Graduate Student Unionization: Legal Guidelines for Faculty Regarding Communications

Yale is committed to a climate of free inquiry and expression. The ability of community members to express their views on matters of consequence to the university’s teaching and scholarship mission is fundamental. The topic of graduate student unionization is one such issue, and this document provides guidance about how faculty members who wish to do so may communicate their views on graduate student unionization and engage with their students on the subject of unionization within the limits imposed by federal labor law.

In a 2016 case involving Columbia University, the National Labor Relations Board ruled that graduate student teaching assistants and assistants in research at Columbia are “employees” covered by the National Labor Relations Act (NLRA). This interpretation means that graduate students have the right to seek to organize a union and that the NLRB may view faculty as managerial employees who are the supervisors of graduate student teaching assistants, part-time acting instructors (PTAIs) and assistants in research.

As a practical matter, Yale faculty will need to follow the rules that govern communication between “employees” and their employer and supervisors when discussing union-related issues with graduate students. In general, faculty members have the right to express their opinions regarding union organizing and related issues as long as they do so in a manner that does not involve threats, interrogation, promises of benefits or surveillance. The applicable rules are described in more detail below.

Section 8(c) of the NLRA 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.

This provision codifies the right to free speech on these and other subjects guaranteed by the United States Constitution, as long as those expressions contain no threat of reprisal or promise of benefit and are not coercive.

The campus may be expected to engage in a robust discussion about the consequences of graduate student unionization, and it is essential that this be done in an atmosphere free from intimidation, restriction or pressure to silence any viewpoint. In exercising your right of free expression, however, you are reminded that certain comments and conduct may be misconstrued, especially in the context of debate. Given the NLRB’s legal interpretation, and that graduate student unions at other universities have filed unfair labor practice charges with the NLRB stemming from faculty statements about unionization, Yale is obliged to remind faculty to refrain from the following expression and/or conduct with regard to graduate students, even though it is very unlikely that a faculty member would in fact engage in such expression or conduct:

1. ***Threats.*** Threats to a graduate student because of the student’s activities or sympathies in support of or against the union are not permitted, e.g., threatening to give a student a poor reference, or refusing to have the student as a teaching assistant on account of pro- or anti-union sympathies, or otherwise threatening adverse consequences because of the student’s support or activities for or against the union. Likewise, it is unlawful to make predictions of adverse consequence that are not based on objective facts, e.g., “if the union gets in, there will be fewer teaching opportunities” or “if the union doesn’t get in, the University will never increase teaching assistant pay.” Faculty should also avoid stating that certain negative or positive consequences “will” result from unionization, as opposed to stating that selection of a union “could” or “may” have such effects. Examples of lawful statements include saying that “unionization of graduate students could enhance the way that teaching assistants are treated and compensated” or that “negotiation of a collective bargaining agreement may result in rules and restrictions on teaching assistant usage.”

2. ***Interrogation.***  Interrogating graduate students (i.e., asking them questions that would force them to admit their own or another student’s engaging in union activity) is unlawful under the NLRA. In particular, faculty should not interrogate graduate students about their union sympathies, whether they signed a union authorization card, or how they plan to vote if the NLRB directs a secret ballot election, nor should they ask indirect questions aimed at eliciting this type of information (e.g. asking them about their views about other unions, or asking them whether they would like a “vote yes” sticker or button). 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 Local 33, or from listening to anything anyone wants to tell them and responding in a non-threatening fashion. Faculty are always free to listen to graduate students who openly offer information or express opinions regarding the union.

3. ***Promises.***  Like threats, faculty promises of favorable treatment as an inducement to support or oppose the union are not permissible. The NLRB has held that 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 made on behalf of the University, which does have the ability to fulfill them. Faculty are free, however, to tell students that promises made by the union cannot be fulfilled without agreement from the University.

 4. ***Surveillance.*** Faculty surveillance of graduate students (or creating the impression that surveillance is taking place) to determine their sympathies for or against the union is not permissible. For example, faculty should not ask graduate students to attend a union meeting (whether in-person or virtual) and to report on who was there and what was discussed. Faculty should also avoid engaging in (or creating the appearance of) electronic surveillance, such as attempting to use a student’s social media to determine their views on unionization or using Zoom and other similar platforms to engage in surveillance.

In sum, University faculty should not engage in conduct that constitutes unauthorized threats, interrogation, promises, or surveillance (TIPS is the often-used acronym) within the meaning of the NLRA. What remains is a broad area for the expression of opinion pro and con regarding graduate student unionization and Local 33-related issues. This dialogue is squarely protected from governmental interference by the NLRA and the First Amendment, and it is protected at the university by longstanding Yale policies governing the freedom of all members of the Yale community to express their views on any and all subjects. That said, please keep in mind that the current NLRB has favored unions over employers in several key rulings in the recent past, and any alleged violations of the rules described above will be closely scrutinized.

If you have any questions about this memorandum or what might constitute a prohibited activity, there are many resources to assist you. Please feel free to contact Vannesa Martinez Cecchini in the Office of the Senior Vice President and General Counsel (203-432-4949).