As seen in the **September 12, 2016** issue of

BUFFALO Law Journal

Graduate assistants have collective-bargaining rights

GUEST COLUMN

Theresa Conroy & Sarah Marangola

As the nation's college campuses begin a new academic year, administrators face a new challenge, this one courtesy of the National Labor Relations Board.

At the end of August, in a decision of great interest to private colleges and universities across the country, the Board held that graduate assistants are statutory employees under the National Labor Relations Act. This decision gives graduate assistants collective-bargaining rights under federal law.

The Aug. 23 decision in Columbia University reverses long-standing NLRB precedent — including its 2004 decision in Brown University — and opens the door for graduate assistants to form or join unions, to engage in collective bargaining and assert other protections under the Act.

In its decision, the NLRB painted graduate assistants with a broad brush, expressly including those engaged in scholarly research funded by external grants within the definition of employee (reversing a decades-old precedent) and leaving open the possibility for undergraduate students to also qualify as "employees" under the Act.

The NLRB's decision departed from its established position that graduate assistants are not covered by the Act. This position was reinforced 12 years ago in Brown, which overturned another departure from this precedent in the NLRB's 2000 decision in NYU.

In Columbia, the Board found that the express language of the Act and its underlying fundamental principles grant the NLRB the statutory authority to treat graduate assistants as statutory employees "where they perform work, at the direction of the university, for which they are compensated."

In its reasoning, the Board was highly critical of the 2004 Brown decision, finding that the Brown decision relied primarily on "theoretical" claims in "depriv[ing] an entire category of workers of the protections of the Act, without a convincing justification."

Thus, the Board rejected the previously accepted argument that the Act extends only to situations where the primary relationship is an economic relationship and, therefore, does not extend to the primarily academic relationship between students and their universities.

Under the Board's reasoning, the fact that an employment relationship exists is sufficient in and of itself, regardless of an additional relationship, for an individual to be covered under the NLRA as an employee. Absent compelling statutory and policy considerations, coverage "is not foreclosed by the existence of some other, additional relationship that the Act does not reach," such as academic or non-economic relationships.

In other words, even if two parties have a relationship that does not fall within the scope of the National Labor Relations Act, the Act may nevertheless apply if there is also an employment relationship, regardless of how the parties might define the purpose or genesis of the relationship.

The Board was not persuaded by the "fundamental belief" that permitting graduate students to partake in collective bargaining would "intrude into the educational process and would be inconsistent with the purposes and policies of the Act."

According to the Board, the belief that unionizing could impede students' education and training is "unsupported by legal authority, by empirical evidence, or by the Board's actual experience."

The Board cited historical evidence based on the 64,000 graduate student employees who are organized at 28 public universities (where collective bargaining is governed by state law, not the National Labor Relations Act) as evidence that universities and students can navigate the complicated issues surrounding the universities' dual role as educator and employer.

Although graduate assistants and organized labor groups celebrate Columbia University as a victory — giving student assistants a seat at the bargaining table to address critical issues such as stipends, working conditions and health insurance — others share the concerns voiced in Brown (and in the Columbia University dissent) regarding the organization of students in private universities.

The provost of Colombia University said: "I am concerned about the impact of having a non-academic third party involved in the highly individualized and varied contexts in which faculty teach and train students in their departments, classrooms and laboratories."

Concerns of higher education institutions vary in scope, from the alteration of the fundamental nature of "studentship" at a college or university, to the implications of student labor strikes, the transformation of the adviser/advisee relationship to one of supervisor/employee and potential increases in tuition due to higher administration expenses.

The American Council on Education issued a blistering statement, calling the Board's ruling "misguided." This "sweeping expansion of federal authority ... turns all students into potential employees who could be organized, even undergraduate students in federal work-study positions," the ACE statement read.

ACE predicts that the ruling will "decrease opportunities for campus jobs that help students — particularly those from low- and middle-income families — finance their education and drive up administrative costs" and finds this consequence untenable "[i]n an era where so many are worried about the costs of college."

ACE wants students to continue to be treated as students until Congress, rather than the Board, decides they should be treated as employees. The Council concludes that "it is surprising and disturbing that the Board has sanctioned such an unprecedented federal intrusion."

Undoubtedly, Columbia University will challenge this decision in federal court, but it cannot file a challenge until a union election has occurred. In the meantime, private colleges and universities can expect increased union organizing activity by research, teaching and other student assistants in the wake of the decision. Indeed, research and teaching assistants at two Upstate New York universities have already announced organizing drives.

As the ramifications of the Columbia University decision play out, colleges and their counsel need to be alert to how their student employees are responding to the entitlements granted to them under the decision and quick studies in planning for what may lie ahead.

THERESA CONROY *leads the higher education practice group at Harter Secrest & Emery LLP and* **SARAH MARANGOLA** *is counsel in the labor and employment practice group: tconroy@hselaw.com and smarangola@hselaw.com.*