

Higher Education Webinar

Current Developments In University Student Assistant Organizing

Proskauer»

Speakers



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Agenda—What We Will Cover Today

- Retrospective of student assistant labor activity over the last 18 months
- The NLRB's proposed rulemaking regarding student assistants
- Analysis of new Board decision affecting religious schools of higher education and its possible effect on student assistants
- Analysis of the NLRB's soon to be implemented representation case rules and how they would affect future student assistant organizing
- Recent and future changes to the composition of the NLRB
- Discussion of what colleges and universities can do now to be prepared

Background

- Historically, the Board has held that student assistants are not Section 2(3) employees
- Since 2000, however, the Board has varied its position, depending on the political party in control of the agency
 - 2000: *NYU* – for the first time in the NLRA's then 65-year history, the Board, under Democratic control, ruled that certain graduate assistants at the university were employees
 - 2004: *Brown* – the Board, under Republican control, overruled *NYU* and held that student assistants are not "employees," because the nature of their relationship with the university is "primarily an educational one, rather than an economic one."

Background (cont'd)

- 2016: *Columbia* – the Board, under Democratic control, overruled *Brown* and held that student assistants are “employees” under the common law test because they perform services in exchange for compensation
- 2019: The Board, under Republican control, issued a proposed rule holding that students are not “employees” (one dissent)

Retrospective of Graduate Student Union Activity Over Past 18 Months

Labor Action and Disruption on Campuses

- The three and a half years since the Columbia decision have seen a number of private universities facing disruption and turmoil on their campuses
 - Unions collectively agreed to avoid using NLRB processes and instead are using pressure to force universities to force recognition
 - Since Grinnell, there have been no other NLRB petitions filed
 - In April 2017, graduate student teachers at Yale embarked on a hunger strike, and erected a shelter in front of the offices of the president to protest the University's refusal to acknowledge their union
 - Columbia University strike in April 2018
 - University of Chicago strike in June 2019
 - Harvard University strike in December 2019

Labor Action and Disruption on Campuses (cont'd)

- UC Santa Cruz, Santa Barbara, Davis strike in February 2020
 - Other UC campuses may join
 - Since the Board issued its Notice of Proposed Rulemaking, there have been thousands of posts on social media encouraging graduate students to submit comments in opposition to the rule and rallies in response to the rule

Columbia University Strike

- In April 2018, teaching and research assistants at Columbia University went on strike in an effort to make the university negotiate the first contract
 - Claims of unpredictable workloads, late pay, unstable health care benefits, and inadequate protections against sexual harassment and assault
- No strike pledge lapses in April. A strike authorization vote began on March 2.

University of Chicago Strike

- On June 3, 2019, graduate students went on a three-day strike, with the hopes of pushing leaders of the University to voluntarily recognize Graduate Students United (GSU)
 - Claims of inadequate health care, high rent, a wage that has not kept up with cost of living, irregular pay, and unaffordable child care
- Notwithstanding the strike, the University did not voluntarily recognize GSU

Harvard University Strike

- After over a year of negotiations, Harvard students and the Union failed to reach agreements on key issues
- December 2, 2019: Harvard students embarked on a 29-day strike
 - Union signed six new tentative agreements with the University
- January 7, 2020: Parties agreed to begin mediation but still have not yet reached an agreement
- New strike authorization vote a possibility.

UC Santa Cruz Strike

- Graduate students at UC Santa Cruz are already unionized and work under an existing collective bargaining agreement
- On February 10, 2020, graduate student workers went on strike and demanded a pay increase due to the high cost of living in Santa Cruz
 - So-called “wildcat strike” – not endorsed by the students’ union
 - Graduate students across the nation are calling for support on social media of their fellow students at UCSC
- Students refused to teach, hold office hours, conduct research, or post grades
 - Students’ picketing resulted in more than one dozen arrests
- The strike has now spread to UC Santa Barbara, UC Davis and other campuses potentially joining as well.

University of Chicago's Library Worker Case

- In May 2017, Teamsters Local 743 sought to represent separate group of library workers
- The University was denied a full hearing at the Regional level.
- An election was held, and the union was certified. The University challenged the certification.
- In *University of Chicago v. NLRB*, the U.S. Court of Appeals for the Seventh Circuit rejected the University's assertion that it was denied due process and affirmed the Board's underlying certification.
 - The Court did not rule on the validity of *Columbia* because the issue on appeal was whether the university was denied a due process right to a hearing
 - Following issuance of opinion, the University recognized the library-student workers. However, bargaining has yet to commence.

Summary of Collective Bargaining among Private Universities

Summary of Collective Bargaining Status Regarding Graduate Student Unions

- Currently five private institutions have graduate student collective bargaining agreements:
 - New York University (whose contract predates *Columbia*)
 - American University
 - Brandeis University
 - Tufts University
 - New School
- Four private universities are still negotiating for their first contracts: Columbia, Georgetown, Harvard and Brown

Columbia University

- December 17, 2014: Graduate Students of Columbia (GWC)-UAW file petition
- February 6, 2015: Petition dismissed
- March 13, 2015: Case remanded for hearing after Union appeals
- December 7 – 8, 2016: Election held
 - **1,602 votes for** union | **23 votes against** the union
- December 18, 2017: NLRB certifies unit
- November 2018: Columbia announces plan to bargain with the Union and parties enter into a Framework Agreement setting forth mutually agreed upon principles to guide future negotiations
- To date, after dozens of bargaining sessions, no agreement has been reached

Georgetown University

- Georgetown University and the Georgetown Alliance of Graduate Employees (GAGE), a group of graduate student representatives engaged in discussions to hold a union election outside of NLRB channels
- Nov. 5 - Nov. 8, 2018: AAA conducts election
 - **555 vote in favor of** unionization | **108 vote against** unionization
- To date, parties have reached agreements on several subjects, and meetings continue on a weekly basis, but no collective bargaining agreement yet
 - Management rights
 - Union rights
 - Grievance and arbitration procedures
 - Procedures to address claims of discrimination and harassment

Harvard University

- October 18, 2016: Harvard Grad Students Union (HGSU-UAW) file petition
- November 16 & 17, 2016: Vote takes place pursuant to Stipulated Election Agreement
 - Final tally after multiple challenges:
 - **1,931 voted for** the union | **1,523 voted against** the union
- April 30, 2018: Certification of Representative issued
- Bargaining between the Union and Harvard commenced but, after over a year of negotiations, the parties failed to reach agreements on key issues.
- Following a 29-day-strike, the Union signed six new tentative agreements with the University and the parties agreed to begin mediation on 1/7/20
- No collective bargaining agreement has been reached

Brown University

- June 21, 2018: Brown and Stand Up for Graduate Student Employees (SUGSE), a student group, finalize agreement setting out terms for potential union representation election among graduate student workers
- October 11, 2018: SUGSE files a notice of its intent to file a petition to hold an election at the University
- November 8, 2018: Brown finalizes memorandum of understanding with SUGSE that election would take place from Nov. 14 - Nov. 19
- AAA tallied results and reported **576 votes for** the Union and **394 votes against** Union
- Although the University and SUGSE has been engaged in negotiations for over a year, no agreement has been reached and negotiations have now stalled
- Students are demanding a contract

Commonly Raised Issues by Graduate Students

- Dental care
- Child care
- Paid time off
- Grievance procedure for sexual assault and harassment complaints
- Graduate student participation in faculty hiring
- Cost of living pay increases
- Graduate student mental health services
- University-subsidized graduate student housing

Using Negotiations to Blur Line Between Traditional Bargaining Subjects and Academic Control

- Southern Illinois University graduate students sought to bargain for the “freedom to create syllabi, select course materials and to determine grades”
- Temple University “graduate students bargained for an Affirmative Action Plan for ‘the selection of graduate and undergraduate candidates for admission,’ and increased ‘funding for Future Faculty Fellowships targeted towards graduate students from minority groups”
- University of Wisconsin graduate students bargained for provisions that prevent faculty from evaluating student teachers through unannounced visits
- University of Michigan graduate students sought a contract provision that non-native English speakers who passed a qualifying test would “not be pulled from their teaching assignment on the grounds that they lack English language proficiency,” even if classroom performance was inconsistent with the test results

NLRB's Proposed Rulemaking Regarding Graduate Student Assistants

Rulemaking vs. Case Law Adjudication Refresher

- **Rulemaking**

- Broadly-applicable rule developed with public participation
- Formal process for proposing and adopting rule (notice and comment)
- May only be overturned by subsequent rulemaking

- **Adjudication**

- Affects the rights of specific individuals (i.e., parties in case), but can have broader application
- Minimal standards for hearing on the record in formal adjudications
- May only be overturned by subsequent NLRB or Supreme Court decision

The NLRB's Rulemaking

- Section 6 of the NLRA authorizes the Board to make such rules and regulations “as may be necessary to carry out the provisions of the Act” in accordance with the Administrative Procedures Act (APA)
 - Historically, Board used rulemaking infrequently
 - **May 2019:** The Board released its “Unified Agenda” of anticipated regulatory actions on a broad spectrum of topics, including whether students who perform services at private colleges or universities in connection with their studies are “employees” within the meaning of Section 2(3) of the NLRA
- NLRB Chairman Ring is big proponent of rulemaking

Board's Proposed Rule and Process

- “Students who perform any services, including, but not limited to, teaching or research assistance, at a private college or university in connection with their undergraduate or graduate studies are not employees within the meaning of Section 2(3) of the Act.”
 - Relationship between school and student is *predominantly educational*, not economic
- The rebuttal comment period was extended to February 28, 2020
- Now that comment period has closed, the Board will incorporate in the rule a concise general statement of its basis and purpose
- Given other recent NLRB rulemaking, the timeline for finalizing the rule is likely to be long
 - For example, the recently issued Joint Employer rule took over a year

Comments to the Rule

- The Board issued the NPRM on September 23, 2019.
- Since then, the time for public comments has been extended three times
 - The initial comment period closed on January 15, 2020
 - Comments in response to the initial comments were due on February 28, 2020
- 13,619 total public comments submitted in response to the Rule
 - The vast majority (~90%) of comments are in opposition, but almost all were submitted by individual students or former students
 - The Office of the AG and Congressional Committee on Education and Labor oppose the rule as contrary to the text and purposes of the NLRA
 - Some organizations, including the American Council on Education, the National Association of Independent Colleges and Universities, the National Right to Work Legal Defense Foundation, submitted comments in favor of the Rule

Sample of Comments Against the Rule

- “Member Kaplan’s participation in this rulemaking is deeply concerning and may violate conflict of interest laws” – Patty Murray, United States Senate
- “We write to oppose the Proposed Rule not only to defend the rights of student workers in our states, but also to protect the interests of our states’ businesses, non-profit organizations, and governmental institutions that depend on student workers for innovative teaching and research. An exhausted and underpaid student workforce not only imperils the well-being of student workers themselves. It also threatens to compromise the quality of academic research and deter promising students from pursuing academic careers—to the detriment of all of our states’ residents . . . **The proposed rule is contrary to the text and purposes of the National Labor Relations Act**” – Gurbir S. Grewal, NJ Attorney General, and various other state AGs

Sample of Comments Against the Rule (cont'd)

- “If the NLRB overturns *Columbia* University through this rulemaking, such a move would frustrate student workers’ human right to freedom of association - Robert Scott, Chair of the Committee on Education and Labor, along with other members of Congress
- “Graduate students need a seat at the negotiating table” – Jon Bomar, National Association of Graduate-Professional Students
- “I strongly oppose the proposed rule that would undermine workers rights by robbing graduate teaching assistants and other student employees of the rights to organize and collectively bargain” – Numerous graduate students

Sample of Comments in Favor of the Rule

- “The Board should not assert jurisdiction over students that have a **primarily academic relationship** with college and universities.” American Council on Education
- “[T]he consequences of including students as employees in the Act are already being felt at universities, such as Harvard University [where] graduate students are on strike during the busiest time of the year: the exam period. . . This strike is part of the UAW’s plan to divert attention from its scandal, and it follows another UAW strike against General Motors. That strike only helped the union, not the workers.” Americans for Tax Reforms
- “[T]he rule would protect the **First Amendment rights of these students**. . . this rule would protect students from disruptions in their studies.” The Center for Worker Freedom

Challenges to NLRB Rulemaking

- There have been challenges to NLRB rules:
 - In 2012, the D.C. Circuit struck down a rule involving the expedited election rules because a three-member quorum was required to engage in rulemaking under the NLRA
 - In 2013, the D.C. Circuit and the Fourth Circuit struck down a Board rule requiring employers to post an official notice informing employees of their rights under the Act.
 - 4th Circuit: The Board does not have the authority to proactively take steps to enforce the NLRA.
 - D.C. Circuit: likened the poster to compelled speech

Anticipated Challenges to the Rule

- We anticipate that organized labor will challenge the Board's rule, once it is final. Here are some of the arguments we suspect will be made:
 - The Board is acting beyond its statutory authority by attempting to change the definition of employee
 - The rule is contrary to the purpose of the NLRA
 - The term “employee” should be defined broadly

Anticipated Challenges to the Rule (cont'd)

- Whether graduate students are truly “predominantly students?”
 - Factual issues with respect to many of the Board’s underlying assumptions
 - Examples of students working 60+ hours/week → Are students truly spending a “limited amount of time performing their additional duties?”
 - Workers are regularly filling out W-2 forms and I-9 forms and taxed on what they earn
 - There is a clear economic exchange between the university and the student workers

AFT Tipping its Hand?

- AFT has made clear that it intends to challenge the rule
 - **Argument 1: Board lacks statutory authority to promulgate rule excluding graduate workers from “employee” definition**
 - Congress did not explicitly exclude graduate students from Act’s definition of “employee,” but did so with reference to other types of laborers (i.e., agricultural laborers, domestic servants, etc.)
 - Supreme Court and Board precedent, as well as common law, set forth broad definition of “employee” under the Act
 - **Argument 2: Board’s proposed rule is “arbitrary and capricious”**
 - Board does not consider dramatic changes to higher education model over last decade
 - Board fails to provide workable standard for what constitutes a “student worker”

AFT Tipping its Hand? (cont'd)

- AFT has made clear that it intends to challenge the rule (cont'd)
 - **Argument 3: Board's Regulatory Flexibility Act analysis is improper and unreasonable**
 - Board estimates that proposed rule will cost ~\$71 for each college, university, and labor union
 - Estimated 1.5 million graduate students stand to lose bargaining rights if rule goes into effect

Legislative Response to Proposed Rule

- The Respect Graduate Student Workers Act
 - Bill introduced in the House of Representatives in November 2019
 - Currently in the House Committee on Education and Labor
 - Bernie Sanders introduced bill to the Senate on January 22, 2020
 - Sanders has previously voiced his support for graduate workers' efforts to unionize at various colleges and universities, including Boston College, Columbia, Cornell, Harvard, and the University of Chicago
 - “For far too long, the trend in our higher education system has been going in the wrong direction: longer hours, lower pay, weaker job security, and more debt. . . . *Stronger unions and worker protections are a key part of solving this crisis in our colleges and universities.*”

Composition of the NLRB and Recent Related Decisions

NLRB Composition



John F. Ring,
Chairman
Term Expires:
December 16, 2022



Marvin E. Kaplan,
Member
Term Expires:
August 20, 2020



William J. Emanuel,
Member
Term Expires:
August 27, 2021

?

?

The terms of the two Democratic Members—Lauren McFerran and Mark Gaston Pearce—have expired. They have not been replaced.

The 2020 Presidential Election



- Three-member Board likely to keep pursuing precedent-shifting agenda through August 2020 and beyond
- Presidential election will result in Board appointments
 - If Trump is re-elected → 1 Republican & 2 Democrats
 - If Democrat is elected → 3 Democrats



NLRB Appointments Coming?

- White House recently announced plan to nominate **Members Kaplan and McFerran** to new five-year terms



John F. Ring,
Chairman
Term Expires:
December 16, 2022



Marvin E. Kaplan,
Member
Term Expires:
August 20, 2020*

*White House
recently
announced plan to
nominate Kaplan
for another five-
year term.

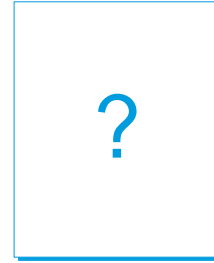


William J. Emanuel,
Member
Term Expires:
August 27, 2021



Lauren McFerran,
former Member

*White House
recently
announced plan to
nominate McFerran
for another five-
year term.



Impact of 2020 Election

- Assume a Democrat is elected president in November 2020 and assume McFerran and Kaplan are appointed to new terms:
 - The vacant 5th seat would likely be filled with a Democratic appointee within the first few months of 2021.
 - Making the Board composition 3 Republican appointees and 2 Democratic appointees.
 - Member Emanuel's seat opens in August 2021 which would permit the president to appoint an additional Democratic member.
 - Making the Board composition 3 Democratic appointees and 2 Republican appointees by September 2021.

Board Jurisdiction Over Religious Educational Institutions – Background

- In *NLRB v. Catholic Bishop*, the Supreme Court held that church-operated schools were exempt from the NLRA because exercising jurisdiction over them would result in excessive entanglement prohibited by the First Amendment
- In subsequent decisions, the Board analyzed the “substantial religious character” of the school *as a whole*, asking whether the entire “entity is . . . exempt from Board jurisdiction under *Catholic Bishop*.”
 - That test involved an analysis of all relevant aspects of the school’s organization and function, including “the purpose of the employer’s operations, the role of unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction.”

Pacific Lutheran

- The Board held that it would **generally exercise jurisdiction over religious institutions** (there: faculty organizing) **except** where the college or university successfully established it both:
 - Demonstrated, as a threshold matter, that it holds itself out as providing a religious educational environment, and
 - Held out the petitioned-for faculty members as performing a specific role in creating or maintaining the school's religious educational environment.
- Dissent: Board's new test still involved the Board in "trolling through religious beliefs"

Duquesne University

- In *Duquesne University*, the NLRB, applying the *Pacific Lutheran* test, and ordered a religiously-affiliated university to bargain with adjunct professors
- A divided D.C. Circuit vacated decision on January 28, 2020
 - Majority rejected the *Pacific Lutheran* test and relied upon D.C. test in *Great Falls*, which sets forth a “bright-line test” for assessing jurisdictional issues in NLRB cases
 - The D.C. Circuit formulated instead a new three-pronged test to determine if school is exempt from coverage under the NLRA:
 - Does the school hold itself out to students, faculty, and the community as providing a religious educational environment;
 - Is it a non-profit;
 - Is it affiliated with, owned, operated, controlled, directly or indirectly, by a recognized religious organization or with an entity whose membership is determined at least in part with reference to religion.
 - Dissent: “Not every religious school’s religious character necessarily requires that its adjuncts leave their NLRA rights at the door.”

Effect of *Duquesne* on Student Assistant Unionization at Religious Universities

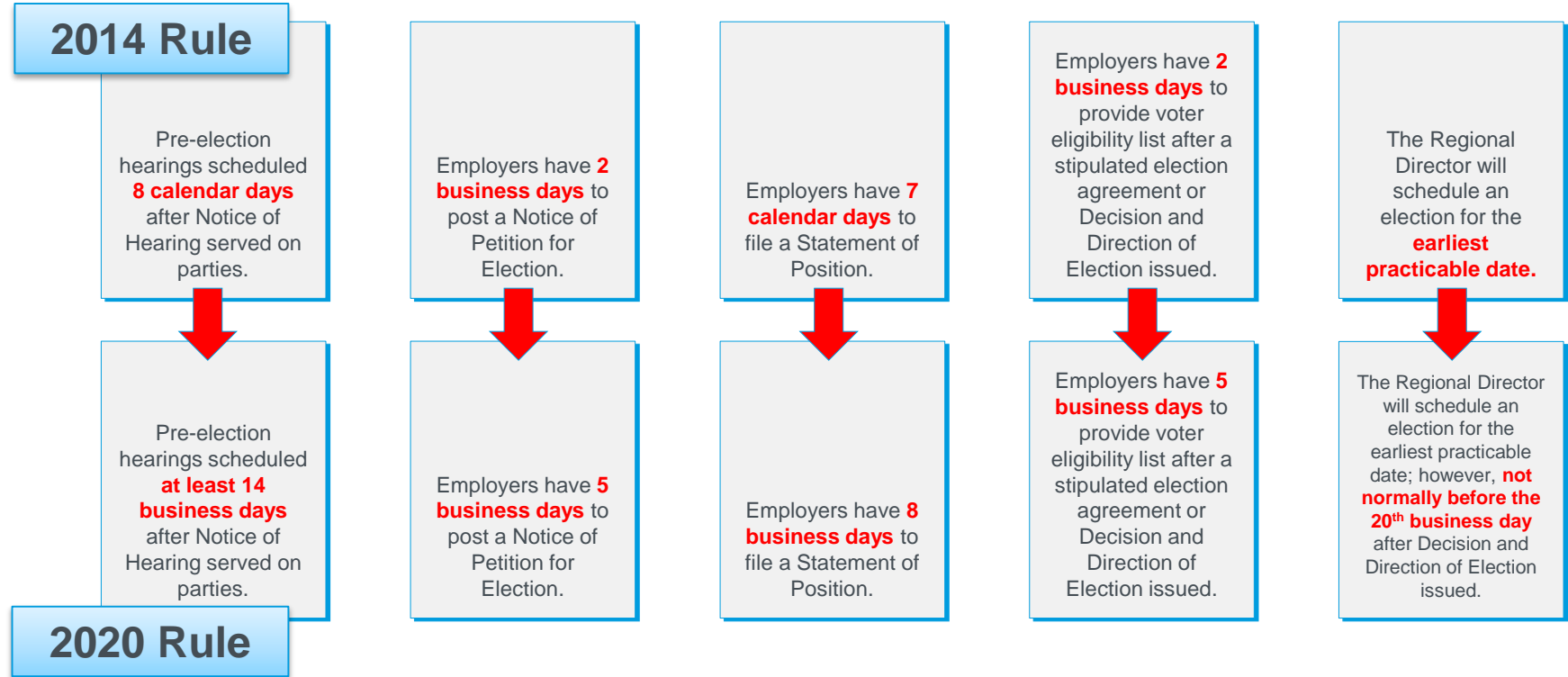
- While *Duquesne* deals with adjunct faculty, its analysis seemingly applies equally to student assistants at religious universities
 - “[T]he adjuncts possess they **key attribute of faculty members: They educate students**. . . . Once we determine that [the adjuncts] are faculty members **or teachers of any sort**, the *Great Falls* test applies, and that test does not permit us to examine the roles played by the faculty members involved in the case.”
 - “Given this vital role played by **teachers**, exercising jurisdiction over disputes involving teachers at any church-operated school presented a 'significant risk that the First Amendment will be infringed...'"
 - Several religious universities (notably Boston College and Loyola) have refused to bargain with unions. While the union withdrew its petition at Boston College, Loyola has continued to refuse to bargain now for 3 years.
 - If *Duquesne* is followed at those schools and any subsequently organized religious schools,, there are strong arguments for defeating unionization on religious grounds

NLRB's Soon to be Implemented Changes to R Case Procedure

Election Rule Background – Framework

- General Framework for Representation (“R”) Cases
 - First: Union petitions to represent employees
 - Followed by: Hearing to establish appropriate bargaining unit
- 2014 Election Rule
 - Established through notice-and-comment rulemaking
 - Submitted comments, public hearings
- 2020 Election Rule
 - Final rule **without** notice-and-comment proceedings
 - Scheduled to go into effect April 16, 2020

Election Rule Timing Changes



Additional Changes in New Election Rules

- Parties are permitted to litigate unit scope and eligibility issues in pre-election hearing.
 - *Prior Rule:* Litigation of such issues was left to RD's discretion.
- Parties may file post-hearing briefs to the RD as of right.
 - *Prior Rule:* Parties may file post-hearing briefs only with RD's permission.
- Petitioning party is also required to file a Statement of Position.
 - *Prior Rule:* Petitioning party does not file a Statement of Position.
- RD is no longer permitted to certify election results if a request for review is pending or if one could still be timely filed.
 - *Prior Rule:* RD may certify results of an election despite pending request for review.

Takeaways

- Far more reasonable timelines for employers to investigate scope and eligibility issues, as well as prepare for and litigate pre-election hearings
- More time to thoroughly vet voter eligibility lists
- More robust pre-election hearings with less RD discretion
- Additional time for employers to lawfully communicate with employees about the union election

Effect of New Rules on Hearing Timing

- For example, the timeline at **Washington University, St. Louis** was:
 - Petition filed: September 15, 2017
 - Notice of hearing: September 17
 - Statement of position due: **September 22**
 - Hearing held: **September 27-October 3**
 - Direction of Election: October 16
 - Election Scheduled: **October 25-27**
- Now, assuming petition filed on September 15, 2020, the timeline would be:
 - Statement of position due: **September 27**
 - Hearing held: **Beginning October 5, at the earliest**
 - Election scheduled: **November 13, at the earliest**

What Can Universities Do Now?

What Can Universities Do Now to be Prepared?

- Continuing to win “hearts and minds”
 - Market surveys to ensure wages and benefits are competitive
 - Addressing issues of concern before union petition filed
 - Attempting to resolve “soft” issues
- Consider enhanced graduate student engagement and empowerment through graduate student government
- Consider revising and revamping graduate student education including time to PhD and regulating admissions in different departments (see University of Chicago) <https://provost.uchicago.edu/announcements/new-funding-and-programs-phd-students>
- Enhancing student data collection and preservation
 - To be better prepare for producing lists for the NLRB
 - Ensuring a University is best positioned to manage potential strike

What Can Universities Do Now to be Prepared? (cont'd)

- Be prepared for union activity in attempt to pressure universities to voluntarily recognize
 - Corporate campaigns
 - Neutrality agreement/card check agreement, etc.
- Reviewing existing documentation to minimize chance our documents don't precisely match university's position on student assistants not being employees.
- Consider what can be done to strengthen unit definition and unit composition issues



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