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Religious Education Employers see Two Significant Jurisdictional Decisions in Summer 2020

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Educational institutions across the nation are grappling with decisions on returning teachers, staff and administrators to work for the academic year 2020-2021 in the midst of the COVID-19 pandemic. Each institution must consider a myriad of factors to decide when, and how, to return employees to work onsite. Two important administrative and court decisions have significantly reduced the ability of religious education employees to bring claims against their religious employers.

Labor Law: On June 10, 2020, the National Labor Relations Board ("NLRB") overruled precedent to narrow NLRB jurisdiction over religious educational institutions. *Bethany College et. al*, 369 NLRB No. 98, available **here**. Under 2014 precedent in *Pacific Lutheran*,[1] whether the NLRB had jurisdiction over an unfair labor practice charge was based on whether the faculty member(s) raising the complaint were "performing a *specific role* in creating or maintaining the [educational institution's] religious educational environment."[2]

The NLRB in *Bethany College* determined that a test requiring review of specific faculty member(s) duties to determine jurisdiction was the "*exact* kind of questioning into religious matters" that United States Supreme Court authority[3] prohibited under the First Amendment.[4] Accordingly, the NLRB overruled the *Pacific Lutheran* test and adopted the *Great Falls* standard set out, and recently affirmed, in cases issued by the United States Court of Appeals for the District of Columbia Circuit.[5]

In the future, the NLRB will review the following issues to determine whether it has jurisdiction over unfair labor practice charges filed by employees against their religious education employers: whether the employing institution (a) holds itself out to the public as a religious institution, (b) is nonprofit, and (c) is religiously affiliated. If the institution meets all of these standards, then the NLRB will not exercise jurisdiction and the employee's unfair labor practice charge will be dismissed. This institution-based, rather than specific faculty member(s)-based, standard makes it easier for religious institutions to determine at the outset the likelihood of coverage by the National Labor Relations Act. In the COVID-19 context, this decision may significantly limit religious employees' right to bring claims before the NLRB based on protected concerted activity, such as demanding certain safety

measures or refusing to work based on concerns for employee safety.

Employment Discrimination Laws: Less than one month later, the United States Supreme Court issued a decision on the "ministerial exception" to employment laws such as Title VII of the Civil Rights Act ("Title VII" – prohibiting employment discrimination, harassment and retaliation based on race, color, sex, sexual orientation, gender identity, national origin, and religion), the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). If the ministerial exception applies to an employee, then he or she is not covered by these employment discrimination laws and the employee's claims against his or her employing religious institution must be dismissed.

In *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19-267 (July 8, 2020), available **here**, the United States Supreme Court held that the ministerial exception applied to two Catholic elementary school teachers' employment-related complaints (one under the ADA and the other under the ADEA). Although the Supreme Court has recognized the ministerial exception in recent precedent,[6] the Supreme Court in the *Morrissey-Berru* decision reiterated that the ministerial exception applies to a broad group of religious workers.

The *Morrissey-Berru* Court held that the First Amendment prohibits judicial review of the manner in which private religious schools implement the education and formation of students, including employment decisions related to their teachers. The Court held that there is not a "rigid formula" to determining whether the ministerial exception applies to an individual teacher, but instead that "all relevant circumstances" should be considered to determine whether "each particular position implicate[s] the fundamental purpose of the exception."[7]

For religious education employers, *Morrissey-Berru* means that specific, rigid criteria (such as a "minister" title or certain formal religious schooling) need not be met for education employees to be covered by the ministerial exception. Although the application of the ministerial exception requires an individual employee analysis, many factors may lead to dismissal based on the ministerial exception – such as roles teaching religion or participation in religious services or prayer with students.[8] Notably, the employee need not personally hold the same religious faith as the institution to be covered by the ministerial exception.

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[1] *Pacific Lutheran University*, 361 NRLB 1404 (2014).

[2] *Bethany College* at Section III.

[3] *NLRB v. Catholic Bishop of Chicago*, 440 US 490 (1979).

[4] *Bethany College* at Section II.

[5] *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002); *Duquesne University of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir. Jan., 28, 2020) petition for en banc consideration filed No. 18-1063 (D.C.

Cir. Feb. 25, 2020).

[6] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

[7] *Morrissey-Berru* at Section III.

[8] *Morrissey-Berru* at Section III (“When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independent in a way that the First Amendment does not allow.”).

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