Faculty Can Unionize Absent Actual Managerial Control, NLRB Decides

Insights
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Last week, the National Labor Relations Board (NLRB or Board) revised its standard for determining when faculty members can unionize. Although the decision is expected to be appealed, it undoubtedly will open the door to a new wave of organizing efforts targeting private college and university faculties. *Pacific Lutheran University.*

Faculty As Managerial Employees

Pacific Lutheran claimed that its full-time adjunct faculty were managerial employees and for that reason alone could not be unionized based on the Supreme Court's 1980 decision in *NLRB v. Yeshiva University*. The Board rejected that argument, finding that the full-time adjunct faculty at Pacific Lutheran failed to exercise sufficient managerial authority on behalf of the university to be excluded as managerial employees.

In reaching its conclusion, the Board revised its framework for answering the question whether faculty in a university setting "actually or effectively exercise control over decision making pertaining to central policies of the university such that they are aligned with management." The Board's new framework for determining whether faculty members have managerial authority examines faculty control of: 1) academic programs; 2) enrollment policies; 3) finances; 4) academic policies; and 5) personnel policies and decisions. The ruling stipulated that "greater weight" be given to the first three of those factors.

In assessing whether the faculty actually controls or makes effective recommendations regarding those areas, the Board made clear that the burden of establishing managerial authority of faculty rests with the university, requiring it to "prove actual -- rather than mere paper – authority." The Board also noted, "A faculty handbook may state that the faculty has authority over or responsibility for a particular decision-making area, but it must be demonstrated that the faculty exercises such authority in fact."

The Board also emphasized the need for "specific evidence or testimony regarding the nature and number of faculty decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed." According to the Board, to be "effective," recommendations must "almost always" be followed by the administration.

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Higher Education Typically Run By Administrators

Perhaps tipping its hand as to how it will approach future cases, the Board noted that its experience applying *Yeshiva* has generally shown that "colleges and universities are increasingly run by administrators." With separate administration, authority at higher education institutions has shifted away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself.

Test For Religiously Affiliated Colleges And Universities

The Board also addressed the test that applies when determining whether it has jurisdiction over faculty members at self-identified religious colleges and universities. The Free Exercise and the Establishment Clauses of the First Amendment to the Constitution require that the Board refrain from any intrusive inquiry into the character or sincerity of a university's religious views. The Board concluded that it would decline to exercise its labor law authority over faculty members at a religious institution only where the college or university first shows that it holds itself out as providing a religious educational environment. If it can make that showing, the religious college or university would then need to show that it holds out the faculty members who seek to join a union as performing a religious function. Specifically, the college or university must demonstrate that it holds out those faculty as performing a specific role in creating or maintaining the university's religious educational environment.

Applying that test to Pacific Lutheran University, the Board ruled that the university demonstrated that it provided a religious educational environment but failed to show that the adjunct faculty seeking to unionize were performing a religious function. Consequently, the Board exercised its authority to decide the union petition related to these faculty members.

Expect New Organizing Efforts

It's no secret that labor unions have been looking for new revenue sources to stem the tide of decades of membership decline, and this decision will undoubtedly lead them to redouble their efforts to organize college and university faculties. If you would like assistance in understanding the issues raised by this decision and how best to position yourself in response, look for our upcoming webinar presented by attorneys from our Education Practice Group. Registration information will be sent out in the next few weeks. Until then, if you have any questions, please contact your regular Fisher Phillips attorney or a member of the Education Practice Group.

This Legal Alert provides an overview of a specific NLRB ruling. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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