# NLRB Will No Longer Exercise Jurisdiction Over Religious Educational Institutions

Insights
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In a major reversal of a 2014 Obama-era precedent, the National Labor Relations Board just ruled that it will no longer assert jurisdiction over *bona fide* religiously affiliated schools. This decision is of enormous significance for religiously affiliated colleges and universities which have faced union organizing in recent years – among their contingent faculty in particular. Such institutions will no longer have to be concerned about union organizing if they meet the new bright-line test established by the Board. What do you need to know about the June 10 decision in *Bethany College* (369 NLRB No. 98 (2020))?

**Board Returns To Bright-Line Standard**

Reversing its decision in *Pacific Lutheran University,* the Board just ruled that from now on it will apply a simple, bright-line test to determine whether it has jurisdiction over religiously affiliated institutions. Under this bright-line test, originally established in 2002 by the U.S. Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, the Board will not exercise jurisdiction over an institution that:

- Holds itself out to students, faculty, and community as providing a religious educational environment;
- Is a non-profit organization; 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.

**Board Explains Reasoning**

In the years after *Great Falls,* the Board majority had blurred the D.C. Circuit's test, ruling in *Pacific Lutheran University* that it would assess the *particular duties* of faculty at religiously affiliated schools to determine what role they performed in maintaining the school's religious educational environment. In this week's *Bethany College* decision, the Board flatly rejected this intrusive approach, noting it was inconsistent not only with the *Great Falls* decision, but with longstanding Supreme Court precedent interpreting the Religion Clauses of the First Amendment.

The Board stated that "this test would allow the Board to determine whether it has jurisdiction without delving into matters of religious doctrine or motive, and without coercing an educational

Without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands." Now under the restored bright-line *Great Falls* test, "the Board will leave the determination of what constitutes religious activity versus secular activity precisely where it has always belonged: with the religiously affiliated institutions themselves, as well as their affiliated churches and, where applicable, the relevant religious community." It will also "provide the Board with a mechanism for determining when self-identified religious schools are not, in fact, bona fide religious institutions, therefore protecting the rights of employees working in those institutions."

**The Standard For Determining Managerial Employee Status For Faculty Untouched**

The only question before the Board in the *Bethany College* case was the test for determining if the Board should assert jurisdiction over a religiously affiliated institution. Left untouched – for the moment – was the new standard announced in *Pacific Lutheran* for determining when college and university faculty are managerial employees.

Under *Pacific Lutheran*, the Board determines "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 "party asserting managerial status must prove actual – rather than mere paper – authority" or that the faculty effectively recommend actions that in essence demonstrate an exercise of control over university decision-making. Thus, "effective recommendations must almost always be followed by the administration."

In making the determination as to whether faculty actively or effectively exercise control over decision-making, the Board examines "the faculty's participation in the following areas of decision-making: academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions, giving greater weight to the first three ["primary"] areas than the last two ["secondary"] areas. This examination will be considered in the context of the university's decision-making structure and administrative hierarchy, as well as the nature of the employment relationship of the faculty in issue."

This test for determining the managerial status of faculty, i.e. whether they are considered "employees" under the Supreme Court's famous *Yeshiva University* decision, will continue to remain a problem for any non-religiously affiliated institution faced with faculty organizing. Hopefully that issue will be revisited by the Board in the future.

**What Should Religiously Affiliated Institutions Do Now To Meet The Bright-Line Test?**

If your institution identifies as a religious institution of higher education, you should:

- Revisit your mission statement to ensure that it thoroughly reflects your commitment to providing a religious educational environment.
- Make sure that your purpose of providing a religious environment is clearly articulated in your communications with faculty, students, and the community. For example, this purpose should be

reflected in your faculty handbook, student handbook, and under your mission statement and other descriptions of your organization publicized to the community.

- Be consistent in your external and internal messaging concerning your mission and purpose of providing a religious educational environment.

**What Should Non-Religiously Affiliated Institutions Do Now To Anticipate Faculty Organizing Drives?**

Non-religious-affiliated institutions should conduct a vulnerability assessment to determine whether, or which of, your faculty constitute managerial employees under the National Labor Relations Act, and thus cannot be represented by a union and are generally exempt from the Act's protection of concerted activities concerning wages, hours, and terms and conditions of employment. This type of assessment is integral to appropriately responding to potential representation petitions filed by a union seeking to represent your faculty, as well as defending against unfair labor practice charges.

Your assessment should include a review of not just your bylaws and faculty handbook, but your actual practices to determine whether, or which of, your faculty "actually or effectively exercise control over decision-making pertaining to central policies of the university such that they are aligned with management." You may also want to consider appropriate structural changes to ensure that the faculty whom you consider to be "managerial" employees actually meet the standard for that designation under the Board's current test.

**Conclusion**

Fisher Phillips will continue to monitor these developments at the NLRB and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this alert, or any member of our Labor Relations Practice Group.

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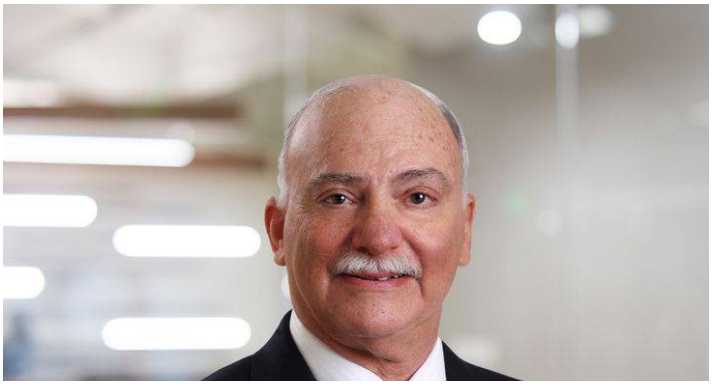

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