

To: Faculty

From: Sian Beilock, Executive Vice Provost and Kim Taylor, Vice President and General Counsel

Re: NLRB guidelines on union-related communications

Date: August 24, 2016

Dear Colleagues,

We write today to follow-up on the recent email sent by President Zimmer and Provost Diermeier regarding the decision by the National Labor Relations Board (NLRB) that students who serve as teaching or research assistants are employees under federal labor law, and thus can form and join unions (for more information on key issues related to graduate student unionization, please visit unionizationinfo.uchicago.edu).

Under this new ruling, faculty as managerial or supervisory employees under federal labor law, are now subject to NLRB rules governing what they can say to student assistants who may vote in a union representation election. The goal of these rules is to prevent managers and supervisors from using coercion or promises to affect the outcome of a potential election.

The NLRB's rules involve the balancing of the free speech rights codified in Section 8(c) of the National Labor Relations Act (NLRA) and the prohibitions on coercion developed over the course of several decades of NLRB jurisprudence. Section 8(c) states:

The expression of any views, arguments or opinions or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any provision of this . . . [law], if such expression contains no threat of reprisal or force or promise of benefit.

Section 8(c) is a codification of the right to free speech on these and other subjects guaranteed by the United States Constitution, as long as those expressions do not promise benefits or contain threats of reprisal or force. In short, threats of reprisal or force or promises of benefits are not protected free speech, and are prohibited.

Accordingly, in exercising the right of free speech, faculty should avoid the following expressions and/or conduct:

1. Threats.

Threats to a student because of his or her activities or sympathies in support of or against a union should be avoided and are unlawful, e.g., **threatening to give a student a poor reference, or to refuse to have the person as a teaching assistant on account of pro- or anti-union sympathies, or otherwise threatening adverse consequences because of the person's support or activities for or against the union.** Likewise, faculty should not make predictions of adverse consequence that are not based on objective facts.

Faculty should avoid stating that certain consequences "will" result from unionization, but rather that selection of a union "could" or "may" have such effects. Examples of lawful statements include saying that "unionization of students could enhance the way that teaching

assistants are treated and compensated” or that “negotiation of a collective bargaining agreement may result in new rules and restrictions on teaching assistant usage.”

The best course for faculty is to express their opinions, share their experiences, convey facts, raise questions, and challenge assumptions. In other words, faculty should continue to function as scholars but not threaten any particular outcome.

2. Interrogation.

The interrogation of students about their union sentiments and related matters is unlawful under the NLRA. In this regard, **faculty should not ask students about whether they are for or against the union, whether they signed a union authorization card, or how they plan to vote if the NLRB directs a secret ballot election.** This prohibition does not prevent faculty from engaging in conversations that do not constitute interrogation, i.e., conversations that are not started or interspersed with questions about union support or lack of it. Likewise, the law does not prevent faculty from expressing their opinions about unionization, or from listening to anything anyone wants to tell them and responding in a non-threatening fashion. For example, it is lawful for a faculty member to begin a conversation with a graduate student by saying that the faculty member would like to discuss issues about student unionization and share his or her views with the student. Finally, faculty always are free to listen to students who openly offer information or express opinions regarding unionization.

3. Promises.

Like threats, **faculty promises of favorable treatment as an inducement to support or oppose a union are impermissible in light of the NLRB’s recognition of students as employees under the NLRA.** Under NLRB rules, a union is free to promise anything because it does not have the ability to fulfill its promises. By contrast, the NLRB will treat promises made by a faculty manager or supervisor as a promise made on behalf of the University, which does have the ability to fulfill them. Faculty are free to tell students that promises made by the union cannot be fulfilled without University agreement.

4. Surveillance.

Finally, it is impermissible for faculty to engage in surveillance of students, or to create the impression that surveillance is taking place, to determine their sympathies for or against a union. For example, **faculty should not ask students to attend a union meeting and report on who was there and what was discussed.**

In sum, University faculty should seek to avoid conduct that constitutes threats, interrogation, promises, or surveillance (TIPS is the often-used acronym) within the meaning of the NLRA, and failure to act within these guidelines could result in serious legal consequences. At the same time, University faculty members retain broad freedom to express their views – pro and con – regarding union-related issues, and all such dialogue is squarely protected against government interference by the NLRA and the First Amendment.

Questions about this memorandum, or any related topic, should be directed to Ted Stamatakos in the Office of Legal Counsel at 773.702.7237 or stamatak@uchicago.edu.