



# Does The NLRB Have Jurisdiction Over Your University?

Insights

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Although a religious college recently scored a victory in its battle against unionization, the legal decision and the proceedings that led to that decision could be somewhat troublesome for your educational institution. All colleges and universities should take heed of this development and determine whether you need to make changes now to avoid trouble later.

## Background: Catholic College Faces Union Organizing Drive

The case dealt with Carroll College, a non-profit Catholic, liberal arts college in Helena, Montana. A union comprised of various faculty members (and affiliated with the AFL-CIO) filed a petition with the National Labor Relations Board (NLRB) seeking an election to become certified as the representative of certain tenured and non-tenured track faculty members.

This attempt to unionize revolved around various issues that the faculty had with their working situation, including concerns over workload, working conditions, benefits, and salary. Carroll College argued, among other things, that it was not subject to the NLRB's jurisdiction because it is a religiously operated institution, and therefore not subject to unionization efforts. The case, then, was determined by an examination of whether the College was sufficiently "religious" to avoid NLRB coverage.

The student body population at Carroll College is slightly more than 50% Catholic. Pursuant to the college's Statement of Mission, it "is committed to present faithfully within its teaching the magisterial teachings of the Catholic Church." The Bishop of the Diocese of Helena serves as Chancellor. While the President is required to be Catholic, the faculty members are not. There are approximately 84 faculty members at the College.

## Two-Part Legal Test Determines Coverage

In 2014, the NLRB first adopted a two-part test for determining whether to assert jurisdiction over religiously affiliated universities in the case called *Pacific Lutheran University* (PLU). That case was widely seen as a pro-union decision because it held that faculty members are not managerial employees and are therefore entitled to unionize.

Under this two-part test, the NLRB will exercise jurisdiction over faculty members at any university which claims to be a religious institution **unless** the university can demonstrate that it holds itself out as providing a religious educational environment, and that the university holds the petitioned-for

faculty out as performing a specific role in creating or maintaining the university's religious education environment.

The NLRB has stated that the first step of this test imposes only a minimal burden on universities. Materials such as the university's mission statement, handbook, or website can be used to show that the university holds itself out as providing a religious educational environment. The second step of the test, however, requires more examination.

### **NLRB Decision Focused On Grounds For Termination**

In the Carroll College case, the NLRB Regional Director quickly found in a single sentence that the College had met its burden of holding itself out as providing a religious educational environment. The Regional Director then focused his inquiry on the second part of the PLU test, whether the faculty played a role in creating and maintaining that environment.

He noted that the College's handbook lists four reasons for which it may terminate faculty members for "serious cause," one of which is "continued serious disrespect or disregard for the Catholic character or mission" of the College. Notably, the Regional Director found it "irrelevant" that the College had never actually terminated a faculty member for this reason, and that it would not look at a school's actual practice when there are publicly available documents on point.

In a footnote in the PLU decision, the NLRB held that it will "decline jurisdiction so long as the university's public representations make it clear that faculty members are subject to employment-related decisions that are based on religious considerations." This footnote specified that "if faculty members were subject to dismissal for teaching a doctrine at odds with the religious faith of the institution," it would decline jurisdiction "so long as the university's public representations indicated that faculty members were expected to comply with (or at least not openly contravene) certain tenets of a religion as a term and condition of employment." Based upon this footnote, and the language above in the handbook, the Regional Director found that it did not have jurisdiction over the faculty at Carroll College.

### **However, Federal Law Did Not Preclude Examination**

The Regional Director also considered whether the Religious Freedom Restoration Act (RFRA) would separately preclude jurisdiction. The RFRA is a federal statute which provides that the "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that the application of the burden to the person is in furtherance of a compelling government interest, and is the least restrictive means of furthering that compelling governmental interest."

The Regional Director rejected this contention by noting that the College did not establish that a "substantial burden" exists because it did not show "substantial pressure on it as an adherent to modify its behavior and violate its beliefs or any specific interference with a tenet or belief that is central to the College's religious doctrine."

## Both Sides Not Pleased With Decision

Both parties have appealed the Regional Director's decision to the full NLRB. The union is requesting a review because it claims the Regional Director did not properly apply the PLU test, and that he relied too heavily on one statement in the handbook. The union claims that the academic freedom of faculty members at the college is paramount, and that faculty members may not be dismissed for teaching doctrine at odds with Catholicism.

Interestingly, despite the fact that they were victorious, Carroll College also submitted a request for review of the Regional Director's decision, claiming that the PLU two-part test was unconstitutional. The College argues that the Regional Director "is not entitled to decide which of Carroll College's beliefs, in his opinion, are religious enough to satisfy PLU." Only time will tell if the Carroll College decision will stand.

## What This Means For Your Institution

For religiously affiliated universities, the takeaway from the *Carroll College* decision is that you should revisit how you are holding yourself out to the public, and whether your publicly available documents reflect that your faculty members are subject to employment-related decisions based on religious considerations. An analysis of these documents pursuant to the guidance from the *Carroll College* decision may indicate whether the NLRB would accept or decline jurisdiction over a faculty unionization attempt.

While the *Carroll College* decision is a victory for colleges and universities who want to stay union free, the fact that unionization efforts are underway at such institutes of higher education should be closely monitored. As this area continues to develop, you should be prepared to revisit your policies and practices accordingly.

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