

## CLIENT ALERT: NLRB Decision Provides New Guidance for Determining Managerial Status for Full Time Faculty Members and When It Will Assert Jurisdiction over Religious Institutions

In a landmark decision issued on December 16, 2014, the NLRB provided new guidance for how it will determine the question of managerial status for full time faculty members at private institutions. In the same decision, it also provided a new test for determining whether or not it will assert jurisdiction over religious institutions of higher education.

In *Pacific Lutheran University*, 361 NLRB No. 157, the Board was confronted with two basic questions: 1) whether it should assert jurisdiction over an institution affiliated with the Lutheran Church of America and 2) whether that institution's full time contingent faculty were managerial employees under the 1980 U.S. Supreme Court's decision in *Yeshiva University*.

This decision followed the Board's earlier call for briefs from the public on how it should deal with these two questions and in particular what factors the Board should examine in dealing with these two fundamental issues under the National Labor Relations Act ("the Act"). Dozens of organizations and individuals had weighed in during 2014 with *amici* briefs on these two topics.

### Jurisdiction Question

On the issue of jurisdiction, the Board reexamined the standard it would apply for determining, in accordance with the Supreme Court's 1975 decision in *NLRB v. Catholic Bishop of Chicago*, when it would decline to assert jurisdiction over faculty members at self-identified religious colleges and universities. In *Catholic Bishop*, the Supreme Court had ruled that the Board could not assert jurisdiction over lay teachers at church-operated schools, because to do so would create "significant risk" that the First Amendment religious rights of the school would be infringed upon. The Court feared that the Board jurisdiction over such schools would "necessarily involve inquiry into the good faith of the position asserted by the clergy -administrators and its relationship to the school's religious mission." The Court had sought to avoid "entanglement with religious mission of the school in the setting of mandatory collective bargaining."

In decisions subsequent to *Catholic Bishop*, there had been a difference in approach to this question between the Board and the courts, particularly the U.S. Court of Appeals for the District of Columbia in the *NLRB v. University of Great Falls* case, 278 F. 3d 1335 (2002). The Board had previously stated that it would determine on a case-by-case basis whether the self-identified religious school has a "substantial religious character" such that the exercise of the Board's jurisdiction would present a significant risk of infringing on that employer's First Amendment religious rights. The Court of Appeals had indicated that the Board's approach would inevitably involve the agency in a detailed inquiry of whether the institution was "sufficiently religious," and thus entangled the Board into an

examination of the religion in question and the practices of that institution. In contrast, the Court had laid out a simple three-part test: 1) does the institution hold itself out as providing a religious educational environment?; 2) is the institution organized as a non-profit?; and 3) is the institution affiliated with, owned or operated, or controlled directly or indirectly by a recognized religious organization? If the answers are yes, then jurisdiction should be declined.

The Board's new standard enunciated in *Pacific Lutheran* is that jurisdiction will be asserted in these cases "unless the college or university demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment" **and** "that it holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school's religious educational environment."

While the Board had no difficulty in finding that Pacific Lutheran held itself out as providing a religious educational environment, it found that the petitioned-for contingent faculty did not have to adhere to the Lutheran faith nor was the practice or knowledge of Lutheranism a requirement for any personnel actions at the institution. The contingent faculty involved had no role whatsoever in performing any religious functions on campus or in the education of the students. They were not obligated to perform any religious role or engage in any activities to assist the institution in carrying out the religious mission of the school. Under these circumstances, there was nothing to impede the Board's jurisdiction over Pacific Lutheran with regard to these contingent faculty members.

Dissenting member Johnson contended that the Board's new standard still will have the effect of requiring the Board to examine the religious practices of the employees involved and thus will continue to entangle the Board in examining the religious beliefs. He chastised the Board for failing to offer specific examples of what might be considered "specific religious functions" sufficient for the Board to decline jurisdiction.

### **Managerial Status of Faculty**

The Board, having asserted jurisdiction over Pacific Lutheran, then went on to examine the alternative argument of the University that its full time contingent faculty were managerial employees under *Yeshiva* and therefore did not have the protection of the Act.

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court ruled that the faculty at Yeshiva were collectively managerial employees and thus excluded from the coverage of the Act. Managerial employees are those individuals who "formulate and effectuate management policies by expressing and making operative the decisions of the employer." Such individuals "must exercise discretion within, or even independently of, established employer policy and must be aligned with management." To determine whether an employee is "aligned with management, the Court held that an employee "must represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy." The relevant consideration is "effective recommendation or control rather than final authority."

Applying these principles to the Yeshiva faculty, the Court found that they "substantially and pervasively operate the enterprise ... by deciding what courses will be offered, when they are

scheduled and to whom they will be taught.” In addition, they determine matriculation standards, decide what students are admitted, retained and graduated and, on occasion, “their views have determined the size of the student body, the tuition to be charged and the location of a school.” In short, the faculty “determines within each school, the product to be produced, the terms upon which it will be offered, and the customers who will be served.”

Since the *Yeshiva* decision, the Board and the Courts have struggled in individual cases to determine whether a given faculty met these standards. In particular, there was considerable debate about which factors should be given primary importance in making these determinations, and the Board’s earlier call for briefs on the subject focused on receiving public comment on such matters.

In *Pacific Lutheran*, the Board developed a new analytical framework for analyzing the managerial status of faculty under the *Yeshiva* decision. In approaching these cases, the Board said it would organize the review of faculty decision-making into five general areas, three primary and two secondary.

The three primary areas where the faculty’s role will be examined are:

- Academic programs. For example, the university’s curricula, research, major, minor and certificate offerings, and the requirements to complete successfully those offerings.
- Enrollment management. The size, scope, and make-up of the university’s student body.
- Finances. The power to control or make effective recommendations regarding financial decisions, both income and expenditure. For example, what the school charges for tuition.

The other two areas of secondary importance are:

- Academic policy. For example, teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy.
- Personnel policy and decisions. Faculty control over personnel policy, including hiring, promotion, tenure, leave, and dismissal policies.

The Board then went on to hold that, within these areas, the institution must prove “actual control or effective recommendation” power by the faculty. Mere paper authority is insufficient. The Board stated that it will need “specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision-making area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed.”

As to what constitutes “effective recommendations,” the Board stated the faculty’s recommendations “must almost always be followed by the administration,” to be deemed effective.

Finally, and importantly, the Board stated that an evaluation of whether the faculty actually exercises control or makes effective recommendations requires an inquiry into the nature of the employment relationship between the faculty in question and the institution. Commenting at length on the “corporatization” of higher education, and the connected use of contingent faculty, the Board noted

that contingent faculty – such as full time non-tenure track lecturers – have limited appointments that often depend on a single administrator “producing the kind of hesitancy regarding controversy or offense in teaching and research that limits academic freedom.” Such faculty members tend not to be involved in governance at most institutions and the net result “of their unique, temporary relationship frequently is a diminution of the faculty voice.” The Board concluded that it would examine “whether the nature of the employment in issue prevents those affected from helping shape the academy as a whole at their individual institutions.”

In the case of Pacific Lutheran, the Board had little trouble finding that the full time contingent faculty had very few attributes of managerial status and thus were deemed eligible to unionize under the Act.

### **Impact of *Pacific Lutheran***

The impact of this decision on academic unionization will be considerable, and the decision raises a number of significant concerns. For example:

- The Board gave no indication of whether an institution must establish faculty decision-making in all three of the so-called primary areas to show managerial status or whether something less will suffice. Is one primary factor sufficient? What if no primary factor is proved but both secondary factors are proved? What if an institution can show faculty power in everything except financial decisions?
- The Board’s emphasis on the fact that “effective recommendation” means that faculty recommendations “must almost always be followed.”
- The fact that normal layers of administrative review of faculty recommendations prior to final enactment – even if perfunctory – may block a finding of managerial status.
- The clear indication that most full time contingent faculty will not be found to be managerial because of the tenuous nature of their appointment.

Undoubtedly, as has been the case before, Board rulings under this new standard of review will be tested in the circuit courts for some time to come.