

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
- Potential impact of the 2020 election and where President-elect Joe Biden stands on labor
- Student organizing tactics amidst COVID-19 health guidelines and university response to pandemic-related financial concerns
- The NLRB's proposed rulemaking regarding student assistants
- Developments at the NLRB
- Discussion of what colleges and universities can do now to be prepared

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Retrospective of Student Assistant Labor Activity under Trump Board

Labor Action and Disruption on Campuses

- The four 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 organized in response to COVID-related health and financial concerns
 - Demands included rent relief, funding extensions, and emergency stipend increases
 - Graduate students have continued to organize in response to universities' plans for on-campus learning during the ongoing pandemic

Labor Action and Disruption on Campuses (cont'd)

- Graduate workers at Columbia engaged in a brief strike in April 2020, refusing to conduct virtual classes, hold office hours, or grade student work
 - The strike was not authorized by the Union, and bargaining continued during the strike
- In December 2019, Harvard graduate students engaged in a 29-day strike as the University and the Union struggled to reach agreement on a first contract
- Graduate students at UC Santa Cruz embarked on a “wildcat” strike in February 2020, which led to the termination of over 70 teaching assistants
 - In August 2020, the parties reached a settlement agreement and the University reinstated 41 graduate student workers who had participated in the strike or withheld grades
- University of Chicago and unionized library workers are in the process of bargaining for their first contract, after the 7th Circuit upheld the Union’s certification in 2019

Demonstrations at Georgetown University in Response to Fall Reopening Plan

- In August 2020, Union members engaged in online and in-person demonstrations to pressure the University into impact bargaining for a separate COVID-19 agreement guaranteeing certain protections for graduate workers
 - The Union has demanded benefit protections for graduate workers unable to return to campus, PPE for those who do return to campus, and remote work for international student workers
- The Union and the University have participated in a number of bargaining sessions but have not reached an agreement
 - The Union maintains that the University has a contractual obligation to bargain over a “COVID-19” agreement separate and distinct from the parties’ current collective bargaining agreement
 - The University has stated that a separate letter of agreement is not necessary where Union concerns are already covered by their CBA, and that it is continuing to work with the Union to develop policies addressing any concerns not already covered by the contract
- As the University has formally denied the Union’s grievance, the Union has requested expedited arbitration of the issue in accordance with the procedures provided in the CBA

University of Michigan Strike

- The Graduate Employees' Organization (GEO-AFT), the union representing graduate student instructors and graduate student staff assistants at the University of Michigan went on strike on September 8, 2020 in response to the University's fall reopening plan
 - The Union's demands included greater COVID-19 protections, such as the right to work remotely for graduate student instructors, and more transparency in reopening planning
 - The strike involved traditional, albeit socially distanced, picket lines and "die-ins" to protest the University's decision to return to in-person learning
- The University filed a ULP and, when the Union voted to continue the strike on September 9, filed for injunctive relief and a temporary restraining order in state court
 - Michigan law prohibits public employees from striking and the current contract between the University and the Union contains a no-strike clause

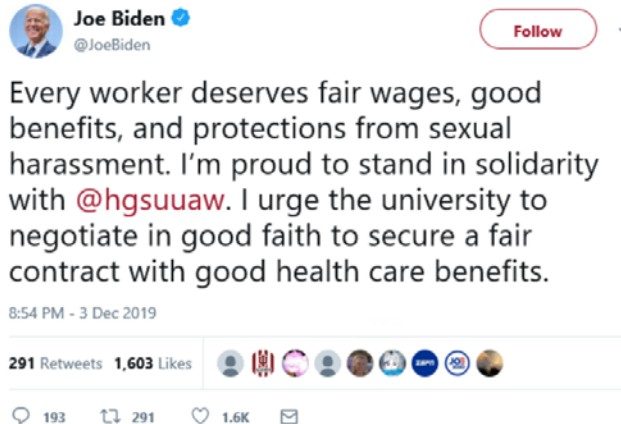
University of Michigan Strike (cont'd)

- With the pending threat of an injunction, the Union voted to accept an offer from the administration on September 16
- Under the terms of the offer, the Union and the University will form a joint panel to review requests from graduate student workers to work remotely
 - Additionally, the University will provide additional funding for daycare and extend the age of children who are covered under the University's child care support plan
- Over the course of the 8-day strike, the Union gained strong inter- and intra-campus support
 - Student residential assistants (RAs) and student dining hall took part in their own actions to protest the University's reopening policies
 - Faculty members in various departments vocalized their support for the strike

Impact of 2020 Presidential Election on Graduate Student Organizing

Political Support for Graduate Student Activism

- President-elect 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 ran on a pro-union platform, promising to “encourage and incentivize union organizing and collective bargaining”
 - Biden received endorsements from of a number of unions, including the AFL-CIO, American Federation of Teachers, Teamsters, National Education Association, Service Employees International Union, United Auto Workers, and American Federation of State, County and Municipal Employees

The collage features several tweets and social media posts:

- Joe Biden** (@JoeBiden) · Oct 25, 2019: "Today, I'm releasing my plan to strengthen **worker** organizing, collective bargaining, and unions." Below the tweet is a blue graphic with the text "REWARD WORK NOT WEALTH".
- Joe Biden** (@JoeBiden) · Sep 21, 2019: "It's wrong what GM is doing to its **workers** — they deserve better. I'm proud to stand in **solidarity** with @UAW members on strike as they fight for fair wages, good benefits, and their hard-earned share of the profits." Below the tweet is a tweet from **UAW** (@UAW) · Sep 20, 2019: "Thank you to elected leaders across the country who have joined in solidarity with UAW members on strike. Check out this video with @JoeBiden. We appreciate him standing with members who are standing up fair wages and quality affordable healthcare. #Solidarity #StandWithUS".
- Joe Biden** (@JoeBiden) · Jan 30: "Airline catering workers will feed thousands of people traveling to the Super Bowl, but can't afford to feed their own families. I stand in **solidarity** with @unitehere_sofia, @AmericanAir needs to ensure @LSGSkyChets pay their workers living wages." Below the tweet is a tweet from **Unite Here Local 355** (@UNITEHERE_SoFia) · Jan 30: "VP @JoeBiden calls Miami Airline Catering workers on Day 4 of #FastForOurFamilies twitter.com/i/broadcasts/1...".
- Joe Biden** (@JoeBiden) · Sep 22, 2019: "Today, I proudly stood alongside @UAW members on strike in Kansas City as they fight for a fair contract. Everything that defines a middle class life is because of unions fighting for **worker** protections. I stand with you, and America stands with you." Below the tweet is a photo of Joe Biden with UAW members on strike.
- Joe Biden** (@JoeBiden) · Sep 17, 2019: "America's unions and workers are standing up and demanding better. Together, we will rebuild the great American middle class and ensure every **worker** receives the pay and benefits they deserve." Below the tweet is a link to an opinion piece: "Opinion | The Autoworkers Strike Is Bigger Than G... How teachers, hotel workers and supermarket cashiers inspired 50,000 General Motors workers t... nytimes.com".
- Joe Biden** (@JoeBiden) · Jan 19: "I stand with the snow plow drivers who work day in and day out to keep our roads safe, often in dangerous conditions. Every **worker** in this country deserves the dignity that comes with fair wages and benefits. Stay safe out there, @IBT_320." Below the tweet is a tweet from **Teamsters Local 320** (@IBT_320) · Jan 16: "Plow drivers strike amid snowfall in St. Louis County strib.mn/2u519ze @Teamsters @Teamstersjc32 @Teamsters".
- Joe Biden** (@JoeBiden) · Oct 29, 2019: "For too long, corporations have stifled workers' right to **organize** and collectively bargain for the pay and benefits they deserve. That ends with a Biden administration. We will hold corporations and executives personally accountable for interfering with the rights of workers."

Biden's "Empower Workers" Labor Platform

- President-elect Joe Biden has said he would sign the Protecting the Right to Organize Act ("PRO Act") into law if elected
 - The Act would bring sweeping changes to the NLRA in organized labor's favor
- Biden has explicitly stated his support for the provisions of the PRO Act that would:
 - Impose financial penalties against employers for interfering with workers' organizing efforts, and Biden states that he would also seek to hold company executives personally liable;
 - Compel mediation in first contract negotiations where agreement is not reached within 90 days;
 - Biden would also require companies to pay a penalty for bargaining in bad faith
 - Make required attendance at employer organizing campaign meetings an unfair labor practice;
 - Codify the more expansive Browning-Ferris joint employer rule and the 2014 representation election rule with shorter union election timelines; and
 - Permit workers to engage in secondary boycotts and prevent employers from permanently replacing strikers

Biden's “Empower Workers” Labor Platform (cont'd)

- During the 2020 presidential campaign, Biden touted his long pro-union political record and outlined other pro-labor changes he would enact as president that would undoubtedly tip the scales in the labor-management relationship
 - Allow unions to secure recognition through a card-check process, denying employers the ability to demand an election through the NLRB's election mechanism;
 - This is more extreme than the PRO Act, which would permit recognition of a union on a card-check authorization **only** if it is determined that the employer improperly interfered in an election
 - Establish a federal right for public sector employees, including educators, to join a union and to engage in collective bargaining;
 - Ban “right to work” laws and allow unions to collect dues from all workers “who benefit from union representation” regardless of union membership;
 - Appoint pro-labor Board members; and
 - Extend the right to organize and bargain collectively to independent contractors

Biden's Pro-Labor Transition Team An Early Indicator of Pro Labor Agenda

- President-elect Joe Biden's initial preparations for his transition to the White House suggest that Biden intends to live up to his pro-labor rhetoric from the campaign trail
- Biden named several prominent labor figures as part of his transition team
 - Former AFL-CIO general counsel Lynn Rhinehart, AFSCME bargaining official Shaun O'Brien, and former NLRB attorney and current CWA counsel Jennifer Abruzzo will assist the new administration in transitioning the federal labor agencies
- Biden and his transition team have actively sought input from organized labor on the transition plan
 - Biden has held virtual meetings with business executives and with leaders from several unions, including the AFL-CIO, United Auto Workers, and Service Employees International Union
 - The AFL-CIO organized a meeting between affiliate unions and the transition team where the unions imparted their recommendations for the transition and labor policy moving forward

Student Organizing Tactics Amidst COVID-19 Health Guidelines 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, Georgetown, and Columbia, have demanded that Universities bargain over the effects of the pandemic
- Graduate students have asked Universities for:
 - Wage and health benefit protections, rent relief, emergency funding and time-to-degree extensions, and transparency in reopening planning

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

- With the start of the Fall 2020 semester, universities implemented a variety of reopening plans, with many administrators opting for a hybrid in-person and remote learning program
- 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
 - In anticipation of the Fall semester, these organizations asserted that it was unsafe to return to in-person instruction in the fall and demanded that campuses remain closed and universities invest additional resources into virtual instruction programming and support for workers
- As universities have permitted students to return to campus for in-person instruction, these groups have vocalized their dissatisfaction with the universities' safety planning
 - Some graduate students, including those at the University of Michigan, have engaged in both traditional and new-age forms of activism, including in-person picket lines and zoom protests

Emergence of New Forms of Student Activism

- At the height of the pandemic, more traditional forms of student activism gave way to new, technology-driven tactics
 - Car caravans, with signs and honking to draw attention to group demands, offer an alternative to rallies and picket lines
 - As COVID-related restrictions have softened, graduate students have deployed a hybrid form of both traditional and newer, technology-driven activism
- “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 that 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 continued in the fall semester
- Grade strikes and other forms of work stoppages and rent strikes against landlord Universities can also be expected to resurface
- 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

Pandemic's Uncertain, Long-term Impact on Campus Unionization

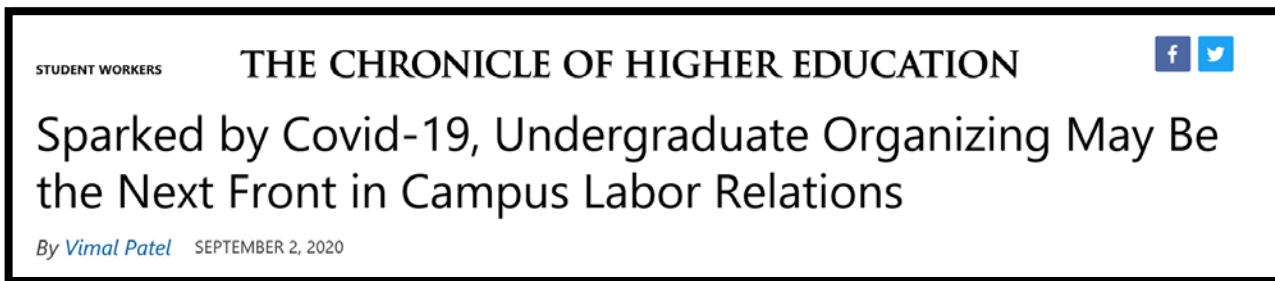
- In response to the COVID-19 pandemic, colleges and universities have begun to make significant cuts to faculty and administrative staff to address budget deficits
 - Some universities and colleges have accelerated plans to layoff faculty positions, while others have initiated the process for implementing layoffs and furloughs in the coming year
- Exacerbating pre-pandemic financial issues, the crisis has led to steep cuts in state government funding and has caused a decrease in enrollment
 - Students and families are opting for a gap year rather than pay full price for an online education
- Additionally, school costs have risen sharply as universities and colleges have needed to implement campus-wide testing, contact tracing, and quarantine protocols
- The Coronavirus is projected to cost higher education institutions \$120 billion
 - Estimate includes costs from increased student aid, lost housing fees and sports-related revenue, advanced public health protocols, and other COVID-related measures

Pandemic's Uncertain, Long-term Impact on Campus Unionization (cont'd)

- Starting with the first wave of the pandemic in the spring of 2020, colleges and universities began making cutbacks to faculty as well as to academic programs
 - Some schools have opted to make cuts to course offerings, eliminating various majors in the humanities and liberal arts
- A post-pandemic trend is emerging from some of the most elite universities in the country: pausing admissions to non-STEM graduate programs
 - Many graduate programs in the humanities and liberal arts, including programs at UC Berkley and the University of Pennsylvania, have stopped taking new Ph.D. students
 - Harvard's Graduate School of Arts and Sciences has suspended admissions for at least five of its departments for 2021 "due to the ongoing impacts of the COVID-19 pandemic"
- These cost-saving measures could either galvanize graduate student activism or serve to weaken on-campus support for student unionizing efforts, especially where the reductions are to unions' traditional powerhouse of grad support— the liberal arts

Undergraduate Organizing the New Frontier?

- Uncertainties in student employment caused by the COVID-19 pandemic have led undergraduate student workers to organize
 - Student workers at Kenyon College (Ohio) have demanded a card check neutrality agreement, enabling the students to elect to unionize outside of a formal NLRB election



- Similar to graduate students, undergraduate concerns include continued pay, job security, and safety as Universities unveil plans for the Fall and Spring semesters
- Could undergraduate unionization be the new frontier in campus labor relations?

Summary of Collective Bargaining among Private Universities

Summary of Collective Bargaining Status Regarding Graduate Student Unions

- Several 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
 - Columbia University (Postdoctoral researchers)
- Graduate students at Columbia are still negotiating for their first contract

Recent Collective Bargaining Recap

- Brown University
 - After 13 months of bargaining and campus disruption, Brown and the Union agreed to a 3-year collective bargaining agreement in June 2020
- Harvard University
 - The University and the Union agreed to a one-year, open-shop agreement in June 2020 after 20 months of negotiations and a 29-day strike earlier in the year
- Georgetown University
 - The University and the Union reached their first contract in May 2020 after thirteen months of bargaining, organizing, and activism
- Columbia University
 - Despite ongoing bargaining sessions since November 2018, Columbia and the Union have yet to reach an agreement

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 and remote vs in-person learning

NLRB's Proposed Rulemaking Regarding Student Assistants

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
- Now that comment period has closed, the Board will incorporate in the rule a concise general statement of its basis and purpose
- Member McFerran’s recent confirmation will likely add further delay to publication of the Board’s final student teacher rule
 - While the comment period has been closed for 10 months, the understanding is that Member McFerran is reviewing the final rule and writing a dissent
 - It is possible Member McFerran could delay her review until just before Biden’s inauguration
- What can universities do if the final rule is published and is not immediately enjoined?
 - Stay tuned, we will discuss later in the webinar

Comments to the Rule

- The Board issued the NPRM over a year ago 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
- 13,740 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

Challenges to NLRB Rulemaking

- There have been previous challenges to NLRB rules:
 - In 2012, the D.C. Circuit struck down a rule involving the expedited election rules because a three-member quorum is required to engage in rulemaking
 - In 2013, the D.C. Circuit and Fourth Circuit struck down a Board rule requiring employers to post a notice informing employees of their rights under the Act.
 - D.C. Circuit: likened the poster to compelled speech
 - 4th Circuit: Board does not have authority to proactively take steps to enforce the NLRA
 - Most recently, in 2020, the D.C. District Court struck down provisions of the Board's 2019 Election Rule, finding that certain provisions were substantive, not procedural, and were subject to public comment

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
 - Whether graduate students are truly “predominantly students?”
 - 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 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 in Light of 2020 Election

NLRB Composition



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



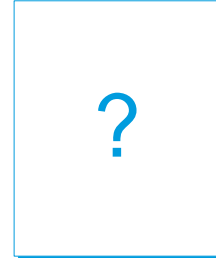
Marvin E. Kaplan,
Member
Term Expires:
August 27, 2025



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



Lauren McFerran,
Member
Term Expires:
December 16, 2024



No nomination has
been made.

Impact of 2020 Election

- With the election of Joe Biden, the vacant 5th seat will 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
- It will take some time before Democrats control the Board as another Board vacancy will not occur until August 2021 when Member Emanuel's term expires
 - Once this seat becomes vacant, President-elect Biden will appoint an additional Democratic member, making the Board composition 3 Democratic appointees and 2 Republican appointees by September 2021
- However, there is a possibility, depending on the outcome of the Senate runoff elections in Georgia, that a Republican-controlled Senate could delay confirmation of Biden's NLRB appointees and maintain the Republican controlled Board until December 2022

Possible Nominees for the Board's Open Democratic Seat

- Four potential candidates for the 5th NLRB seat have emerged in the 5 weeks since the 2020 election, and all four attorneys have substantial union affiliations
 - Kent Hirozawa, a former Board member under the Obama Administration and current partner at union-side firm Gladstein Reif & Meginniss;
 - Jennifer Abruzzo, a former NLRB Deputy General Counsel and current special counsel to the Communication Workers of America (CWA);
 - David Prouty, general counsel for SEIU Local 32BJ; and
 - Gwynne Wilcox, attorney at union-side firm Levy Ratner
- Discussions regarding the vacant Democratic seat are still ongoing, and no unions have announced any specific endorsements

What will January 20, 2021 Mean for the NLRB?

- Soon after his inauguration, President-elect Joe Biden will likely appoint Member Lauren McFerran as Chairwoman of the Board
 - Although not as impactful without majority control of the Board, the Chairperson position holds considerable power, including oversight of the NLRB's regulatory agenda
- President-elect Biden could take the unprecedented step of terminating General Counsel Peter Robb before the expiration of his term in November 2021
 - Some in the labor community have called on Biden to fire NLRB General Counsel Peter Robb to facilitate a more timely change of the Board
 - No president has ever fired a sitting General Counsel, so there are both legal and political considerations involved in replacing Robb before next November
 - If Biden opts to terminate General Counsel Robb before his term expires next year, Jennifer Abruzzo (CWA) is thought to be a top candidate for the GC position

NLRB Amendments to R Case Procedure

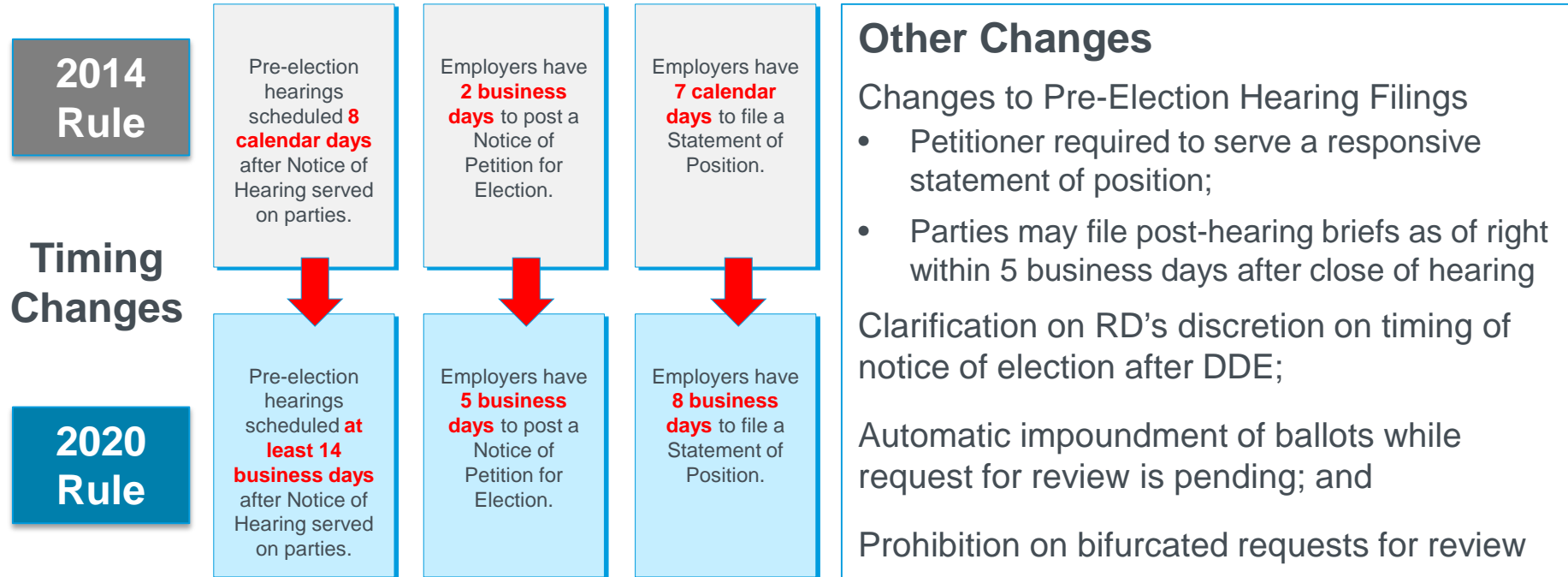
Election Rule Background – Framework

- General Framework for Representation (“R”) Cases
 - Representation petition followed by a hearing to establish appropriate bargaining unit
- 2014 Election Rule
 - Established through notice-and-comment rulemaking
- 2020 Election Rule
 - Final rule **without** notice-and-comment proceedings
 - Implemented in part on May 31, 2020 after a delay caused by legal challenges
- July 2020 Notice of Proposed Rulemaking
 - On July 28, 2020, the Board published a NPRM proposing two additional amendments
 - Eliminate the requirement that employers provide the union with available personal email addresses and home and cell phone numbers of eligible voters
 - Provide absentee ballots for employees on military leave

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 Proposed Timing Changes



Time periods calculated as "business days" rather than calendar days.

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)

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 is in the process of appealing the Court's decision regarding the enjoined provisions

Other Noteworthy Labor Law Developments

AFL-CIO Challenge to Board Election and Recognition Rules Stayed by Federal Judge

- On October 23, 2020, Judge Beryl Howell of the D.C. District Court suspended the AFL-CIO's action challenging a series of Board rules published in March 2020, pending resolution of an appeal of another AFL-CIO lawsuit currently before the D.C. Circuit Court
 - The 2020 rules significantly change Board policy and procedures concerning blocking charges, voluntary recognition, and the formation of Section 9(a) collective bargaining relationships in the construction industry
- Judge Howell determined that it “would promote interests of judicial economy” to allow the D.C. Circuit Court to weigh in on the Board's pending appeal of the court order vacating certain provisions of its 2019 representation election rules before moving forward in this suit
 - The Board has argued that both of the AFL-CIO's lawsuits should have been brought before the D.C. Circuit and not in federal district court because the NLRA gives the Circuit Court authority to review “orders” of the Board
- The district court's stay likely means that any future challenges to Board rulemaking will be held until the D.C. Circuit case is completed, which could extend into 2022

Possible Extension of “Critical Period” Policy

- Tucked in a footnote of a one-page decision, Members Kaplan and Emanuel recently signaled an interest in reviewing the Board’s “critical period” policy for setting aside election results due to misconduct or party interference
 - The Board will set aside election results and order a new election where either the union or the employer commit an unfair labor practice during the “critical period” leading up to an election
 - Currently, under *Ideal Electric and Manufacturing Co.* (1961), the critical period extends from the time of the filing of a petition for election until the date of the election
- Members Kaplan and Emanuel suggested that the current length of the “critical period” was not sufficient to “adequately protect[] employees from election interference by coercive threats made immediately prior to the filing of an election petition.”
 - If the critical period is extended, employers, unions, or workers could object to coercive conduct and other labor violations occurring during a unionization campaign but before workers have petitioned the Board to hold an election

Judicial Review of Representation Decisions

- Generally, the Board's representation decisions are not directly reviewable by federal courts, outside of the circumstances specified in Section 9(d)
- The Supreme Court articulated an exception to this rule in *Leedom v. Kyne* (1958)
 - Federal district courts may set aside a certification decision only where the Board has exceeded its delegated powers and has acted contrary to a specific prohibition in the Act
- In September 2020, a federal judge in the District Court of South Carolina re-affirmed the very narrow scope of the *Kyne* exception
 - The court dismissed a suit brought by a union seeking review of a Board decision blocking a subset of the employer's employees from organizing in a separate bargaining unit
 - The judge found that the court lacked jurisdiction over the matter as the union did not make "a strong and clear demonstration that the Board violated a clear, specific, and mandatory statutory provision"

D.C. Circuit: Board Must Distinguish Contrary Precedent When Certifying Bargaining Units

- On October 23, 2020, the D.C. Circuit refused to enforce the Board's certification of two separate bargaining units where the Board did not address an earlier contrary decision
 - Initially, the Regional Director found that the proposed bargaining unit was inappropriate under the *PCC Structurals* “community of interest” standard where the interests of the excluded workers were not sufficiently distinct from the interests of the employees in the petitioned-for-unit
 - However, the RD later certified two proposed bargaining units that continued to exclude the same workers and directed an election without explaining the departure from the previous decision
 - The Board denied the employer's request for review
- The D.C. Circuit remanded the case to the Board, finding that the RD and the Board failed to properly distinguish contrary Board precedent or the RD's first decision in this case
 - Despite the employer's arguments, neither the RD nor the Board explained why the community of interest analysis in the first decision in the case did not govern the union's second petition
 - Although the Court clarified that the Board need not distinguish every case cited by a party, it must distinguish contrary precedent that is directly on point and cannot ignore the argument

Board Jurisdiction Over Religious Educational Institutions

- In *Bethany College* (2020), the Board ruled that it does not have jurisdiction over faculty at bona fide religious institutions of higher education
 - The decision overrules the Board's jurisdictional standard under *Pacific Lutheran* as inconsistent with Supreme Court precedent cautioning against entanglement with the First Amendment
 - The *Pacific Lutheran* standard, which considered whether the petitioned-for faculty members perform a specific religious function, faced heavy criticism over the past two decades from the D.C. Circuit
- The Board in *Bethany College* adopted the test announced by the D.C. Circuit in *University of Great Falls v. NLRB* (2002)
 - Under *Great Falls*, 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
- The fight about the scope of the NLRB's religious exemption isn't over...(*Manhattan College v. NLRB*)

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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

What Can Universities do if the Board's Student Assistant Rule Goes Into Effect?

1. Universities with a collective bargaining agreement in effect
 - Must wait until the expiration of the CBA before withdrawing recognition from the union
 - See e.g., NYU withdrew recognition from UAW following a 2005 report from faculty, students, and administrators on the impact of graduate assistant union representation
2. Universities in the middle of collective bargaining with a recognized union
 - Possible to challenge the union's status as bargaining representative on the basis that the threshold question of the bargaining unit's "employee" status has not been satisfied
 - See e.g., *NLRB v. Wang Theatre* (1st Cir. 2020)
 - ***Beware: Universities should consult legal counsel before taking such action***
3. Universities with no ongoing collective bargaining and no recognized union
 - Can decline to recognize union on the basis that the proposed bargaining unit does not consist of employees per the student assistant regulation

Alternative to Contentious Board Processes: Private Election Agreements

- The landscape has changed dramatically since 2016.
 - No longer the case that NYU is the only private university with collective bargaining relationship- now this list includes: Harvard, Brown, Columbia, Georgetown, etc.
 - President-elect Biden is big friend to labor
 - Legal challenge to/reversal of NLRB's graduate student rulemaking appears to be certainty
- As a result, it may be more politically difficult for a university to take strong stance against graduate student organizing
- Universities that are unwilling to take very aggressive stance against graduate student organizing should consider a private election agreement akin to Cornell and Brown agreements including provisions such as:
 - Limits on union access
 - Clear protections for university and faculty free speech
 - Protocol for fair and private election
 - No strike pledge
 - Dispute resolution/election objection mechanisms



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