

# Reversing Course, NLRB Determines Not to Exercise Jurisdiction Over Religious Institutions

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Overruling a controversial 2014 National Labor Relations Board (NLRB) decision, the NLRB has adopted a new test for determining whether it will exercise jurisdiction over religious institutions. *Bethany College*, 369 NLRB No. 98 (June 10, 2020), *overruled Pacific Lutheran University*, 361 NLRB 1404 (2014) (*PLU*).

### New Test; *Great Falls*

In *Bethany College*, the NLRB adopted an objective three-part test the federal appeals court in D.C. established in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

Under that test, if the institution (1) “holds itself out to the public as a religious institution”; (2) “is nonprofit”; and (3) “is religiously affiliated,” then the NLRB will not exercise its jurisdiction.

The NLRB stated that *Great Falls* correctly interpreted the U.S. Supreme Court’s decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), on this issue, and the NLRB’s *PLU* decision was incorrect because it failed to avoid the risk that the protections in the Religion Clauses of the First Amendment of the U.S. Constitution would be infringed.

### *Catholic Bishop of Chicago*

The Supreme Court held in *Catholic Bishop* that the NLRB should not exercise jurisdiction over lay teachers at two Catholic high schools (one controlled by the Bishop of Chicago, the other, by a Catholic Diocese in Indiana). The Court worried that NLRB involvement in determining the terms and conditions of employment for these employees, and resolving alleged unfair labor practices, would pose “a significant risk” of infringing on First Amendment rights under the Constitution’s “Religion Clauses” (*i.e.*, the Establishment and Free Exercise Clauses). These provide, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....” The Court also included this “definition” or characterization of a school operated by a church: “parochial schools involve substantial religious activity and purpose.”

Based on this, the NLRB decided on a case-by-case basis whether a self-identified religious school had a “substantial religious character” such that exercise of its jurisdiction would present a significant risk of infringing on that employer’s First Amendment religious rights.

### *Pacific Lutheran University*

In *Pacific Lutheran University*, the NLRB (with then-Members Philip Miscimarra and Harry Johnson dissenting) established a stringent standard for the entity claiming exemption from NLRB jurisdiction. Under this standard, the entity must:

first demonstrate, as a threshold requirement, that First Amendment concerns are implicated by showing that it holds itself out as providing a religious educational environment. Once that threshold requirement is met, the university must then show that it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by its representations to current or potential students and faculty members, and the community at large.

The NLRB ultimately held that it was appropriate to exercise jurisdiction over the faculty members in *PLU* because there was nothing in the school's "governing documents, faculty handbook, website pages, or other material" demonstrating that the faculty "perform any religious function." At the time, the NLRB stated that its standard provides a "better approach to protecting employees' rights while being sensitive to First Amendment concerns." The decision was expected to lead to widespread organizing of faculty in private religious colleges and universities.

### *Bethany College*

In *Bethany College*, the NLRB held the *PLU* standard was incorrect, finding it was "inherently inconsistent" with *Catholic Bishop*. The NLRB also decided that employee rights under the National Labor Relations Act (NLRA) "are subordinate to those enshrined in the Constitution where there is a potential conflict between the two" and that the "fundamental flaw in *Pacific Lutheran* was the majority's refusal to accept [that] reality."

### Takeaways

The NLRB will apply a bright line test for determining whether it will exercise jurisdiction over teachers or faculty at religious institutions, providing clarity for these organizations and their employees.

*Bethany College* also raises the question of whether religiously affiliated colleges and universities may withdraw recognition of unions certified as collective bargaining representatives of faculty under the *PLU* test.

Finally, while the NLRB will no longer assert jurisdiction, religious colleges and universities must be prepared to respond to requests for voluntary recognition of faculty unions outside the framework of the NLRA and the NLRB's jurisdiction.

Please contact a Jackson Lewis attorney with any questions about this development or the NLRB.

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