

NLRB Declines Jurisdiction Over Faculty at Religious Educational Institutions

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Practice Area: Labor and Employment

In a major decision for religious institutions of higher education, the National Labor Relations Board (the "NLRB") recently ruled in *Bethany College*, 369 NLRB No. 98 (June 10, 2020) that it has no jurisdiction over faculty at such institutions. In reaching this decision, the NLRB also created a new jurisdictional standard, or test, for determining whether jurisdiction over faculty at religious educational institutions is appropriate. *Bethany College* overrules the NLRB's prior jurisdictional standard, which was inconsistent with Supreme Court precedent. This *Legal Update* provides a brief summary of the *Bethany College* decision and its implications for religious educational institutions.

The New Test for NLRB Jurisdiction over Religious Educational Institutions

Under the new standard for asserting jurisdiction over faculty at religious educational institutions, the NLRB will apply a "bright line" test set forth by the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). Under the *Great Falls* test, the NLRB must decline to exercise jurisdiction over faculty at an institution which:

1. Holds itself out to students, faculty and community as providing a religious educational environment;
2. Is organized as a nonprofit; and
3. Is affiliated with, owned, operated, or controlled directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.

According to the NLRB, the *Great Falls* test will provide a faithful application of the constitutional principles set forth in Supreme Court precedent for determining whether to exercise jurisdiction over the faculty of self-identified religious schools, including colleges and universities. The prior test, set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014), required an assessment of whether faculty members at religiously affiliated institutions of higher learning were performing specific religious functions. The NLRB characterized this assessment as an impermissible and intrusive inquiry into areas safeguarded by the Religion Clauses of the First Amendment. The new "bright line" test will avoid the risk of conflict with constitutional rights inherent in the *Pacific Lutheran* test and leave determination of what constitutes religious activity with the religious institutions themselves.

Application of the *Great Falls* Test in *Bethany College*

The Respondent in the case, Bethany College, is a 501(c)(3) institution of higher learning located in Lindsborg, Kansas. Bethany College is owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod of the Evangelical Lutheran Church in America (ELCA), with a student body totaling 643 at the time of the NLRB hearing. Additionally, Bethany College's employees were not represented by a labor union at the time of the hearing.

Applying the prior jurisdictional standard, the Administrative Law Judge (ALJ) found that faculty at Bethany College were subject to the NLRB's jurisdiction. As such, the ALJ concluded that Bethany College had committed a number of unfair labor practices, including unlawful discharge of employees for engaging in protected concerted activity and maintaining unlawful workplace rules.

On appeal, the NLRB dismissed the unfair labor practice complaint on the grounds of lack of jurisdiction. In finding that Bethany College was exempt from its jurisdiction, the NLRB applied the *Great Falls* test. As to the first prong of the test, the NLRB noted that Bethany College held itself out to students, faculty and the community as providing a religious educational environment. For example, Bethany College's handbook contained specific language setting forth the religious mission of the institution. Moreover, Bethany College's job postings noted that prospective faculty members and other employees were informed of its religiously-based nature. The NLRB found the second prong of the *Great Falls* test was established by the fact that Bethany College was a 501(c)(3) nonprofit institution. As to the third prong of the *Great Falls* test, the NLRB found it was met because Bethany College was owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod of the ELCA.

What This Decision Means for Employers

First, the *Bethany College* decision serves as a reminder that almost all employers — both union and non-union — can be subject to the mandates of the National Labor Relations Act (the "NLRA"). Many employees in non-union workplaces enjoy Section 7 rights under the NLRA to engage in protected concerted activities. If Bethany College's faculty had been subject to the NLRB's jurisdiction — and most private non-religious employers are — it could have been exposed to liability for numerous unfair labor practice charges.

Second, religious educational employers should be prepared to document their religious organization status in order to establish a defense to jurisdiction by the NLRB. This way, religious educational employers will best be able to assert their rights and maintain their status as exempt from NLRB jurisdiction.

We recommend that religious educational institutions take the following steps to protect their rights:

- Review their handbooks and policies to clarify their specific religious educational mission with sufficient detail to document that they hold themselves out to students, faculty, and the community as having a religious educational environment;
- Distribute and communicate these handbooks and policies to faculty, students and the community on a regular basis;
- Regularly inform prospective faculty members and other employees of the religiously-based nature of the institution;
- Include religiously-based mission statements on job postings for faculty and employees;
- Have sufficient documentation on record of 501(c)(3) nonprofit status; and
- Maintain sufficient documentation of affiliation, ownership and control by a recognized religious organization.

Religious educational institutions may wish to consult with experienced labor counsel for further guidance on how to best document their religious educational mission so as to protect and maintain the exempt status of their faculty from the NLRB's jurisdiction.

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