

Higher Education Webinar

A Coming Resurgence of
Graduate Student Organizing in
2021?

Proskauer»

Speakers



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Agenda—What We Will Cover Today

- Retrospective of student assistant labor activity under Trump Board
- Student organizing tactics amidst COVID-19 stay-at-home orders and social distancing regulations
- The NLRB's proposed rulemaking regarding student assistants
- Developments at the NLRB
- Discussion of what colleges and universities can do now to be prepared

Retrospective of Student Assistant Labor Activity under Trump Board

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 applying pressure to universities to force recognition
 - Since Grinnell in the fall of 2018, there have been no other NLRB petitions filed
- Graduate students have organized on campuses and on social media to voice their opposition to the NLRB's proposed rule on student assistants
- COVID-19 has brought renewed activism to a number of university campuses
 - Graduate students across the country have organized in response to COVID-related health and financial concerns
 - Demands include rent relief, funding extensions, and emergency stipend increases

Most Recent Columbia University Strike

- In April 2018, teaching and research assistants at Columbia University engaged in a week-long strike in an effort to make the university negotiate the first contract
 - Columbia agreed to bargain, but no contract was reached.
- A no-strike pledge in the bargaining framework with Columbia lapsed in April 2020, and a strike authorization vote was held in March
 - 96% of students voted to authorize a strike but the Union decided not to call a strike
- In-person classes were cancelled due to COVID-19, but virtual learning continued.
- A group called Columbia Graduate Workers on Strike called a strike on April 24
 - During the brief strike, students refused to conduct virtual classes, hold office hours, or grade student work. Students who live in university housing also withheld rent starting May 1.
 - The strike was not sanctioned by the Union, and bargaining continued during the strike.

Harvard University Strike

- Following the Union election and certification, the University and Union engaged in months of collective bargaining without reaching agreement on key issues
- December 2, 2019: Harvard students embarked on a 29-day strike
 - The strike was prompted in part by disagreement over three key provisions: compensation, health care, and grievance procedures for discrimination and sexual harassment complaints.
- January 7, 2020: Parties agreed to begin mediation
- University continued to bargain “virtually” amid COVID-19.
 - Sen. Warren and Rep. Levin commented on the ongoing tension and publicly called on the parties to reach an agreement.
- Tentative agreement for one year deal reached on June 15, 2020.

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
 - Students refused to teach, hold office hours, conduct research, or post grades
- The cost of living adjustment (COLA) strike spread to several UC campuses.
- The University terminated the employment of over 80 graduate teaching assistants for participating in the strike and withholding grades.
 - The graduate student Union reached an agreement with the University in March to reinstate the health care coverage of the students terminated for participating in the strike and to permit them to apply for a spring appointment

UC Santa Cruz Strike (cont'd)

- The University and the Union have filed state ULP charges with CA's Public Employment Relations Board against each other
 - In March, the Union called for a strike authorization vote and began collecting ULP strike pledges from its members.
- At the end of March 2020, UCSC strikers launched “Strike University”
 - The “university” consists of workshops, teach-ins, and other free educational activities for graduate and undergraduate students and other community members within the UC system
- Organizers have utilized the Zoom platform to host calls with strikers across the state to discuss strategy and tactics.
- Since the onset of COVID-19, the cost of living strike has shifted form, with most strikers submitting their grades by mid April and relying on newer, digital tactics.

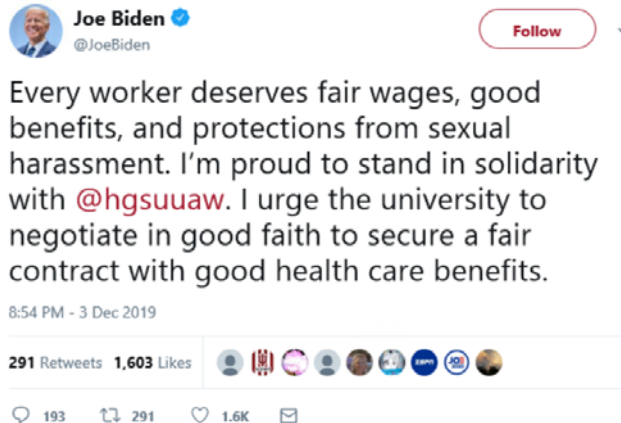
University of Chicago's Library Worker Case

- 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.
- The University has since submitted dates for bargaining, and sessions are expected to commence soon, albeit virtually.

Impact of 2020 Presidential Election on Graduate Student Organizing

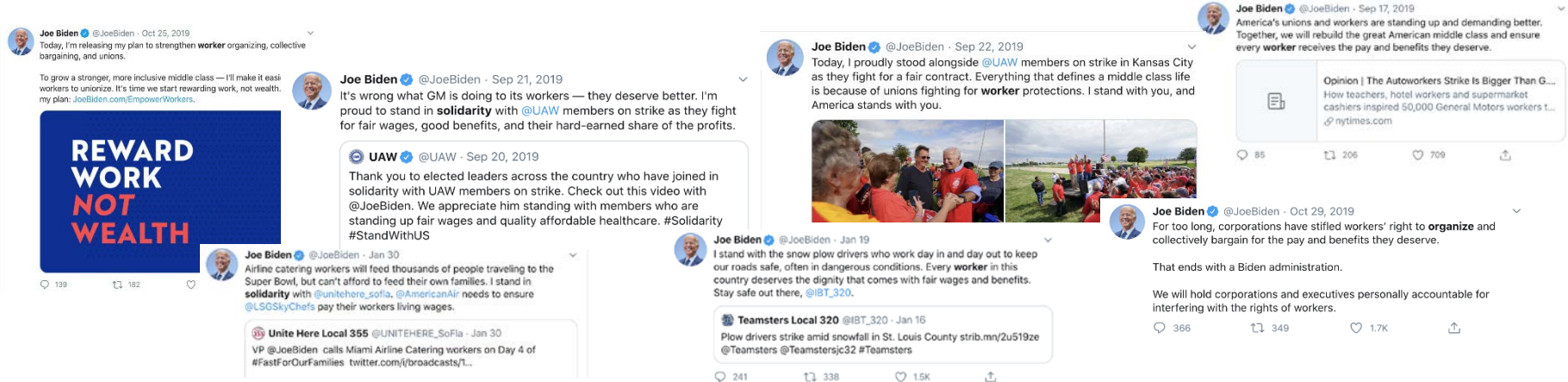
Political Support for Graduate Student Activism

- Presumptive Democratic nominee Joe Biden supports graduate student unionization.
 - Biden publicly offered his support to the Harvard Graduate Student Union-UAW when the Union went on strike in December 2019



Political Support for Graduate Student Activism

- Joe Biden has run on a pro-union platform, promising to “encourage and incentivize union organizing and collective bargaining”.
 - Biden has received endorsements from of a number of unions, including the American Federation of Teachers and the United Auto Workers.



Student Organizing Tactics Amidst COVID-19 Stay-at-Home Orders and Social Distancing Regulations

Shift in Student Demands in Response to COVID-19

- As COVID-19 threatens to trigger a global economic downturn, the issues at the heart of student activism have shifted.
- Concerns about graduate student job security grow as hiring freezes and other austerity measures are put into effect and universities nationwide are experiencing financial deficits and underfunded budgets.
- Students at various universities, including UC Santa Cruz and Columbia, have called for the Universities to bargain over the effects of the pandemic.
- Graduate students have asked Universities for:
 - Increased summer funding;
 - Rent relief; and
 - Emergency funding and time-to-degree extensions.

Shift in Student Demands in Response to COVID-19 (cont'd)

- Looking ahead to the Fall 2020 semester, universities are faced with the difficult decision of whether students will return to campus
- Student activist organizations, led by graduate workers and professional students, are vocalizing their demands that universities implement plans that prioritize the safety of students and campus workers
- These organizations assert that it is unsafe to return to in-person instruction in the fall, and they demand that campuses remain closed and universities invest additional resources into virtual instruction programming
 - Demands also include protections for graduate student workers and campus workers, the continuation of pay and benefits for all workers, and a one-year time-to-degree extension
- For students and workers who must return to campus, student groups are demanding that universities provide masks and other necessary PPE, hazard pay for on-site workers, single-occupancy dorm rooms, and expanded mental health services

Emergence of New Forms of Student Activism

- The more traditional forms of student activism have given way to new, technology-driven tactics.
- Car caravans, with signs and honking to draw attention to group demands, have replaced rallies and picket lines.
- “Strike University” is the new form of the UC Santa Cruz strike
 - Strike U is an online “think tank” for the UC cost of living movement
 - Provides free lectures, teach-ins, and “Wildcat Organizer School” where students are instructed in the basics of organizing a student-led movement against a higher-ed institution
- Intercampus coalitions and social media campaigns to raise awareness of COVID-19-related working conditions and voice common demands
 - On May 1, graduate students at more than 75 public and private universities mobilized on social media and in virtual classrooms to protest student worker conditions.

...But is it Here to Stay?

- Increased participation from those on campus and greater interconnection between students at different universities.
 - A digital platform affords greater access both on campus and across campuses.
- The trend toward cross-campus activism and social media awareness campaigns that emerged when Universities went virtual will likely continue next fall.
- Grade strikes and other forms of work stoppages and rent strikes against landlord Universities can also be expected to resurface in the fall semester.
- Messaging connected with other social and economic equality movements will likely shape graduate student activism in 2021
 - Austerity measures by Universities in response to COVID-19 have already engendered graduate student responses highlighting University endowments and administrator salaries.

Summary of Collective Bargaining among Private Universities

Summary of Collective Bargaining Status Regarding Graduate Student Unions

- Currently seven private institutions have graduate student collective bargaining agreements:
 - New York University (whose contract predates *Columbia*)
 - American University
 - Brandeis University
 - Tufts University
 - New School
 - Georgetown University
 - Brown University
 - Harvard University
- Graduate students at Columbia are still negotiating for their first contracts.

Brown University

- Brown was the most recent university, and the first Ivy League school, to achieve a ratified collective bargaining agreement with a union representing graduate students.
- In 2018, Stand Up for Graduate Student Employees (SUGSE), a student group, was elected in an agreed-upon election outside of the NLRB process.
- After 13 months of bargaining, Brown and SUGSE agreed to a 3-year collective bargaining agreement that was ratified by Union members on June 15, 2020.
 - As bargaining seemed to stall in early 2020, graduate students engaged in car caravans, email and social media campaigns, and other tech-driven tactics to voice their demands for a contract.
- The contract includes COVID-related and other worker protections, stipend increases, health, parental, and other benefits, a no-strike clause, and a union security provision.
 - Effective pay increase of 3.7% in year 1 and raises equivalent to faculty raises in years 2 and 3.
 - One-year appointment extension for certain Ph.D. candidates in light of COVID-19.
 - Relief for graduate worker-parents in the form of backup childcare and increased childcare subsidies and health care coverage.

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.
 - A second election was ordered and held on April 18 & 19, 2018 whereby:
 - **1,931 voted for** the union | **1,523 voted against** the union
- April 30, 2018: Certification of Representative issued
- After over a year of negotiations, the parties failed to reach agreements on key issues and the Union initiated a 29-day strike.
 - Following the strike, the parties agreed to participate in mediation in the hopes of reaching an agreement.
- The University halted bargaining at the end of March in order to re-evaluate the University's finances amid the COVID-19 crisis.
 - Bargaining resumed virtually on May 1.

Harvard University (cont'd)

- The University proposed a one-year contract in response to financial uncertainty, and the Union agreed to negotiate for an agreement to be effective for one year
- On June 15, 2020, after 20 months of negotiations, the University and the Union reached a tentative agreement for a one-year contract
- The tentative agreement includes a no-strike provision and extends a number of benefits and protections to graduate student workers, including:
 - 2.8% compensation increase for research assistants and teaching fellows, and an increased minimum hourly pay rate for non-salaried student workers;
 - Improved health benefits, parental support, sick leave and other time off, and commuter benefits for student workers;
 - New University policies, procedures, and committees addressing harassment and discrimination in the work place.
- The agreement is currently being considered by HGSU-UAW for ratification

Georgetown University

- The Georgetown Alliance of Graduate Employees (GAGE) was certified as the bargaining representative for graduate students after the parties agreed to an election outside of NLRB channels
- On May 8, 2020, GAGE members voted to ratify their first contract with the University, which provides:
 - Cost of living, stipend, and hourly wage increases for graduate assistants;
 - Reduction in out-of-pocket health care expenses;
 - Paid parental and medical leave for PhD assistants; and
 - Protections for graduate employees, including sexual harassment and discrimination grievance procedures.

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; parties sign Framework Agreement with mutually agreed upon principles to guide future negotiations
- Beginning in March 2020, bargaining sessions are conducted virtually via Zoom with immediate attention being given to COVID-19 relief for students.
 - No agreement has been reached between Columbia and GWC-UAW.

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
- **And now**, COVID-related support measures

NLRB's Proposed Rulemaking Regarding Student Assistants

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

- “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.)
 - **Argument 2: Board’s proposed rule is “arbitrary and capricious”**
 - Board does not consider dramatic changes to higher education model over last decade
 - **Argument 3: Board’s Regulatory Flexibility Act analysis is improper and unreasonable**
 - 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

NLRB Composition



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

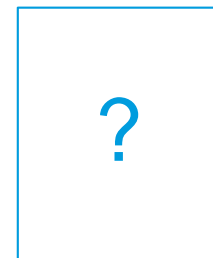
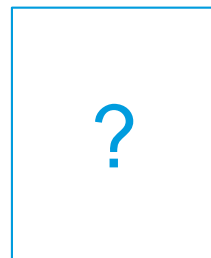


Marvin E. Kaplan,
Member
Term Expires:
August 20, 2020*

*Recent rumor that there is potential plan to nominate Kaplan for another five-year term.



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



The terms of the two Democratic Members—Lauren McFerran and Mark Gaston Pearce—have expired. On March 2, 2020, President Trump nominated Lauren McFerran to fill one of the Democratic seats.

NLRB Composition Assuming Recent Appointments are Confirmed

- Assuming most recent appointments are confirmed:



John F. Ring,
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Term Expires:
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Marvin E. Kaplan,
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*President Trump
nominated Kaplan
for another term.
Awaiting Senate
confirmation.



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



Lauren McFerran,
former Member

*President Trump
nominated
McFerran for
another term.
Awaiting Senate
confirmation.





No nomination has
been made.

*Democrats are
reportedly
recommending
Jennifer Abruzzo,
former NLRB
Attorney.

The 2020 Presidential Election



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



Impact of 2020 Election

- Assume Joe Biden is elected president in November 2020 and assume McFerran and Kaplan nominations are confirmed by the Senate:
 - 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.

Recent Change in NLRB's Jurisdiction over Religiously-Affiliated Universities

Board Jurisdiction Over Religious Educational Institutions – Background

- In *NLRB v. Catholic Bishop* (1979), 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.
 - Subsequently, the Board applied a “substantial religious character” test to determine whether religiously-affiliated school should be exempt from Board jurisdiction under *Catholic Bishop*
- In *University of Great Falls v. NLRB* (2002), the D.C. Circuit criticized the Board’s test as constitutionally problematic and formulated a three-prong jurisdictional test:
 - (1) Does the school hold itself out as providing a religious educational environment; (2) is it a nonprofit; and (3) is it affiliated with, owned, operated, controlled, directly or indirectly, by a recognized religious organization
- In *Pacific Lutheran* (2014), the Board held that it would decline to exercise jurisdiction over the petitioned-for unit of faculty members of a college or university that:
 - Holds itself out as providing a religious educational environment, and
 - Holds out the petitioned-for faculty members as performing a specific religious function.

Duquesne University

- In *Duquesne University*, the NLRB, applying the *Pacific Lutheran* test, ordered a religiously-affiliated university to bargain with adjunct professors
- On appeal, a divided D.C. Circuit Court vacated the decision in *Duquesne University of the Holy Spirit v. NLRB* (2020)
 - Majority rejected the *Pacific Lutheran* test and reinforced the D.C. Circuit standard established in *Great Falls*, which sets forth a “bright-line test” for determining whether the Board may exercise jurisdiction over a religious school
 - The Court held that the Supreme Court’s decision in *Catholic Bishop* foreclosed the application of *Pacific Lutheran*
- The D.C. Circuit Court’s decision in *Duquesne University* raised the question of whether the Board would re-evaluate its *Pacific Lutheran* precedent.

Board Overturns *Pacific Lutheran* and Adopts *Great Falls* Standard

- In *Bethany College* (2020), the Board ruled that it does not have jurisdiction over faculty at bona fide religious institutions of higher education.
 - The recent decision overrules the Board's jurisdictional standard under *Pacific Lutheran* as inconsistent with Supreme Court precedent in *Catholic Bishop*.
- The Board in *Bethany College* adopted the test announced by the D.C. Circuit in *University of Great Falls v. NLRB* (2002).
 - Under the *Great Falls* test, the Board must decline to exercise jurisdiction over faculty at an institution that:
 - Holds itself out to the public as providing a religious educational environment;
 - Is organized as a nonprofit; and
 - Is affiliated with a recognized religious organization.

Bethany College Spells Victory for Boston College and Loyola University Chicago

- In March 2017, the Boston College Graduate Employee Union (BCGEU)-UAW filed a representation petition.
 - In May, the Regional Director issued a Decision and Direction of Election, holding the graduate students were entitled to an election despite the University's religious affiliation.
- The graduate students voted to unionize and the NLRB issued a certificate of representation.
 - The University filed a request for review and refused to bargain with the union.
- In February 2018, the Union withdrew its representation petition.
 - Graduate students continued to organize and urge the University to recognize the Union and participate in collective bargaining
- Under *Bethany College*, the Board lacks jurisdiction over the graduate student teachers, and any organizing efforts would fall outside of the NLRA's protection

***Bethany College* Spells Victory for Boston College and Loyola University Chicago (cont'd)**

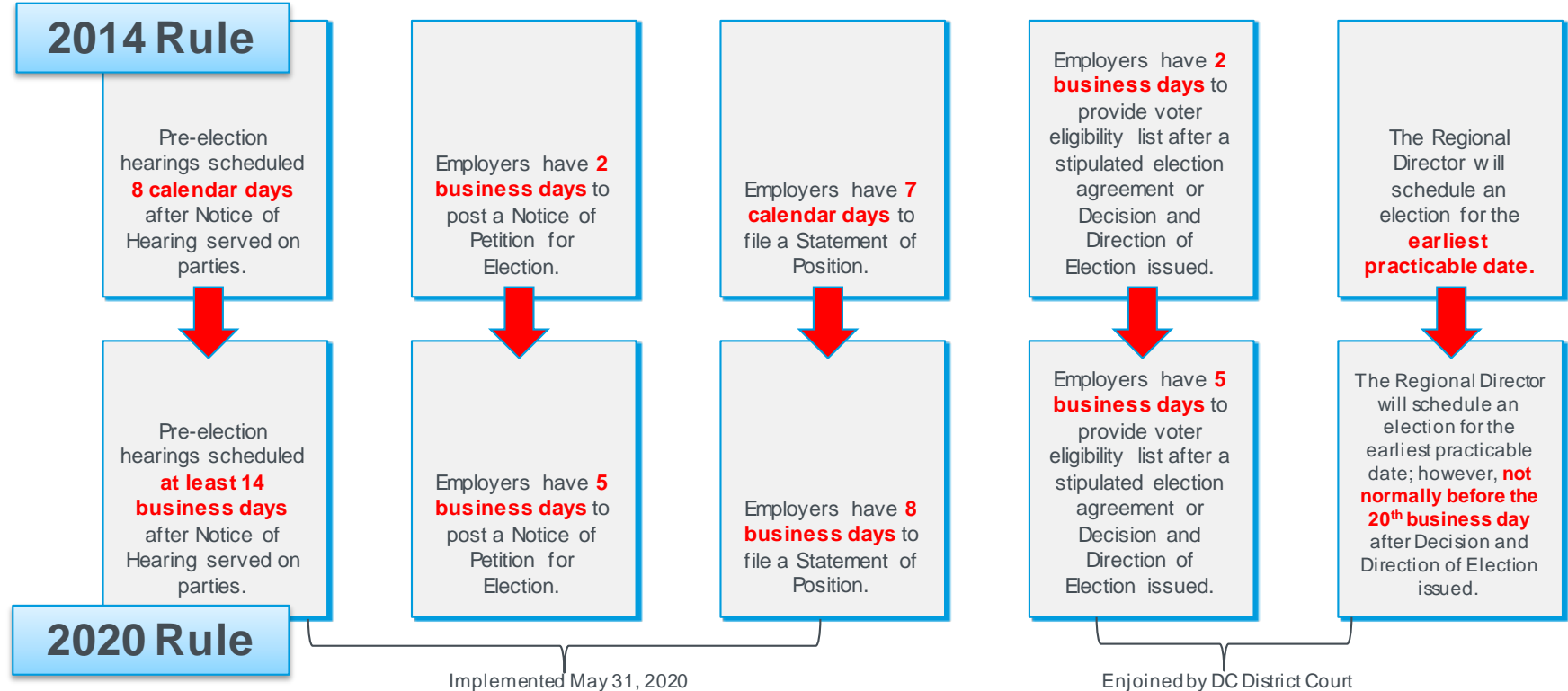
- In December 2016, SEIU filed a representation petition on behalf of graduate students at Loyola University Chicago
- The NLRB directed an election, and graduate students voted in favor of the Union in February 2017
 - The NLRB certified the Union, and the University's request for review was denied in July 2017.
- The University has not recognized the Union and has consistently refused to bargain with the Union over the past three years.
 - The University maintains that graduate students are “students in every sense of the word”, and not employees.
- With the Board's decision in *Bethany College*, the University cannot be forced to recognize or bargain with the Union under the NLRA.

NLRB Amendments 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
 - Originally scheduled to go into effect April 16, 2020, but implementation was postponed until May 31, 2020 due to legal challenges.

Election Rule Proposed 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.

Additional Changes in New Election Rules

- ✓ RD has discretion to grant a postponement of hearing and extensions for filing deadlines for good cause.
 - *Prior Rule:* Parties could only request a two business day postponement upon a showing of “special circumstances” and additional time required a showing of “extraordinary circumstances”.
- ✓ RD has discretion to issue DDE with or without a Notice of Election.
 - *Prior Rule:* Ordinarily, Notice of Election issued with DDE.
- ✓ Automatic impoundment of all ballots when a Request for Review is filed within 10 business days of issuance of DDE and remains unresolved at time of election.
 - *Prior Rule:* Party filing RFR may request impounding of ballots as a form of “extraordinary relief”.

Legal Challenge to New Election Rules

- On March 6, 2020, the AFL-CIO filed a lawsuit against the NLRB in the U.S. District Court for the District of Columbia.
 - The lawsuit alleges that the NLRB violated administrative law (APA) by issuing a substantive rule without utilizing the full notice-and-comment rulemaking process.
 - The NLRB is arguing that the rules are procedural and therefore exempt from public comment.
- The D.C. District Court rendered a decision on May 30, 2020 striking down parts of the election rule and effectively blocking the full rule from taking effect
 - The court agreed with the AFL-CIO that parts of the rulemaking effect the substantive rights of parties in representation matters and are therefore subject to the public comment requirement.
 - The court's order enjoined implementation of several provisions and remanded the provisions of the rule extending deadlines to the Board for reconsideration.
- On June 1, the NLRB announced that it would implement in full all of the election rule changes unaffected by the court order with an effective date of May 31, 2020.

Election Rule Provisions Implemented on May 31, 2020

- Timing Changes
 - Scheduling the hearing at least 14 business days from issuance of the notice of hearing;
 - Posting the notice of election within 5 business days instead of 2 calendar days;
 - Timeline for serving non-petitioning party's statement of position set at 8 business days after notice of hearing;
 - Time periods calculated as "business days" rather than calendar days.
- Changes to Pre-Election Hearing Filings
 - Petitioner required to serve a responsive statement of position;
 - Parties may file post-hearing briefs as of right within 5 business days after close of hearing.
- Clarification on RD's discretion on timing of notice of election after DDE;
- Automatic impoundment of ballots while request for review is pending; and
- Prohibition on bifurcated requests for review.

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, the timeline would be:
 - Statement of position due: **September 27**
 - Hearing held: **Beginning October 5, at the earliest**
 - Election scheduled: **October 25-27** (subject to change)

Election Rule Provisions Struck Down by Court

- Reinstitution of pre-election hearings for litigating eligibility issues;
- Timing of the date of election;
 - Provision would have mandated a 20-day wait period between the direction of election and the date of the election.
- Voter list timing;
 - The rule would have extended the deadline for providing a voter list from 2 business days to 5 business days.
- Election observer eligibility; and
- Timing of Regional Director certification of representatives.
 - The rule instructed that the RD will no longer issue certifications if a request for review is pending or before the time has passed during which a request for review could be filed

Takeaways

- As proposed, the new election rule would provide a number of benefits, including:
 - 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
- While the NLRB has implemented the rules unaffected by the DC District Court order, the Board has announced that it will appeal the Court's decision regarding the enjoined provisions.

What Can Universities Do Now?

What Can Universities Do Now to be Prepared for 2021?

- 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)
- 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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