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FEDERAL LABOR BOARD WEIGHS IN ON HIGHER EDUCATION'S DUTY TO BARGAIN OVER SHARING STUDENT DATA

Graduate and undergraduate student workers across the United States have been organizing in records numbers in the last few years. These campus organizing campaigns have raised questions about universities' duty under the National Labor Relations Act ("NLRA" or "Act") to provide student data to collective bargaining representatives in light of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which protects students' records and their personally identifiable information. On August 6, 2024, the General Counsel for the National Labor Relations Board ("NLRB" or "Board") published a Memorandum ("Memo") providing guidance on reconciling university employers' obligations under both statutes.

Generally, the Act requires employers to furnish a union with a list of employees when the union shows a thirty percent (30%) showing of interest in connection with an election petition. Employers also may voluntarily furnish such information in the context of voluntary recognition. After a collective bargaining representative is certified, an employer must furnish information relevant to collective bargaining, such as information regarding terms and conditions of employment. Where employers claim such information is confidential, the Board conducts a balancing test, weighing a union's need for the information against an employer's legitimate confidentiality interests; the burden is on the employer to demonstrate that its interests outweigh the union's needs. Even where an employer does demonstrate such a need, it must bargain in good faith with the union to seek reasonable accommodation.

However, under FERPA, institutions of higher education that receive federal funding are restricted from sharing "education records" or personally identifiable information of a student, unless that student has provided consent. There are a few exceptions to this prohibition, such as where there exists a lawfully issued subpoena. "De-identified" information, where personally identifiable information is removed, does not require consent. Further, an institution may designate certain information as "directory information" not requiring consent to share, but only where the school has given public notice that it is treating certain information as "directory" and has given students a reasonable period of time to object to the release of this information without prior written consent.

Despite these restrictions, colleges and universities still must comply with their obligations under the NLRA, and the General Counsel's Memo offers framework for such compliance. First, an institution must determine which information is actually protected by FERPA; general information like workplace handbooks which do not contain student's personal information is clearly not protected. Further, information that does contain a student's information is not be protected by FERPA if the student is not employed "as a result of" their status as a student. Next, if there is requested information that is protected

by FERPA, the college or university must offer a reasonable accommodation and bargain in good faith with the union in reaching such accommodation. Third, where an accommodation agreement is reached, the employer must abide by the accommodation and provide the information in a timely manner. If the parties cannot agree on an accommodation, then the union may file an unfair labor practice charge calling on the Board to strike an appropriate accommodation.

Finally, because FERPA consents are so frequently required in the context of student employee bargaining, and because time is often of the essence in student union organizing campaigns due to the semester-based calendar, the Board has collaborated with the United States Department of Education to develop a template consent form, available here.

SECOND CIRCUIT FINDS WORKER'S SEXUAL HARASSMENT CLAIMS CAN STAY IN COURT

On August 12, 2024, the United States Court of Appeals for the Second Circuit ("Court" or 'Second Circuit") held that an employee's claims for sexual assault, sexual harassment and retaliation can stay in court under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA"). The case is *Olivieri v. Stifel, Nicolaus & Co*., No. 23-00658 (2d. Cir. Aug 12, 2024).

The plaintiff alleged that she was subjected to assault and harassment by a senior manager and then subjected to retaliation after returning from maternity leave. She claimed that the manager began giving her inappropriate attention in June 2018. Among other acts, the manager talked to her regarding his sex life and cheating on his spouse, promised her raises and bonuses and, at one point, touched her rear end. The plaintiff raised concerns with management and human resources, who in turn stated that she made inappropriate comments. She eventually filed suit against the company in January 2021. When she returned from maternity leave one week after the EFAA went into effect in 2022, the retaliation continued. The employer delayed its response to an accommodation request, and she was kept out of meetings.

At issue was the meaning of when her claim "accrued" under the EFAA. While the harassment started before the EFAA's March 3, 2022 effective date, the Court found that the employee's claim accrued afterwards under the continuing violation doctrine, meaning that claims accrue at the last act in furtherance of the hostile work environment. The Court found that she experienced a retaliatory hostile work environment before March 2, 2022, which continued after the EFAA was enacted. And so, her claim accrued after the EFAA effective date. As such, she was able to invalidate her arbitration agreement with her employer and keep her claims in federal court.

A GROUNDBREAKING COLLABORATION: NLRB AND MICHIGAN AG FORGE A UNITED FRONT FOR LABOR RIGHTS

In a pioneering move, the National Labor Relations Board ("NLRB") has entered into its first-ever partnership with a state attorney general's office. This collaboration with the Michigan Department of Attorney General, spearheaded by Michigan Attorney General Dana Nessel, is designed to bolster the enforcement of labor laws through shared resources and strategic alignment. Accomplished via a Memorandum of Understanding ("MOU"), effective from August 5, 2024, to August 5, 2025, the agreement marks a significant step towards integrated labor law enforcement at both state and federal levels.

The core of this agreement is to enhance the efficacy of both entities in tackling misclassification of workers, addressing exploitative financial practices, and ensuring fair market compensation for workers. By pooling their resources and information, the NLRB and the Michigan AG aim to extend their reach and impact, potentially setting a precedent for other states to follow.

The MOU outlines comprehensive plans for the exchange of information and data that support enforcement mandates, which include complaint referrals and other investigative data. Both parties are committed to a systematic approach that facilitates easy exchange of this data, ensuring that information flows seamlessly between the two agencies to aid in enforcement actions.

The MOU also provides for monthly virtual meetings where both parties will discuss ongoing concerns, share legal theories, and explore new areas for partnership expansion. This regular interaction is intended to keep both parties aligned and responsive to emerging challenges in labor law enforcement.

Perhaps one of the most actionable aspects of the MOU is the mechanism for referring potential statutory violations to one another. This ensures that any infractions that fall under the purview of the other agency are promptly directed to the appropriate jurisdiction, enhancing the speed and effectiveness of legal responses.

As stated in the MOU, "this partnership with the National Labor Relations Board bolsters our ability to enforce those laws and protect our workforce," remarked Michigan AG Dana Nessel. This sentiment is echoed by Elizabeth Kerwin, head of the NLRB's Detroit office, who described the agreement as a "significant step" towards ensuring comprehensive compliance with labor laws across Michigan.

This collaboration is not just about sharing resources; it is also about creating a more coherent and unified front against violations of labor rights. The strategic partnership is expected to enhance the ability of both agencies to tackle complex cases that span both state and federal jurisdictions, particularly in a landscape increasingly dominated by gig economy issues and complex corporate structures that can often dilute workers' rights.

By bridging state and federal resources, this MOU not only amplifies the enforcement capabilities of both parties but also sets a robust model for other states to consider. As this partnership unfolds over the next year, it will be crucial to monitor its

effectiveness in addressing labor violations and enhancing the working conditions for Michigan's workforce. This innovative approach may well herald a new era of cooperative enforcement in labor law, with potential national implications.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

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