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The National Labor Relations Board
and the Future of Collective Bargaining in Higher Education

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“The National Labor Relations Board and the Future of Collective Bargaining”

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A. Introduction

The National Labor Relations Board has been in the spotlight like never before over the past two years, particularly for higher education institutions. Controversial decisions; new proposed rules on elections and employer posting requirements; a suggestion that the Supreme Court’s decision in NLRB v. Yeshiva University case should be revisited to some degree; a re-visiting of the Brown University case on the employee status of graduate teaching assistants: a very active outreach to unrepresented employees; and, of course, the largest issue of all: whether the NLRB itself was lawfully constituted since the beginning of 2012. Certainly, this last issue has received considerable press, and it is the first of several topics to cover.

But as we review these cases and Board initiatives, there is a larger conflict at play here, one that is embedded in virtually every one of these topics. That conflict is what is the NLRB supposed to be. In simple terms, is it a neutral arbiter of federal labor relations policy? Or is it the engine for advancing the goals of organized labor, and, further, as some may opine, the engine for re-creating a vibrant middle class? In these most recent initiatives and decisions that we will review, we see an activist Board that has believed that its function is more than just functioning as an impartial agency deciding cases, but rather as an agency that is charged with advancing collective bargaining and union organizing as much as possible. The question going forward is whether the newly constituted Labor Board will take the same approach.

B. The Recess Appointments and Beyond

Right now, we have a fully functioning NLRB. On July 30, the U.S. Senate voted to confirm a slate of three Democratic and two Republican nominees to the NLRB, giving the agency a full complement of five members for the first time in a decade. The confirmed Board members are: Chairman Mark Gaston Pearce (D), Kent Hirozawa (D), Nancy Schiffer (D), Philip Miscimarra (R) and Harry Johnson (R).1

1 Mark Pearce has been Chair of the Board since August 2011 and is a former union/plaintiff attorney from Buffalo. Kent Hirozawa has been chief counsel to Chairman Pearce until his recent appointment to the Board and represented unions and employees in New York City. Member Nancy Schiffer was associate general counsel and deputy general counsel to the UAW for many years and also associate general counsel to the AFL-CIO for over a decade. Philip Miscimarra is a career labor lawyer in Pennsylvania on the management side. Harry Johnson has also been a management side labor lawyer in California for his entire career.
The confirmation came about as the result of an agreement reached earlier to avert a controversial rule change known as the “nuclear option,” which would have involved a simple majority of senators voting to change the rules to allow executive nominations to be subject to a simple majority vote threshold. As part of the agreement, President Obama withdrew the nominations of Sharon Block and Richard Griffin, who had been serving under controversial recess appointments, and replaced them with Hirozawa and Schiffer.

Behind much of the debate were two political points of view about the NLRB. On the one hand, many Republicans argued that the Board is, or should be, a neutral arbiter of federal labor law and Board members should not be cheerleading for organized labor. On the other hand, many Democrats would contend that the NLRA is designed to “encourage collective bargaining” and thus activist Board members who seek to expand NLRA rights are simply doing their job. Thus, when Board Democratic Members have sought to require NLRA postings by all employers or have tried to streamline election rules to get to representation elections quicker, the two points of view clearly come into focus. The controversy led to deadlock on the normal process of Presidential Board appointments, and with the deadlock, ultimately came Obama’s move to appoint his NLRB members during what he thought was a Senate Recess, thus insulating the appointments from the full scrutiny of a divided U.S. Senate.

But behind the politics was also a real legal issue about the constituency of the NLRB over the past two years and all of it centered on the extent of the President’s authority to recess appoint.

Thus, in *Noel Canning Divisions of Noel Corp. v. NLRB*, 705 F. 3d 490 (D.C. Cir., January 25, 2013), the U.S. Circuit Court for the District of Columbia decided that President Obama’s recess appointments to the NLRB in early 2012 were not valid. Current Members Sharon Block and Richard Griffin, along with Terrence Flynn who later resigned, were appointed by the President on January 4, 2012.

The particular case was before the Court because the company, found guilty of unfair labor practices by the Board, argued that Members Block and Griffin, who sat on the case, were not properly appointed. The employer in the case asserted *inter alia* that the Board did not have a quorum for the conduct of business on the operative date that it found the company guilty of unfair labor practices. Citing *New Process Steel v. NLRB*, 130 S.Ct.2635 (2010) which held that the Board cannot act without a quorum of three members, the company said, that even though there were five members on the Board on the date the Board ruled against the company, three of them were invalidly appointed, and thus there was no such quorum on that date. While Board Chairman Pearce and Member Hayes had been confirmed by the Senate, Members Flynn, Block and Griffin were all “recess appointments.” The employer claimed “the purported appointments of the last three members of the Board were invalid under the Recess Appointments Clause of the Constitution, Article II, Section 2, Clause 3.”
In its decision, the Court’s three judge panel (Chief Judge Sentelle and Justice Henderson, with a concurring opinion by Justice Griffith) had to deal with the term “the Recess” as use in the Recess Appointments Clause of the Constitution. That clause reads as follows:

**The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.**

The employer argued that the term “Recess” as used in the Constitution only refers to “the intersession recess of the Senate, that is to say, the period between the sessions of the Senate when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President.” In contrast, the NLRB argued that the alternative appointment procedure created by the Clause “is available during intrasession ‘recesses,” or breaks in the Senate’s business when it is otherwise in continuing session.”

**The Court agreed with the employer and found that the term “the Recess” only refers to the intersession breaks between formal sessions of Congress and not breaks or adjournments that may take place during a session of Congress.**

To reach that result, the Court first looked at the clear language of the Clause. It noted that the phrase “the Recess” clearly envisions but one recess, not many.

Unlike “a” or “an,” that definite article [“the”] suggests specificity. As a matter of cold, unadorned logic, it makes no sense to adopt the Board’s proposition that when the Framers said “the Recess,” what they really meant was “a recess.” This is not an insignificant distinction. In the end, it makes all the difference.

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It is universally accepted that “Session” here refers to the usually two or sometimes three sessions per Congress. Therefore, “the Recess” should be taken to mean only times when the Senate is not in one of those sessions.

Thus, turning to the case at hand, since the President made three appointments on January 4, 2012, after Congress began a new session on January 3 and while that new session continued, the appointments were invalid at their inception. Because the Board therefore lacked a quorum of three members when it issued its decision in the case at bar on February 8, 2012, its decision must be vacated.

As a secondary argument nullifying the appointments, the Court also said that the vacancies did not “happen,” i.e. take place during “the Recess” but were only “in existence” at that time. The Constitution’s language mentions filling “vacancies that may happen during the Recess of the Senate.” Thus, since the vacancies here did not come into being during “the Recess,” there was no authorization to fill them.
The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience or facilitation of the functions of government. In light of the extensive evidence that the original public meaning of “happen” was “arise,” we hold that the President may only make recess appointments to fill vacancies that arise during the recess.

The Court acknowledged that its interpretation placed it at odds with the 9th Circuit and the 2nd Circuit in this issue—both courts contending on the “in existence” approach—but nevertheless felt that its interpretation of the Constitutional language was the correct one.

While the *Noel Canning* case was definitive on the issue of the President’s lack of power to make the NLRB appointments, it is true that other cases involving the same issue are also pending, including *Richards v. NLRB*, No. 12-1973 and *Lugo v. NLRB*, No. 12-1984, both out of the Seventh Circuit. Oral arguments were heard in those cases on November 30, 2012. In addition, contrary opinions from other circuits were cited by Board in these cases: *Evans v. Stephens*, 387 F. 3d 1220 (11th Cir., 2004); *U.S. v. Woodley*, 751 F. 2d 1008 (9th Cir., 1985); *U.S. v. Allocco*, 305 F. 2d 704 (2d Cir., 1962)

Because of the case’s enormous constitutional significance, coupled with the split in the circuits, the U.S. Supreme Court granted certiorari on June 24, 2013 (*NLRB v. Noel Canning*, No. 12-1281; 2013 WL 1774240) and the case is expected to be decided next year. In granting cert, the Court also asked the parties to address the additional question of whether the president can make recess appointments when the Senate convenes every three days for so called pro-forma sessions.

According to a report by the Congressional Research Service, President Obama has made 32 recess appointments. President Bush made 99 and President Clinton made 95 such appointments. There has been a total of 329 intrasession appointments since Ronald Reagan’s first term.

Following *Noel Canning*, the Board made it clear that it would continue to issue decisions and that pending a definitive resolution by the Supreme Court, it would fulfill its obligations under the Act and continue to process cases.

But things got worse for the Board when two other Circuit Courts weighed in on the same issues. First, the Third Circuit on May 16 agreed with the DC Circuit and ruled that the Recess Appointments Clause is strictly limited to the intersession breaks between the annual Senate sessions. *NLRB v. New Vista Nursing & Rehabilitation*, 2013 WL 2099742, 195 LRRM 2781 (3rd Cir., 2013)

In going even further than the D.C. Circuit, the Third Circuit held that the appointment of Board Member Becker, who was appointed during a March 2010 intrasession break, was also invalid, potentially opening up for challenge an even larger number of active NLRB cases in which Member Becker participated.
Then, on July 17, the Fourth Circuit Court of Appeals similarly ruled that the appointments were invalid. *NLRB v. Enterprise Leasing Co.*, (No. 12-1514, 4th Cir., 2013). The Court thus ruled that the appointments of Members Block, Flynn and Griffin were all invalid intrasession actions and thus cannot stand. The Board had argued that the intrasession appointments were supported by earlier decisions from two other circuits, *Evans v. Stephens*, 387 F. 3d 1220 (11th Cir., 2004) and *United States v. Woodley*, 751 F.2d 1008 (9th Cir., 1985). But the Court said that the President’s power to make recess appointments refers to “something different than a generic break in proceedings,” supporting the view that such appointments can only be made during the interval between Senate sessions. The Court said that its holding “adheres to the plain language of the Appointments and Recess Appointments Clause and is consistent with the structure of the Constitution, the history behind the enactment of these clauses, and the recess appointment practice of at least the first 132 years of our Nation.”

Now, with a fully constituted, a fully confirmed Board, the cases going forward will not likely be challenged. However, many cases over the past two years remain in limbo, and the Supreme Court’s ultimate ruling on this issue will not only determine whether those cases remain good law or whether they are all null and void. Beyond that, the major Constitutional issue of the President’s right to make recess appointments will affect the balance of power between the Executive and Legislative branches, not only with regard to NLRB appointments, but also for a myriad of other Presidential appointments for which Senate confirmation is necessary.

If the Supreme Court ultimately decides that the Board was lawfully appointed, then the cases we will discuss herein remain good law. But if the Supreme Court ultimately rules against the Board, many of the controversial decisions that have been in the spotlight over the past year or two will be essentially null and void. While this may provide a sigh of relief to employers, it may be a short lived joy. For indeed, now that there is a new fully confirmed Board with a Democratic majority, even if struck down, the controversial decisions issued by the Board may once again be issued in a new form with new titles and different parties by the new Board.

Thus, reviewing those previously decided cases still is extremely important.

C. Decisional Law under the Obama Board

1. Prohibition on confidentiality during investigations

*Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012)

In this case, the employer’s human resources consultant routinely would ask employees making a complaint not to discuss the matter with their coworkers while the company’s investigation was going on. The Board found such a blanket approach to be in violation of the Act by restricting employees from discussing working conditions and matters under investigation.
To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs the employees’ section 7 rights. … In this case, the judge found that the Respondent’s prohibition was justified by its concern with protecting the integrity of its investigations. Contrary to the judge, we find that the Respondent’s generalized concern with protecting the integrity of its investigations was insufficient to outweigh employees’ Section 7 rights. Rather, in order to minimize the impact on Section 7 rights, it was the Respondent’s burden “to first determine whether in any given investigation witnesses needed to be protected, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up.” [Citing Hyundai America Shipping Agency, 357 NLRB No. 80 (2011)].

In The Boeing Company and Joanna Gamble, Case No. 19-CA-089374 (July 26, 2013), an administrative law judge of the NLRB held that Boeing violated the Act by disciplining an unrepresented employees for communicating with coworkers about a recently completed human resources investigation into her allegations against her supervisor. The company’s routine use of the confidentiality notice to prohibit employee witnesses from discussing ongoing HR investigations with other employees violated the Act. While the ALJ said that the company’s arguments in support of the need for confidentiality in investigations is “not without factual or legal support,” he was “bound to follow the Board precedent unless and until it is reversed by the Supreme Court.” Significantly, after the unfair labor practice charge was filed, the company revised its policy so that instead of “directing” employees to maintain confidentiality, it would simply “recommend” to employees that they “refrain from discussing this case with any Boeing employees other than company representatives investigating this issue or union representatives.” The ALJ found this change insufficient to avoid a finding of liability. The policy still indicated the company’s desire that the matter remain confidential and “nothing in the revised notice can reasonably be interpreted as an assurance to employees that they are nevertheless ‘free’ to disregard the company’s recommendation/request and ‘discuss the case if he or she chooses to do so.’” Such a “recommendation” was seen as to have a “reasonable tendency to chill employees from exercising their statutory rights.”

2. Solicitation cases: off duty employee restrictions

A frequent issue in the area of solicitation policy has to do with the degree to which an employer can restrict off-duty employees from coming back to the facility to engage in solicitation activities. The Board has issued three decisions on rules governing off-duty access over the past year and has made it more difficult for employers to carry out any restrictions on off-duty employees.

In Saint John’s Health Center, 357 NLRB No. 170 (December 30, 2011), the Board majority found unlawful a rule under which off duty employees were generally prohibited access to most of the interior of the hospital, except the cafeteria, although the rule does make exceptions for retirement parties, and baby showers and other hospital-sponsored events. In the Board’s opinion, since the rule did not uniformly prohibit access
by off duty employees seeking entry to the property for any purpose, as allegedly required by Tri-County Medical Center, 222 NLRB 1089 (1976), and thus it was unlawful interference with employees’ Section 7 rights. Member Hayes dissented claiming that Tri-County was being improperly read and the reasonable exceptions in this case did not render the rule unlawful.

This theme was continued in Sodexo America, 358 NLRB No. 79 (July 3, 2012), where the rule on off-duty access in that case stated:

Off duty employees are not allowed to enter or re-enter the interior of the Hospital or any other work areas outside the Hospital except to visit a patient, receive medical treatment, or to conduct hospital-related business.

1. An off duty employee is defined as an employee who has completed his/her assigned shift.
2. Hospital-related business is defined as the pursuit of the employee’s normal duties or duties specifically directed by management.
3. Any employee who violates this policy will be subject to disciplinary action.

The Board again cited Tri-County Medical Center, 222 NLRB 1089 (1976) and noted that the third part of the test requires a ban on off-duty access for all purposes without exception. While the Board did concede in this case that allowing exceptions to visit patients or to receive medical care were valid (because such exceptions are unrelated to the employees’ employment and access is allowed in those case the same as other members of the public), the Board found that the exception to allow access “to conduct hospital-related business” was an impermissible exception.

Member Hayes dissented again noting that “the end result of the majority’s holding is that a hospital cannot maintain a valid off duty access rule if it also allows employees to engage in innocuous activities such as picking up paychecks, completing employment-related paperwork or filling out patient information. This was undoubtedly not the scenario intended by the Board in Tri-County.

In J.W. Marriott, 359 NLRB No. 8 (September 28, 2012), the Board (Pearce and Block, with Hayes dissenting), struck down another rule that dealt with access by off-duty employees.

Associates are not permitted in the interior areas of the hotel more than fifteen minutes before or after their work shift. Occasionally, circumstances may arise when you are permitted to return to interior areas of the hotel after your work shift is over or on your days off. On these occasions, you must obtain prior approval from your manager. Failure to obtain prior approval may be considered a violation of Company policy and may result in disciplinary action. This policy does not apply to parking areas or other outside nonworking areas.
The majority first cited Saint John’s, supra and Sodexo America LLC, 358 NLRB No. 79 (2012), and indicated that similar rules were struck down in those cases because they violated the third prong of Tri-County Medical Center, 222 NLRB 1089 (1976), namely, that a policy barring off duty employees from returning to the workplace should “uniformly prohibit access to off-duty employees seeking entry to the property for any purpose.” Similarly here:

The Respondent’s rule is not a uniform prohibition of access; rather, it prohibits off-duty employee access except in certain unspecified circumstances subject to a manager’s “prior approval,” giving the Respondent broad – indeed, unlimited – discretion to “decide when and why employees may access the facility.” Sodexo America, supra. See Saint John’s Health Center, supra (“In effect, the respondent is telling its employees, you may not enter the premises after your shift except when we say you can.”)

The majority did not see its decision as contravening Tri-County in any way. But Member Hayes interpreted the majority as re-writing the third prong of the Tri-County test. In dissenting here, as he did in Sodexo and Saint John’s, Hayes argues that the third prong “prohibits discrimination against union activity and does not require a blanket prohibition on all off-duty access.”

Requiring employers to prohibit all access in order to prohibit any makes it virtually impossible for an employer to draft an enforceable rule restricting off-duty employee access. For example, what if an employee forgets her medication at the workplace and faces a medical emergency if she cannot retrieve it? The Act cannot reasonably be interpreted to force employers to choose between inhuman rigidity and giving off-duty employees free rein to the interior of their facilities. Here, because union activity is treated no differently from any other group activity under the access rule, I would find these rules lawful.

With regard to outside groups soliciting on employer property, the Advice Division of the Officer of the General Counsel issued an opinion on August 14, 2013 in a case involving Wal-mart and a group known as OUR Walmart, an organization that generally protests Wal-mart’s employment policies around the country. The question that had been referred to Advice by Region 13 was whether the store violated Section 8(a)(1) by requesting that the police remove non-employee organizers from its parking lot, consistent with the employer’s lawful rule, where the officers allowed the employee involved in the demonstration to stay on the premises, albeit while depriving him of the use of the OUR Walmart van to carry on demonstrations. Wal-Mart Stores, Inc., Case 13-CA-99526, Division of Advice, August 14, 2013

Wal-mart’s Solicitation and Distribution of Literature Policy stated that employees can “participate in solicitation and/or the distribution of literature outside its facilities during non-working time.” However, non-employees and organizations who wish to
solicit on the property outside the buildings must first obtain permission from the employer. If approved, the outside group or non-employees are given a location on the sidewalk (but not the parking lot) and cannot have more than 15 individuals soliciting at the same time. The policy is uniformly enforced against all outside groups.

One of Wal-mart’s employees was a member of OUR Walmart. On his off day from work, he drove to the employer’s story in a minivan owned by the organization, accompanied by an OUR Walmart organizer. The van was clearly identifiable as belonging to the organization and was equipped with a large video projection system and stadium-style speakers. When the duo arrived they parked the van two rows from the front of the store and proceeded to set up the audio and video projection systems. Once done, the employee began playing loud music, including “We’re Not Gonna Take It” and union songs from the 1920s and 30s. Then they began to project video clips onto the store’s façade from earlier protests.

The police arrived about 10 minutes later and found a crowd of 20 demonstrators on the site, of which only the employee and his wife were Wal-mart employees. The police told the group that the loud music violated the local city ordinance. Another officer talked to the manager who told them that the store does not allow outside groups to solicit in the parking lot. The police told the group to leave but did tell the employee and his wife that they could stay because he was a current employee.

The Advice Division concluded that since the demonstrators were predominantly non-employee Our Walmart organizers and congregated around the van, it was reasonable for the employer to conclude that this was a non-employee demonstration, despite the presence of two employees. Citing *Lechmere Inc. v. NLRB*, 502 U.S. 527, 537 (1992), the Division noted that as a general rule an employer may exclude non-employee organizers from the property. Accordingly, the employer’s policy was lawful. In this case the employer was merely enforcing this lawful rule. Applying the rule, the police permitted the one employee who attended the demonstration to stay and advised the non-employees that they could take the van to the shoulder of the road that runs adjacent to the Wal-Mart property. While the actions of the police deprived the employee of the use of the van, “the employer did not unreasonably conclude that the van was owned and operated by OUR Walmart and was an instrument of non-employee solicitation requiring prior approval.” No Section 7 rights of the employee were violated.

3. **Union dues checkoff survives contract expiration**

In *WKYC-TV*, 359 NLRB No. 30 (December 12, 2012), the NLRB overturned 50 years of precedent by ruling that an employer’s obligation to check off union dues continues after the expiration of a collective bargaining agreement. In a 3-1 decision, the Board reversed *Bethlehem Steel*, 136 NLRB 1500 (1962) which established that an employer had no obligation to continue a dues checkoff provision after the contract expired. This had been basic labor law for half a century.
In reversing this long standing precedent, the Board majority (Pearce, Griffin and Block) found that the 1962 Board had no rational basis for ever saying that the provision should expire and that instead the dues check off clause, like any other term and condition of employment, should continue as part of the status quo, even if the agreement itself has expired.

The Board began by noting that “it has long been established that an employer violates Section 8 (a) (5) when it unilaterally changes represented employees’ wages, hours and other terms and conditions of employment without providing their bargaining representative prior notice and a meaningful opportunity to bargain about the changes. NLRB v. Katz, 369 U.S. 736, 742 (1962).

Under this rule, an employer’s obligation to refrain from unilaterally changing these mandatory subjects of bargaining applies both where a union is newly certified and the parties have yet to reach an initial agreement, as in Katz, and where the parties’ existing agreement has expired and negotiations have yet to result in a subsequent agreement… Litton Financial Printing Division v. NLRB, 501 U.S. 190, 198 (1991)

The Board then stated:

An employer’s decision to unilaterally cease honoring a dues-checkoff arrangement established in an expired collective bargaining agreement plainly contravenes these salutary principles. Under settled Board law, widely accepted by reviewing courts, dues checkoff is a matter relating to wages, hours and other terms and conditions of employment within the meaning of the Act and is therefore a mandatory subject of bargaining…. The status quo rule, then, should apply to dues checkoff, unless there is some cogent reason for an exception. We see no such reason.

It is true, the Board acknowledged, that some contract clauses do indeed expire with the contract. Thus, no strike, arbitration, union security, management rights clauses do not survive the expiration of a collective bargaining agreement, even though they are mandatory subjects of bargaining.

In agreeing to each of these arrangements, however, the parties have waived rights that they otherwise would enjoy in the interest of concluding an agreement, and such waivers are presumed not to survive the contract.

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The rationale behind these narrowly drawn exceptions to Katz does not apply to dues checkoff. Unlike no-strike, arbitration and management rights clauses, a dues-checkoff arrangement does not involve contractual surrender of any statutory or nonstatutory right. Rather, it is simply a matter of administrative convenience to a union and employees whereby an employer agrees that it will establish a system
where employees may, if they choose, pay their union dues through automatic payroll deduction.

The Board then rejected an argument that section 302(c) of the Act, whereby employers are prohibited from making payments to unions with the exception of certain payments, including dues checkoff, as long as the employer had received a written authorization which shall not be irrevocable for a period of more than one year or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner. This language does not, in the Board’s view, require that dues checkoff end with the contract. It only has to do with the employee’s individual right to revoke such authorization, not the employer’s right to end it.

In addressing the Bethlehem Steel decision itself, the Board explained that the decision in that case made it clear that union security clauses do not survive the expiration of a contract, and that was appropriate, but that the prior Board erred by then ruling that dues checkoff was so inextricably bound up with union security that it, too, had to expire with the end of the collective bargaining agreement.

The Board apparently reasoned that because the checkoff provision in the contract “implemented” the union-security provisions, the proviso to Section 8(a)(3) dictated that dues checkoff, as well as union security, expired upon contract termination. If so, the Board’s finding is a non sequitur. Although the contracts in Bethlehem Steel contained both union-security and dues-checkoff provisions, that is by no means true of all or even nearly all collective bargaining agreements. Parties have the option of negotiating either without the other; they may agree to union security, but not dues checkoff, and vice versa.

The best example of this, the Board explained, was in right-to-work states, where contracts cannot have union security clauses but often have dues checkoff provisions.

The Board also stressed that dues checkoff, unlike union security clauses, is a voluntary matter. An employee does not have to have his or her dues checked off; the employee has the right to select or reject dues checkoff as the method by which to pay union dues.

Finally, the Board opined that if dues checkoff ends with the contract, then “presumably it would be as unlawful for an employer, postcontract expiration, to continue to honor a dues checkoff arrangement as it would be to continue to honor a union-security arrangement.” But, they underlined, no cases since Bethlehem have so

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2 The rationale for the expiration of union security clauses with the expiration of the contract can be found in Section 8(a)(3), which states that even though an employer cannot discriminate against employees because they refrain from union activity (as well as support it), “nothing in this Act. shall preclude an employer from making an agreement with a labor organization. to require as a condition of employment membership therein.” The Board has interpreted this language to mean that the maintenance of union membership as a condition of employment can only be required under a contract that comports to the proviso. Once the contract expires, once no agreement is in place, then the employees should be free to refrain from union membership and not be penalized with loss of employment.
held and indeed the Board has held quite the contrary and allowed employers to continue dues checkoff if they so desired without running afoul of the Act.

Lastly, the Board did not apply the new rule retroactively, but only prospectively, given the fact that Bethlehem Steel has been good law for 50 years and employers should have been able to reasonably rely upon it.

In dissent, Member Hayes tries to link the existence of a dues checkoff provision with the existence of a union security provision. Both should stand or fall together, and he cites various federal circuit court decisions to support that view. The Board has long understood that a union security clause operates as “a powerful inducement for employees to authorize dues checkoff, and that it is unreasonable to think that employees would generally wish to continue having dues deducted from their pay once their employment no longer depends on it.”

Further, he notes that the elaborate language that sometimes accompanies employees’ rights to revocation can be confusing and employees may not understand their limited ability to revoke, whereas the expiration of the contract is a clean line under which the obligation ceases. Employees need to be protected in their rights to refrain, as well as engage in, union activity and support.

Member Hayes also argues that dues checkoff should be in that special grouping of clauses that are not part of the status quo and must be seen in the context of economic power of the parties and not just whether or not a particular statutory right is being waived. In the end, he contends that the majority’s decision to upset 50 years of settled law was based on another agenda.

My colleagues know well that an employer’s ability to cease dues checkoff upon contract expiration has long been recognized as a legitimate economic weapon in bargaining for a successor agreement. The ability of parties to wield such weapons is an integral part of the system of collective bargaining that the Wagner Act and the Taft-Hartley Act envisioned for the peaceful resolution of industrial disputes. To strip employers of that opportunity would significantly alter the playing field that labor and management have come to know and rely on. Indeed, even in times of union boycott and other economic actions in opposition to an employer’s legitimate bargaining position, the employer will be forced to act as the collection agent for dues to finance this opposition. This is the unspoken object of today’s decision, and it contravenes the well-established doctrine that the Board may not function “as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.”
4. Duty to bargain with union over disciplinary actions prior to first contract

In *Alan Ritchey Inc.*, 359 NLRB No. 40 (December 14, 2012), the NLRB ruled that an employer must bargain with a union before imposing disciplinary discipline on a unit employee after the union has been certified but before a first contract has been negotiated. A Board panel of Chairman Pearce and Members Griffin and Block ruled that, like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and employers cannot impose certain types of discipline unilaterally.

The Board first explained that once a union is chosen as the representative of employees, an employer cannot continue to act unilaterally with respect to terms and conditions of employment, even where it had previously done so routinely or at regularly scheduled intervals. However, the Board notes that it

...has never clearly and adequately explained whether (and to what extent) this established doctrine applies to the unilateral discipline of individual employees. We now conclude that it does, and that an employer must provide its employees’ bargaining representatives notice and the opportunity to bargain with it in good faith before exercising its discretion to impose certain discipline on individual employees.

In the particular case before the Board, the employer imposed the discipline at issue for absenteeism, insubordination, threatening behavior and the failure to meet efficiency standards. Sanction ranged from formal warning to discharge and was imposed pursuant to a five step progressive disciplinary system. For the period in question, many employees were disciplined for one or more offenses with varying degrees of discipline. In all cases, company witnesses testified that some discretion was involved as to what discipline was imposed. The General Counsel for the Board argues that each act of discipline was a unilateral change because it did not represent an automatic execution of established policy (e.g. a standard wage increase on the anniversary of an employee’s employment.)

In analyzing whether bargaining was required in each case, the Board first noted that, to be bargainable, a unilateral change must have a “material, substantial and significant impact on the employees’ terms and conditions of employment.” *Toledo Blade Co.*, 343 NLRB 385 (2004).

Disciplinary actions such as suspension, demotion and discharge plainly have an inevitable and immediate impact on employees’ tenure, status or earnings. Requiring bargaining before these sanctions are imposed is appropriate.. because of this impact on the employees and because of the harm caused to the union’s effectiveness as the employees’ representatives if bargaining is postponed.

On the other hand, lesser forms of discipline – like oral and written warnings – have less impact on employees, and, held the Board, “bargaining over these lesser sanctions –
which is required insofar as they have a ‘material, substantial and significant impact’ on terms and conditions of employment – may properly be deferred until after they are imposed.”

The Board summarized its basic conclusions as follows:

Accordingly, where an employer’s disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintained the fixed aspects of the disciplinary system and bargain with the union over the discretionary aspects (if any), e.g. whether to impose discipline in individual cases, and, if so, the type of discipline to impose. The duty to bargain is triggered before the suspension, demotion, discharge or analogous sanction is imposed, but after the imposition for less sanctions, such as oral or written warnings.

While this seems clear in concept upon first reading, the Board’s remaining explanations are anything but clear when trying to explain what the nature of that pre-imposition bargaining will look like:

At this stage, the employer need not bargain to agreement or impasse, if it does so afterward. In exigent circumstances, as defined, the employer may act immediately, provided that, promptly thereafter, it provides the union with notice and an opportunity to bargain about the disciplinary decision and its effects. Finally, if the employer has properly implemented its disciplinary decision without first reaching agreement or impasse, the employer must bargain with the union to agreement or impasse after imposing discipline.

In elaborating on what this means, the Board explained that this duty would involve “sufficient advance notice to the union to provide for “meaningful discussion concerning the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion.”

It will also entail providing the union with relevant information, if a timely request is made, under the Board’s established approach to information requests….. The aim is to enable the union to effectively represent employees by providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action. But the employer is not required to bargain to agreement or impasse at this stage; rather, if the parties have not reached agreement, the duty to bargain continues after the imposition of the discipline.

Moreover, the Board said there will be some “exigent circumstances” where the employer has “a reasonable, good faith belief that an employee’s continued presence on the job presents a serious, imminent danger to the employer’s business or personnel and in these cases, no pre-imposition bargaining need occur.
Finally, the Board said that the employer “need not await an overall impasse in bargaining before imposing discipline so long as it exercises its discretion within existing standards.”

After fulfilling its pre-imposition duties as described above, the employer may act, but must continue to bargain concerning its action, including the possibility of rescinding it, until reaching agreement or impasse.

Among its other reasoning, the Board stated that bargaining over such decisions make sense because “to hold otherwise and permit employers to exercise unilateral discretion over discipline after employees select a representative … would render the union that purportedly represents the employees impotent.”

5. Duty to disclose witness statements to union

In *Stephens Media d/b/a Hawaii Tribune-Herald*, 359 NLRB No. 39 (December 14, 2012), the Board ruled that a newspaper company that fired a union steward for alleged insubordination had an obligation to turn over to union representatives a witness statement by the steward’s co-worker that described the confrontation they had had.

In 1978, the Board, in *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978) had held that an employer did not have to turn over to the union “witness statements” obtained during investigations into allegations of misconduct. But it was not entirely clear what constituted a witness statement. The Board had followed up on *Anheuser-Busch* in the case of *New Jersey Bell*, 300 NLRB 42 (1990), where it found that an employer’s investigative reports were not witness statements because: 1) the individual did not review the report, read them, or adopted them as a reflection of any statement she may have made and 2) the individual did not request, nor did she receive any assurances of confidentiality, as was the case in *Anheuser-Busch*.

In this case, the Board noted that the employee involved had indeed reviewed her statement- that had been written up by a company official – and signed it. However, she had not been given any assurances that the statement would remain confidential. As a result, the Board said the document was not a witness statement entitled to be kept from disclosure.

In addition, the Board found that the document was not protected from disclosure because it was a document prepared in anticipation of litigation. While the Board did agree that the work-product privilege applies to documents that are specifically created in anticipation of litigation, that privilege does not apply to documents produced in routine investigations.
the work-product privilege does not apply to documents produced pursuant to routine investigations conducted in the ordinary course of business, as it is limited to those documents specifically created in anticipation of foreseeable litigation.

In this case, management did meet with the witness “on advice of counsel” and the manager’s handwritten note on the document states that it was “prepared at the advice of counsel in preparation for arbitration.” However, that was insufficient to create a privilege. For one thing, the attorneys did not direct the manager to prepare a written statement. Second, the note inserted on the document regarding it being prepared at the advice of counsel” could have been written at any time prior to the hearing in this case and thus “does not evince the Respondent’s motivation at the time the statement was prepared…. [the] note amounts to nothing more than a conclusory assertion of privilege that has little evidentiary value.”

While this case seemed significant when issued, it was dwarfed by the Board’s subsequent decision in American Baptist Homes of the West d/b/a Piedmont Gardens, 359 NLRB No. 46 (December 21, 2012). In Piedmont, the Board officially overruled Anheuser-Busch, Inc., supra and stated that unions were not to be automatically denied access to witness statements obtained by the employer but instead the Board would utilize a “balancing test” in assessing union requests for the names and statements of witnessed interviewed during a company investigation.

In this case, a charge nurse (Berg) had seen a certified nursing assistant (Bariuad) sleeping while on duty. The HR director told the charge nurse to prepare a written statement and further told her that her statement would be confidential. Meanwhile, another charge nurse (Hutton) saw the same CNA sleeping, wrote up the incident and slipped it under the HR Director’s door. She later clarified the statement at the request of the HR Director.

In investigating the case, the HR Director asked another CNA who was on duty with the employee under investigation to write up a statement as to how often she had seen him sleeping while on duty. She did so.

After reviewing all the statements, the HR Director fired the employee. The union asked for “any and all statements that were used as part of your investigation.” The request was denied, citing Anheuser-Busch.

The Board majority (Pearce, Griffin and Block) found that “the rationale of Anheuser-Busch is flawed.” The Board majority noted that unions are entitled to “relevant information necessary to the union’s proper performance of its duties… including information that the union needs to determine whether or not to take a grievance to arbitration.” However, if an employer asserts that the relevant information is ‘confidential,’ then the Board balances the union’s need for the information against
any legitimate and substantial confidentiality interests established by the employer. Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979).

In Anheuser-Busch, the Board then had decided that “witness statements are fundamentally different from the type of information contemplated in Acme and disclosure of witness statements involves critical considerations that do not apply to requests for other types of information.” The current Board, however, rejected this premise.

We are not persuaded that there is some fundamental difference between witness statements and other types of information that justifies a blanket rule exempting such statements from disclosure.

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We recognize that, in some cases, there will be legitimate and substantial confidentiality interests that warrant consideration, including the risk that employers or unions will intimate or harass those who have given statements, or that witnesses will be reluctant to give statements for fear of disclosure. But the same risks are presented by disclosure of witness names, for which there is no exemption, even where an employer asserts a good faith concern of confidentiality, threats, or coercion.

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We find no basis to assume that all witness statements, no matter the circumstances, warrant exemption from disclosure. Rather we find it more appropriate to apply the same flexible approach that we apply in cases involving witness names. That test requires that if the requested information is determined to be relevant, the party asserting the confidentiality defense has the burden of proving that a legitimate and substantial confidentiality interest exists, and that it outweighs the requesting party’s need for the information. See Detroit Edison, 440 U.S. 301, 318-320 (1979); Jacksonville Area Association for Retarded Children, 316 NLRB 338, 340 (1995). The Board considers whether the information withheld is sensitive or confidential based on the specific facts of each case. See Northern Indiana Public Service Co., 347 NLRB 210, 211 (2006). As stated above, the party asserting the confidentiality defense may not simply refuse to furnish the requested information but must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party. Detroit Newspaper Agency, 317 NLRB 1071, 1072 (1995)

Member Hayes (whose term ended in December) dissented from the opinion, finding no rationale for upsetting a 34 year precedent. He noted that withholding witness statements from unions would not and had not hindered a union’s ability to investigate grievances or
prepare for arbitration. Unions are free to obtain summaries of such statements without the statements themselves.

The bright rule of *Anheuser-Busch* has for over 30 years supported employer efforts to assure employee participation in the employer’s investigatory process, protected participating witnesses from intimidation, retaliation or harassment by the union or coworker, enabled employers to effectively conduct investigations of workplace misconduct and facilitated the quick resolution of misconduct in private collectively bargaining grievance-arbitration systems.

6. **Unions may in some cases charge Dues Objectors fees for lobbying activities**

In *United Nurses & Allied Professionals (Kent Hospital)*, 359 NLRB No. 42 (December 14, 2012), the Board ruled that a union may charge non-member dues objectors an amount for union lobbying expenses that “are germane to collective bargaining, contract administration or grievance adjustment.” Such an analysis will be done on a case by case basis to see whether the particular lobbying activity for which the non-member is being charged is germane or not. The Board allowed interested parties to file amicus briefs on the question of “germaneness.”

In analyzing this case, the Board declined to hold that no lobbying expenses of private sector unions can ever be charged to dues objectors. Instead, the Board noted that certain lobbying and legislative proposals often involve “core employee concerns such as wages, hours and working conditions which all clearly raise issues that related to a union’s most essential representative functions.” The Board distinguished this case from the Supreme Court’s decision in *Lehnert v. Ferry Faculty Association*, 500 U.S. 507 (1991) where it appeared the Court limited appropriate lobbying expense charges in the public sector to those activities designed to secure “implementation or ratification of a collective bargaining agreement.” The Board said, however, that the high court was concerned about First Amendment issues in that case, which do not pertain to the private sector.

The Board also said that lobbying expenses may be charged in some settings even if the unit employees would not benefit from the legislation. In this case, for example, some of the lobbying activities were for the passage of Vermont legislation, even though the unit was based in Rhode Island. To rationalize this, the Board observed that the “pooling” approach of some unions meant that other unions in other states might someday send money to support Rhode Island initiatives.

In sum… we hold today that (1) lobbying expenses may be charged to objectors, but only if they are germane to the union’s role in collective bargaining, contract administration or grievance adjustment, and (2) extra-unit lobbying expenses may be charged only if they were incurred for services that are otherwise chargeable and that may ultimately inure to the benefit of employees in the objector’s bargaining unit because of the union’s participation in expense-pooling arrangement. This
The latter requirement can be established by showing that the lobbying charge is reciprocal in nature.

Some examples given of “presumptively germane” lobbying activities offered by the Board would include:

- Lobbying for or against minimum wage legislation
- Professional licensing requirements
- State supplements to WARN Act

On the other hand, something like lobbying for general economic stimulus or for environmental policies might be difficult to view as germane.

7. Temporary Staffing Agencies bargaining units

On June 20, a Regional Director of the NLRB ruled that workers supplied by a temporary staffing agency to clients on a short term project basis are employees of the staffing firm and constitute a unit appropriate for bargaining. *Bergman Bros. Staffing Inc.*, NLRB Regional Director No. 5-RC-105509. (6/20/13) Rejecting an argument that they were just temporary employees, the Board ordered an election in the six man unit. The Regional Director also rejected the argument that the petition should be dismissed because it only named the employer and not the employer’s clients, citing *Oakwood Care Center*, 343 NLRB 659 (2004). (The Board had held there that a unit including solely and jointly employed workers is permissible only with both employers’ consent.) The Regional Director said that Oakwood does not require that all petitions must name both joint employers. Here the union was not seeking to impose a bargaining obligation on different employers – only the staffing agency – and thus consent of both the agency and the client is not required.

The RD found that these employees remained employees of the staffing agency even if their time with a single client was limited.

8. Soliciting Grievances during Union Campaign

Overruling a 1984 decision, the NLRB held that an employer interfered with employee rights during a union organizing campaign by soliciting grievance from a store cashier even though the worker did not express any complaints or demands in response to the solicitation. *Albertson’s LLC*, 359 NLRB No. 147 (July 2, 2013). In this case, the manager questioned an employee about whether she had “any concerns” about work; the employee did not respond.

The Board said that soliciting grievances during a union campaign “raises an inference that the employer is promising to remedy the grievance.” An employee’s silence “does not negate the objectively coercive tendency of the solicitation itself.”
This case effectively overruled *William T. Burnett & Co.*, 273 NLRB 1084 (1984) where the Board had found no unlawful interference with employee rights if the employee who is solicited by the supervisor or manager did not respond to a question about grievances by voicing any complaints.

9. **Bargainable topics**

A change in practice from no-enforcement to strict enforcement of a rule or procedure is itself a bargainable topic. In this case, the company had failed to enforce a new procedure on a checklist of tasks over a period of 14 months and never disciplined employees for failure to complete the new checklist. *American Medical Response of Connecticut, Inc.* 359 NLRB No. 144 (2013). Further, it was found that the union was never given an opportunity to negotiate over the change despite the employer’s argument that the union waived its right to bargain because the employees were notified of the change. “Notification to unit employees is not equivalent to providing notice to their collective bargaining representative,” citing *Bridon Cordage, Inc.* 329 NLRB 258, 259 (1999)

10. **Data requests**

Section 8(a)(5) of the Act mandates that an employer provide a union with relevant information that is necessary for the proper performance of its duties as the exclusive bargaining representative. *NLRB v. Truitt Mfg.* 351 U.S. 149 (1956); *Detroit Edison Co.*, 440 U.S. 301 (1979). Several Board decisions in recent months have expanded and clarified this obligation.

First of all, the NLRB clarified that an employer must respond promptly to requests for information, even if the information requested may be irrelevant to the union’s representation of employees. *IronTiger Logistics, Inc.*, 359 N.L.R.B. No. 13 (2012).

In this case, the Board held that a transportation company violated its duty to bargain with the union when it failed to give the union a timely response to a request for information. The Board ultimately found the request data irrelevant to the union's representation of employees, but Chairman Pearce and Member Block explained that the union requested information about union-represented drivers that was *presumptively* relevant, but the company waited more than four months before it responded that the information was irrelevant and declined to produce it. Ultimately, as noted, the requested data was indeed found to be irrelevant, but the Board said the Act “requires a timely response even when an employer may have a justification for not actually providing requested information,”

As explained, the duty to provide information is a component of the broader duty to bargain in good faith under Section 8(a)(5) of the Act. The issue in this case must be decided in that context. **The question here is not whether the Respondent had a duty to provide the information sought by the Union, but rather whether it had a duty to respond to the Union’s request in a timely way.**
Board precedent, cited above, requires a timely response *even when* an employer may have a justification for not actually providing requested information. Our colleague would distinguish those cases on the ground that they involved requests for *relevant* information. But where, as here, the information sought is *presumptively* relevant, that distinction is immaterial.

Former Member Hayes dissented in that case. Arguing that “requested information is either legally relevant to a union's representative duties, or it is not,” Hayes said the majority's ruling would give unions latitude to “hector employers with information requests for tactical purposes that obstruct, rather than further, good-faith bargaining relationships.”

One way in which the duty comes into play is in collective bargaining contract negotiations when an employer claims an inability to meet the union’s economic demands. However, the question of whether an employer is claiming “inability” versus “unwillingness” to pay is often debatable. In the former case, a union may be entitled to audit a company’s books to ascertain for itself that the employer is “unable” to pay.

In *Coupled Products, LLC*, 359 NLRB No. 152 (July 10, 2013), the Board agreed with an administrative law judge and ruled that a union was not entitled to audit the records of an auto parts manufacturer to substantiate the company’s proposals for union concessions. The Board said that the manufacturer never claimed that it was unable to meet the costs of the union demands. The evidence was that the company was *unwilling* not unable to pay.

*NLRB v. Truitt Manufacturing Co*, 351 U.S. 149 (1956) has stood for many years for the proposition that if an employer claims an inability to pay a union’s bargaining demands, it may be required to disclose financial information upon request to the union. The Court had noted that good faith bargaining “necessarily requires that claims made by either bargainer should be honest claims,” and if such a claim is “important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.” Id at 152.

On this point, the Board said that “we certainly agree that no “magic words” are required to establish a claim of inability to pay: the employer’s statements and actions need only be specific enough to convey that claim.”

The present case illustrates that the Board’s post-Truitt analytical framework distinction between inability-to-pay and less-than-inability-to-pay cases often leads parties to become preoccupied with “magic words,” distracting them from genuine dialogue and information sharing that can lead to productive collective bargaining.”

However, in the case at bar, the employer’s actions, looked at as a whole, did not convey that it was unable to pay, but instead that it was unwilling to pay.
Some cases involving cost items may not rise to the level of “inability” to pay situations but may nonetheless trigger a requirement to disclose some information to the union.

We leave undisturbed Board precedent emphasizing that the “inability to pay” doctrine does not mean that “a union faced with something less than an inability to pay claim is not entitled to any information…. Thus, even where a union is not entitled to broad access to an employer’s assertions about its business and competitiveness- provided, of course, that it requests such information. In that context, an “information request… is not an all or nothing proposition.”

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The duty to provide relevant and necessary information to a union comes up not only in periodic contract negotiations but also during the life of an agreement. The next case covers many of the issues that come up when Unions seek certain information during the life of the Agreement. In NACCO Material Handling Group, 359 NLRB No. 139 (June 21, 2013), the Board affirmed an administrative law judge’s ruling that a company violated Section 8(a)(5) when, in addition to other actions, refused to provide the union with information relating to the discipline of a unit member.

In this case, an employee had charged a co-worker named Hall with sexual harassment. When Hall was brought in for the investigation, he was asked if he wanted union representation. He declined, saying he wanted to keep the matter private. Hall was ultimately disciplined.

However, through the grapevine the Union president heard that Hall had been disciplined for sexual harassment and went to the HR manager and asked whether or not this was true. The HR manager refused to provide him with the information. The Union President made a formal request for “an answer to my question about any disciplinary action done, or planned to be done, to Ed Hall concerning Maria Munioz on or about March 16th. I’m not asking for any details except for any disciplinary action you may have taken.”

The Company declined to provide the answer and the Union filed an unfair labor practice charge over the denial. The Company argued that the information was not relevant because a grievance had not been filed on behalf of Hall, nor was a grievance filed or pending on behalf of any other bargaining unit employee who was subject to the same type of discipline. The Company argued that the speculative nature of the Union’s concern makes its request irrelevant and premature.

The administrative law judge found that the Company should have provided the information.

I find that the Respondent’s argument fails to overcome the presumptive relevant nature of the requested information…. I find that the requested information is necessary for the Union to effectively monitor and enforce the terms of the CBA.
Its access to Hall’s discipline information enables it to compare discipline issued to employees for similar violations and ensure that the Respondent is consistently implementing the discipline of bargaining unit employees. Additionally, the information requested is relevant and necessary because it enables the Union to make a determination on whether to file a grievance on behalf of not only Hall but other unit employees who might have unknowingly been the victim of discriminatory discipline. This is a legitimate function for the Union and the requested information was necessary for it fulfill that duty. 359 NLRB No. 159, at 6.

Even though the Union had not filed any grievances yet, the judge cited Board rulings that a union is not required to wait until a grievance is pending to make a request to the employer for relevant and needed information. “The law dictates that the Union is entitled to information at issue to determine if it is prudent and appropriate to file a grievance. Citing Ohio Power, 216 NLRB 987 (1975); Leland Stanford Junior University, 307 NLRB 75, 80 (1992).

The fact that Hall wanted to keep the matter private and that he himself had not filed a grievance was irrelevant as to whether the Union was entitled to the information. The judge noted that to agree with such an argument would be “to strip the union for all practical purposes of its statutory duties as the exclusive bargaining representative of unit employees and its power to enforce violations of the CBA.”

As for the claim of confidentiality, the judge found that the party asserting confidentiality has the burden of proof, and even if confidentiality is established, an employer cannot simply refuse to furnish the information “but must engage in accommodative bargaining with the Union to seek a resolution that meets the needs of both parties.” Citing Detroit Newspapers Agency, 317 NLRB 1071, 1073 (1995). Here the employer did nothing to engage in such a process even though the Union had indicated a willingness to narrow the scope of its inquiry by not requesting details.

The fact that the CBA did not provide for the Union receiving disciplinary records of employees was irrelevant. The “CBA’s silence on this issue does not abrogate the Respondent’s statutory obligation under the Act.

Finally, the fact that the Union could have gotten the information from Hall himself was irrelevant. The availability of information from another source is not a sound defense and “does not alter a party’s duty to provide relevant and necessary information that is readily available.”
D. **Yeshiva Redux**

On May 22, 2012, the Board requested briefs in the case of *Point Park University* on the issue of whether the faculty members of that institution are statutory employees or rather are excluded managerial employees consistent with the U.S. Supreme Court’s decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

In his original decision and direction of election, the Regional Director found that the faculty members were not managerial employees, and, after an election, the Petitioner was certified as their collective bargaining representative. The underlying issue ultimately was presented to the United States Court of Appeals for the District of Columbia Circuit, which found that the Board had “failed to adequately explain why the faculty’s role at the University is not managerial.” *Point Park University v. NLRB*, 457 F.3d 42, 44 (D.C. Cir. 2006). The court instructed the Board to identify which of the relevant factors set forth in *Yeshiva University*, supra, are significant and which less so in its determination that the Employer’s faculty members are not managerial employees and to explain why the factors are so weighted. Following the court’s remand, the Regional Director issued a Supplemental Decision on Remand. The Employer sought review of that decision, which the Board granted on November 28, 2007.

The Board – after a five year wait – this summer asked for briefs from interested parties. Specifically, the Board said the briefs should address some or all of the following questions:

1. Which of the factors identified in *Yeshiva* and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?

2. In the areas identified as “significant,” what evidence should be required to establish that faculty make or “effectively control” decisions?

3. Are the factors identified in the Board case law to date sufficient to correctly determine whether faculty are managerial?

4. If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?

5. Is the Board’s application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context or (b) can the Board more closely align its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?
(6) Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?

(7) Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board’s analysis?

(8) As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty—such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty—depending on the faculty's structure and practices?

In response to this request, the AAUP filed an extensive brief urging the Board to read *Yeshiva* narrowly. It went on to offer additional factors the Board should consider. The thrust of the AAUP’s brief essentially is that since the 1980 decision, the growth of the corporate business model of running colleges and universities has increased dramatically and is now pervasive. Some of the key points, and consequences, presented by the AAUP to support this thesis included the following:

- There has been a major expansion of administration hierarchy which exercises greater unilateral control over academic affairs.
- Administrations today are making unilateral academic and other decisions based on market forces rather than relying on faculty recommendations.
- Faculty influence has eroded through administrations’ application of corporate business model.

Ironically, some of these points advanced by the AAUP in its brief on the evolution of collegial institutions to top down corporations were exactly the same points advanced by the dissent in the *Yeshiva* case. Thus, Justice Brennan writing for the dissent noted:

But the university of today bears little resemblance to the "community of scholars" of yesteryear. Education has become "big business," and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization. The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and special interest group has only added to the erosion of the faculty’s role in the institution’s decision-making process.
Collective bargaining has been effective where it exists and has not created the conflict of loyalties and other problems that the Court envisioned in 1980.

Faculty interests are not aligned with administrations in many of the initiatives set forth by modern colleges and universities.

Between 1976 and 2009:

- Full time executives and managers on campuses grew 129% compared to faculty growth of only 68%
- Places like Cornell and MIT and other major universities are layered with high level academic administrators, thus creating “buffer” zones between faculty and administration.,
- More money is now allocated in budgets for administrative spending rather than instructional needs
- There has been an increase in part time faculty by 256% and a diminution of tenure track faculty, thus diminishing further the input of full time faculty into decision making.

Administrations are making decisions on program discontinuance and student admissions standards independent of faculty involvement and approval.

Administrations have increased involvement in nonacademic matters, such as hiring, reappointment, promotion and tenure decisions.

General Counsels have made statements that faculty handbooks are not contracts and not binding on the administration.

These economic exigencies have also exacerbated the tensions in university labor relations, as the faculty and administration more and more frequently find themselves advocating conflicting positions not only on issues of compensation, job security, and working conditions, but even on subjects formerly thought to be the faculty's prerogative. 444 U.S. 672 at 703-704)

Justice Brennan’s argument that universities are already “big business” operations suggests that the AAUP is probing deeper into the decision itself and arguing that the entire issue of managerial status should be stripped down and reviewed de novo.
Strategic initiatives and market considerations are made by administrations rather than faculty.

There has been a growing influence of corporate donors on issues like curriculum and program content.

The AAUP brief goes on to state:

Administrators have made it increasingly clear that they will consult with faculty when they please, fail to consult with them when they pleased, accept or reject faculty input and recommendations when they please, and even dissolve faculty governance bodies when they please. As a result, administrations increasingly make and implement unilateral decisions when they please. The faculty does not make “effective recommendations” or have “effective control” over many academic and nonacademic matters. These conditions show that administration and faculty interests are not aligned.

In conclusion, and specifically, the AAUP urged the Board to consider the following additional factors in assessing managerial status under Yeshiva.

1. The extent of administration hierarchy

2. The extent to which administrators makes academic decisions based on revenue generation or other market based considerations

3. The degree of consultation by administrations with faculty over academic and nonacademic matters

4. Whether administrations see faculty recommendations as advisory rather than effective

5. Whether administrations routinely approve nearly all faculty recommendations without independent review

6. Whether conflict between the administration and the faculty reflects lack of alignment of admin and faculty interests.

On the other side of the argument, an amicus brief filed on behalf of the American Council on Education, National Association of Independent Colleges and Universities, Council of Independent Colleges, Association of Independent Colleges and Universities of Pennsylvania, College and University Professional Association for Human Resources emphasized that the Board’s very call for amicus briefs constituted de facto rulemaking and expanded the mandate of the D.C. Circuit, namely, that the Board should “identify which of the relevant factors set forth in Yeshiva... are significant and which less so... and
to explain why the factors are so weighted.” The questions posed by the Board in its call for briefs go far beyond that directive.

The brief supports an argument that the Point Park University faculty members are indeed managers. In addition, the brief emphasizes the core findings of the Supreme Court. These include the central points that the “effective authority in matters of curriculum and course selection are of paramount importance under Yeshiva and such authority is the sine qua non of managerial status; that graduation policies, course scheduling, grading, student admission and retention policies, matriculation standards and teaching methods are also important and faculty should ordinarily have authority in a majority of these areas to be considered managerial; and that other considerations like faculty status matters are relevant but not central to managerial status under Yeshiva.”

Such factors remain the only factors the Board should consider; the Supreme Court identified these factors as the core of its decision with great articulation and therefore there is no need for the Board to expand those factors in considering future cases.

Further, the brief underlined that the Supreme Court recognized that the Act cannot be applied to higher education in the same manner that it would be to private industry generally. The Board must analyze managerial factors in that spirit.

If such an inquiry proves different in the context of higher education than it does in the context of manufacturing, retail, health care or any of the other myriad areas subject to the Board’s jurisdiction, it is simply a product of the fact that, as recognized by Yeshiva, higher education does not fit within the mold of pyramidal hierarchies found in private industry generally.

Finally, the brief noted, in answer to one of the Board’s questions, that there have been no significant developments in models of decision-making in private universities since Yeshiva. Faculty today continue to exert the same amount of influence and control, if not more, over the aspects of institutional governance as they always have.

Unlike the issue discussed below on the employee status of graduate student teaching assistants, the Board will not be reversing any precedent in this particular case, as the Supreme Court’s decision remains the law of the land for determining managerial status of private sector faculty. But the Board’s slant in this case, its decision to choose some factors over others in importance, its possible addition of other consideration in these case make the Point Park University case extremely interesting to watch for future litigation.

E. The Employee Status of Graduate Teaching and Research Assistants

On June 22, 2012, the Board invited briefs from interested parties in two cases, New York University, Case No. 2-RC-23481 and Polytechnic Institute of New York University, Case No. 29-RC-12054. Both cases dealt with the overall issue of the employee status of
graduate teaching and research assistants and whether or not such individuals have a right to unionize under the NLRA.

The Board wrote that parties and amici specifically were invited to address the following questions:

1. Should the Board modify or overrule Brown University, 342 NLRB 483 (2004), which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act, because they “have a primarily educational, not economic, relationship with their university”? 342 NLRB at 487.

2. If the Board modifies or overrules Brown University, should the Board continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, in part because they do not perform a service for the university? See New York University, 332 NLRB 1205,1209 fn. 10 (2000) (relying on Leland Stanford Junior University, 214 NLRB 621 (1974).

3. If the Board were to conclude that graduate student assistants may be statutory employees, in what circumstances, if any, would a separate bargaining unit of graduate student assistants be appropriate under the Act?

4. If the Board were to conclude that graduate student assistants may be statutory employees, what standard should the Board apply to determine (a) whether such assistants constitute temporary employees and (b) what the appropriate bargaining unit placement of assistants determined to be temporary employees should be?

In this case, amici curiae briefs were filed by interested parties, including one by the American Council of Education, the Association of American Medical Colleges, the Association of American Universities, the College and University Personnel Association for Human Resources, and the National Association of Independent Colleges and Universities. The central points of that brief are:

1. Brown was correctly decided because the relationship of students to the University is one of student/teacher, not master/servant, and thus graduate teaching assistants are not employees within the meaning of Section 2 (3) of the Act. This relationship is not primarily a commercial but educational relationship.

2. Mandatory collective bargaining cannot be imposed without undermining the University’s control over academic decisions at the core of its educational mission. This includes the right to evaluate students’ performance, determine admission and matriculation standards, tuition, enrollment levels, eligibility for and issuance of award scholarships and grants, and all aspects of educational curriculum, including what courses will be offered, to whom and
by whom courses will be taught, and the teaching methods used. Indeed, the experience of graduate teaching assistant collective bargaining in the public sector has shown that unions representing such groups have frequently reached into the academic sphere with their proposals and demands. The brief states:

*The NLRB properly recognized in Brown that none of the subjects of collective bargaining which Petitioners would characterize as unalloyed issues of wages and “other terms and conditions of employment” can be separated from the core educational concerns and academic decisions of the University – such as decision as who, what, where to teach or research, the class size, time, length and content of graduate students’ duties, stipends and evaluations of their performance.*

On the other side, a brief filed by the AAUP, NEA and AFT stresses:

1. *Brown* should be reversed. Graduate teaching assistants are employees under common law and Supreme Court rulings and should therefore have the right to unionize.

2. Under the National Labor Relations Act, institutions are free to reject any particular proposals at the bargaining table, including those that might impinge on their educational missions. Therefore, the institutions themselves control to what degree a union representing such individuals will intrude into academic decisionmaking and educational missions.

3. The experience of public sector bargaining involving graduate teaching assistants has demonstrated that bargaining has not been injurious to the institutions in question in terms of their fundamental education mission.

All indications have been for some time that the Board will ultimately reverse *Brown*. The call for briefs will likely give it a better cover to do so and may influence the Board as to the rationale it uses to make that reversal.

F. **Appropriate bargaining units:**

The Board issued a major decision on bargaining units at the end of 2010 which has had and will continue to have a ripple effect on organizing in all industries, including higher education. The case was *Specialty Healthcare & Rehabilitation Center of Mobile, 356 NLRB No. 56* (December 22, 2010), where the Board drastically altered its approach to bargaining units and indicated that it would look favorably on units with a small grouping of employees who share a community of interest, even if a larger unit makes more sense in light of all community of interest factors. In particular, the Board held that:
...in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees.

This approach will make it very difficult for employers to seek to expand the scope of petitioned units and may lead to the so-called “micro-units” where small clusters of employees who are identifiable as a group and who share a community of interest will now have the right to unionize even if they have a considerable amount of connection to and community of interest with other employees. Standard bargaining units like production and maintenance units or service and maintenance units – common throughout the country – may now be subdivided by craft or department or job function. The Board’s use of the term “overwhelming” is a clear signal that it will not lightly accept employer arguments that only a larger unit of employees is appropriate.

The Specialty Healthcare case was appealed in the 6th Circuit, as the employer engaged in a technical refusal to bargain in order to test the composition of the unit. The companion unfair labor practice case is Specialty Healthcare & Rehabilitation Center of Mobile 357 NLRB No. 83, at *1(Aug. 26, 2011) cross-appeals pending sub nom. Kindred Nursing Ctrs. E., LLC v. NLRB, Nos. 12-1027 & 12-1174 (6th Cir.).

On August 15, 2013, the Sixth Circuit upheld the Board’s ruling under the case name Kindred Nursing Centers v. NLRB, (6th Cir., No. 12-1027). The Court said that the Board correctly acted within its “wide discretion” to determine bargaining units and analyze community of interest factors.

In reviewing the Board's decision, the court noted that judicial review of the Board's decision was limited as it must "uphold the Board's interpretation of the Act if it is 'reasonably defensible;' [it] may not reject the Board's interpretation 'merely because the courts might prefer another view of the statute.'"

Finding that the Board's decision was not arbitrary, unreasonable, or an abuse of discretion because the Board "cogently explained why it adopted the approach it did in Specialty Healthcare...," the court determined that the Board adopted a community-of-interest test based on some prior Board precedents. It further held that requiring an employer to show that excluded employees have an "overwhelming community of interest" with the included employees was not a material change in the law:

**Application of Specialty Healthcare**

Specialty Healthcare has already been applied in a number of cases. See for example, DTG Operations, 357 NLRB No. 175 (December 30, 2011). Rental services agents and lead rental service agents at a car rental facility shared virtually all community of interest factors and constituted an appropriate unit. Employer claim that unit must
include staff assistants, return agents, lot agents, service agents, fleet agents, exit booth agent, shuttlers, bus drivers and building maintenance techs was not found valid. Rental agents did not have an overwhelming community of interest with them.

*Cf. Odwalla Inc*, 357 NLRB No. 132 (December 9, 2011), where a proposed unit that included route sales drivers, relief drivers, warehouse associates, and cooler techs, but excluded merchandisers, was deemed to be a “fractured unit,” because it did not track any lines drawn by the Employer, such as classification, department, function, lines of supervision, methods of compensation or work location. Because of this, the Board found that the employer carried its burden of proving that the merchandisers shared an “overwhelming” community of interest with the petitioned for employees.

*Northrup Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (December 30, 2011). A petitioned unit of radiological control technicians, calibration technicians, lab technicians, and RCT trainees was an appropriate unit even though it excluded other technical employees. The Board noted the unique function of providing independent oversight of radiation exposure and separate department status. Common benefits, time off policies, break facilities and personnel policies was insufficient to establish “overwhelming” community of interest with other technical employs.

In *Nestle Dryer Ice Cream*, the maintenance employees petitioned for their own unit, but the employer requested the production employees to be included in the unit as well – as had been the circumstances of previous organizing efforts by the same union in the same facility. The Board’s Regional Director in the case rejected the employer’s request citing the *Specialty* case. Employer engaged in technical refusal to bargain to challenge unit. Unfair labor practice found by Board. Case on appeal to Fourth Circuit. *Nestle Dreyer’s Ice Cream Co.*, 358 NLRB. No. 45 (May 18, 2012)

**Regional Director case:**

*Bergdorf Goodman*, Case No. 2-RC-076954 (May 4, 2012)

Unit of women’s shoes associates (total of 46 employees) was deemed appropriate despite employer’s claim that only an overall store unit of 372 sales associates was appropriate. All sales associates had identical evaluations forms and procedures; identical benefits and time off policies and probation period; access to same cafeteria. Women’s shoes department was one department out of ten.

Employer failed to show “overwhelming community of interest” with other associates. The distinct method of payment (draw versus commission basis as opposed to base plus commission basis applicable to all other sales associates) was deemed critical. Transfers in or out of department only numbered 4 out of 42 transfers store-wide over 13 years.

Even though “the presumption of a store-wide unit exists, the presumption can and has been rebutted in this case.”
G. Update on expedited election rules

The Board originally published its final rule amending its representation procedures on December 22, 2011. 76 Fed. Reg. 80138. The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a lawsuit in the U.S. District Court for the District of Columbia challenging the rule.


The Board appealed to the U.S. Court of Appeals for the District of Columbia Circuit. On Feb. 19 that Circuit issued an order holding the appeal in abeyance an appeal concerning the December 2011 adoption of amendments to its regulations on representation case procedures (Chamber of Commerce v. NLRB, D.C. Cir., No. 12-5250, 2/19/13). The case is an NLRB appeal from a lower court decision that NLRB improperly adopted amendments to its representation case regulations based on approvals of Chairman Mark Gaston Pearce (D) and then-Member Craig Becker (D). The lower court found then-Member Brian E. Hayes (R) did not participate in an electronic voting room procedure that was used to register final approval of the regulatory change, depriving the board of a three-member quorum required for action.

The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a statement of supplemental authorities Jan. 29 arguing that Becker was placed on the board by a recess appointment that the business groups said would be considered unconstitutional under the D.C. Circuit's recent ruling in Noel Canning, 194 LRRM 3089 (D.C. Cir. 2013). Therefore, the Chamber argued, the Noel Canning decision provides additional independent grounds to affirm the lower court’s decision, since under its reasoning Member Becker’s recess appointment on March 27, 2010 was unconstitutional. The NLRB did not respond to the filing. Even if Hayes participated in approval of the rule, the business groups argued, Becker's appointment was invalid and NLRB lacked a quorum when it changed its regulations.

In a brief order that cited “consideration of” Noel Canning, the court removed the Chamber of Commerce case from an April 4 oral argument calendar and said the case would be “held in abeyance pending further order of the court.”

H. Update on NLRB Posting Mandate

National Association of Manufacturers. v. NLRB, 846 F. Supp. 2d 34, 846 F.Supp. 2d 34, 2012 WL 691535 (D.D.C., March 2, 2012). District Court for D.C. ruled that the Board had the authority to require employers to post notice of NLRA rights. But the Court struck down the unfair labor practice penalty that the Board had promulgated for not posting, only to the extent that “the Board cannot make a blanket advance
determination that a failure to post will always constitute an unfair labor practice.” This case was appealed by the Plaintiffs and the Board filed a cross-appeal.

On appeal to the DC Circuit, the Court reversed the district court and found it unnecessary to address the issue of the board’s rulemaking authority but instead wrote that the rule sought to compel employer speech in a manner that was inconsistent with the Act and it was thus struck down.

The Board on July 22 petitioned the Court of Appeals for a rehearing and en banc consideration of the three judge panel ruling. The petition was denied on September 4, 2013.

In *Chamber of Commerce v. NLRB*, 856 F. Supp. 2d 778, 2012 WL 1245677 (D.S.C., April 13, 2012) the South Carolina federal district court ruled that the Board lacked statutory authority to promulgate the rule requiring all employers to post the notices informing employees of their rights under the NLRA. That decision was appealed to the Fourth Circuit by the Board.

The U.S. Court of Appeals for the Fourth Circuit held June 14, 2013 that the NLRB lacked statutory authority to adopt the posting rule, concluding that the Act “only empowers the Board to carry out its statutorily defined reactive roles in addressing unfair labor practice charges and conducting representation elections upon request.” 196 LRRM 2001 (4th Cir., 2013)

The Court on Aug. 12, 2013 then denied the NLRB’s petition for rehearing of the three-judge panel's decision that NLRB lacked statutory authority to promulgate a 2011 regulation. (*Chamber of Commerce v. NLRB*, 4th Cir. No. 12-1757, rehearing denied 8/12/13)

I. Future Organizing on Campuses

*The Growth of Adjunct Faculty Organizing*

In looking ahead to the challenges of the next decade for academic labor relations personnel, another question to address is where future unionization on campuses is likely to occur. We know that as long as the Supreme Court’s decision in *Yeshiva University* remains good law, unionization of tenure d faculty in the private sector is likely to proceed slowly.4 But there will undoubtedly be an increase in unionization in some other key academic employment areas.

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4 *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). As noted *infra*, the Circuit Court of Appeals for the District of Columbia remanded to the NLRB a case dealing with the Board’s interpretation of *Yeshiva* asking for greater clarity as to how it reached the result it did in determining that faculty at Point Park University were not managerial. *Point Park University v. NLRB*, 457 F.3d 42, 44 (D.C. Cir. 2006). The Board recently asked for briefs from the public on the issue. While the NLRB is re-examining the application of the criteria set forth in the Supreme Court’s decision, it cannot reverse that decision.
First of all, it is likely that the growth areas for faculty organizing in the immediate years ahead will undoubtedly be among part-time/adjunct faculty and, perhaps, graduate teaching assistants. Unionization efforts among adjunct and part-time faculty, and to some degree, among non-tenure track full time faculty, are particularly noteworthy. Recent data establishes this reality. In 1998, the National Center for the Study of Collective Bargaining in Higher Education and the Professions reported in its Directory of Faculty Contracts (Hurd, R., Bloom, J., & Johnson, B. H. 1998) a total of 75,882 adjunct and part time faculty represented by unions. By 2012, that number had risen to 147,021, almost double the number in 14 years (Berry & Savarese, 2012, p. vii). There are 107 free-standing units of adjunct, part-time faculty members, not counting the units that include part timers along with full time faculty. New units are being added on a regular basis, and these numbers are likely to climb as attention is being focused on the increased use of adjunct faculty as well as the relatively lower compensation and troublesome working conditions for many such faculty around the country. The SEIU, for example, has found success in the Washington, DC area in organizing adjuncts as part of their city wide campaign at American University, Georgetown, and George Washington University. As this article is being written, the SEIU has launched a similar city wide effort in Boston and has pending elections at Tufts University and Bentley University.

While organizing adjuncts in the public sector will continue, it is also true that, in the private sector, union organizing of adjuncts will be easier than organizing full-time faculty, because they will be unencumbered by the Yeshiva University decision. Adjuncts simply do not have the managerial involvement in running their institutions that full-time tenured and tenure-track faculty have to make such a managerial argument credible. Indeed, a growing number of major private universities—like the University of San Francisco, George Washington University, American University, and Syracuse University to name a few—already have adjunct bargaining units.

**New Life to Graduate Teaching Assistant Unionization**

Currently, over 64,000 graduate student employees are represented by unions, distributed among 28 institutions of higher education, all in the public sector (Berry & Savarese, 2012). However, this number is likely to rise if the National Labor Relations Board (NLRB), now firmly on labor’s side for the next four years, reverses the Brown University decision and give bargaining rights to graduate teaching assistants and perhaps research assistants as well in the private sector.

Indeed, as noted above, the Board invited briefs from interested parties in two cases, *New York University*, Case No. 2-RC-23481 and *Polytechnic Institute of New York University*, Case No. 29-RC-12054. Both cases dealt with the overall issue of the employee status of graduate teaching and research assistants and whether or not such individuals have a right to unionize under the National Labor Relations Act (NLRA).
Table Talk: What Issues Will Be Front and Center in Faculty Negotiations?

What will the central issues for negotiations look like in the next decade? As always, administrators at the bargaining table will hear familiar themes. For full time faculty especially, such faculty will complain of too many students who are ill prepared for college, too little time, and not enough autonomy or resources. They will complain about too much pressure to publish or engage in meaningful research. They will rail about the amount of time spent in service activities, and how the decline in staffing the institution with tenure track faculty has only added to their burdens. They will grumble about process issues, unfair evaluations, and too much emphasis on student evaluations. They will insist that benefits be kept untouched, salaries increased, the benefits enjoyed prior to bargaining be added to those now being negotiated, release time for every manner of activity be instituted, and in many locales, work for the union be recognized as academic service for promotion and tenure.

Of course, there will be lectures about arbitrary decision-making of executives, their embrace of new “corporate models,” the increasing number of administrators, and the lack of attention to the basic values of the academy in pursuit of goals of trustees, legislators or other “outsiders.” All these will sound familiar, some of it in some places will be true, and few would disagree that faculty are at the core of what colleges and universities represent and do. Collective bargaining will continue to provide one forum for the expression of such global themes.

Online courses and distance learning –

Front and center will be the myriad of issues surrounding online courses and distance education. Clearly, the development of these new modes of delivering the curriculum has as much significance to higher education as, say, automation did years ago to manufacturing. The national debate about the use and value of MOOCs (Massive Open Online Courses), hybrid courses, and all manner of online instruction will intensify in the years to come and cannot help but become significant issues in negotiations with faculty of all stripes.

Some of the likely areas of discussion that are connected to online instruction will focus on workload; other areas will include the question of ownership of such courses and what compensation, if any, faculty should receive for developing such courses or for having others teach such courses. As online education advances in the years ahead, and as more and more faculty are engaged in developing and teaching online courses, there will inevitably be difficult negotiations over such issues as:

- Whether such online course work can be assigned or will it remain voluntary?
- How much training will institutions give faculty for online teaching?
Will there be incentive compensation for faculty who choose to teach online? Incentives for those who choose to develop courses online?

Should teaching an online course count equally for workload purposes as live classroom instruction? Is it more difficult or easier or the equivalent?

Who owns the intellectual property to such courses?

Will faculty who develop a course receive royalties when someone else teaches it?

Who owns the courses? The institution, the faculty member or is it shared?

Is there room for some profit sharing for developing online programs?

Some of these issues are already being dealt with in collective bargaining agreements. No doubt where an institution has made a substantial investment in online education, there will be added pressure to share the “profits” of their endeavors with the faculty involved. Long discussions on the vagaries and intricacies of copyright law will ensue.

**Family-centered issues**

Here, colleges and universities have been, and will increasingly be faced at the bargaining table with demands to accommodate family needs and to strike the proper balance between work and family. This is the era when all employers have had to modify their work requirements with the realities of family life in the 21st century. Unions, who like to advertise themselves as “the people that brought you the weekend,” will be strong advocates for workload adjustments to address this balance. Unions have made, and will continue to advocate for, provisions in collective bargaining agreements that focus management’s attention on the needs of individual workers in all aspects of their personal lives from the challenges of child rearing and the poignant and time-consuming care of elderly parents to the complex issues of mental health, the all-consuming emotions of divorce and other personal crises. Time off for such events—with or without pay—will likely be a benefit that unions will strive to achieve in their negotiations with administrations.

On this point, many faculty contracts already embrace not only the basics of the Family Medical Leave Act but other family-friendly policies that are not required by law.

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5 Indeed, polling results from the National Partnership for Women & Families, issued on December 3, 2012, indicate that regardless of party affiliation, a majority of respondents struggle with the balance between work and family responsibilities. The majority feel that Congress should pass legislation that would require paid sick days and paid family and medical leave insurances. The proposed Health Families Act (H.R. 1876, S. 984) currently pending in Congress would require businesses with 15 or more employees to let workers accrue up to seven job-protected paid sick days per year so they could recover from their own illness, access preventative care, or care for a sick family member. (see Daily Labor Report, (Bureau of National Affairs, Washington, DC: December 6, 2012)
These include paid time for certain family emergencies, suspending the tenure clock for pregnancies and early child rearing, special provisions to cover adoptions, flexible work schedules, work-at-home arrangements, and other family-friendly policies.

In dealing with such issues at the table, institutions of higher education will not have the option that non-educational employers have to argue that personal life issues must sometimes yield to the competitive need for high production and achievement of maximum profit. And while the daily business of the university needs to be attended to, unions can often make compelling cases that education will not be ruined by accommodating the personal vagaries of individual faculty life and that indeed campuses should lead the way on this movement.

The impact of technology on doing business –

In addition to the focused issue of online education mentioned above, the new ways of communicating—email, texting, Twitter, Facebook, and other social media—will be part of the dialogue at the table in various ways. For example, students may still need face-to-face office time, but they are much more likely to communicate with their professors via email—and to assume they can do it at any time of the day or night. Indeed, thousands of students taking online courses never see their professor; in some locales students can get a degree without attending a traditional class. What are the 21st century means of communications between faculty member and student? Administrations will rightfully expect faculty to respond to student needs, but to what degree? This becomes a workload issue in contract talks.

What faculty post on Facebook for their students will be a new area of concern, particularly as to the scope and propriety of such postings. These may lead to arguments over policies that address social media and questions on the appropriate level of discipline for improper use of social media.

For those who teach online, how will they be evaluated by students and administration? How does a colleague, chair or administrator “observe” an online course in action, and how is such information incorporated into rank and tenure considerations? What changes will need to be made to the methods of evaluating faculty?

Regarding student evaluations, most institutions still might use paper course evaluations but they are fast giving way to online evaluations. This raises questions about when such online evaluations should be done; what form they should take; what type of access professors will have to such evaluations; and what they can be used for. Again, all these are items for discussion at the table.

Other issues that entangle new technologies with the educational process – many unforeseen at present-- may also find their way to the bargaining table.
Merit pay and compensation issues –

On the administration side, there will be a loud and growing demand for accountability. This will manifest itself in a variety of ways. Certainly, the current discussions at the federal level on how to measure the success of an institution and the value of an institution to students may end up having real consequences in the work life of faculty, and may accordingly lead to contract negotiations issues that will reach from workload implications to the outer bounds of academic freedom and how courses are taught.

Related to this broad issue of determining educational value will be the already contentious issue of paying faculty based on performance as well as student and institutional outcomes measures. Merit pay will only grow in importance, as students, legislators, and parents demand accountability. Administrations will ask “what is working and what is not?” How can merit be woven into the collective bargaining agreement in a way that respects and rewards faculty efforts and success (we would argue only with the faculty union as a partner not as an adversary) and is not merely perfunctory window dressing? The format for deciding upon merit pay, the criteria to be used, and the amount of the raise dedicated to merit, and the link of compensation to institutional outcomes, will be salient topics.

Regardless of how salary money is distributed, administrations—both public and private—will struggle with bottom-line issue of raising revenues to support such increases. The reality facing virtually every institution in the country is that tuition can only be raised so much. The drive to keep tuition increases very low (fueled by the realities of low inflation now for many years); the recession; the currently high cost of tuition, room and board at many institutions; and growing student debt will likely be maintained in all quarters. On top of that, public institutions will continue to deal with the fact that they will not be well-funded by the state for the foreseeable future and that consequently new revenue will be limited. In response unions will continue to attack what they will suggest are needless (i.e. non-faculty) expenditures on campus. They will demand an increasing amount of data and information from administrators on how money is spent and criticize the growth in the number of administrators, and they may suggest linking pay increases to tuition increases, or linking the size of the entering class to a certain pay raise, much like there have been conditional salary increases in the public sector based on state funding.

Everyone will continue to look for solutions to the rising cost of health insurance. The passage of the Affordable Care Act will present new challenges, particularly with part-time faculty, as noted below. Moreover, many institutions and states will finally be forced to pay attention to the debt they have incurred promising post-retirement medical benefits. Aggressive proposals from the administration side of the table will seek to lower future retiree benefits for current faculty and perhaps eliminate them all together for new faculty. These will pose immense challenges at the table to find some common ground.
The special issues in adjunct faculty negotiations –

If there is a growth industry for unions in the immediate years ahead, it will most definitely be in organizing adjunct faculty, and in the private sector, many institutions for will soon be dealing with academic collective bargaining the first time. Those table discussions will be quite dissimilar in many respects from what occurs in full time faculty union negotiations and will present unique challenges to both sides. While some of the areas cited above that full time faculty will be concerned about will also be important to adjunct faculty unions, adjunct faculty negotiations will present very special challenges in the years ahead over and above those other issues. Here many administrations are still in virgin territory. While there is a growing number of adjunct contracts already in place, the field is still relatively new. As more and more adjunct units come into being, new approaches to handling common issues may emerge, especially in areas like course assignments. This will include what will be the perpetual tension between the need for administrative flexibility to deal with the vagaries of student enrollment and the adjuncts’ desire for commitment as to how much and when they will teach.

Adjunct faculty are a diverse group, with some teaching for an occasional supplement to income or to share their professional expertise in the classroom but with others desperately seeking to cobble together a living from part time assignments, often at more than one institution. They are integral to many colleges and universities. Such faculty members, especially those who are in the liberal arts and in the forefront of unionizing efforts, are looking for guaranteed commitment and respect not only from institutions but from full-time colleagues as well. Some may ultimately seek a pathway to full time status but at the very least, they would like the certitude of knowing they can teach two, three or four courses a semester in order to maintain their current income levels. Given the semester-to-semester adjustments in course offerings, this is often difficult for many administrations to accept. Further, in assignment situations, the goals of an adjunct union will be at odds with the interests of full-time faculty. As but one clear example of the conflict, recently headlined in California and Washington State, is the clash between the interests of full time faculty to maximize their right to teach overloads and the equally compelling interests of adjuncts to minimize that right so that more courses are available for them. Moreover, when budgets are trimmed, courses taught by adjuncts, not full-time faculty, are the first to go, thus exacerbating the problem of guaranteed work. Administrations will balk at providing too much security for this last remaining faculty group over whom considerable flexibility now exists.

On a related issue, adjuncts will seek greater job security for more senior members of the group, asking for commitments in offered classes especially desirable to them. Here, administrations will counter with the need to put the best possible adjunct faculty member in the classroom taking into account academic credentials; past teaching experience in the particular course; qualifications and sub-qualifications; curriculum needs in general; teaching effectiveness; and, of course, student demand. But compromises in these areas can be reached. As but one example, there are now preferred hiring pools at some institutions where adjuncts, once accepted into the “pool,” have a reasonable guarantee of employment for classes they have been teaching, sometimes for
many years. In other contracts, seniority is a tie-breaker for assigning courses but only after analyzing relative credentials, teaching experience and performance and determining that all such factors are equal.

Another issue for the adjunct table will be how to deal with reductions in offered courses. The idea of retrenchment, in its traditional sense, does not quite fit the world of contingent faculty because unlike tenured faculty, they do not have contractual ongoing employment. It is likely that parties will at some point have to address the issue of how to deal with large-scale cutbacks in available adjunct assignments. When an institution needs to cut budgets, adjuncts that traditionally might have been given three or four courses per semester to teach may find that they are only given one course. Thus, while not technically without work, or “laid off,” the bulk of their income may be severely reduced. Regardless of contract language, the practical expectations that long-term adjuncts develop vis-à-vis workload and income will have to be reconciled with an institution’s need to reduce costs and courses. These issues may be dominant in bargaining and functionally equivalent to traditional layoff arguments in other employment sectors.

Another growing area of concern is how institutions will measure performance. In trying to establish reasonable procedures for determining teaching effectiveness, evaluations will play a new role in adjunct negotiations. Given their sheer numbers, adjuncts have rarely been systematically evaluated. At best, an institution may have a handful of student course evaluations to measure the adjunct’s performance. But in bargaining, it is likely that administrations—desirous of avoiding straight seniority assignments—will now have to establish clarity in this area so they can reasonably measure the performance of one adjunct against another. The need for greater accountability from adjuncts will necessitate such evaluations, and perhaps equally as important, will also usher in an era of greater training and much improved professional support for these faculty members.

An attendant complication where both full time and adjunct faculty are unionized is that the burden of evaluating adjuncts may fall on department chairs. In many cases, such chairs are also unionized, sometimes residing in the same bargaining unit with adjuncts, sometimes not. Thus, changes in an adjunct collective bargaining agreement with regard to chairs’ duties to evaluate adjuncts may spawn workload disputes with the full-time faculty union that represents chairs.

Because negotiations with adjuncts is still a relatively new phenomenon, and because there is no pre-existing template such as a tenure system to accommodate, adjunct bargaining will potentially be highly creative in terms of how the parties address job security protections, pay systems, and other working conditions. Lacking the traditional but rigid tenure system and lacking a large number of comparators, adjuncts and their bargaining partners can literally create new schemes of contract sequences, compensation options, performance pay, training and professional development, and other areas.
Also, it is reasonable to assume that, little-by-little, adjuncts will attain some success in negotiating benefits for themselves, albeit on a modest level. One can already see small incursions into this territory. Some adjunct contracts already provide limited health insurance benefits to more senior adjuncts, for example, or for those who teach a certain number of courses in an academic year. In addition we are seeing limited contributions to pensions (a benefit that, unlike health insurance, can be specifically calculated and budgeted) and some access to tuition reimbursement. This benefit trend is probably going to continue (though slowly) as it will simply be too difficult to defend the structure of half the curriculum taught by faculty members who have no benefits.

And finally, and perhaps most imminently, the impact of the Affordable Care Act will loom large, as institutions try to understand the Act’s 30-hour provision for defining full-time work and try to ascertain how many hours a week their adjunct faculty really spend working. We have already seen many institutions, fearful of future IRS interpretations as to what constitutes full time work for an adjunct, scale back the number of courses/credits being offered to their adjunct faculty in order to maintain their “part-time” status.

How this new law is ultimately interpreted will be a major factor as to whether or not adjuncts begin to attain health insurance coverage. In some situations, administrations will be faced with a new reality that some of the adjuncts they considered “part-time” are really “full-time” under the Act. That, in turn, will lead to new internal administrative debates about assessing the cost of providing health insurance to such individuals versus incurring government penalties for not doing so. This will be immensely complicated and, at present, stands as a question without any firm guidelines or regulations from the federal government.

Concluding thoughts….

With the NLRB providing assistance whenever it can through its decisional law and rulemaking capabilities, unions are likely to make great strides in organizing the unorganized on campuses around the country, building on their strengths in the public sector. New adjunct units will create special issues for the parties. New issues of technology and work life/family life balance will be set forth at both full time and part time faculty bargaining tables. But even as collective bargaining itself takes on a wider range of issues, it will continue to deal with the most fundamental issues of all – compensation, workload and job security. These issues, as they always have been, will remain the centerpiece of negotiations on campuses everywhere.