I. BACKGROUND - THE IMPORTANCE OF THE BARGAINING UNIT

Under the National Labor Relations Act (the “Act”), a bargaining unit is a grouping of two or more employees aggregated for the purpose of asserting collective rights. The bargaining unit is an essential structural element of the collective bargaining process, since the definition of the unit can determine whether the union is entitled to represent the employees. A union which may have majority support in a smaller unit may not be able to establish a majority in a larger one. Since the definition of the unit is critical, it is often a subject of sharp dispute between employers and unions maneuvering for advantage in an election.

When the parties to a representation proceeding disagree on the composition of the unit, the National Labor Relations Board (“the NLRB” or “the Board”) will determine whether the unit as defined by the petitioner is an “appropriate unit.” This determination is driven by an analysis of whether the employees have a mutual interest in wages, hours and conditions of work, otherwise known as a “community of interests.” The community of interests analysis does not require the Board to determine the single best unit, only whether the proposed unit is an appropriate one. Over the years the Board has used a number of factors related to the community

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of interests analysis to determine whether a unit is appropriate, including evaluation of the employees’ desires, the extent of union organization, bargaining history, and the employers’ organizational structure. 3

In 1947, Congress imposed some specific limitations relative to bargaining unit determinations:

- Professional employees may not be included in a unit with other employees unless a majority of the professionals vote for inclusion in the unit. 4
- The Board may not decide that any craft unit is inappropriate on the ground that prior Board determinations established a different unit. 5
- Guards may not be included in a unit with other employees, and any organization representing guards may not be affiliated with any other organization that admits other employees to membership. 6
- The extent of union organization shall not be controlling in determining whether a unit is appropriate. 7

Because of the concern for cohesion in the bargaining unit, the Act and caselaw have established certain categories of employees who are not covered by the Act or must be placed in particular kinds of bargaining units. Generally speaking, the employees in a unit must meet the Act’s definition of a covered employee, and must not be supervisory or managerial employees. The remainder of this paper will discuss the application of these definitions and exclusions in determining units in healthcare and higher education.

II. EXCLUSIONS DEFINED BY THE ACT AND CASELAW

The definition of an employee in the National Labor Relations Act is quite broad. Section 2(3) states that, “the term employee shall include any employee, and shall not be limited

3 Id. at pp. 451-456.
7 See 29 U.S.C. § 159(c)(5).
to the employees of a particular employer, unless this subchapter explicitly states otherwise.” 8 This language has traditionally been held to include all individuals engaged in a master-servant relationship with the employer, unless specifically excluded by the Act. 9

According to Section 2(11) of the Act, a supervisor is:

[A]ny individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.10

Section 14(a) of the Act states that supervisory employees may become members of labor organizations, but that “no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, related to collective bargaining.” 11 Therefore, employers hold an option to allow supervisory employees to be included in a bargaining unit or not. The employer cannot be “compelled” to do so. This exclusion was created in 1947, in an attempt to maintain a balance between unions and employers, and to avoid situations where members of a bargaining unit might experience a conflict of interest between representing management as a supervisor and collective action on behalf of employees. 12

In contrast with the statutory exclusion of supervisory employees, an exclusion has evolved from caselaw for what are termed “managerial” employees. In the case of N.L.R.B. v. Bell Aerospace, 13 the Supreme Court held that employees who were even higher in the management structure, but who might not meet the definition of a supervisor, were implicitly also excluded from coverage of the Act. Managerial employees were defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” 14 The court further

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8 See 29 U.S.C. § 152 (2).
10 29 U.S.C. § 152(11)
11 29 U.S.C. § 164 (a)
14 Id., at 288
held that managerial employees must exercise independent judgment and discretion, perhaps even independent of employer policy, and must be “aligned with management” 15

The Act also makes certain special provisions for “professional employees.” A professional employee is defined as one who is engaged in work predominantly intellectual in nature, involving the consistent exercise of discretion and judgment, which cannot be measured in output over a certain period of time, and requiring advanced knowledge in a field of science or learning. 16 A professional is also an employee with such education, performing work under the supervision of a professional in order to become qualified as a full professional. 17 Professional employees are covered by the Act and may organize, with one restriction: a bargaining unit consisting of both professional and non-professional employees cannot be approved by the Board unless a majority of the professionals vote for inclusion in the unit. 18 In practice, then, professional employees are often matters of contention in defining bargaining units, with employers arguing that they are managerial or supervisory employees excluded from coverage by the Act, and unions arguing for their inclusion in a bargaining unit. Where there is evidence that the professional supervises others in any of the twelve functions defined in Section 2(11), the employer will invoke that section. Failing that, the employer will invoke the somewhat more vague definitions of managerial functions in Bell Aerospace to attempt to exclude the professionals from coverage.

These definitions and exemptions have provided fertile ground for controversy, especially in the areas of higher education and healthcare. Both types of employers have employees whose duties straddle the lines of professional, supervisory and managerial functions. Beginning in the late 1970’s and continuing today, the proper status of full time faculty, graduate student assistants, medical residents and interns, and other medical professionals has slowly come into focus in the caselaw of the Board and the federal courts.

15 Id., at 286-287
III. YESHIVA UNIVERSITY AND SUBSEQUENT DECISIONS - FACULTY AS MANAGERIAL EMPLOYEES.

In 1980, the Supreme Court, in the landmark case of N.L.R.B. v. Yeshiva University, decided that the university’s full time faculty were exempt from the coverage of the Act as managerial employees of the university. In Yeshiva, the Union had petitioned the Board for certification of a bargaining unit consisting of the full time faculty at 10 of the 13 schools making up the University. The University opposed the Union’s petition on the ground that the University’s faculty were managerial employees. The Board held a series of hearings over a period of five months, and eventually granted the Union’s petition. The unit as certified included Assistant Deans, senior professors and department chairs, as well as associate professors, assistant professors and instructors. Deans and Directors, who headed up the individual schools, were excluded. Subsequently, the Union won the election and was certified by the Board as the bargaining agent for the employees. When the University refused to bargain with the Union, the Union filed unfair labor practice charges, won at the Board level, and sought enforcement from the Second Circuit Court of Appeals. The Second Circuit refused to enforce the Board’s order, holding that the faculty in the bargaining unit were not covered by the Act as they were managerial employees of the University. The Supreme Court granted certiorari, and affirmed the Second Circuit.

The Yeshiva faculty were highly involved in a variety of decision making functions of the University, and especially within the individual schools. They had significant authority in determining grading policies, teaching methods, and matriculation standards. They effectively decided which students would be accepted retained and graduated. They had occasional input into the size of the student body, the tuition to be charged and the location of a school. The Supreme Court held that the faculty exercised authority “which in any other context unquestionably would be managerial.” While making clear that it was not creating an

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19 444 U.S. 672 (1980).
20 Id., at 674.
21 Id., at 678.
22 Id.
23 Id., at 679
24 Id.
25 Id., at 686
26 Id.
application of Bell Aerospace that would sweep all professionals outside the Act, the court also
seemed to accept the view that the managerial arrangement at Yeshiva was common in American
academia. 27 The court also cited the significant possibility of divided loyalty within the faculty
as reason for excluding the faculty from coverage. 28

Cases after Yeshiva tended to turn on intensive analysis of the extent of faculty
involvement in university operations, especially in areas of broader university policy. For
instance, in N.L.R.B. v. Lewis University, 29 the Seventh Circuit conducted a detailed review of
the facts surrounding Lewis’ faculty, finding that they had significant authority in many of the
same areas as the Yeshiva faculty. In Lewis, the faculty of 69 professors in the proposed unit
met periodically as the “faculty convened” to elect chairpersons of sixteen departments, and to
formulate policies and to determine the governance structure of the college. 30 While the
administration held final authority over all decisions, it rarely exercised its veto power. 31 In
fact, the actions of the “faculty convened” were almost invariably approved by the
administration. 32 The court followed Yeshiva in holding that the faculty were excluded from
coverage.

Similarly, in Boston University AAUP v. N.L.R.B., 33 the First Circuit upheld a Board
decision following Yeshiva and holding that the university faculty were managerial employees.
The Board, in applying Yeshiva, had determined that the faculty had “absolute authority over
such matters as grading, teaching methods, graduation requirements, and student discipline.” 34
Since the Board had made these findings of fact, the First Circuit cited Section 10(f) of the Act,
which establishes that appellate review is limited to evaluating whether the Board decision is
supported by “substantial evidence on the record considered as a whole.” 35 Finding substantial
evidence supporting the faculty’s managerial status, the court upheld the Board’s dismissal of
unfair labor practice charges against the university.

27 Id., at 680 (Describing the continuing tradition of collegiality in higher education)
28 Id., at 689
29 119 LRRM 2993 (7th Cir. 1985).
30 Id., at 2997.
31 Id.
32 Id.
33 127 LRRM 2193 (1st Cir. 1987).
34 Id., at 2195.
35 29 U.S.C. 160(f)
While the Supreme Court had seemed to accept the view of the predominance of the collegial model of management in academia, some subsequent cases illustrated the exceptions. For instance, in *N.L.R.B. v Cooper Union*, the Board made findings of fact that Cooper Union’s faculty were frequently overruled in decisions on matters of policy. Further, the administration had implemented significant financial policies with minimal faculty input, and over faculty objection. Eventually, the faculty Senate, the titular faculty governing body, was dissolved and the faculty decided to pursue collective bargaining. The court held that this was substantial evidence that the faculty at Cooper Union were not aligned with management in the way that the *Yeshiva* and *Lewis* faculties were.

In *Loretto Heights College v. N.L.R.B.*, the Tenth Circuit held that Loretto Heights had violated the Act when it unilaterally withdrew recognition of the faculty union in the wake of the *Yeshiva* decision. The *Loretto Heights* court described the extent of faculty involvement at Yeshiva as “extraordinary,” and held that Loretto Heights faculty were more like run of the mill professional employees, exercising professional judgment within the narrow scope of their profession. The court reviewed the various committees of faculty members, and their inputs into decision making, but ultimately viewed the college as more akin to an industrial organization employing professionals, but managed by an administration headed by the President, and ultimately a Board of Trustees. The court described the faculty’s actual authority as “severely circumscribed.” This characterization seems to have been driven by the finding that the faculty had little input into the University’s “business affairs.”

In *N.L.R.B. v. Florida Memorial College*, the Eleventh Circuit considered a governance system diametrically opposed to the collegial system in *Yeshiva*. The court noted that the Florida Memorial faculty had no faculty wide governing organization, other than a faculty council that met once or twice a year. Indeed, faculty members had very weak positions on various smaller committees, serving only when appointed by a senior

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36 121 LRRM 2561 (2nd Cir. 1986)
37 Id., at 2563
38 Id.
39 Id.
40 117 LRRM 2225 (10th Cir. 1984)
41 Id., at 2227
42 Id., at 2230
43 Id.
44 820 F.2d 1182 (11th Cir. 1987)
45 Id. at 1184
administrator. Referring to *Yeshiva*, the court held that faculty asserted “insufficient control in terms of almost every one of the relevant criteria considered by the Court in that case.”

Perhaps the ultimate result from this line of cases, then, is the delineation of a continuum of faculty authority ranging from the extreme collegiality of *Yeshiva* to the administration dominated model of *Florida Memorial*. Universities seeking to define an advantageous bargaining unit, or to exclude faculty from coverage at all, must evaluate their chances in light of the amount of authority actually exercised, especially in areas touching on the “business affairs” of the university, and outside traditional purely academic concerns.

**IV. Kentucky River - The Current State of the Supervisory Exclusion.**

The statute-created supervisory exemption has been a point of contention in recent years, especially within the health care industry. The essence of the controversy was the Board’s practice of attempting to define supervision primarily as a function of the exercise of “independent judgment,” particularly as related to Section 2(11)’s definition of a supervisor as one with authority “responsibly to direct” others. Employers argued that this impermissibly narrowed the definition of a supervisor, pulling into coverage many employees with true supervisory responsibilities, who supervised under some direction from higher management.

The recent case of *N.L.R.B. v. Kentucky River Community Care* provided some much needed guidance in this area.

In *Kentucky River*, the employer operated an 80 bed home for the mentally disabled. The facility employed approximately 110 professional and non professional employees in addition to about 12 clearly managerial or supervisory employees. When the Union petitioned the Board for certification of a unit including all 110 employees, the employer objected to the inclusion of six registered nurses entitled Building Supervisors. The Board granted summary

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46 Id., at 1185
47 Id., at 1184
50 Id., 121 S.Ct. at 1865.
51 Id.
judgment to the Union, and the employer petitioned the Sixth Circuit Court of Appeals for review. The Board cross petitioned for enforcement of its order. 52

The Sixth Circuit, holding that the Board’s interpretation of the “independent judgment” language of Section 2(11) was in error, refused to enforce the Board’s order. 53 The Supreme Court granted certiorari on several grounds, including the question of the “independent judgment” interpretation.

The Board had argued that even where supervisory employees are imbued with authority to use independent judgment, that authority was insufficient to remove them from coverage of the Act, if it is only “ordinary professional or technical judgment in directing less skilled employees to deliver services.” 54 In other words, independent judgment is not independent if it arises from technical knowledge or experience.

The employer argued that this interpretation of independent judgment essentially eliminated all professionals from the supervision category, since they commonly exercise judgment based on technical training. Applying the Board’s interpretation of the term naturally excluded professional employees, a result rejected by the Court in Yeshiva. 55

Justice Scalia authored the Court’s decision, and conducted an extensive analysis of the meaning of Section 11’s independent judgment requirement. Ultimately the Court held that the Board’s interpretation was not supported by the language, history or intent of Section 2(11). Noting the concern for an overly narrow definition, the Court stated: “What supervisory judgment worth exercising, one must wonder, does not rest on some “professional or technical skill or experience”? If the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate “supervisors” from the Act.” 56

In the brief time since May of 2001 when the Supreme Court decided Kentucky River, a few cases have considered its rationale. In Beverly Enterprises-Minnesota v. N.L.R.B., 57 the Eighth Circuit, applying Kentucky River, remanded a case to the Board for further proceedings. The Board in that case had also applied its interpretation of the independent judgment requirement.

52 Id., at 1864.
53 Kentucky River Community Care v. N.L.R.B., 193 F.3d 444 (6th Cir. 1999).
54 Kentucky River, 121 S.Ct., at 1867.
55 See note 26, supra.
56 Kentucky River, 121 S.Ct., at 1868.
57 266 F.3d 785 (8th Cir. 2001).
In *N.L.R.B. v. Quinnipiac College*, the Second Circuit applied *Kentucky River* to a bargaining unit of security guards at a private college. The college successfully argued that six of the security guards met the 2(11) requirement by performing at least three of the twelve supervisory functions. In addition, the court observed that in emergency situations the guards were authorized to use independent judgment based on their technical training. The court refused to enforce the Board’s decision and order finding the college in violation of the Act.

This recent line of supervisor cases seems to indicate that the Board’s attempts to narrow Section 2(11)’s scope have been unsuccessful. The *Kentucky River* decision appears to restore the unambiguous plain language of the statute to center stage. Employees who perform any of Section 11’s twelve supervisory functions, in the interest of the employer, with independent judgment (no matter the source of the judgment), are exempt from the coverage of the Act.

V. THE NEW BATTLEGROUN D: GRADUATE ASSISTANTS, RESEARCH ASSISTANTS, TEACHING ASSISTANTS, MEDICAL INTERNS AND RESIDENTS

Yet another line of recent cases has played out in the halls of higher education and medicine, and focused on an even more fundamental question: Should graduate student assistants and medical interns and residents be covered under the Act and allowed to organize?

Traditional thinking in this area held that these types of individuals were outside the Act, even given the expansive definition of an employee in Section 2(3). In *Cedars Sinai Medical Center*, the Board had decided that interns and residents were not statutory employees entitled to collective bargaining rights, partially based on general policy concerns such as the limitations on academic freedom that would be suffered by faculty who might be forced to negotiate standards with interns or residents. Clarifying *Cedars Sinai*, the Board, in *St. Clare’s Hospital & Health Center*, observed that interns and residents were primarily students, and not primarily employees, and their relationship with the institution was primarily academic and not economic.

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58 256 F.3d 68 (2nd Cir. 2001).
59 Id., at 78
60 223 N.L.R.B. 251 (1976).
In 1999, the Board abandoned the rationale of Cedars Sinai and St. Clare’s, and overruled both decisions. In Boston Medical Center, 62 the Board conducted an extensive factual analysis of the status of interns and residents at the medical center, and determined that the earlier decisions had ignored the realities of these positions, and the breadth of the Act’s definition of a covered employee:

“Ample evidence exists here to support our finding that interns, residents and fellows fall within the broad definition of “employee” under Section 2(3), notwithstanding that a purpose of their being at a hospital may also be in part, educational. That house staff may also be students does not thereby change the evidence of their “employee” status.” 63

The Board also relied on Section 2(12)’s inclusion of professional employees, stating:

“Literally read, Section 2(12)(b) embraces house staff. Interns, residents and fellows clearly are individuals who have completed a course of specialized intellectual instruction and study “in an institution of higher learning or a hospital.” Just as plainly, they are “performing related work under the supervision of a professional to qualify” to be a professional under the Act.” 64

It was not long before this evolved view of the status of interns and residents was applied to an analogous group of individuals: Graduate students engaged in teaching and research assistantships (“GSA’s”). In New York University, 65 the Board relied on the Boston Medical Center holding to determine that a unit of graduate teaching and research assistants was appropriate under the Act. The university argued that the case was not controlled by Boston Medical Center because the GSA’s spent only 15 percent of their time teaching or conducting research as opposed to the 80 percent of time Boston Medical Center interns spent on patient care. Further, the university argued that GSA’s were not compensated for their time as employees would be, but were only receiving financial aid in the form of tuition discounts, and that the work was only performed in furtherance of a degree, unlike interns who already held a degree. 66

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63 Id., at 43-44.
64 Id., at 51.
65 332 N.L.R.B. 111 (2000); 2000 NLRB LEXIS 748.
The Board rejected all three arguments, stating: “Contrary to the Employer and others, we do not find this case significantly distinguishable from Boston Medical Center.” 67 The percentage of time argument was unavailing because it did not refute the contention that the work, whatever the volume, was conducted for the university, under its control. The compensation argument was rejected because the tuition discounts were seen as simply another form of pay for the work, and the GSA’s received no academic credit for the work. Finally, the employer’s contention that the work was primarily educational as unpersuasive, since many graduate students received degrees without performing GSA work, and since it would imply that the fact that work had educational benefits might remove the worker from coverage of the Act. 68

In the wake of New York University, Professor Hayden has suggested that there are three general frameworks courts and the Board have used to analyze GSA’s in the collective bargaining context. Under the first framework, GSA’s are viewed as “students rather than employees. 69 Under the second, GSA’s are excluded from coverage because, on the balance, they are “primarily” students. The third theory excludes GSA’s for policy reasons, because of the perceived negative effects GSA organization would have on the system of academic freedom. 70

Hayden attempts to systematically dismantle each of these views in making a case for coverage of GSA’s under the Act. He first notes that the first framework creates a false dichotomy. There is, after all no reason that “student” and “employee” must be mutually exclusive categories. A student could easily also maintain a master-servant relationship with the institution. 71

He also argues that the form of compensation argument proffered by New York University was properly rejected by the Board. In light of the fact that stipends, salaries and other forms of financial aid often come out of general university funds, and are paid through payroll channels, there seems to be little useful distinction between pay for work and financial aid. He argues that since the money paid to GSA’s is not based on financial need, and is connected to services performed, it is compensation for employment. 72

67 Id.
68 Id., at *8-*12.
70 Id., at 1247-1249.
71 Id.
72 Id., at 1251
Hayden also rejects the argument that educational roles and concerns are primary for GSA’s. He cites a decision of the California state labor relations authority, wherein the agency found that within the California state universities, when conflicts arose between a GSA’s duties and his or her own academic pursuits, GSA work took precedence. 73 While this may or may not be indicative of the general run of GSA appointments, it is easy to imagine that universities would be quite disturbed if their teaching assistants consistently failed to fulfill their duties, citing their own academic programs as priorities. Classes would not be taught, research not performed. This sort of scenario provides some ammunition for the argument that GSA’s are not necessarily even primarily students in some universities. As Hayden suggests, they may best be seen as performing a dual role that includes both student and employee status.

Finally, Hayden reviews the argument that allowing GSA’s to organize is bad policy, since it would interfere with academic freedom and disrupt faculty-student relationships. 74 Under this theory, allowing GSA’s to organize would lead to “bargaining over education.” Since educational and economic concerns are intertwined, GSA’s would inevitably be led to negotiating academic practices better decided by regular faculty. 75 Bargaining over wages, hours and other conditions of employment by GSA’s would have a negative impact on the academic, financial aid and admissions policies of universities. Collective bargaining would affect academic policymaking, traditionally the province of the university.

Hayden argues that these concerns are simply overwrought. Given such a broad view of academic concerns, the same argument could be brought to bear against organization of any union within the university, since they may desire bargaining over a matter that ultimately touches on academic policy. He also suggests that this potential problem may be dealt with by limiting the scope of bargaining. He cites as examples states that have established certain parameters for bargaining, ostensibly limiting GSA’s to areas where they can have less adverse impact. 76

Such an approach is little comfort for those concerned about the negative impact of bargaining with GSA’s. First, it seems to belie Hayden’s first position, that the concerns are overstated. If they are, why would limits on the subjects of bargaining be necessary? Second, at

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73 Id., at 1259-1260
74 Id., at 1260
75 Id., at 1261.
76 Id.
least under Board jurisdiction, this would imply a long sequence of litigated cases defining what subjects constitute mandatory and permissive bargaining. Given the Board’s traditionally expansive view of the Act and its authority, most employers would prefer far more clarity, far sooner.

Still, Hayden’s overall analysis is generally in keeping with recent caselaw, and probably represents a growing trend. Cases such as Boston Medical Center and New York University seem to take a realistic approach to the unique situation of GSA’s and medical interns and residents. If the academic community is relying more and more on GSA’s to do the basic work of the university, GSA’s will continue to attempt to organize, and they will be perceived more and more as employees of the university. If universities wish to avoid bargaining with GSA’s, a radical rethinking of their relationship may be in order. Given the broad coverage of Section 2(3) of the Act, it may be difficult to remove GSA’s from coverage, but creating a structure that more clearly places GSA work in the category of student activity may be a step in the right direction. This might include alternative compensation systems, providing academic credit for GSA work, or other actions.

There also appears to be no case where a university attempted to apply other exclusions to GSA’s. It seems unlikely that GSA’s at most universities are aligned with management enough to qualify for exclusion under Yeshiva. However, given the right circumstances, it may be possible to argue that a graduate student assistant is both a professional and a supervisor under 2(11). Where a GSA has authority to responsibly direct other employees, perhaps using the type of technical knowledge displayed by the nurses in Kentucky River, a university may have an argument for his or her exclusion from a bargaining unit.

It is quite possible, however, that none of the exclusions discussed earlier will be consistently applied to GSA’s, and the trend toward their organization will continue. In this case, universities will be called upon to either utilize the lawful techniques of union avoidance or to bargain with graduate students. Where the subjects of bargaining proposed by the students are viewed as restricting academic freedom, the university will be called upon to either litigate the issue of mandatory bargaining, or to engage in creative bargaining that avoids the potential problem.
VI. CONCLUSION

The healthcare industry and higher education have been the focus of numerous cases considering the definition of bargaining units and the status of employees under the National Labor Relations Act. The Yeshiva University line of cases, establishing the factual circumstances where faculty might be excluded as an extension of management, is well settled. This line of cases may be seen as drawing a continuum of faculty involvement ranging from high involvement in a variety of university functions, to a point where faculty is only marginally involved and has no significant authority, especially in university business affairs.

The supervisory exception, especially as it relates to professional employees, has received some much needed clarification through Kentucky River. The Board’s practice of limiting the definition of supervisor as applied to professionals was struck down, and the clear statutory language of Section 2(11) was given its due weight.

In the emerging area of the organization of interns, residents and graduate assistants, employers have suffered a significant setback in the cases of Boston Medical Center and New York University. In reversing its own precedent and applying the Act to these categories of “employees,” the Board has created significant uncertainty. Since other established exclusions are not being applied (and arguably will not apply in most situations), employers in healthcare and higher education may be faced with a wave of organization efforts.