



# **Your School Is Religious – Does That Mean It's Exempt?**

Insights

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You've just received notice from your state unemployment commission that the School owes \$10,000 in back unemployment taxes. You don't understand how this occurred since your religious school has always been treated as exempt from unemployment. It's only after searching your records that you see that the unemployment commission disagreed with your assertion of exempt status and your school failed to appeal the determination on a timely basis. It has now taxed you for three years of unpaid taxes, penalties, and interest. Now what?

## **Can A Religious-Based School Be Exempt?**

One costly mistake a private, religious school can make is not knowing whether a particular law applies to it, or timely and properly asserting its rights. Unbeknownst to many religious schools, certain laws provide exemptions from coverage. These exemptions can result in no legal requirement to accommodate a disabled student, or denial of the unemployment compensation claim of a former teacher. On the other hand, if a religious school assumes that it is exempt from the National Labor Relations Act because of its "substantial religious character" and therefore believes it is immune from a union organizing effort, it should think again.

Application of exemptions are often fact intensive and can depend on whether your institution is "religious enough" for the exemption. This article is not an exhaustive discussion of exemptions, but discusses potential exemptions for private, religious schools or institutions under three employment laws: the ADA, state unemployment compensation laws, and the National Labor Relations Act.

## **The Americans With Disabilities Act (ADA)**

Title III of the ADA applies to "commercial facilities" (which includes most privately owned, non-residential facilities) and to "public accommodations" (private businesses that are open to and serve the public). A private school which is not controlled by any particular church or religious organization is a "public accommodation" under Title III of the ADA and may be held liable for failure to comply with the law.

For example, a private, non-religiously controlled school which expelled a student for uttering expletives and becoming hysterical after accidentally cutting herself in art class was found to have denied the student the opportunity to attend class because of a disability where the student's reaction was due to an autoimmune disorder affecting her blood system. (*Thomas v. Davidson Academy*).

However, the provisions of Title III of the ADA do not apply to religious organizations or entities *controlled* by religious organizations, including places of worship. Even where a religious school serves the public, the school is exempt from the ADA Title III requirements. If, in the above example regarding a student who had outbursts in class, a church controlled the private school, the private school would have been exempt under Title III of the ADA – meaning it would have no obligation to accommodate the student.

Remember that, although religious schools may be exempt from Title III of the ADA, they may nonetheless be covered as "employers" under Title I of the ADA, which governs employers with 15 or more employees. Therefore, even though a religious school may not need to accommodate members of the public (for example, students), they still may need to make accommodations for disabled persons they employ. Moreover, religious schools may also have obligations under state or local laws that have similar requirements to ADA Title III. This is an area in which you should consult counsel for guidance.

### **Unemployment Compensation**

Every state provides a system whereby employees who lose their jobs through no fault of their own can make a claim for temporary income payments if they are able to work and available for work. Often the unemployment system of a state is funded by a tax on employers, and an employer must pay a significant part of a former employee's claim for unemployment.

Whether such laws apply to religious schools (for taxation purposes or for purposes of claim eligibility by a former employee) depends on the state in which the school or institution operates and the facts which support the exemption. Religious schools should neither assume that unemployment compensation laws apply to them nor should they assume that they are automatically exempt from such laws. However, religious schools need to be aware that, in many states, there is a potential exemption to assert and that this defense should not be overlooked or, worse yet, waived.

For example, both Florida and Missouri provide an exemption for churches and organizations operated primarily for religious purposes which are operated, supervised, controlled, or principally supported by a church or convention or association of churches. Pennsylvania exempts from coverage of the unemployment compensation laws "[s]ervice performed in the employ of ... an organization which is operated primarily for religious purposes ...."

Despite the statutory exemption, a Pennsylvania court recently found that a Christian academy was not exempt from the unemployment compensation laws where the academy was operated primarily for educational purposes with a strong religious influence from Petra International Ministries. The court noted that the employer was legally separate from its founder, Petra, received no funding from Petra, and purchased its own facility. Thus, the court found that the academy was not operated primarily for religious purposes and was not exempt from the unemployment compensation laws.

### **National Labor Relations Act**

The National Labor Relations Act (NLRA) is the statute which allows employees to seek union representation and collective bargaining with an employer. However, a school with a "substantial religious character" may be exempt from such unionization efforts under federal law.

The U.S. Supreme Court found that there was a significant risk that the First Amendment would be infringed when the government becomes involved in the labor disputes of religious educational institutions. Therefore, the Supreme Court narrowly construed the NLRA to find that the National Labor Relations Board (NLRB) should not exercise jurisdiction over a school with a "substantial religious character" based on First Amendment concerns. *NLRB v. Catholic Bishop of Chicago*.

Despite this Supreme Court ruling, the NLRB has nonetheless asserted jurisdiction over religious schools which it has found to be not "religious enough." In so doing, the Board considers a number of factors, including: the degree of the school's religious mission; the school's organizational structure; whether enrollment is limited to those adhering to the school's religion; the nature of required religious courses and whether instruction in the school's faith is a significant part of the curriculum; whether the school provides a comprehensive secular education and whether this or the religious component predominates; whether faculty are required to adhere to a religious faith; and the school's significant funding sources.

Under this standard, the Board has found a number of faith-based schools, including those closely affiliated with churches, to be subject to the NLRA, including such institutions as St. Xavier University and Marquette University. 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. Due to the Board's case-by-case approach, there is no bright line rule to determine when and if the Board will find that it lacks jurisdiction over a religiously affiliated school. But by paying attention to the factors that the Board considers, a school can organize itself in such a manner so as to establish a compelling case against coverage under the NLRA.

### **The Bottom Line**

The religious character or control of a private school or institution raises unique defenses and exemptions from the application of the law. Courts and agencies often consider and recognize the application of such exemptions, including exemptions not discussed in this article, such as the ministerial exception to employment discrimination law.

Because a private religious institution has unique defenses available, don't assume that you are subject to a particular law without exploring possible exemptions. Conversely, don't presume that your school is exempt from the law because of its religious character – particularly in the application of the NLRA. By understanding which laws apply and don't apply, a private, religious school can avoid costs, headaches, and even better position itself to be found exempt.

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