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CLIENT ALERT

THE NLRB RULES THAT IT WILL ASSERT JURISDICTION OVER NONTEACHING EMPLOYEES OF RELIGIOUS INSTITUTIONS AND NONPROFIT RELIGIOUS ORGANIZATIONS

APRIL 2017

In its 2014 landmark decision in *Pacific Lutheran University (PLU)*, the National Labor Relations Board (NLRB) held that it will assert jurisdiction over faculty at religious colleges and universities unless the college or university can show that it holds the faculty out "as performing a specific role in creating or maintaining" the religious educational environment. We previously reported on that decision **here**. The NLRB was very specific in *PLU* that its holding only applied to faculty employed at religious colleges and universities.

In its **decision** last week in *Saint Xavier University*, the NLRB established the test it will use to determine whether it will assert jurisdiction over nonteaching employees of religious institutions. In its decision, the NLRB pointed to its prior decision in *Hanna Boys Center*, in which it previously found that neither the Supreme Court's decision in *Catholic Bishop* (ruling that the NLRB did not have jurisdiction over teachers at a parochial school), nor the Religious Clause of the First Amendment prohibited the NLRB from exercising jurisdiction over nonteaching employees of religiously-affiliated organizations. The employees at issue in *Hanna Boys Center* included clerical employees, child-care workers, recreation assistants, cooks and maintenance employees. In *Hanna Boys Center*, the NLRB held that it could exercise jurisdiction over this group of employees because they "were not teachers" and "there was no record evidence that their duties…had any connection to the employer's 'possible religious mission'."

In its recent *Saint Xavier University* decision, the NLRB stated that it would adhere to its "established precedent in *Hanna Boys Center* to determine whether nonteaching employees at religious colleges or universities have collective-bargaining rights" under the National Labor Relations Act. The NLRB noted that, where these employees do not play a similar role in carrying out the religious mission of the school, "the sensitive First Amendment concerns of excessive entanglement are not implicated and the process of inquiring into the actual duties and responsibilities of such employees will not 'impinge on rights guaranteed by the Religion Clauses'." Therefore, the NLRB held that it will assert jurisdiction "over nonteaching employees of religiously-affiliated colleges and universities, unless it has been demonstrated that their actual duties and responsibilities require them to perform a

specific role in fulfilling the religious mission of the institution."

As he frequently does these days, Member Miscimarra dissented from the majority decision. He argued that the majority's holding—that the NLRB will only decline to assert jurisdiction over non-teaching employees at religiously-affiliated organizations when those employees have duties and responsibilities that require them to perform specific roles in fulfilling the organizations' religious mission—strikes at the very inquiry that impermissibly risks entangling the NLRB in religious matters. According to Member Miscimarra, this is precisely the concern the Supreme Court cited in *Catholic Bishop*, where it held that the NLRB did not have jurisdiction over teachers at religiously-affiliated schools.

Member Miscimarra found that, rather than applying the tests of *PLU* or *Hanna Boys Center*, the NLRB should adopt the standard established by the D.C. Circuit Court of Appeals in *Great Falls* to resolve the question of the NLRB's jurisdiction over both teaching and nonteaching employees at religiously-affiliated institutions. In his dissent, he argued that *Great Falls* established a "bright-line test that would allow the [NLRB] to determine whether it has jurisdiction without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands." Pursuant to this test, an institution is exempt from NLRB jurisdiction if it (1) holds itself out to the public as a religious institution, (2) is nonprofit, and (3) is religiously affiliated. Member Miscimarra found that adoption of the *Great Falls* bright-line test has the "additional benefit of yielding understandable and predictable results."

The NLRB has asserted jurisdiction over teaching and nonteaching employees at a number of religious colleges and universities throughout the country, and there are several requests for review pending before the NLRB requesting that it adopt the *Great Falls* test. To date, the NLRB has yet to issue a decision in most of these cases. However, with two current NLRB vacancies that the new administration can fill immediately, we anticipate that the NLRB could ultimately adopt a new test similar to that established in *Great Falls*. We will continue to follow the developments at the NLRB closely and alert you to any relevant changes.