OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 24-06 **August 6, 2024**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Clarifying Universities' and Colleges' Disclosure Obligations under the National Labor Relations Act and the Family Educational Rights and Privacy Act

The National Labor Relations Board (NLRB or "Board") has seen a significant increase in student-workers at private colleges and universities exercising rights protected by the National Labor Relations Act (NLRA).[1] The exercise of these rights often requires such educational institutions to disclose student-related information to a labor union that represents or seeks to represent those student-workers. In addition, the Family Educational Rights and Privacy Act of 1974 (FERPA) protects the privacy of student education records and personally identifiable information contained therein. This memo provides guidance clarifying the requirements of NLRA and FERPA in cases involving the duty to furnish information where both statutes may be implicated.

Brief Overview of Statutory Frameworks

Private universities and colleges ("institutions") that employ student-workers are subject to the NLRA, as "student assistants [and others] who have a common-law employment relationship with their university are statutory employees under the [NLRA]."[2] Thus, student-employees are guaranteed the Section 7 "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all of such activities."[3] Just like other statutory employees, student-employees may seek representation either by means of a Board election or a demonstration that a majority support representation.[4] In connection with the processing of an election petition, an

[1] *See* Alyssa Lukpat, *Union Wave Comes to the College Campus*, Wall St. J., Oct. 28, 2023; Parker Purifoy, *Unionization Nears Record Levels as Students, Interns Organize*, Bloomberg Law, Aug. 24, 2023; Robert Iafolla, *Yale Union Election Is Latest Move in Campus Labor Renaissance*, Bloomberg Law, Nov. 30, 2022.

[2] *Columbia University*, 364 NLRB 1080, 1081 (2016).

[3] 29 U.S.C. § 157.

[4] *See, e.g.*, *Mine Workers v. Ark. Oak Flooring Co.,* 351 U.S. 62, 71-72 & n.8 (1956).

employer is required to furnish an employee list to the union generally upon a thirty percent showing of interest.[5] When representation is sought outside of a formal Board representation proceeding, an employer may voluntarily furnish such a list without a threshold showing of interest, such as pursuant to a neutrality agreement.

Once voluntarily recognized or certified, a collective-bargaining representative is entitled to information relevant and necessary to carry out its representational duties and responsibilities, including bargaining for a collective-bargaining agreement and processing grievances.[6] Information concerning terms and conditions of employment of bargaining unit employees is presumptively relevant.[7] Where the information is not presumptively relevant, the employer may still have a duty to furnish it if the union can demonstrate its relevance.[8] Relevant information must be provided to the union in a timely manner.[9]

When an employer asserts that relevant information requested by a union is confidential, the Board balances the union's need for the information against any legitimate and substantial confidentiality interests asserted by the employer.[10] When the assertion stems from a state or federal law, the Board will consider that in its assessment of whether a legitimate confidentiality interest exists.[11] The employer has the burden to establish that it has such a confidentiality interest and that this interest outweighs the union's need for the information.[12] If established, the employer may not simply refuse to furnish the requested information, but must timely seek an accommodation with the union that will effectuate the union's interest in obtaining the information.[13] Thus, it is the employer's duty to offer the union a reasonable accommodation and bargain in good faith toward an

---

[5] 29 C.F.R. §§ 102.62(d), 102.67(l) (codifying requirement that the employer furnish a voter eligibility list, initially adopted in *Excelsior Underwear*, 156 NLRB 1236 (1966)). In this context, the NLRA and FERPA can be applied without conflicts. In order to perform our primary function related to representation cases, the NLRB may subpoena voter lists from institutions and then share those lists with any union that is a party to the representation case. *See* 20 U.S.C. § 1232g(b)(1)(J)(ii), (b)(2)(B); 34 C.F.R. §§ 99.31(a)(9)(i), 99.33(c) (exempting disclosures pursuant to a subpoena from redisclosure conditions).

[6] *See, e.g.*, *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151-53 (1956).

[7] *See, e.g.*, *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991).

[8] *See, e.g.*, *Disneyland Park*, 350 NLRB 1256, 1257-58 (2007).

[9] *See, e.g.*, *Bundy Corp.*, 292 NLRB 671, 672 (1989).

[10] *See, e.g.*, *Pennsylvania Power*, 301 NLRB at 1104-05.

[11] *See Borgess Medical Center*, 342 NLRB 1105, 1105 (2004); *GTE California, Inc.*, 324 NLRB 424, 425 n.2, 426-27 & n.5 (1997).

[12] *A-1 Door & Building Solutions*, 356 NLRB 499, 500-01 (2011).

[13] *Id.*; *Borgess*, 342 NLRB at 1106.

agreement that addresses both parties' interests.[14] If the union is not satisfied with the employer's proffered accommodation, it is required to respond and explain why the employer's offer is insufficient, but it need not propose a precise alternative.[15] Where the parties are unable to reach an accommodation, the Board will balance the parties' respective interests and strike an accommodation "in light of proposals made during bargaining."[16]

FERPA provides that institutions that are the recipients of federal funds under any applicable program may not disclose "education records," or personally identifiable information[17] contained in such records, unless the student[18] has provided prior written consent or an exception applies.[19] Records maintained by such an institution constitute "education records" if they "contain information directly related to a student."[20] Consent is not required to disclose "de-identified" information[21] or information an institution has

[14] *Metropolitan Edison Co.*, 330 NLRB 107, 107-09 (1999).

[15] *See Piedmont Gardens*, 362 NLRB 1135, 1137 n.7 (2015), *enforced sub nom. Am. Baptist Homes of the W. v. NLRB*, 858 F.3d 612 (D.C. Cir. 2017); *Borgess*, 342 NLRB at 1106; *Allen Storage & Moving Co.*, 342 NLRB 501, 503 (2004).

[16] *Metropolitan Edison*, 330 NLRB at 109-10; *see also Piedmont Gardens*, 362 NLRB at 1137 n.7.

[17] 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3 (defining personally identifiable information as including, but not limited to, name, address, social security number, student number, biometric record, date and place of birth, mother's maiden name, as well as "[o]ther information that, alone or in combination, is linked or linkable to a specific student").

[18] FERPA rights transfer from the parent(s) to the student once a student turns 18 years old or attends an institution. 20 U.S.C. § 1232g(d); 34 C.F.R. §§ 99.5(a)(1), 99.3 (defining "[e]ligible student").

[19] 20 U.S.C. § 1232g(b), (h)–(j); 34 C.F.R. § 99.31. The exceptions include, among other things, records sought pursuant to a lawfully issued subpoena. 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9). I do not plan to issue subpoenas in FERPA cases as I believe it is counter to our mandate of promoting good faith collective bargaining, in addition to being administratively burdensome to do so as a matter of course every time a union seeks FERPA-covered information.

[20] 20 U.S.C. § 1232g(a)(4)(A). FERPA regulations specify that records concerning a student-employee "who is employed as a result of his or her status as a student are education records." 34 C.F.R. § 99.3 (defining "[e]ducation records"). On the other hand, records maintained by institutions that "[r]elate exclusively to the individual in that individual's capacity as an employee" and that are "not available for use for any other purpose" are not "education records" within the meaning of FERPA. *Id.*

[21] 34 C.F.R. § 99.31(b)(1). Records are considered "de-identified" if all personally identifiable information has been removed and there is a "reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information." *Id.*

designated as "directory information;" however, there are substantive and procedural limitations on this latter exception.[22]

Guidance for Responding to an Information Request

Applying the above principles to those institutions to which FERPA applies, such institutions must take certain steps, which are set forth below, to comply with their NLRA obligations and, if applicable, their obligations under FERPA, upon receiving a request for relevant information from a collective-bargaining representative that might implicate FERPA.

First, the institution must determine whether the request seeks education records or personally identifiable information contained therein. While many requests seek information specific to individual student-employees, others may not. For example, a benefit plan or workplace handbook that does not include any student information is general in nature and would not constitute an education record. Because these documents are not protected by FERPA, there is no confidentiality concern, and the institution must produce such records in a timely manner. Even as to requests that seek individual-specific data, the institution must consider whether the student-employee is employed as a result of their status as a student.[23] If the institution determines that some or all the student-employees' records at issue are covered by FERPA, the institution should be prepared to explain why and substantiate with documentary evidence, if available, that the student-employee is employed as a result of their status as a student to the union and, if necessary, before the NLRB. Some examples of documentary evidence include, but are not limited to, job announcements, employment contracts or offer letters (in redacted form, if appropriate), and student-employment program documents.[24] The institution is required to make this showing for each job classification the information request encompasses. If the union's request concerns some records that are *not* covered by FERPA, the institution must provide that information without delay, even if FERPA applies to other parts of the request. For example, where a union represents student-employees who are not employed as a result of their student status,

[22] 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.31(a)(11); *see* 20 U.S.C. § 1232g(a)(5)(A) (defining "directory information"); 34 C.F.R. § 99.3 (same); 20 U.S.C. § 1232g(a)(5)(B) (describing conditions for disclosing directory information); 34 C.F.R. § 99.37 (same). In order for information to be disclosable to third parties as directory information, the institution must have given public notice of the categories of information which it has designated as directory information to students and allowed a reasonable period of time for students to inform the institution that any or all of the information designated should not be released without prior written consent. *See* 34 C.F.R. § 99.37.

[23] For more information on this issue, see *Trustees of Grinnell College*, Case 18-CA-300972, Significant Advice Memorandum dated May 25, 2023 (citing the definition of education records in 34 C.F.R. § 99.3(b) which excludes employment records unless the individual is employed as a result of their status as a student).

[24] *Id.*

the institution would be required to provide information expeditiously because no accommodative bargaining is necessary.

Second, if a request seeks information protected by FERPA, the institution must offer a reasonable accommodation in a timely manner and bargain in good faith with the union toward a resolution of the matter. For example, the parties may bargain over the process for requesting written consents (e.g., whether electronically[25] or by mail, whether distributed by the employer or the union), the scope of the consent, the possibility of the institution utilizing the process for designating the data as directory information to the extent appropriate and permissible by law, and the acceptability of de-identified information. Where a union does not possess the identities and/or contact information for the student-employees in question, I have taken the position that proposing that the union seek the FERPA consents, rather than the institution, is unreasonable and a violation of the duty to bargain. For example, if a union learns that certain bargaining unit members were paid late, files a grievance on behalf of all affected bargaining unit members, and requests information about all affected employees, the union cannot be expected to seek FERPA consents since only the institution can identify all of the individuals who were impacted by the delayed payroll. On the other hand, if a union files a grievance concerning the discipline of a single unit employee, whose contact information is known, it would be reasonable to offer to produce information connected to that individual contingent on the union securing a FERPA-compliant consent.

Third, if the parties reach an agreement over an accommodation, the institution must abide by that agreement and furnish the records. If, however, the parties are unable to reach agreement, the union may file an unfair labor practice charge and the Board will strike an appropriate accommodation in light of the parties' bargaining proposals. In several cases presenting such circumstances, I have authorized issuance of a complaint, absent settlement, and sought a Board order requiring the institution to seek the FERPA consent, furnish the information in full as to student-employees who consent, and, if possible, provide de-identified information for any employees who decline to grant consent.

Facilitating the Consent Process

The frequency with which information requests require accommodative bargaining is exceptionally high for institutions due to FERPA. To help facilitate an efficient process, institutions to which FERPA applies may include the attached FERPA consent template in paperwork to be completed by a student-employee upon onboarding of employment. The Office of the General Counsel has engaged with the U.S. Department of Education in the development of this consent form.

This template consent form, when signed and dated by the student-employee, would permit an institution covered by FERPA to disclose to a union, consistent with FERPA, any employment-related records of a student that are relevant and reasonably necessary

[25] 34 C.F.R. § 99.30(d) (setting forth requirements for consent "in electronic form").

for each stage of the representation process: organizing (e.g., pursuant to a neutrality agreement), voluntary recognition or union election, and serving as representative (e.g., negotiating a collective-bargaining agreement and processing grievances). Furthermore, it would permit a union to redisclose such records to third parties as reasonably necessary for these purposes. Obtaining such consent when students begin employment would reduce delay and obviate the need to seek students' consent at the time a union seeks to represent employees or submits an information request to carry out its representative functions.

If an institution covered by FERPA chooses not to present such consent forms, on its own initiative, at the time of students' employment onboarding, the parties may bargain over establishing a process to request consent once a union is recognized or certified. They need not wait for the first information request to initiate such bargaining. For example, the parties may agree to seek consent from current student-employees as well as new hires during the onboarding process. And they may agree that the institution will provide de-identified data (such as statistics or redacted information) relating to any students who decline to provide consent, if possible.

I trust that this memorandum will help Regional Offices, institutions, and labor unions understand their obligations under FERPA and the NLRA. As a reminder, Region 1 is coordinating pending cases involving institutions of higher education, especially where FERPA issues are raised. If Regions have questions about applying the principles set forth in this memorandum in a specific case, they should consult with the Division of Advice and copy Region 1.

/s/
J.A.A.

Attachment