



God In The Details - NLRB Modifies Test For Jurisdiction Over Religious Education Employers

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Long-standing U.S. Supreme Court precedent provides that where a federal law results in "[excessive entanglement](#)" of the government with religion, it is unconstitutional under the freedom of religion clauses in the First Amendment. This limitation applies equally to the NLRB as a government agency.

For decades, the agency struggled to determine whether asserting jurisdiction over religious employers in the education context would result in such entanglement, and on numerous occasions federal courts reversed the NLRB's exercise of jurisdiction, finding it violated the First Amendment.

In December, in *Pacific Lutheran University*, 361 NLRB No. 157, the NLRB set out a new test in an attempt to provide better guidance on this issue. That test would only prohibit jurisdiction over religious education employers if the employer both held itself out as "providing a religious educational environment" *and* held out the petitioned-for employees as "performing a specific role in creating or maintaining the school's religious educational environment." In applying this test, the NLRB then determined that contingent or adjunct faculty at Pacific Lutheran University could be covered by the NLRA. However, under this new standard, it is unclear how the Board will avoid "entanglement" with religion if it must undertake an analysis of whether particular employees are performing a religious function.

The Board seems to argue that this analysis does not violate the First Amendment, because it is only reviewing whether the staff members are "held out" as performing religious functions, not whether they actually do so. This would appear to be a distinction without a difference. Moreover, many religious employers would argue that all of their employees contribute to "maintaining the religious environment," and so there should be no jurisdiction

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over any of their employees under the NLRB's new test. But the NLRB apparently believes that many staff in the religious education context are "indistinguishable" from staff at secular schools or colleges and therefore they fall within the NLRB's jurisdiction. Yet this would seem to ignore the realities of many if not most religious educational environments. (It certainly was not the experience of this author at the religious college I attended.)

The Board's decision states that "generalized statements" that staff members are expected to "support the goals or mission" of the employer are not sufficient to show that they are "held out" as performing religious functions. Instead, employers must expressly show in job descriptions, handbooks, etc. that its employees perform some religious function for them to be considered "held out" as performing a role in maintaining the religious educational environment.

The take-away from *Pacific Lutheran* for religious employers who wish to avoid the scrutiny of the NLRB is that the burden on is on the employer to expressly show that all of its employees perform some religious function, not just that its employees generally are required to adhere to the organization's religious mission. Without this express "holding out" of the staff members as furthering the religious mission of the organization, they will be considered subject to the labor laws policed by the NLRB.

For non-religious employers, this case is simply another example of the NLRB's concerted efforts during the Obama Administration to expand its reach into areas traditionally outside of its jurisdiction.

Last year that also included the Regional Director in Chicago [allowing Northwestern football players](#) to hold a union election, as well as the NLRB General Counsel [authorizing complaints](#) that would expand the definition of joint employers to hold franchisors liable for labor decisions made by their independent franchise operators. This is just another reminder that all employers should be aware of the labor laws enforced by the NLRB and analyze whether they may impact their workforce, even if traditionally non-union.