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Stopping the Presses: Private Universities and Gag Orders on Media Interviews

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Abstract

The right of employees to speak freely to journalists about workplace matters is well recognized as a constitutional principle in the public sector. Less well recognized is the ability of private-sector employees, including those at private colleges and universities, to invoke the protection of the National Labor Relations Act to resist unduly broad "gag orders" that inhibit their ability to share information with the media. Recent precedent from the National Labor Relations Board fortifies that right—but it is under attack by the NLRB's Trump-appointed majority and staff, as once-settled worker-rights principles are reexamined. This article looks at the enforceability of media "gag orders" in the private university setting and offers some grounds for arguing that free-speech protections should extend to employees on private campuses.

"I'm not allowed to talk to you." It's a disturbingly common roadblock for journalists in search of information—whether from a government agency, a Fortune 500 company, or a private university. While it's understood that the First Amendment gives some measure of free-speech protection to public employees, the absence of constitutional guarantees at private institutions has emboldened owners and managers to believe they have total authority to silence their employees' interactions with journalists—and punish any who stray.

As a result, journalists covering private organizations, including private colleges and universities, regularly are shuffled off to a public relations office, where they and their audiences must make do with a "canned"

statement by someone who may or may not have any knowledge of the subject. Whistle-blowing is stifled, and accountability suffers.

The rank-and-file university employee—a police officer, a laboratory technician, a maintenance worker—is often in the best position to provide informed firsthand information, but employer gag orders make that impossible. When information is instead filtered through a university's media relations office or general counsel, it is more likely to be inaccurate, incomplete, or sanitized.

Absent a contractual remedy, it has long been assumed that private sector employees have no legally protected right to speak about workplace matters, and no recourse if their employer retaliates for unapproved interaction with the news media. But that assumption may be faulty.

The National Labor Relations Act (NLRA)[1] has been interpreted to protect certain free speech rights at private universities and other nongovernmental workplaces. In recent years, the National Labor Relations Board (NLRB)—the executive branch agency charged with enforcing compliance with federal worker-rights laws—has found that employers can go too far in gagging their employees from speaking about work-related issues.[2]

However, just when it appeared that the law of free speech in the private workplace was solidifying in favor of employee speech rights and against blanket gag orders, a recent Trump administration decision signaled a course reversal.[3] The forecast for private sector free speech rights has abruptly changed from "mostly sunny" to "partly cloudy."

This essay examines recent developments in the law of employee speech rights in the private sector and how those rights may or may not apply to varying classes of higher education professionals. It concludes with policy arguments advocating for the recognition of legally protected free-expression rights at private universities to a comparable degree as would exist under the US Constitution as a public institution.

[1] 29 U.S.C. §§ 151–69.
[2] Phillips 66, 2014 NLRB LEXIS 921 (N.L.R.B. Nov. 25, 2014); *In re* Banner Health System, 358 NLRB No. 93, Case No. 28–CA–023438 (2012). *See also* General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context, Memo GC 17-01 (NLRB Jan. 31, 2017); Report of the General Counsel Concerning Employer Rules, Memo GC 15-04 (NLRB Mar. 18, 2015).
[3] Mandatory Submissions to Advice, Memo GC 18-02 (NLRB Dec. 1, 2017).

NLRA Overview, Who and What Is Protected

Congress passed the National Labor Relations Act in 1935 to protect workers against abusive employment practices by safeguarding the right to organize and bargain for improved working conditions. The NLRA outlaws specified "unfair labor practices" and empowers a five-member panel of presidential appointees, the National Labor Relations Board, to enforce the act's provisions. The act applies only to private-sector employers, so a state college or university is not subject to NLRB jurisdiction, although state employees may have remedies for infringements of their rights through the Constitution or state statute. The board has jurisdiction only over employers that do $50,000 or more in annual interstate business, so that small entities serving a purely local clientele are exempt, while there is an annual $1 million minimum for private and nonprofit colleges, universities, and other schools.[4]

Not all private colleges are subject to the NLRA. A nonprofit educational institution is exempt from the act if the institution holds itself out to the public as overtly religious (even if secular subjects are taught) and is formally affiliated with a religious order or denomination.[5] Typically, this status is determined on a case-by-case basis; the NLRB will consider the involvement of the religious institution in daily operations of the school, the degree to which religion plays a role in the school's curriculum, whether religious factors are used for the hiring and evaluation of employees,[6] and whether the school holds the petitioned-for faculty members out as performing a religious function in furtherance of its religious mission.[7]

Even where the act applies, not all employees are covered. Employees in managerial roles are unprotected, and that applies even if the scope of supervisory authority is relatively small, such as a full-time faculty member with authority to make curricular decisions.

In a 1980 case alleging antiunion practices at Yeshiva University, the Supreme Court decided that full-time faculty have no statutorily protected collective bargaining rights if they have "absolute" authority over academic matters.[8] In that case, the Court looked at the university's strong tradition of faculty participation in governance decisions, including budget and personnel decisions, and determined that Yeshiva faculty fit the definition of "managerial" employees, because they "formulate and effectuate management policies by

[4] National Labor Relations Board, *Jurisdictional Standards*, https://www.nlrb.gov/rights-we-protect/jurisdictional-standards (last visited January 8, 2018).
[5] University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002).
[6] *Id.* at 1339.
[7] Pacific Lutheran Univ., 361 NLRB No. 157 (Dec. 16, 2014).
[8] NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

expressing and making operative the decisions of their employer."[9] Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these.[10]

In reaching this result, the justices overruled the position of the NLRB, which was persuaded that faculty did not qualify as "managerial" because any supervisory decisions they made were reached as a matter of independent professional judgment, not just carrying out the wishes of management. The Court found that distinction to be immaterial, focusing instead on the considerable weight that collective faculty decisions carried in campus governance.

As one of the few NLRA cases to reach the Supreme Court, the *Yeshiva* standard became the accepted measuring stick for assessing the "management" status of college instructional personnel. However, the determination is highly fact-specific and generalizations are difficult.

A federal appeals court decided in 1989 that faculty at a Michigan design school did not participate in campus governance to a degree sufficient to classify them as "management," and accordingly, they were entitled to NLRA protection.[11] Faculty at the Michigan college, the judges found, played a far more limited role in governance than those at Yeshiva: "While having been cloaked with the appearance of authority in some limited areas of decisionmaking, [the faculty] does not significantly or effectively participate in the operation of the enterprise" and thus does not qualify as "managerial."[12]

Factors that have weighed in assessing the "managerial" status of faculty include whether the college maintained an "open admissions" system (negating any faculty influence over admission decisions) and whether faculty earned tenure or worked under year-to-year contracts,[13] and whether faculty have the ability to approve students for graduation and choose their own textbooks.[14] In a 2004 case in which a reviewing

[9] *Id.* at 682 (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 288 (1974)).
[10] *Id.* at 686.
[11] David Wolcott Kenfall Mem. Sch. v. NLRB, 866 F.2d 157 (6th Cir. 1989).
[12] *Id.* at 161.
[13] Florida Memorial College, 263 N.L.R.B. 1248 (1982).
[14] University of Great Falls, 325 N.L.R.B. 83 (1997)

court overturned the NLRB's judgment, then-appellate judge John Roberts skeptically described the board's evaluation process as "an open-ended rough-and-tumble of factors."[15]

In a recent case, the NLRB refined the *Yeshiva* analysis so that faculty authority over three "primary" areas—academic programs, enrollment management, and budgeting—is given greatest weight in determining whether they are "managerial" for purposes of the NLRA.[16] Other areas of faculty authority, such as personnel policy authority, are to be given less importance in determining NLRA eligibility.

While it is not entirely clear where the "supervisor" line will be drawn, courts have determined that the act does protect graduate teaching assistants and does apply to contract employees of outside vendors who work under the supervision of a private educational institution.[17] Adjunct faculty ineligible for tenure have been held to be nonmanagerial and thus entitled to the benefit of the NLRA, although a decision ordering the University of Southern California to bargain with non-tenure-track faculty is currently being contested before a federal appeals court.[18]

In sum, a rank-and-file employee at a private university, such as a police officer, payroll clerk, or laboratory technician, should be within the scope of NLRA protection, while it is less clear whether instructional personnel are or are not covered. The less that a faculty member appears to be part of "management," the stronger the chance that the NLRA will apply, so contingent faculty (adjuncts, teaching assistants, and so forth) will be far more likely to benefit from the free expression protections of the act than tenure-track professors. This leaves professors at private institutions, where First Amendment guarantees do not apply, to seek protection for their expression in norms of academic freedom and shared governance, as well as any contractual safeguards or safeguards against retaliation provided in institutional regulations.

The NLRB's Application of the NLRA to Employee Speech

The NLRA is understood to protect employees' ability to speak freely, because the workplace is "the natural

[15] LeMonye-Owen College v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004).
[16] Pacific Lutheran, *supra*, at *23.
[17] Nova Southeastern University v. NLRB, 807 F.3d 308 (D.C. Cir. 2015). The NLRB has also independently ruled that graduate teaching and research assistants at private universities are school employees, overruling a 2004 Brown University ruling in which the board said graduate students would not be protected. Trustees of Columbia University, Case 02–RC–143012 (N.L.R.B. Aug. 23, 2016).
[18] University of Southern California, NLRB 31-CA-178831, 31-CA-192125 (June 7, 2017). The case is on appeal to the DC Circuit, Docket Nos. 17-1149 and 17-1171, and the AAUP has filed a supporting brief urging affirmance of the board's decision in favor of USC adjuncts.

gathering place" for employees to discuss working conditions.[19] Thus, it is regarded as an unfair labor practice for employers to unduly interfere with worker-to-worker communications, even when the workers are using certain communications channels or devices provided by the employer.[20]

For instance, employees have a right—except in very limited circumstances—to use their work email to organize unions and to discuss the terms and conditions of employment during nonworking hours.[21] This type of "concerted activity" is protected by NLRA Section 7, which addresses the rights of employees to self-organize, form labor organizations, and bargain collectively through representatives of their choosing.[22] Notably, however, this standard does not apply to employer regulation of email during working time and only applies to employers who already grant employees access to business email systems. Further, despite some efforts by prior NLRB general counsel to extend this standard to employees' use of other company electronic systems (e.g., the Internet, phones, and instant messaging),[23] a December 2017 announcement by the NLRB's newest general counsel has set aside such initiatives.[24]

Nonetheless, in recent years, the NLRB and its staff have recognized communications beyond worker-to-worker—and specifically with the news media—as a legally protected adjunct to the right to organize toward improving workplace conditions.

Most recently in 2014, an NLRB administrative law judge (ALJ) found that a company's news media policy, which effectively acted as a blanket gag order on everyone other than a designated spokesperson, was unlawful under the NLRA.[25]

The case, filed by the United Steelworkers Union (USU) against petroleum giant Phillips 66, alleged a series of unfair labor practices directed at employees of an oil refinery in Santa Maria, California. Specifically, the USU alleged that Phillips management pressured employees not to join the union, threatened to take pay

[19] *See, e.g.,* N.L.R.B. v. Magnavox Co. of Tennessee, 415 U.S. 322 (1974) (holding that a workplace rule against distribution of literature can constitute interference with employees' statutorily protected right to organize).
[20] *See, e.g.,* Purple Communications, Inc. and Communications Workers of America, 361 NLRB No. 126201, L.R.R.M. (BNA) 1929 (Dec. 11, 2014) (holding that, when employer provides email access for business purposes, employer must tolerate the use of the email system for statutorily protected communications).
[21] *Id.* The NLRB's position on the matter was reconfirmed in a supplemental decision and order: Purple Communications, Inc. and Communications Workers of America, AFL–CIO, 365 NLRB No. 50 (Mar. 24, 2017).
[22] 29 U.S.C. § 157.
[23] *See* Memo GC 16-01 (NLRB 2016).
[24] The memo has also set out to revisit the NLRB's original *Purple Communications* decision in order to determine whether there may be an "alternative analysis" that is more favorable to employers. Memo GC 18-02 (NLRB 2017).
[25] *Phillips 66*, 2014 NLRB LEXIS 921 (N.L.R.B. Nov. 25, 2014).

and benefits from those who did join, refused to engage in good-faith collective bargaining, and imposed an overly broad gag order on all employee interactions with the news media.

The media policy stated that, if employees were contacted by the media, "no information exchange is permitted concerning [company] operations." Employees were informed that it was "against company policy for anyone but an authorized company spokespersons [*sic*] to speak to the news media."[26] The ALJ held, in accordance with NLRB precedent,[27] that the policy would tend to chill protected activity and thus violated Section 7 of the NLRA, because employees could reasonably understand the policy as prohibiting them from discussing "'wages,' 'labor disputes,' and other terms and conditions of employment."[28] The ALJ said the ability to discuss workplace conditions with coworkers is "the most basic of Section 7 rights," and talking with those outside the workplace is a logical adjunct to that core right.[29]

The *Phillips 66* case built on a foundation of two decades' worth of NLRB precedent disfavoring wholesale prohibitions on employee communications with the news media—including, notably, one involving the Trump Organization.

In August 2008, an employee of the Trump Marina Casino Resort in Atlantic City was called into his manager's office and confronted about a quote in the local newspaper, the *Atlantic City Courier Post*, made in his capacity as a union representative.[30] The employee, Mario Spina, was reminded of a company policy providing that only specified top managers are authorized to speak with the media, and told not to commit further violations of the policy.

Spina lodged an unfair labor practices complaint with the NLRB. An NLRB trial judge found in the employee's favor, and the NLRB affirmed that finding in a December 2009 decision, finding both that the intimidating interrogation of Spina about his interview with the *Courier Post* was illegal and that the entire media policy was unlawfully broad.[31] The board found that the only justification offered by the employer—

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[26] *Id.* at 19.
[27] *See* Crowne Plaza Hotel, 352 NLRB 382 (2008). In *Crowne Plaza*, the NLRB found that a policy forbidding unauthorized employees from speaking with the media about "any incident that generates significant public interest or press inquiries" was unlawfully broad. *Id.* at 386. The validity of the *Crowne Plaza* decision has been questioned, because it was the product of only a two-member majority vote on a depleted NLRB, but its core principles have since been reaffirmed several times.
[28] *Phillips 66*, 2014 NLRB at 34.
[29] *Id.*
[30] This factual narrative is derived from the NLRB's ruling in Trump Marina Assoc., LLC, 354 NLRB 1027 (Dec. 31, 2009).
[31] *Id.* at 1030–31. Significantly, although the employer attempted to justify the prohibition by noting that the policy did not itself contain penalties for unapproved media interviews, the NLRB looked to the broader context of the

the need to prevent disclosure of proprietary or confidential information—could not justify a restraint encompassing all dealings with the media, even (as in Spina's case) merely offering opinions about a controversy over workplace conditions. The Trump casino was directed to refrain from "enforcing rules in its employee handbook that prohibit employees from releasing statements to the news media without prior authorization and limiting the employees who are authorized to speak with the media."[32]

The Trump Organization appealed the NLRB ruling to the US Court of Appeals for the District of Columbia, but in a brief four-paragraph judgment, the court unanimously affirmed the board's decision.[33] The court cited its own 2007 ruling in a case against Cintas Corporation, in which a company "confidentiality policy"—forbidding discussion outside the workplace of "any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters"—was found to be unduly restrictive in violation of the NLRA.[34]

In other cases, the NLRB has struck down employee gag policies stating that employees are forbidden from discussing company "policies and/or practices" with the media,[35] or instructing employees that "all inquiries from the media and other organizations be referred to the corporate office" and that communications with the media must be "specifically authorized."[36]

In short, it has been the consistent position of the NLRB dating back at least to 1990, affirmed on multiple occasions by the courts, that it is an unfair labor practice to restrict employees from discussing work-related matters outside the workplace, including with journalists. Thus, a private university's policy forbidding unapproved communications with the news media is presumptively unlawful and vulnerable to legal challenge, either on its face or as applied in a particular employee's disciplinary case.

Although the law disfavors workplace restrictions on media interviews, those policies nevertheless persist. At Long Island University, student journalists and employees have complained that their university's restrictive access policies interfere with the public's ability to get candid information about campus news events.[37] A professor supportive of the campus newspaper, the *Pioneer*, complained of an administrative

employee handbook and found that the policy implicitly carried the threat of dismissal, as did any other violation of the handbook.

[32] *Id.* at 1031.

[33] Trump Marina Assoc., LLC v. NLRB, No. 10-1261 (D.C. Cir. May 27, 2011) (unpublished slip opinion).

[34] Cintas Corp. v. NLRB, 482 F.3d 463 (D.C. Cir. 2007).

[35] Leather Center, Inc., 312 NLRB 521 (Sept. 30, 1993).

[36] Interbake Foods LLC, 2013 WL 4715677 (NLRB Div. Jud. Aug. 30, 2013).

[37] Amanda Ocasio, "A Real-World Lesson on Press Freedom at Long Island University–Post," *Queens Free Press*, February 20, 2017; *see also* Wandera Hussein, "Censorship at LIU Post Campus Draws Concern from Student

"crackdown" on employees speaking with student reporters after the newspaper's detailed reporting on campus unrest that led the president to "lock out" faculty. The *Pioneer*'s student editor complained that, because LIU required employees to route every question to a media relations spokesperson, news stories were late, incomplete, and at times inaccurate.

While a wholesale prohibition on unapproved interviews would clearly constitute an NLRA violation, many institutional policies are more nuanced and fall into a grayer legal area. For instance, at DePaul University, employees are told, "Faculty and staff members who are asked by reporters to provide information about DePaul's students, administration or operations should consult with a member of the Media Relations department prior to engaging in the interview to determine the appropriate person to give the interview and/or to obtain mutual agreement on topics to be addressed."[38] Restrictions on the release of information about students may be justifiable on privacy grounds, but it is less certain that a court would uphold a restriction on furnishing information about the "administration or operations" of a private university, which appears to broadly encompass topics that might include workplace grievances. In a similar vein, Emory University tells employees that the university media relations office must "initiate all contacts and respond to all inquiries from the news media and release information about events, programs, research, emergencies, and incidents involving Emory."[39] This policy, too, suggests that faculty will be in violation of university policy if they initiate contact with a journalist to discuss university "programs" or "events," which is sufficiently wide-ranging to encompass legally protected speech, at least as to any affected employees who qualify for NLRA protection.

"Notification" policies are commonplace, such as this language from the employee handbook at Samford University: "Employees who are contacted directly by news media should use personal and professional discretion in responding to media inquiries and should immediately notify the Office of Communications of media inquiries."[40] It is unclear whether the courts and NLRB would regard a policy of mandatory employer notification alone to be an infringement of legally protected freedoms, especially if it is permissible to give notification after the interview has taken place. The NLRB has never published an opinion addressing the

Newspaper," *Seawanhaka*, November 29, 2016 (reporting on complaint lodged by student editor about inability to speak with campus employees).

[38] DePaul University Code of Conduct, at 4, https://offices.depaul.edu/compliance-and-risk-management/Documents/Code_of_Conduct.pdf.

[39] Emory University Faculty Handbook, Chapter 19: Policies on Media, Communication, and Marketing, http://provost.emory.edu/faculty/handbook/chapters/nineteen.html.

[40] Samford University Policy Manual, Policy 1.17, https://www.samford.edu/departments/files/Human_Resources/Samford-University-Policy-Manual.pdf.

legality of a policy that is phrased in terms of "notification" only. But because the Samford policy (despite recognizing "discretion" to respond) requires "immediate" notification on receipt of an inquiry, it can be read as signaling to the employee that employer approval is mandatory—which the NLRB disfavors.

Policies categorically forbidding contact with the news media are more commonplace within athletic departments, reflecting the special sensitivity with which universities treat potentially unfavorable information about their teams, players, and coaches, and the autonomy of many athletic departments to formulate their own standards separate-and-apart from general university standards. Northeastern University's policies offer an example typical of those at athletic departments everywhere: "Athletic staff and student-athletes must inform and obtain the consent of the Assistant Athletic Director (Communications) or designated staff member prior to discussing with the media any item concerning Northeastern's intercollegiate athletics program."[41] To the extent that such prior-approval policies extend to nonmanagement and nonsupervisory staff, they would run afoul of NLRA prohibitions.

The Northwestern Cases and the General Counsel's Memo

In January 2014, a group of Northwestern University football players made headlines by petitioning the NLRB to be declared "employees" for purposes of the protection of the NLRA and the Fair Labor Standards Act.[42] The complaint attracted nationwide attention because of its potential to upend the traditional university/athlete relationship. Universities have scrupulously avoided classifying players as "employees" to minimize liability; indeed, the term "student-athlete" was popularized as part of a coordinated national campaign to emphasize "student" status so that athletes could not claim eligibility for workers' compensation or employee death benefits.[43]

The issue of the players' status took years of litigating before the NLRB to resolve, but what ultimately came out of the board and its staff turned out to be of relatively little consequence for most athletes—but of much greater consequence for all other college employees.

[41] Northeastern University, Policy on Media Contacts Regarding Athletics, https://www.northeastern.edu/policies/pdfs/Policy_on_Media_Contacts_Regarding_Athletics.pdf.
[42] Ben Strauss, "In a First, Northwestern Players Seek Unionization," *New York Times*, January 28, 2014.
[43] Taylor Branch, "The Shame of College Sports," *Atlantic*, October 2011, 80, 88–89.

Initially setting the stage for the Northwestern decision was a March 2015 advisory memorandum, the "Report of the General Counsel Concerning Employer Rules."[44] The memo cautioned employers against excessively controlling their employees' speech to outside audiences, including the media.

The NLRB reviewed employers' handbooks and identified a number of prohibitions as unlawful under the NLRA. The prohibitions flagged as violating the act were those categorically forbidding employees from discussing work-related information outside the workplace, or requiring that employees say only favorable things about the employer. While many of the provisions that the NLRA flagged as problematic are fine social courtesies—speaking respectfully about others, refraining from "embarrassing" or "hurtful" online comments—they cannot be enforced as mandatory employment standards. That's because requiring employees to refrain from "damaging" or "derogatory" speech, or speech that "undermines the reputation" of the employer, risks inhibiting the speech that the NLRA exists to protect: Speech bringing workplace shortcomings to light so employees can unify in seeking reforms.

Among the restrictions that the NLRB memo expressly identified as unlawful were prohibitions on speaking with the media unless "designated" to do so by the employer, and requiring that all media inquiries be referred to a company hotline.[45] The key takeaway from this memo was that the NLRB would consider it a violation of the NLRA for any private employer, including a college or university, to require employees to only say favorable things about the company or to gag the employees from giving interviews altogether.

In August 2015, David Rosenfeld, an activist labor lawyer with the firm of Weinberg Roger & Rosenfeld in Alameda, California, filed a complaint with the NLRB, alleging that Northwestern University was guilty of "unfair labor practices" in its treatment of football players by restricting their speech, including their use of personal social media accounts during off hours.[46]

In response, the NLRB issued an "advice memorandum" on September 22, 2016, essentially finding that the case was moot, because after receiving Rosenfeld's complaint, the university rewrote its football team handbook to be less speech-restrictive. Those revisions thus made it unnecessary to decide whether Northwestern football players were or were not employees, because in the NLRB's view, the revised handbook met NLRA standards even if the NLRA did apply to athletes.

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[44] Report of the General Counsel Concerning Employer Rules, Memo GC 15-04 (NLRB 2015).
[45] *Id.* at 12.
[46] Lester Munson, "Free to Tweet: Northwestern's Restrictions on Football Players Ruled Unlawful," *ESPN*, October 10, 2016, http://www.espn.com/espn/otl/story/_/id/17765516/nlrb-rules-northwestern-restrictions-unlawful.

Nevertheless, the board's associate general counsel proceeded to analyze the prior version of the football team handbook to identify those provisions that—if applied to employees—would be unlawful. Echoing the prior March 2015 guidance memo, the September 2016 memorandum flagged a series of forbidden statements in the handbook that purported to require athletes to protect the university's image and reputation, to refrain from "embarrassing" the university on social media, and to avoid discussing information about the team with anyone. Specifically, the Northwestern memorandum said it would violate the NLRA to enforce a directive requiring that all requests for media interviews be approved by the university communications office, and an accompanying directive to "politely, but firmly redirect" any media inquiries to the athletic department.

In other words, it was the view of the NLRB legal counsel's office that Northwestern, as a private employer, could not enforce restrictions on its employees requiring them to clear interviews with their supervisors or to say only favorable things to the media. This broad reiteration of two decades' worth of NLRB precedent went largely unremarked, because the national media perceived the story as being one about the rights of football players, and the resolution of Rosenfeld's complaint did not produce a conclusion about the employment status of athletes.

In the waning days of the Obama administration, the NLRB legal counsel's office formulated a compilation about the application of labor law to university faculty and students, which actually came out a few days after President Donald Trump took office, but with holdover Obama appointees still running the NLRB.[47] In that compilation memo, the board's staff finally answered "the Northwestern football question" in the athletes' favor: Football players at major-college (Division 1) programs will be regarded as employees, because they work a schedule approximating full-time employment and receive a package of compensation comparable to the value of a salary.[48] Accordingly, those students are entitled to organize and otherwise take advantage of the protections of the NLRA.

As part of that memo, the general counsel reiterated the board's positions from the *Pacific Lutheran* case that were seen as narrowing the universe of colleges that could claim the religious exemption to the NLRA

[47] General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context, Memo GC 17-01 (Jan. 31, 2017).

[48] Because most of the universities playing Division I football are public and therefore beyond the reach of the NLRA, the memo applies to only seventeen major-college programs: Baylor, Boston College, Brigham Young, Duke, Miami, Northwestern, Notre Dame, Rice, Southern Cal, SMU, Stanford, Syracuse, TCU, Tulane, Tulsa, Vanderbilt, and Wake Forest. See Frank LoMonte, "It's No Gag: Major-College Athletes Gain Legally Protected Right to Speak with Media," *Student Press Law Center News Flash*, February 6, 2017, http://www.splc.org/blog/splc/2017/02/nlrb-college-athlete-gag-orders.

and also tightening the definition of which university instructors would qualify as unprotected management employees. The memo also reaffirmed the board's position in the *Columbia University* case that graduate teaching assistants are entitled to NLRA protection, including the right to unionize and bargain. The memo comes across as the outgoing administration's attempt to solidify these holdings by informing workers of their rights and employers of their limitations.

But whatever force the January 2017 memo carried was neutralized by the subsequent decision of the NLRB's newly appointed general counsel, Peter B. Robb, to rescind the guidance as part of a wave of withdrawals announced in December 2017.[49] In the memo, Robb referenced dozens of pro-employee-rights positions taken by the NLRB in recent years on which his office might be inclined to issue "an alternative analysis," which he instructed regional NLRB offices to request. These specifically included the principles set forth in the *Purple Communications* case that employees have the right to use the employer's email systems for protected NLRB organizing activity. The memo did not, however, refer to past NLRB positions as to the enforceability of media gag orders.

The most immediate result of the Robb memo and its withdrawal of past NLRB guidance was to cast the status of football players at Division I college back into an undetermined limbo, since their recognition as employees was memorialized only in a now-rescinded interpretive memo.[50] But the impact of the Robb memo ("Mandatory Submissions to Advice") extends significantly further, signaling both a chance in philosophy and approach so that previously settled NLRB positions may be revisited, particularly where those positions took a broad view of workers' rights.

Making the Case for the Continued Right to Discuss Work-Related Matters with Journalists under a Trump NLRB

The near-universal recognition of a reporter's privilege not to divulge sources, which is on the books in forty-eight states, demonstrates the value society places on candid and unfettered communications between journalists and whistle-blowers. While referred to as a "reporter's" privilege, the privilege more accurately is understood as protection for sources, not journalists, as it enables journalists to safely keep confidences without exposing their sources to workplace retaliation. Whistle-blowers occupy a folk-hero status in

[49] NLRB Memorandum GC 18-02 (Dec. 1, 2017). See also Steven M. Swirsky, "NLRB General Counsel Peter Robb Issues 'Mandatory Submissions to Advice Memo,' Outlining His Approach and Identifying Direction to Come," *National Law Review*, December 7, 2017.

[50] See Joseph Wilkinson, "New NLRB General Counsel Rescinds Memo That Labelled Football Players as Employees," *Daily Northwestern*, December 15, 2017, https://dailynorthwestern.com/2017/12/15/lateststories/new-nlrb-general-counsel-rescinds-memo-labelled-football-players-employees/.

American culture, lionized in cinematic portrayals (such as 1983's *Silkwood* and 1999's *The Insider*) and in the popular press (three whistle-blowers shared *Time* magazine's 2002 "Person of the Year" honors, including two from the private sector). Still, the legal system does not always offer clear and complete protection against retaliation for employees who provide information to journalists about work-related matters.

In the public sector, the Supreme Court has long disfavored blanket restraints on employee speech.[51] In its most recent foray into the realm of employee speech, the court recognized the importance of protecting employees who come forward with information about workplace wrongdoing: "There is considerable value . . . in encouraging, rather than inhibiting, speech by public employees. For government employees are often in the best position to know what ails the agencies for which they work."[52]

Lower courts have consistently struck down overly broad gag orders in the public sector that restrict government employees from having unapproved conversations with journalists. In the most recent example, a federal appeals court struck down a Nevada sheriff's department policy as unconstitutionally restrictive, because it instructed employees that any communications with journalists or others outside of law enforcement about departmental programs must "be expressly forwarded for approval to your chain-of-command."[53] It is clearly established, then, that in the public sector the First Amendment protects workers against retaliation for discussing work-related matters with the news media without getting supervisory approval.

Although the First Amendment does not apply to private employers—even private employers that, like most private universities, accept substantial federal grant support—there are persuasive practical arguments in favor of protecting employee whistle-blowers whether the entity is public or private.

The Supreme Court has observed that government employee speech is worthy of protection because, as knowledgeable insiders, employees have unique subject-matter expertise and are uniquely situated to expose inefficiency and wrongdoing.[54] The same would hold true at a private educational institution. A private university, unlike a department store or a fast-food chain, occupies a position of public trust because it is

[51] See, for example, United States v. National Treasury Employees Union, 513 U.S. 454 (1995) (striking down statute that prohibited federal employees from accepting compensation for speeches as a "prior restraint" violating the First Amendment).
[52] Lane v. Franks, 134 S.Ct. 2369 (2014) (internal quotes and brackets omitted).
[53] Moonin v. Tice, 868 F.3d 853 (9th Cir. 2017).
[54] See Lane, 134 S.Ct. at 2379 ("[S]peech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment").

taking responsibility for educating young people and, in the process, often accepting millions of dollars in government subsidies to do so.

If federal labor law is to meaningfully protect the ability to organize, it must necessarily protect the right to speak to listeners beyond just those within the physical workplace. The NLRB has long recognized—including, more recently, in the context of social media—that employees have the right to use modern communications channels to distribute information as a necessary adjunct to their Section 7 right to organize.[55]

There is well-founded doubt whether Obama-era policies recognizing free-speech rights in the private workplace will survive. President Trump has made two appointments to the five-member board since taking office in January 2017,[56] and based on term cycles, should have at least two more vacancies to fill before the 2020 election. There is considerable industry pressure to rein in some of the prolabor positions advanced by the board and its staff during the Obama years, when Democrats held a controlling majority. That new mentality is reflected in the December 2017 "Mandatory Submissions" memo, signaling the general counsel's intent to revisit formerly settled NLRB interpretations of workers' rights.

In the first wave of decisions since Trump appointments gave Republicans 3-2 control of the board, the NLRB has moved aggressively to narrow or overturn workers' rights precedents—even, as reported by the investigative news outlet *ProPublica*, where those precedents were not directly at issue in the cases.[57] The legally protected freedom that private-college employees enjoyed to criticize workplace policies or use social media without fear of heavy-handed monitoring may consequently face new challenges from within the NLRB itself.

Nonetheless, the NLRB is bound by judicial precedent and cannot overrule the core holding of cases such as the DC Circuit's ruling in *Cintas Corp.*,[58] recognizing that overbroad confidentiality orders are unenforceable under the NLRA. Because employees' right to speak to journalists is grounded not just in

[55] For example, in Hispanics United of Buffalo, Inc., NLRB Case 03-CA-027872 (Dec. 14, 2012), the board found that employees were protected against retaliation when exchanging complaints about their supervisor on a publicly viewable Facebook wall. The board has thus recognized that the right to communicate about workplace concerns is not strictly limited to speech distributed only in the workplace to a workplace audience but also encompasses communications that may reach a larger public audience.

[56] Lydia Wheeler, "Senate Confirms Second Trump Nominee to Labor Board," *The Hill*, September 25, 2017, http://thehill.com/regulation/administration/352345-senate-confirms-second-trump-nominee-to-labor-board.

[57] Ian McDougall, "Trump NLRB Appointee Finds a Way around Conflict of Interest Rules," *ProPublica*, January 23, 2018, https://www.propublica.org/article/trump-nlrb-appointee-finds-a-way-around-conflict-of-interest-rules.

[58] *Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007).

NLRB case law but to some degree memorialized in judicial precedent as well, that right will not be easily undone, regardless of who occupies the White House.

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