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Labor & Employment Alert
News Concerning Recent Labor and Employment Issues

COZEN O'CONNOR

NLRB General Counsel Takes a Bold Stance on Student Athletes

More than a year and a half after the National Labor Relations Board (NLRB or the Board) ruled that Northwestern University's football players could not form a union, NLRB General Counsel Richard Griffin announced his conclusion that scholarship football players at Division I FBS private colleges and universities are employees entitled to protection under the National Labor Relations Act.

Northwestern University — in which the university was represented by Cozen O'Connor attorneys Joe Tilson, Anna Wermuth, Jeremy Glenn, and Alex Barbour — involved an effort to certify a bargaining unit of Northwestern University's scholarship football players. In August of 2015, a unanimous five-member Board determined that it would not effectuate the purposes of the NLRA to certify the proposed unit and thus declined to exercise jurisdiction over the petition. Importantly, however, the Board did not decide whether scholarship football players are "employees" under the NLRA.

Eighteen months later, in a recent report titled "General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context" and self-described as a "guide for employers, labor unions, and employees," the NLRB general counsel determined that "scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act." While this statement is carefully cabined, it sends a clear message that the general counsel — the agency's chief prosecutor — views scholarship student athletes as being very much in play for NLRA protection. In fact, the report notes that "[t]here are undoubtedly other sports that provide substantial benefit to colleges/universities and that involve scholarship athletes who are under significant control by the schools and the NCAA."

The report goes so far as to state that "it is clear from the evidentiary record established in *Northwestern University* that scholarship football players at Northwestern and other Division I FBS private colleges and universities are employees under the NLRA because they perform services for their colleges and the NCAA, subject to their control, in return for compensation." The report spills much ink to explain the basis for this conclusion, effectively providing a preview of its arguments in the cases that may arise in the future. While the general counsel's conclusion is striking, its long-term impact is likely relatively short-lived. For one, it does not change the ruling issued by the full Board in 2015 that these student athletes may not unionize under the NLRA. In addition, the general counsel's term expires in early November of this year, and in any event, the report states his view as a prosecutor of unfair labor practice complaints, not as an adjudicator.

The report also discusses how the general counsel will apply two other recent Board decisions addressing the representation rights of faculty and students — *Pacific Lutheran University* and *Columbia University* — in the unfair labor practice (ULP) context.

In *Pacific Lutheran*, the Board analyzed when faculty of religious, educational institutions are subject to its jurisdiction and sharply narrowed the test for determining the applicability of the religious exemption to coverage under the NLRA and also narrowed the test for determining when faculty members are considered to be managers and therefore not protected by the NLRA. The report makes clear that the general counsel will apply the standards set out in *Pacific Lutheran* when considering whether to pursue ULP charges on behalf of faculty members and when considering to pursue ULP charges filed by employees of religious colleges and universities.

In *Columbia University*, the Board reaffirmed its position that student assistants in colleges and universities are statutory employees. The report says the general counsel will pursue ULP claims on behalf of student assistants in light of the *Columbia University* decision. Further, while *Columbia*

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University was limited to teaching and research assistants engaged in activities of an academic nature, the general counsel takes the position that the case "has broader implications beyond just student assistants." Students performing non-academic work in exchange for compensation, are also considered employees, so long as they "meet the common-law test of performing services for and under the control of universities," the report states.

Key Takeaways

The report sends a clear message to institutions of higher education that the general counsel intends to take an aggressive position when it comes to pursuing unfair labor practice charges on behalf of university faculty and students, including student athletes.

With the general counsel's term expiring later this year and two seats on the Board to be appointed by President Trump, the lasting impact of this report is questionable. In the short term, however, college and university employers would be wise to review their handbooks and policies applicable to student athletes, student workers, teaching and research assistants, and faculty to ensure compliance with current Board rules.

Cozen O'Connor's Labor & Employment attorneys are available to provide counsel and guidance on the issues discussed in this Alert.