



Divine Intervention? NLRB Rejects Challenge to Jurisdictional Test for Religious Educational Institutions

Insights

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In a rare rebuke of its own General Counsel, the National Labor Relations Board has rejected an invitation to flip-flop on its own precedent and will instead continue to apply a simple, bright-line test when determining whether it has jurisdiction over religiously affiliated higher educational institutions. The Board's recent decision is welcome news to schools and could serve as a signal to the General Counsel to slow down on her efforts to radically transform labor law in the waning days of the Biden administration. What do you need to know about this decision's impact on religious schools, and what should private colleges and universities be tracking from the NLRB over the next few months?

In the Beginning: The NLRB's Approach to Religious Institutions

Historically, the NLRB's jurisdiction over religious educational institutions has oscillated between different tests:

- ***NLRB v. Catholic Bishop of Chicago (1979)*** - The Supreme Court held that extending NLRB jurisdiction to religious schools risked excessive entanglement with religion, violating the Establishment Clause, based on two factors: (1) the absence of clear congressional intent to regulate religious institutions, and (2) potential First Amendment conflicts.
- ***University of Great Falls NLRB (2002)*** - The D.C. Circuit held that the NLRB could not assert jurisdiction over a religious college without risking First Amendment violations. The court used a three-prong test to determine whether a school was excluded from the NLRB's jurisdiction: (1) whether the school holds itself out as religious; (2) is a nonprofit; and (3) is religiously affiliated or owned by a religious organization.
- ***Pacific Lutheran University (2014)*** - The NLRB held that a religious educational institution must not only hold itself out as religious but must also prove that its faculty are directly involved in maintaining or supporting that environment.
- ***Bethany College (2020)*** - The Board rejected the *Pacific Lutheran* standard and returned to the *Great Falls* three-part test, which is less invasive in evaluating an institution's religious character, and easier to satisfy. Indeed, the board's most recent decision maintained the bright-line test announced in *Bethany College*.

Welcome Restraint – The Board Adheres to *Bethany College*

In the most recent decision, the Board concluded that a university met all three prongs of the *Bethany College* test and, therefore, should be exempt from NLRB jurisdiction. Despite the General Counsel's argument to overturn the *Bethany College* precedent, the NLRB chose instead to apply the existing framework. This outcome not only affirmed the university's status as a religious institution exempt from the NLRB's jurisdiction, but also rebuked the General Counsel's push to reconsider the Board's standards on this subject, which is significant in the context of the Board's historically shifting positions based on its political composition.

Guidelines for Religious Institutions to Maintain the Exemption

- **Consistent Public Messaging:** You should clearly and consistently present yourself as providing a religious educational environment. This means publicizing your religious identity and incorporating religious values into your public-facing statements and internal policies. Emphasize your religious mission and identity in all public materials, such as websites, student handbooks, and promotional documents.
- **Document Religious Activities:** Maintain clear and accessible documentation of religious events, such as services, masses, or religious study groups – and demonstrate that you encourage participation by students and faculty.
- **Ensure Non-Profit Status:** Keep all certifications and documentation regarding the institution's non-profit status up-to-date and readily available, as this is a make-or-break element of the exemption.
- **Formal Affiliation with Religious Organizations:** To satisfy the third prong, formalize and document your affiliation with recognized religious bodies, including having representatives of such organizations in governance roles.
- **Avoid Conflicting Messaging:** Be cautious about marketing and other public communications that might emphasize a secular image over the religious identity, as mixed messaging could undermine claims to exemption.

Broader NLRB Issues Affecting Higher Education Institutions

Apart from jurisdictional concerns for religiously affiliated institutions, the NLRB continues to address several other issues relevant to all private higher education institutions, including:

- **Student Workers:** The NLRB's stance on whether graduate students and other student workers are considered employees entitled to unionize continues to be an area of flux. Recent Board decisions have almost uniformly leaned towards allowing these students the right to organize. This includes high profile efforts to classify student-athletes as employees in multiple cases.
- **FERPA:** The Board's General Counsel recently urged private colleges and universities to release student-worker information to unions. upending the balance between student privacy rights and

the NLRA's obligation to furnish certain information to unions. According to this [guidance](#), schools must negotiate in good faith to comply with labor obligations, preemptively seek student-worker consent to disclose FERPA-protected information, or provide de-identified data if acceptable to the union.

- **Joint Employer Standards:** Private institutions that have partnerships or contractual relationships with other entities (such as facilities management or food service companies) should be mindful [of evolving standards](#) regarding joint employer status. Such changes could broaden the definition of "employer" and increase the number of entities potentially liable under the NLRA.
- **Expansion of Unfair Labor Practices:** The Board has been broadening interpretations of what constitutes an unfair labor practice, including [increased scrutiny](#) on employer policies that might interfere with concerted activity or union organizing efforts. Institutions should regularly review handbooks and policies to ensure compliance with current standards and avoid any [increased chances for liability](#).

Conclusion

The NLRB's most recent decision reflects a restrained approach to the Board's jurisdiction over religiously affiliated educational institutions, preserving their ability to remain exempt under a broad interpretation of religious freedom. This decision provides stability in an area marked by previous shifts in the law. Religious institutions seeking to maintain their exemptions should closely follow the outlined guidelines to maintain their exempt status, while all higher education institutions must stay attuned to broader labor law issues affecting their workforce and labor practices.

We will continue to monitor developments as they unfold. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information direct to your inbox. If you have any questions on how these developments may impact your operations, please do not hesitate to contact your Fisher Phillips attorney, the [author](#) of this Insight, or any member of our [Labor Relations Group](#) or [Higher Education Team](#) for additional guidance.

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