

IS THE “POST” MAN COMING TO YOUR SCHOOL?

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Imagine that on November 14, 2011, as the Director of the St. James Interdenominational Faith Academy, one of the school's teachers comes into your office and informs you that unless the school immediately posts the National Labor Relations Board notice advising employees of their rights, including the right to form a union and bargain over their wages and other terms of employment, he will file a complaint with the NLRB forcing you to post it and also seek to have the NLRB impose the full penalties allowed by law. You have never heard of such a notice. Is it really required? The school has no union and isn't the NLRB only concerned with unions? Aren't religious schools exempt from such laws? What do you do? Where do you begin?

Private schools, including private religious schools, such as the fictional St. James in the example above, are increasingly, and sometimes painfully, becoming aware that the myriad of federal labor and employment laws that they gave no thought to in the past thinking that their schools were exempt, might apply to them after all. Is this true with respect to the NLRB's new rule requiring employers to prominently post a notice which explains the rights that employees have under the National Labor Relations Act (NLRA)? The answer, as is so often the case is, "It depends." But a word to the wise....get your thumb tacks ready.

THE NLRB POSTING REQUIREMENT

The National Labor Relations Board (NLRB) is the federal agency charged with enforcing the NLRA – a law that guarantees the right of employees to unionize, process grievances, collectively bargain wages and benefits and if necessary, go on strike. The NLRB recently determined that employees covered by the NLRA have limited knowledge of their rights under the law and should have those rights fully explained to them in a notice posted in the workplace.

After some give and take regarding the language of the notice and how it should be communicated to employees, the NLRB adopted a final rule which goes into effect on November 14, 2011. On that date, employers covered by the NLRA must post the 11 × 17 inch notice where other notices to employees are customarily posted.

Additionally, if the employer maintains its employment policies on its Internet site, then the notice must also be posted there. It is not necessary to email the notice to each employee even if the employer normally communicates to its employees by email.

ARE FAITH-BASED SCHOOLS COVERED?

Almost all private employers are covered by the NLRA. This is because the NLRB asserts jurisdiction over any “non-retail” business if there is a “direct or indirect inflow or outflow of at least \$50,000 per year.” As to private colleges and universities, the NLRB will assert jurisdiction if there are gross annual revenues of at least \$1,000,000. Moreover, if two or more criteria arguably apply, the NLRB will assert jurisdiction if *either* applies. The number of employees at the school is irrelevant to a determination of whether the NLRA applies.

Contrary to what one might think, the law provides no exemption for educational or charitable institutions. Although the NLRA exempts *public* schools (which includes charter schools), private schools are considered “employers” under the NLRA – unless enforcing the law as to those employers would be unconstitutional on religious grounds.

The First Amendment to the U.S. Constitution provides that Congress shall pass no law prohibiting the free exercise of religion. As to a religious school, one might conclude that any federal regulation is inherently unconstitutional. That would be a false conclusion. Many faith-based schools often have a significant secular component to their curriculum and consequently, the fact that the school has a faith component as well, even a significant one, often is not enough to insulate the school from coverage under the NLRA.

The NLRB originally exempted schools that were “completely” religious but not those there were “merely religiously associated.” In 1979, in a case in which a union sought to represent the teachers in a high school operated by the Bishop of Chicago, the U.S. Supreme Court found that the NLRB’s approach did not sufficiently guarantee the rights of the school under the First Amendment.

The Court held that “church operated” schools are not within the NLRB’s jurisdiction even though they were not “completely” religious. To hold otherwise, the Court reasoned, would be to inject the NLRB into an impermissible inquiry as to the school’s good faith religious beliefs. Unfortunately, the Supreme Court offered no

guidance as to when a school might be considered to be within the jurisdiction of the NLRB; an omission that has led to differing and confusing interpretations.

Here is an overview of the current criteria being used.

THE “SUBSTANTIAL RELIGIOUS CHARACTER” TEST

The NLRB has interpreted the Supreme Court’s decision in *Catholic Bishop* as requiring it to apply a “substantial religious character” test when determining whether a school is “church operated” and thus exempt from the NLRA. Under this test, the NLRB reviews several factors to determine if the school has a substantial religious character, including:

- the degree of the school’s religious mission;
- the school’s organizational structure;
- whether the school educates individuals regardless of their faith or limits its enrollment to those adhering to the school’s religion;
- the nature of required religious courses paying particular attention to whether instruction in the school’s specific faith is a significant part of the curriculum;
- whether the school provides a comprehensive secular education, and if so, whether this or the religious component predominates;
- whether faculty members are required to adhere to any particular religious faith or conduct themselves in accord with the religious tenets; and
- the school’s significant funding sources.

Under this standard, the NLRB has found any number of faith-based schools, including those closely affiliated with churches, to be subject to the NLRA. In fact the NLRB readily acknowledges that in most instances it will find that a private faith-based school is subject to the NLRA. For example, in one recent case decided earlier this year, the NLRB found that St. Xavier University was subject to the jurisdiction of the NLRB noting that:

- not all of the University’s trustees were required to be Catholic;
- about 90% of the school’s funding came from student tuition rather than from the Sisters of Mercy with which it is affiliated;
- students were required to take religious courses but not Catholic religious courses; and,

- the faculty is not required to hold Catholic values or face discipline.

Last year, Marquette University was told by the NLRB general counsel that it would be denied exemption as it was primarily a secular institution. Similarly, this year the NLRB found that Manhattan College was subject to the NLRA even though it is affiliated with the Christian Brothers and upon dissolution, half of the assets of the college are required to be distributed to the religious order.

Factors significant to the NLRB's decision included the fact the college's bylaws provided that there be no loyalty oath or a requirement that students attend religious services or take classes in Catholic theology. Faculty are hired based on academic qualifications rather than religious affiliation. In short, the NLRB found that the school was not dedicated to the "propagation of religious faith" and thus is subject to the NLRA.

The NLRB has found private religious schools to be exempt only in rare cases such as the Jewish Day School in Washington, D.C., in which all members of the board of directors are Jewish, the board is required to maintain a liaison with Jewish community organizations, the recruitment material indicates that students are to "identify with the Jewish people," and the school's stated philosophy is to promote an "intense Jewish religious education."

The NLRB found that St. Joseph's College in Maine was outside of its jurisdiction but in that case, unlike with most private schools, the religious order, in this instance the Sisters of Mercy, maintained complete legal control of the school and occupied all the board positions.

THE "TRIPARTITE" TEST

In contrast to the NLRB, some courts that have looked at the issue since the *Catholic Bishop* case – most notably the influential Circuit Court of Appeals for the District of Columbia – have developed a three-part test to determine whether the school is subject to the NLRB's jurisdiction. The factors to be examined under this test are whether the school:

- holds itself out to students, faculty and the community as providing a religious educational environment;
- is organized as a non-profit; and,
- is affiliated with, or 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.

Under this test, a court reviewing an NLRB decision is generally confined to looking at objective public documentation rather than an exhaustive review of the school's operations that the NLRB may have undertaken. Ordinarily, a court gives deference to an agency's determination of its own jurisdiction but when that decision arguably infringes on Constitutional rights, the court will take a harder look. Significantly, the D.C. Circuit's tripartite test generally results in a determination that a faith based school is *not* subject to NLRB jurisdiction.

In determining that Great Falls University was not subject to the NLRA, the court in *Univ. of Great Falls v. NLRB*, looked only to the school's publications and determined that statements in those documents such as the university was a "Catholic University sponsored by the Sisters of Providence" were enough to exempt it from jurisdiction even though, as found by the NLRB, the school provided a mainly secular education, did not require its faculty to be Catholic, Catholic students comprised only a third of the student body and its policies were not required to be consistent with Catholic beliefs. To delve deeper into the operation of the school was determined to be an impermissible violation of the school's religious protections guaranteed by the First Amendment.

Similarly, the D.C. Circuit recently found that Carroll College was not subject to the NLRA. The Court reviewed the school's:

- articles of Incorporation which declared the school to be a "Christian liberal arts college dedicated to God";
- catalogues outlining numerous Christian religious course offerings;
- the Board of Directors' Statement of Christian Purpose; and
- "other public documents" including an agreement between the school and church affirming the school's "heritage in the concern of the Church."

Carroll College is a non-profit organization "affiliated" with the Presbyterian Church and thus met all three criteria established by the D.C. Circuit.

RECONCILING THE DIFFERING INTERPRETATIONS

Unless your school is in the D.C. Circuit, and until the Supreme Court addresses the differing interpretations, a private faith-based school will generally be subject to the NLRA unless it can meet the difficult "substantial religious character" test applied by the NLRB. Indeed, the NLRB is bound only by Supreme Court rulings and thus is free to overlook the D.C. Circuit's tripartite test.

In the Manhattan College case, the NLRB went a step further hinting that if it were required to follow the D.C. Circuit test it would look beyond the public documents and conduct its own inquiry as to whether the school was truly holding itself out as providing a religious education. Clearly, the NLRB views its role as expansive and only reluctantly grants an exemption to faith-based schools.

Therefore, a review of the school's charter and bylaws should be undertaken to determine to what extent it is devoted to propagating a religious education. Are the teachers required to belong to the school's faith? Are the students required to be a certain faith and required to be instructed in that faith. Is there an endowment from the affiliated religious organization?

In our St. James example, if the school accepts students from all religious backgrounds, does not require the faculty to adhere to a particular faith, is interdenominational and not associated with a specific religious institution, it likely will be deemed to be subject to the NLRB's jurisdiction. Challenging the jurisdiction through court action is an expensive and time consuming proposition that few schools can afford to undertake.

WHAT HAPPENS IF THE SCHOOL FAILS TO POST THE NOTICE?

The NLRB rule provides that failure to post the notice by an employer subject to the NLRA is in itself an unfair labor practice. Worse, intentional failure to post the notice could result in a determination that the school harbors anti-union animus in connection with any other charge that might be brought.

Finally, the NLRB has indicated that the Board is free to "toll" the normal limitation period for any alleged unfair practice until the notice is actually posted. Simply stated, the failure to post the notice could result in unpleasant consequences while the issue of whether the NLRB's decision on the law's applicability to your school is being litigated. Therefore, making the correct decision at the outset is critical.

Assuming that the school is subject to the notice requirement, if 20% of the employees are not proficient in English but proficient in a different language, the notice must be posted in that language as well.

And whether there is already a union in place is totally irrelevant to determining whether the NLRB notice must be posted. In fact, the general decline of unions in the private sector is one of the key factors that led the NLRB to adopt the rule in the first place. The NLRA applies to all workers, not just those who are unionized.

If your school is subject to the notice requirement, the NLRB will provide one at no cost. It can be obtained from its [website](#). Commercial providers will also make the notice available for purchase.

THE BOTTOM LINE

Whether your private faith-based school is subject to the new NLRB posting requirement is a complicated question that turns largely on the specific circumstances of the school. Consequently, before any decision is made, we suggest you consult with your employment counsel.

For more information contact the author at WBlackie@fisherphillips.com or 440.838.8800.