Key NLRB Decision Opens a Wide Door for Faculty Organizing

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In a stunning and far-reaching decision, the National Labor Relations Board (NLRB) opened the door to union organizing among faculty at thousands of private-sector institutions, both secular and religious. The board's majority decision in *Pacific Lutheran University* (12/16/14), issued in the face of powerful dissents, will inevitably spark controversy and ongoing litigation both about the legality of NLRB intrusion into the operation of religious institutions and the proper interpretation of the "managerial" status of faculty under the U.S. Supreme Court's historic *Yeshiva University* decision.

Pacific Lutheran University case

The question before the NLRB in *Pacific Lutheran University* was whether a local of the Service Employees International Union could represent a unit of nontenure-eligible contingent faculty members employed by the university in Tacoma, WA. The university argued that, as a church-operated institution, it was exempt from NLRB jurisdiction and that its full-time contingent faculty were managerial employees excluded from representation under the Supreme Court's 1980 decision in *Yeshiva University*.

In reviewing the decision of its regional director, the NLRB took the opportunity to solicit *amicus briefs* about the broad issues of jurisdiction over all religious institutions and the proper analysis of managerial status of all faculty at private higher education institutions. In its decision, the board articulated new, more stringent, standards that will make it difficult for religious institutions to claim exemption from the National Labor Relations Act and for all private institutions to claim that their faculty are exempt from union organizing. It held that the contingent faculty in question were entitled to organize.

Difficult new test

In Yeshiva, the Supreme Court ruled that the faculty of that institution were "managerial employees" excluded from collective bargaining because they "formulate and effectuate management policies by expressing and making operative the decisions of their employer." Controversy had existed in applying the Yeshiva standards in the 34 years since that case was decided. Reviewing courts and others had criticized the NLRB for creating confusing standards that gave poor guidance to litigants. Despite these concerns, the overwhelming majority of private-sector institutions in the country have relied on the principles of this case to maintain union-free status among their faculty.

In the *Pacific Lutheran case*, the board stated its new rule as follows:

1. Where a party asserts that university faculty are managerial employees, the board will examine the faculty's participation in the following areas of decision-making: academic programs, enrollment management, finances, academic policy, and personnel policies and decisions, giving greater weight to the first three areas than the last two areas.
2. The board will then determine, in the context of the university's decision-making structure and the nature of the faculty's employment relationship with the university, whether the faculty *actually control or make effective recommendations over those areas*. If they do, the board will find that they are managerial employees and, therefore, excluded from the act's protections.
3. The board interpreted the term "effective recommendations" to mean that those recommendations "must almost always be followed by the [college or university's] administration," and that they must "routinely become operative without independent review by the administration."

In his thoughtful dissent, NLRB member Harry I. Johnson III pointed out the virtual impossibility of satisfying this new standard:

… by increasing the burden of proof for what the board considers to be "effective" recommendations, and by failing to consider the actual, diverse processes of university business operations and governance, the board has raised the bar for establishing managerial status of faculty to an unattainable height, one beyond the reach even of Aretē.

Johnson pointed out that the new requirement, that to be effective, recommendations "must almost always be followed by the administration," is an "overly onerous standard," which will result in fewer board decisions conferring managerial status on faculty." In addition, Johnson criticized the board majority's holding that faculty recommendations are *not effective* if they are subject to independent review. He pointed out that discounting internal review "seems to utterly disregard the realities of decision- and policymaking in complex organizations."

The dissent's observations underscore the uphill battle nearly any college or university will have in demonstrating that its faculty are "managerial" and therefore not subject to collective bargaining.

Jurisdiction over religious institutions

The board also ruled that it will exercise jurisdiction over religious institutions–and hence *allow* faculty organizing—except where:

1. The college or university first demonstrates that it holds itself out as providing a religious educational environment.
2. Once that threshold requirement is met, the college or university must then show that it holds out the faculty members it seeks to organize as performing a religious function. This requires a showing by the college or university that it holds out those faculty as performing a specific role in creating or maintaining the university's religious educational environment.

As Johnson pointed out in his dissent, the board's new standard, which requires a religious university to *prove* that it "holds out" its faculty "as performing a *specific* role in creating and maintaining" its religious educational environment, necessarily involves the government in the process of evaluating religious beliefs and practices, thereby improperly intruding into the Religious Clauses of the First Amendment. This is particularly true because the majority decision requires a showing that faculty are required to serve a specific "religious function"—something that, of course, can vary widely from religion to religion. In Johnson's view, if the *Pacific Lutheran* standard is eventually appealed to the D.C. Court of Appeals, it will be overturned.

Take-away for all private higher ed institutions

The NLRB's decision—unless and until it is reversed or modified—will force nearly all private-sector institutions to reevaluate their vulnerability to union organizing among their faculty. For institutions that view their faculty as truly "managerial" and not subject to organizing, the decision injects a new era of uncertainty about the fundamental relationship between faculty and administration.

Institutions should audit their administrative structure to determine the extent to which their faculty (whether regular or contingent) make "effective recommendations" which are "almost always" followed by the administration, without review. This standard may be unattainable in the era of modern higher education. Institutions who wish to maintain union-free status among their faculty should also train their administrators how to respond to organizing activities by understanding how union organizing works under the National Labor Relations Act, recognizing organizing activities, and educating faculty to the pro's and con's of collective bargaining.

Religious universities likewise should audit their administrative structure to determine whether they "hold out" their faculty as serving specific religious functions.

All institutions should carefully monitor ongoing developments in this critical area.

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