LEGAL UPDATES

PUBLISHED: JUNE 22, 2020

Board Decides Religious Educational Institutions Not Subject to Labor Laws While Supreme Court Grapples with Ministerial Exception

Services

Higher Education

Labor & Employment

Traditional Labor Relations

Professionals

ELLEN M. BABBITT
CHICAGO:
312.655.1500
ELLEN.BABBITT@
HUSCHBLACKWELL.COM

TOM O'DAY
MADISON:
608.234.6017
MILWAUKEE:
414.273.2100
TOM.ODAY@
HUSCHBLACKWELL.COM

TRACEY O'BRIEN
ST. LOUIS:
314.480.1562
TRACEY.OBRIEN@
HUSCHBLACKWELL.COM

Key Points

In the June 10, 2020, National Labor Relations Board (Board) decision *Bethany College*, the Board reversed its own 2014 decision, *Pacific Lutheran University*, and held that the Board lacks jurisdiction over bona-fide religious educational institutions.

The Board clarified how it will determine if the religious educational institution is bona fide such that it is not subject to the National Labor Relations Act (Act).

The Board adopted a three-prong bright-line test that bars the exercise of Board jurisdiction over entities that:

Hold themselves out to the public as a religious entity;

Are non-profit institutions; and

Are religiously affiliated.

The U.S. Supreme Court is expected to release a decision this summer defining the scope of the ministerial exception which bars ministers from suing their religious employers.

The Board decision in *Bethany College* follows the 2020 U.S. Court of Appeals for the D.C. Circuit decision, *Duquesne University of the Holy Spirit v. NLRB*, which criticized Pacific Lutheran University as being inconsistent with the

seminal Supreme Court decision *NLRB v. Catholic Bishop of Chicago*, as we discussed here. The Board decision in *Bethany College* prioritizes religious educational institutions' First Amendment rights under the U.S. Constitution's Religion Clauses over statutory labor protections provided under the National Labor Relations Act (Act); prohibits inquiry into the religious and secular functions of religious educational institutions for jurisdictional purposes; and adopts the bright-line jurisdictional test established in *University of Great Falls v. NLRB*.

Lutheran college questions Board jurisdiction over labor dispute

Bethany College (College) is a ministry of the Evangelical Lutheran Church of America (ELCA), owned and operated by the Central States Synod and Arkansas/Oklahoma ELCA. Two faculty members alleged the College violated the Act by proscribing their right to engage in protected activities under §7 of the Act in conjunction with the tenure process and by terminating them for engaging in protected activities. In response to charges filed, the College claimed an exemption from the Act because of its religious affiliation. It chose not to create an evidentiary record on jurisdiction or participate in the administrative trial. The ALJ applied the test adopted by the Board in *Pacific Lutheran University* and concluded that the Board's exercise of jurisdiction over the College was lawful because the College did not satisfy its burden of establishing an exemption based on its religious affiliation. An appeal was filed with the Board.

Board overrules *Pacific Lutheran* and bars extension of jurisdiction to religious schools

Focusing on the constitutional implications of encroaching on the protections guaranteed to religious institutions, the Board described its mission of protecting employees as "subordinate to" the protections enshrined in the U.S. Constitution. It recognized that in *Catholic Bishop* the Supreme Court (SCOTUS) reasoned that the Establishment Clause and Free Exercise Clause (Religion Clauses) of the First Amendment are constitutional limitations on Congress that seek to prevent government entanglement in the affairs of religious institutions. SCOTUS admonished lower courts of the constitutional perils of inquiring into the evidence of religious faith, practice, mission and terms of employment at religious educational institutions that would eventually flow from the assertion of Board jurisdiction.

The U.S. Court of Appeals decision in *Duquesne* rejected the Board's jurisdictional test in *Pacific Lutheran* because it was inconsistent with the *Catholic Bishop* decision and risked excessive government entanglement in the affairs of religious educational institutions. Relying on *Catholic Bishop, Great Falls* and *Duquesne*, the Board overruled *Pacific Lutheran* and adopted the three-prong bright-line test articulated in *Great Falls*. That test bars the exercise of Board jurisdiction over entities that:

Hold themselves out to the public as a religious entity;

Are non-profit institutions; and

Are religiously affiliated.

The test prevents intrusive government inquiries and maintains separation between religion and government, while providing "some assurance that institutions availing themselves of the Catholic Bishop exemption are bona-fide religious institutions." The burden of proof regarding jurisdiction rests with the general counsel of the Board.

SCOTUS grapples with breadth of immunity for religious institutions under ministerial exception

While the Board has restored precedent precluding its assertion of jurisdiction over bona-fide, non-profit religious educational institutions and their labor disputes with faculty, the U.S. Supreme Court appeared to struggle to define the scope of the ministerial exception which bars ministers from suing their religious employers for employment discrimination. In the 2012 case *Hosanna-Tabor Lutheran Church and School v. EEOC (Hosanna-Tabor)*, SCOTUS recognized a ministerial exception which bars employment discrimination lawsuits by church employees against their religious employer because of the protections guaranteed to religious institutions under the Religion Clauses of the First Amendment. In *Hosanna-Tabor*, the discrimination claim was filed by a teacher who was also an ordained minister of the Lutheran School. In reaching its holding, however, SCOTUS declined to provide a "rigid formula" that identifies employees who qualify as ministers.

On May 11, 2020, SCOTUS heard oral arguments in the consolidated cases *Our Lady of Guadalupe School v. Morrissey Berru and St. James School v. Biel*. In the cases, two teachers claimed that their contracts were not renewed by the schools and that they were victims of discrimination. One teacher (Biel) claimed that her contract was not renewed after she disclosed she was being treated for breast cancer, and the other teacher (Morrissey-Berru), who taught fifth grade for about 15 years, claimed age discrimination when the school refused to renew her contract. In separate cases with different panels, the Ninth Circuit declined to classify the teachers as "ministers" for the purpose of the ministerial exception because the teachers were not in the type of leadership positions required under the exception. The schools appealed to SCOTUS claiming that churches have the discretion to determine who is a minister of their faith and that the "separation of church and state" means that the government cannot interfere with their choice of who "teaches their faith."

Questions from the justices during oral argument evidenced their struggle with the school's proposed interpretation of the scope of the Court-crafted ministerial exception. Justice Sotomayor commented that the schools were asking for an "exception to law that's broader than the ministerial exception and broader than necessary to protect the church." Justice Sotomayor contemplated the prospect of the

ministerial exception applying to laws that have nothing to do with religion: the Family Medical Leave Act, wage and hour laws and even breach of contract claims. Justice Ginsburg described the scope of the proposed exemption by the schools as "staggering."

When Justice Gorsuch commented that he could envision a situation in which everyone takes a pledge to teach kids the faith, including a bus driver or janitor, counsel for the petitioners responded that the term minister is a "legal term" that addresses "the functions that make religious communities distinctive within our society." He stated that it would not include individuals whose religious activities were "de minimus." Justice Gorsuch raised entanglement issues and considered the incongruity of the schools' insistence that the Court both defer to the institution's determination of who is a minister but to define important religious functions and de minimus functions. Justice Kavanaugh commented on the practical issue faced by the Court as to whether, if the schools prevailed, there would be "litigation over what particular students take out of particular coaches or particular teachers."

What this means to you

The NLRB decision in *Bethany College* provides a simple and clear test that assures bona-fide religious institutions of an exemption from the provisions of the NLRA and Board oversight. It remains to be seen how the U.S. Supreme Court will address the ministerial exception and government entanglement issues raised in the two cases of *Our Lady of Guadalupe School v. Morrissey Berru and St. James School v. Biel.* A decision in these consolidated cases is expected later this summer, and we will provide an update on the decision at that time.

If you have questions about the impact of the NLRB decision or other related labor issues facing your business, contact Ellen Babbitt, Tom O'Day or your Husch Blackwell attorney.