifting landscape, higher education institutions have been left to grapple with whether certain students are entitled to receive employee protections under the National Labor Relations Act (the Act), and how to respond to student conduct that might implicate the Act.

The National Labor Relations Act is the federal labor law that protects private sector employees and their rights to self-organize; to form, join, or assist labor organizations; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to abstain from any of these activities. The Act also prohibits certain private sector unionized and non-unionized

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employers and unions from engaging in conduct that interferes with an employee's protected rights.

The National Labor Relations Board (NLRB) is the independent federal agency responsible for conducting independent secret-ballot elections on behalf of private sector employees who seek to unionize, and conducting investigations into whether an employer or union has violated the Act by engaging in prohibitive conduct. Two departments carry out the NLRB's responsibilities. The first, the Office of the General Counsel, oversees the regional offices of the NLRB, which conduct the investigative and election work performed by the NLRB, and sets the litigation priorities of the NLRB. The second department, the Board, operates as a quasi-judicial body made up of up to five board members who review NLRB cases decided at the regional level and set NLRB legal precedent by issuing legal opinions.

Here are the top three NLRB legal developments affecting campus life that colleges and universities should know about and prepare to address on their campuses:

1. The NLRB's Promotion of Voluntary Recognition Places Time Limits on Employers' Unionization Responses

Did you know that Board law places a two-week time limit on higher education institutions to formulate their position on unionization once a union makes a valid demand for recognition and bargaining?

Under the Board's recent decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), an employer violates the Act if it refuses to recognize and bargain with a union upon request, after the union demonstrates it enjoys support from a majority of employees in an appropriate bargaining unit. An employer's only recourse to challenge a union's demand for recognition involves the employer filing a RM petition with the NLRB within

two weeks of receiving the union's recognition demand. Any delay in filing an RM petition may result in an employer waiving its right to contest the recognition and bargaining demand and receiving an order from the NLRB requiring the institution to bargain.

Institutions would be wise to take advantage of the benefit of time to engage stakeholders and start developing institutional philosophies about responses to union organizing as a broader part of their institutional planning.

2. Student Protests and Political Speech on Campus and Potential Protections Under the NLRA

The Act has long protected employees who engage in strikes, walkouts, and protests when those activities are tied to employee desire to improve their terms and conditions of employment, but only under certain conditions. Since worker rights for students are a relatively new phenomenon, little guidance exists to assist higher education institutions to decipher whether student protests involve student-centered speech unprotected by the Act, work-related or political speech potentially protected under the Act, or speech protected by the First Amendment. To boot, students on college campuses currently find themselves at odds with their institutions over the appropriate place to draw the line between permissible First Amendment freedom of speech protections, with nearly 68 percent of those college students polled finding free speech protections should extend to threats and inciting violence.^[1] As the Board continues to find increasingly more political issues as protected under the Act and students continue to push the envelope when protesting, institutions should revisit their student codes of conduct and other policies and practices concerning how to respond to student protests on campus with the assistance of labor counsel, especially in light of expected activism from students during this year's election cycle.

3. Employee Status for Students Performing Extracurricular Activities

The NLRB general counsel's current model of employee status under the Act finds an employer-employee relationship exists between higher education institutions and their students when, among other things, the institution has the right to control the student's extracurricular activities and the student activities performed involve student receipt of certain benefits like tickets to school functions, lodging, or meals, or involve fringe benefits like academic support, career development, sports and counseling psychology, sports nutrition, leadership and mental performance training, strength and conditioning training, sports medicine, and integrative health and wellness. While this position is not law since it has not been formally adopted by the Board, it may lead many students in extracurricular activities engaging in conduct arguably protected under the Act while litigation over this issue ensues. If your institution is grappling with how it might wish to assess its vulnerabilities should the Board adopt this theory of employee status, or have questions about your current institutional model in light of the NLRB GC's current position on this issue, contact your Akerman counsel to discuss your concerns and learn more.

Akerman counsel are well-versed in working with higher education institutions to formulate action plans in response to union organizing activities, communication plans to ensure appropriate messaging to all community stakeholders, and training to educate all constituencies about what to expect and how to conduct oneself during a union organizing campaign. We also assist clients with responding to student protests and assessing risk under the NLRA.

As always, Akerman Higher Education and Traditional Labor attorneys stand ready to provide counsel and assist institutions with adapting to

higher education's rapidly evolving institutional model.

[1] Lexi Lonas, 68 percent of college students say free speech protections should extend to threats, inciting violence: Poll, The Hill, Mar. 14, 2024, <https://thehill.com/homenews/education/4531633-more-than-two-thirds-of-college-students-say-free-speech-protections-should-extend-to-threats-inciting-violence-poll/>

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