

Religious Colleges and Universities No Longer Subject to the National Labor Relations Act

June 11, 2020

On Wednesday, June 10, 2020, the National Labor Relations Board, (the “NLRB” or the “Board”) issued a decision holding that faculty at religious higher education institutions are not covered by the National Labor Relations Act. [1] The decision involves Bethany College, a Lutheran institution, and sets forth a new standard.

In the 1979 case of *NLRB v. Catholic Bishop of Chicago*, the U.S. Supreme Court held that the exercise of jurisdiction over religious institutions by the NLRB, a federal agency, would inevitably involve inquiry into the religious tenets of those institutions and entangle the government in religious matters in violation of the Religion Clauses of the First Amendment. [2] In subsequent years, the NLRB engaged in a case by case determination as to whether a particular institution was sufficiently “religious” to bar NLRB jurisdiction. The courts were not receptive to the NLRB’s analyses.

The most recent interpretation by the NLRB was the 2014 case of *Pacific Lutheran University*. [3] Under the prior standard, an institution contending that the NLRB lacked jurisdiction had to prove that: (1) it held itself out as creating a religious educational environment; and (2) it held out the faculty members as performing a specific role in creating or maintaining the college or university’s religious educational environment. In a statement regarding the *Bethany College* decision, the NLRB indicated that this test “was fatally flawed, as it required consideration of whether faculty members at religiously affiliated institutions of higher learning are performing a specific religious function. To make such an assessment, the Board would have to engage in an inquiry, impermissibly intrusive into an area safeguarded by the Religion Clauses of the First Amendment, ‘into what does and what does not constitute a religious function.’”

The *Bethany College* decision adopts a three-point standard from the 2002 District of Columbia Circuit case of *University of Great Falls v. NLRB*. [4] Under this “bright-line” test, the NLRB does not have jurisdiction over (1) nonprofit institutions that (2) hold themselves out “as providing a religious educational environment” and (3) are “affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization.”

In its decision, the NLRB indicated that the *Great Falls* test “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.” The NLRB further indicated that this test “will remove any subjective judgments about the nature of the institution’s activities or those of its faculty members and limit the Board to making jurisdictional determinations based on objective evidence.”

This decision could have major implications for religious institutions of higher education. Faculty unions which may have been protected by the National Labor Relations Act are no longer required to be recognized by those institutions.

If you have questions regarding how the NLRB's decision may impact your institution or about any aspects of labor and employment law, please contact Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenllp.com, James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com or Hayley B. Dryer at (516) 357-3745 or via email at hdryer@cullenllp.com.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Thank you to [Maria A. Gomez](#), an associate with Cullen and Dykman, for her assistance with this post.

Footnotes

[1] *Bethany College*, 369 NLRB No. 98.

[2] *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

[3] *Pacific Lutheran University*, 361 NLRB 1404 (2014).

[4] *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

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