B&K CLIENT ALERT

October 2016

In recent decisions by the National Labor Relations Board ("NLRB" or "Board"), the Board again waded into controversial waters with a number of anticipated decisions. First, the Board provided further guidance on the reformed joint employer test detailed in *Browning-Ferris*. Then, in a widely expected decision, the Board reversed existing precedent and found that graduate students may be considered employees under the National Labor Relations Act ("Act"). In both cases, the Board relied on the common law employment relationship to determine whether an employment relationship exists under the Act. Finally, the Board recently upheld an Administrative Law Judge's decision issuing a *Gissel* bargaining order, which is a rare remedy requiring the employer to recognize and negotiate with a union where the employer's unlawful conduct severely tainted the underlying election.

STUDENT ASSISTANTS ARE EMPLOYEES UNDER THE ACT

In an August 23, 2016 decision impacting the scope of collective bargaining in higher education, the Board found that students who perform services at a university in conjunction with their studies are statutory employees within Section 2(3) of the Act. *Columbia University*, 364 NLRB No. 90 (2016). The broadly-worded decision applies to both graduate and undergraduate students.

The Board's decision is the latest change in precedent on the status of students as employees, with *Columbia University* reversing a 2004 precedent and returning to the standard set in a 2000 decision. In 2000, the Board found that graduate students were statutory employees in *New York University (NYU)*, 332 NLRB 1205 (2000). Then, in 2004, a differently comprised Board overruled *NYU* and held that graduate student assistants were not statutory employees. *Brown University*, 342 NLRB 483 (2004). In so ruling, the *Brown University* majority relied on policy-driven arguments centering on the university's academic mission and purpose, stating student employees cannot be statutory employees simply because they "are primarily students and have a primarily educational . . . relationship with their university." *Id.*

In *Columbia University*, the Board found that "student assistants" who have a common-law employment relationship with their university are statutory employees under the Act. A common law employment relationship exists where the employer has the right to control the employee's work, and the