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## **NATIONAL LABOR RELATIONS BOARD**

**29 CFR Part 103**

**RIN 3142-AA15**

### **Jurisdiction---Nonemployee Status of University and College Students Working in Connection with Their Studies; Correction and Extension of Comment Period.**

**AGENCY:** National Labor Relations Board

**ACTION:** Notice of proposed rulemaking; Correction; extension of comment period.

**SUMMARY:** This document corrects the preamble to a proposed rule published in the *Federal Register* of September 23, 2019, regarding Nonemployee Status of University and College Students Working in Connection with Their Studies. This correction revises the Regulatory Flexibility Act section in the preamble of the proposed rule to substitute an Initial Regulatory Flexibility Analysis. The date to submit responses to the Notice of Proposed Rulemaking is also extended for 60 days.

**DATES:** The comment period for the notice of proposed rulemaking published at 84 FR 49691 is extended. Comments must be received by the Board on or before Monday, December 16, 2019. Comments replying to comments submitted during the initial comment period must be received by the Board on or before Monday, December 30, 2019.

**FOR FURTHER INFORMATION CONTACT:** Roxanne Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570-0001, (202) 273-1940 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

### **SUPPLEMENTARY INFORMATION**

#### **Correction**

In proposed rule FR Doc. 2019-20510, beginning on page 49691 in the issue of September 23, 2019, make the following correction, in the Supplementary Information section. On page 49699, in the 1st column, revise the text between “*Regulatory Flexibility Act*” and “*Paperwork Reduction Act*” to read as follows:

*A. Initial Regulatory Flexibility Analysis*

The Regulatory Flexibility Act of 1980 (“RFA”), 5 U.S.C. 601, *et seq.*, ensures that agencies “review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].”<sup>1</sup> It requires agencies promulgating proposed rules to prepare an Initial Regulatory Flexibility Analysis (“IRFA”) and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities.<sup>2</sup> However, an agency is not required to prepare an IRFA for a proposed rule if the agency head certifies that, if promulgated, the rule will not have a significant economic impact on a substantial number of small entities.<sup>3</sup> The RFA does not define either “significant economic impact” or “substantial number of small entities.”<sup>4</sup> Additionally, “[i]n the absence of statutory specificity, what is ‘significant’ will vary depending on the economics of the industry or sector to be regulated. The agency is in the best position to gauge the small entity impacts of its regulations.”<sup>5</sup>

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<sup>1</sup> E.O. 13272, Sec. 1, 67 FR 53461 (“Proper Consideration of Small Entities in Agency Rulemaking”).

<sup>2</sup> Under the RFA, the term “small entity” has the same meaning as “small business,” “small organization,” and “small governmental jurisdiction.” 5 U.S.C. 601(6).

<sup>3</sup> 5 U.S.C. 605(b).

<sup>4</sup> 5 U.S.C. 601.

<sup>5</sup> Small Business Administration Office of Advocacy, “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act” (“SBA Guide”) at 18,

As discussed below, the Board believes its proposed rule will likely not have a significant economic impact on a substantial number of small entities but is not certain. The Board assumes for purposes of this analysis that a substantial number of small employers and small entity labor unions will be impacted by this rule because at a minimum, they will need to review and understand the effect of the proposed standard as it relates to undergraduate and graduate students who perform services for compensation in connection with their studies. Additionally, there may be compliance costs that are unknown to the Board.

For these reasons, the Board has elected to prepare an IRFA to provide the public the fullest opportunity to comment on the proposed rule.<sup>6</sup> An IRFA describes why an action is being proposed; the objectives and legal basis for the proposed rule; the number of small entities to which the proposed rule would apply; any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; any overlapping, duplicative, or conflicting Federal rules; and any significant alternatives to the proposed rule that would accomplish the stated objectives, consistent with applicable statutes, and that would minimize any significant adverse economic impacts of the proposed rule on small entities.<sup>7</sup> An IRFA also presents an opportunity for the public to provide comments that will shed light on impacted entities and potential compliance costs that are unknown to the Board or on any other part of the IRFA.

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<https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>.

<sup>6</sup> After a review of the comments, the Board may elect to certify that the rule will not have a significant economic impact on a substantial number of small entities in the publication of the final rule. 5 U.S.C. 605(b).

<sup>7</sup> 5 U.S.C. 603(b).

Detailed descriptions of this proposed rule, its purpose, objectives, and the legal basis are contained in the SUMMARY and SUPPLEMENTAL INFORMATION sections of the Notice of Proposed Rulemaking. See 84 FR 49691. In brief, the proposed rule states that students who perform any services, including teaching or research assistance, at a private college or university related to their studies are not statutory employees subject to jurisdiction of the Board. The Board has concluded that this rule – providing that undergraduate and graduate students performing services in connection with their studies are not statutory employees – is more consistent with the purposes and policies of the National Labor Relations Act (Act or NLRA), which contemplates jurisdiction over economic relationships not those that are primarily educational in nature.

*B. Description and Estimate of Number of Small Entities to Which the Rule Applies*

To evaluate the impact of the proposed rule, the Board first identified the universe of small entities that could be impacted by the determination that students who perform services at a private college or university in connection with their studies are not statutory employees. The United States Census Bureau does not specifically define “small business” but does break down its data into firms with fewer than 500 employees and those with 500 or more employees. Consequently, the 500-employee threshold is commonly used to describe the universe of small entities. However, for defining small businesses among specific industries, the standards are defined by the North American Industry Classification System (NAICS).

The Board believes that the proposed rule only impacts private universities and colleges and the labor organizations that seek to represent students at those institutions. Universities and colleges are classified under the NAICS Sector 61

Educational Services, specifically 611210: Junior Colleges; and 611310: Colleges, Universities, and Professional Schools.<sup>8</sup> According to the Census Bureau, there were 2,746 entities included in those two NAICS definitions, and of those, 1,747 entities (63.6 percent of total) are small entities that fall under the Small Business Administration's ("SBA") "small business" standard for classifications in NAICS codes 611210 (\$20.5 million) and 611310 (\$27.5 million).<sup>9</sup>

This proposed change will also impact labor organizations that represent or seek to represent employees at universities and colleges. Labor organizations, as defined by the NLRA, are entities "in which employees participate and which exist for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."<sup>10</sup> The SBA's "small business" standard for NAICS code 813930: Labor Unions and Similar Labor Organizations" is \$7.5 million in annual receipts. In 2012, there were 13,740 labor unions (and similar labor organizations) in the U.S., and of those, 13,408 (97.6 percent of total) are small entities according to SBA standards. The Board lacks the means to accurately identify the number of small labor unions that primarily represent employees in the private higher education sector but welcomes input from the public.

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<sup>8</sup> See U.S. Department of Commerce, Bureau of Census, 2012 Statistics of U.S. Businesses ("SUSB") Annual Data Tables by Establishment Industry, <https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html> (from downloaded Excel Table titled "U.S., 6-digit NAICS").

<sup>9</sup> The Census Bureau only provides data regarding receipts in years ending in 2 or 7. The 2017 data has not been published, so the 2012 data is the most recent available information regarding receipts. See U.S. Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, [https://www2.census.gov/programs-surveys/susb/tables/2012/us\\_6digitnaics\\_r\\_2012.xlsx](https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx)

<sup>10</sup> 29 U.S.C. 152(5).

Although the proposed rule would only apply to colleges and universities who meet the Board's jurisdictional requirements, the Board does not have the means to calculate the number of small colleges and universities within the Board's jurisdiction.<sup>11</sup>

Accordingly, the Board assumes for purposes of this analysis that the great majority of the 15,155 identified small colleges, universities, and labor unions could be impacted by the proposed rule.

### *C. Recordkeeping, Reporting, and Other Compliance Costs*

The RFA requires agencies to consider the direct burden that compliance with a new regulation will likely impose on small entities.<sup>12</sup> Thus, the RFA requires the Board to determine the amount of "reporting, recordkeeping and other compliance requirements" imposed on small entities.<sup>13</sup>

The Board concludes that the proposed rule imposes no capital costs for equipment needed to meet the regulatory requirements; no lost sales and profits resulting from the proposed rule; no changes in market competition as a result of the proposed rule and its

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<sup>11</sup> Pursuant to 29 U.S.C. 152(6) and (7), the Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. *NLRB v. Fainblatt*, 306 U.S. 601, 606-07 (1939). To this end, the Board has adopted monetary standards for the assertion of jurisdiction that are based on the volume and character of the business of the employer. As relevant to this proceeding, the Board asserts jurisdiction over private colleges and universities if they have a gross annual revenue not less than \$1 million. 35 FR 18370; 29 CFR 103.1.

The Census Bureau does not provide data on the number of colleges and universities with annual receipts less than \$1 million; the lowest data range it covers is for entities with receipts less than \$100 million.

<sup>12</sup> See *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) ("[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities.").

<sup>13</sup> See 5 U.S.C. 603(b)(4), 604(a)(4).

impact on small entities or specific submarkets of small entities; and no costs of hiring employees dedicated to compliance with regulatory requirements.<sup>14</sup>

Small entities may incur some costs from reviewing the rule in order to understand the substantive changes. To become generally familiar with the proposed student assistant standard, the Board estimates that a human resources specialist at a small employer or labor union may take at most thirty minutes to read the rule. It is also possible that a small employer or labor union may wish to consult with an attorney, which the Board estimates will require thirty minutes.<sup>15</sup> Using the Bureau of Labor Statistics' estimated wage and benefit costs, the Board has assessed these labor costs to be \$71.08 for each college, university, and labor union.<sup>16</sup>

Although the Board does not foresee any additional compliance costs related to interpreting the definition of statutory employee to exclude student assistants, this change would obviate the need to hold some elections that may have been held in units with students. Arguably, this would conserve resources for small employers and labor unions that would otherwise be expended during organizing campaigns and election-

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<sup>14</sup> SBA Guide at 37.

<sup>15</sup> We do not believe that more than thirty minutes of time by each would be necessary to read and understand the rule. The rule constitutes a return to the “primarily educational” standard, and most employers and unions are already knowledgeable about that standard if it is relevant to their businesses, as are labor-management attorneys.

<sup>16</sup> For wage figures, see May 2018 National Occupancy Employment and Wage Estimates, found at [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm). The Board has been administratively informed that BLS estimates that fringe benefits are approximately equal to 40 percent of hourly wages. Thus, to calculate total average hourly earnings, BLS multiplies average hourly wages by 1.4. In May 2018, average hourly wages for a Human Resources Specialist (BLS #13-1071) were \$32.11. The same figure for a lawyer (BLS #23-1011) was \$69.34. Accordingly, the Board multiplied each of those wage figures by 1.4 and added them to arrive at its estimate.

related litigation. The Board is not aware of a basis for estimating any such cost-savings and welcomes any comment or data on this topic.<sup>17</sup>

#### *D. Overall Economic Impacts*

The Board does not find the estimated, quantifiable cost of reviewing and understanding the rule--\$71.08 for small universities, colleges, and unions in the education sector--to be significant within the meaning of the RFA. In making this finding, one important indicator is the cost of compliance in relation to the revenue of the entity or the percentage of profits affected.<sup>18</sup> Other criteria to be considered are the following:

—Whether the rule will cause long-term insolvency, i.e., regulatory costs that may reduce the ability of the firm to make future capital investment, thereby severely harming its competitive ability, particularly against larger firms;

—Whether the cost of the proposed regulation will (a) eliminate more than 10 percent of the businesses' profits; (b) exceed one percent of the gross revenues of the entities in a particular sector, or (c) exceed five percent of the labor costs of the entities in the sector.<sup>19</sup>

The minimal cost to read and understand the rule will not generate any such significant economic impacts.

Since the only quantifiable impacts that the Board has identified is the \$71.08 that may be incurred in reviewing and understanding the rule, the Board does not believe

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<sup>17</sup> The RFA explains that in providing initial and final regulatory flexibility analyses, “an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.” 5 U.S.C. 607.

<sup>18</sup> See SBA Guide at 18.

<sup>19</sup> See SBA Guide at 19.

there will be a significant economic impact on a substantial number of small entities associated with this proposed rule. The Board welcomes input from the public regarding additional costs of compliance not identified by the Board or costs of compliance the Board identified but lacks the means to accurately estimate.

*E. Duplicate, Overlapping, or Conflicting Federal Rules*

Agencies are required to include in an IRFA “all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.”<sup>20</sup> The Board has not identified any such federal rules, but welcomes comments that suggest any potential conflicts not noted in this section.

*F. Alternatives Considered*

Pursuant to 5 U.S.C. 603(c), agencies are directed to look at “any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.” Specifically, agencies must consider establishing different compliance or reporting requirements or timetables for small entities, simplifying compliance and reporting for small entities, using performance rather than design standards, and exempting small entities from any part of the rule.<sup>21</sup>

First, the Board considered taking no action. Inaction would leave in place the interpretation of statutory employee under the Act that includes students who perform services for compensation at a private college or university in connection with their studies. However, for the reasons stated in Sections I through IV of the Notice of Proposed Rulemaking (84 FR 49691), the Board finds it desirable to revisit this

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<sup>20</sup> 5 U.S.C. 603(b)(5).

<sup>21</sup> 5 U.S.C. 603(c).

interpretation and to do so through the rulemaking process. Consequently, the Board rejects maintaining the status quo.

Second, the Board considered creating exemptions for certain small colleges, universities, and labor unions. This was rejected as impractical, considering that exemptions for small entities would substantially undermine the purposes of the proposed rule because such a large percentage of colleges and universities (63.6 percent) and unions (97.6 percent) would be exempt under the SBA definitions. In this regard, exempting small universities and colleges from the decision to exclude students from the Board's jurisdiction would incongruously result in the exercise of Board jurisdiction over students who attend small colleges and universities, but not larger educational institutions. Similarly, if a large university employer entered into a bargaining relationship with a small labor union (or vice versa), both entities would be exempted. Drawing this distinction appears to be an impermissible interpretation of the relevant statutory provisions and one that would undermine the policy behind the proposed rule. Moreover, given the very small quantifiable cost of compliance, it is possible that the burden on a small entity of determining whether it fell within a particular exempt category might exceed the burden of compliance. As such, exempting small entities would be contrary to the objectives of this rulemaking and of the NLRA.

Because no alternatives considered will accomplish the objectives of this proposed rule while minimizing costs on small entities, the Board believes that proceeding with this rulemaking is the best regulatory course of action. The Board welcomes public comment on any facet of this IRFA, including alternatives that it has failed to consider.

Dated: October 9, 2019.

Roxanne Rothschild,

Executive Secretary.

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