

2020 Legal Affairs Briefing

GUENTHER, JORDAN & PRICE

ATTORNEYS-AT-LAW

INTERNATIONAL ASSOCIATION
OF BAPTIST
COLLEGES AND UNIVERSITIES

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I. Religiously-affiliated schools and the the National Labor Relations Act.

A. Can employees organize at a school that has a religious affiliation?

1. For more than 20 years, the National Labor Relations Board (NLRB) has been trying to get the workforce at religious schools under its jurisdiction

B. *University of Great Falls v. NLRB*, DC Court of Appeals (2002)

1. IABCU participated in that case as an amicus back when it was ASBCS
2. NLRB found the university guilty of an unfair labor practice for its refusal to bargain collectively with the faculty; University appealed the decision to the DC Court of Appeals
3. The university cited a 1979 Supreme Court decision known as Catholic Bishop: the NLRA doesn't say that it applies to religious institutions, so Congress must not have intended for it to apply.
4. Court of Appeals established a three part test for exemption from NLRA: the institution
 - a. holds itself out to the public as a religious institution;
 - b. is nonprofit; and
 - c. is religiously affiliated.
5. University of Great Falls meets these criteria, and is exempt from NLRB jurisdiction

C. NLRB disagreed with the court's application of Catholic Bishop and has been trying since 2002 to

undermine *Great Falls*. Three key decisions:

1. NLRB decision: Pacific Lutheran University and Service Employees Int'l Union, 361 NLRB 1404, 1404 (2014)
 - a. Decision related to **teaching faculty**
 - b. We will not decline to exercise jurisdiction over faculty members at a college or university that claims to be a religious institution unless:
 - (1) the university demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment; and
 - (2) The university shows that it holds out the petitioned-for faculty members as performing a religious function. This requires a showing by the college or university that it holds out those faculty as performing a specific role in creating or maintaining the university's religious educational environment.
2. NLRB decision: Saint Xavier University and Service Employees Int'l Union, 13–RC–092296 (2017)
 - a. Decision related to **non-teaching employees**
 - b. NLRB will assert jurisdiction over the non-teaching employees of religious institutions or nonprofit religious organizations unless their actual duties and responsibilities require them to perform a specific role in fulfilling the religious mission of the institution.
3. NLRB decision: Duquesne University and AFL-CIO, No. 06-RC-080933, 2017
 - a. Decision related to **teaching faculty**
 - b. NLRB concluded that the Board had jurisdiction with respect to Duquesne's *adjunct* faculty because Duquesne did not hold out to the public that its adjunct faculty performed specific religious roles at the school.
 - c. Union should be certified as the exclusive bargaining representative of the adjuncts, excepting only adjunct faculty who teach theology.

D. *Duquesne University of the Holy Spirit v. NLRB*, D.C. Court of Appeals (2020)

1. The Court of Appeals reversed the NLRB's decision.
2. *Great Falls* decision is strongly affirmed:

This case begins and ends with our decisions in *Great Falls* and *Carroll College*. In *Great Falls*, we established a “bright-line” test for determining whether the NLRA authorizes the Board to exercise jurisdiction in cases involving religious schools and their teachers or faculty. . . . This case involves faculty members and Duquesne satisfies the *Great Falls* test. The NLRA therefore does not empower the Board to exercise jurisdiction.

3. The focus is on the *school* not the faculty members: “The Board’s jurisdiction depends on three features of the religious school, not the roles played by the faculty members involved in the case.”

4. What about non-teaching employees?
 - a. The court set the stage for the sequel
 - b. “We need not resolve the extent of the Board’s jurisdiction under the NLRA in cases involving religious schools and their non-faculty employees. . . .”

II. Family and Medical Leave Act - Intermittent FMLA leave and attendance

- A. Employer had “no-fault” attendance & punctuality policy which assigns employees “event points”(or “occurrences”) when absent from work without prior notice

Point system

- 4-6 Events: Employee Counseling
- 7 Events: Verbal Warning
- 8 Events: Written Warning
- 9 Events: Final Written Warning with or without suspension
- 10 Events within 12 months: Termination

- B. Tori applied for intermittent FMLA with a diagnosis of reactive arthritis
 1. Physician certification: Tori needs *up to* 2 full days and 2 half days off per month on account of her illness.
 2. When Tori missed more work than provided in her certification, the employer asked her doctor for a recertification of Tori’s condition. Her doctor repeated the need for up to 2 full days and 2 half days per month
- C. Tori accrued 10.5 points within 12 months and was fired
 1. How she accrued the points:
 - Requesting FMLA leave in excess of her certified allotment (6 points)
 - Requesting FMLA leave for an unrelated injury (2 points)
 - Failing to follow proper notification procedure (1 point) - failed to notify HR that she needed to be absent as part of her FMLA leave
 - Failing to state FMLA and unrelated illness (1.5 event points)
 2. Tori sued for:
 - a. Illegal discrimination on the basis of a disability under the Americans with Disabilities Act
 - b. Failure to accommodate a disability under the ADA
 - c. Retaliation under the ADA
 - d. Failure to grant FMLA leave as provided by law
- D. Employer wins - without a trial!
 1. Because Tori was not able to be at work in compliance with the attendance policy, as modified by her FMLA leave, she could not perform the essential functions of her job, with or without

accommodation

- a. Eighth Circuit: Regular and reliable attendance is a necessary element of most jobs. “An employee who is unable to come to work on a regular basis is unable to satisfy any of the functions of the job in question, much less the essential ones.”
- b. Some circuits (6th and 8th are two) say whether regular and reliable attendance is a necessary element of the job depends on the facts. Last year’s outline had a detailed discussion of this issue.)

2. Tori did not do her part under the FMLA

- a. When an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave.
- b. Calling in ‘sick’ without providing more information will not be considered sufficient notice to trigger an employer’s obligations under the Act. 29 C.F.R. § 825.303(b)

E. Critical Take-Aways

1. Have sound, clear FMLA and attendance policies
2. Keep good records, both with FMLA certifications and reasons for absences
3. Beware of taking an aggressive stance with some employees but not others. Inconsistency makes it easier for an employee to establish a discrimination or retaliation claim
4. Know your circuit’s rule about attendance as an essential element. Consider doing a factual analysis of the job and situation.

III. Final Title IX Regulations - Headlines from 30,000 feet

A. Reminder: What exactly is Title IX?

1. 20 U.S.C. 1681: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”
 - a. “The final regulations specify how recipients of Federal financial assistance covered by Title IX, including . . . postsecondary institutions . . . *must respond* to allegations of sexual harassment consistent with Title IX’s prohibition against sex discrimination.”
2. The good news:
 - a. A school must act only upon having *actual* knowledge (the proper authority did know) as compared to *constructive* knowledge (the proper authority should have known because somebody in the organization knew)
 - (1) Duty to respond is triggered by notice to any school official who has authority to institute corrective measures on behalf of the school (an “official with authority”)

- (2) The school creates its own categories for employees and their obligation to report sexual harassment to the Title IX Coordinator. Employees who:
 - (a) must report
 - (b) may report
 - (c) must only with a student's consent
- (3) Should faculty be just "a friendly ear" or mandatory reporters?
- b. The universe of claims that must be handled under Title IX is smaller because of the definition of what constitutes sexual harassment and what constitutes a complaint which requires the school to act
- c. ED penalizes schools only for "deliberate indifference"
 - (1) The regs "clarify and modify" sanctions the Department of Education (ED) may impose for non-compliance

B. Much work to do, little time to do it. It's too late to get an early start.

- 1. "The Department appreciates that exigent circumstances exist as a result of the COVID-19 national emergency, and that these exigent circumstances require great attention and care on the part of. . . [schools]. The Department recognizes the practical necessity of allowing [schools] time to plan for implementing these final regulations, including to the extent necessary, time to amend their policies and procedures necessary to comply. Taking into account this national emergency. . . the Department has determined that these final regulations are **effective August 14, 2020.**"
- 2. ED's preamble to the regs is 2008 pages. (the Table of Contents is 10 pages!)

C. Live hearings. There must be a live hearing in which evidence will be presented

- 1. ED: *Robust adversarial* procedures improve the legitimacy and credibility of a school's process
- 2. Each party must have an advisor. A party who does not provide his or her own advisor must have one provided by the school.
- 3. Cross-examination must be permitted in the hearing
 - a. Cross-examination is "an essential pillar of fair process."
 - b. "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility;"
 - (1) No evidence from any person who is willing to give a statement but unwilling (or unable) to attend the hearing and be cross-examined

ED Preamble: The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-

examination. . . . Thus, police reports, SANE [sexual assault nurse examiner] reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination. While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.

D. More staffing. What is the cast of essential characters?

1. Title IX Coordinator

- a. Will be responsible for overall institutional response
- b. Needs to maintain impartiality
- c. Although not prohibited by the regulations, most commentators advise should not serve as the investigator

2. Investigator

- a. This may be the most crucial role. It certainly requires significant skills
- b. Must collect all the evidence, conduct interviews, and submit a written report that fairly summarizes relevant evidence, for distribution to the complainant, respondent, and decision-maker
- c. Must present evidence supporting the complainant's case and evidence supporting the respondent's case without bias
- d. May be a witness subject to cross-examination
- e. Will the investigator draw conclusions and make recommendations? Opinions differ.
 - (1) Investigators look the witnesses "in the eye" and may be in a better place to assess credibility
 - (2) If the investigator makes a recommendation, that opens the door for a party to claim his/her bias tilted the entire proceeding
 - (3) How competent is the investigator?

3. Advisors

- a. Parties may provide their own advisor, which can be a friend, parent, faculty member, or attorney
- b. School must provide an advisor for any party (not witness) who does not have one
- c. The advisor does not have to be a lawyer

- (1) Fundamental fairness? What if one party is represented by an experienced trial lawyer?
 - (2) *ED Preamble*: The requirement for a party's advisor to conduct cross-examination on a party's behalf need not be more extensive than simply relaying the party's desired questions to be asked of other parties and witnesses.
 - (3) Also from *ED Preamble*: assisting a party to a grievance process is best viewed not as practicing law, but rather as providing advocacy services
4. Decision-maker (hearing)
- a. *ED Preamble*: The decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report.
 - b. Regs say cannot be Title IX Coordinator or the investigator
 - c. Conducts and manages the live hearing for the parties and all witnesses
 - (1) Need a strong personality; will have to control the hearing, possibly in the presence of "very zealous" advocates
 - (2) In the hearing, must decide on the relevancy of every question
 - (a) Regs: "Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant."
 - d. Must issue a detailed written determination regarding responsibility which includes:
 - (1) the allegations
 - (2) The process, notices given, interviews, site visits, methods used to gather evidence, and hearings held
 - (3) Findings of fact supporting the determination
 - (4) Conclusions applying school's conduct rules to the facts
 - (5) "A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the [school] imposes on the respondent, and whether remedies designed to restore or preserve equal access to the [school's] education program or activity will be provided by the [school] to the complainant."
 - (6) The process and permissible grounds for an appeal
 - e. Decision-maker (appeal)
 - (1) Appeals are no longer optional

- (2) The regs list several bases on which either party can appeal
- (3) The school's policy must provide "reasonably prompt" time frames for concluding the grievance process, including any appeals
- (4) Common error we see - too many appeals. A single appeal is sufficient.
 - (a) Don't get the appeal decision maker in the loop too early or let him/her have input into the initial decision. That could be used as an indication of bias.

f. Mediator

- (1) The school has the option to offer a voluntary informal resolution under certain conditions
- (2) The informal resolution avoids the investigation and the hearing
- (3) No prohibition on the mediator having other roles in the process (Title IX Coordinator or investigator)

E. **More training**

- 1. The entire cast of characters listed above must receive training on specific subjects identified in the regs. (including whatever technology will be used in the course of the live hearing)
- 2. The school must make "all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process" publicly available on its website.
 - a. Presumably this includes online or pre-recorded materials
 - b. What about copyrighted materials?

F. **More record retention.** Specified records, including all training materials, must be retained for 7 years

G. **Employee claims must be handled under Title IX (ED) and Title VII (EEOC)**

- 1. Employee can have an advisor (Title IX only)
- 2. Employee must get live hearing and right to cross-examine (Title IX only)
- 3. Can the employer discipline if no one signs a complaint?
- 4. Will this become an exception to employment at will? *ED Preamble:* We understand the issues; if you want federal money, deal with it.

H. **Religious Exemption** from application of Title IX

- 1. Old regs:

§ 106.12 Educational institutions controlled by religious organizations.

(a) **Application.** This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) **Exemption.** An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

2. New regs: The institution can wait until it is under investigation to claim the exemption

(a) No change

(b) **Assurance of exemption.** An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

3. But when is an educational institution controlled by a religious organization?

a. Regulations *proposed* by ED and published in the *Federal Register* on January 17, 2020. Would follow (a) and (b) above as 34 CFR § 106.12(c).

(c) **Any of the following shall be sufficient to establish that an educational institution is eligible to assert an exemption** to the extent application of this part would not be consistent with its religious tenets or practices:

(1) A statement that the educational institution is a school or department of divinity.

(2) A statement that the educational institution requires its faculty, students, or employees to be members of, or otherwise engage in religious practices of, or espouse a personal belief in, the religion of the organization by which it claims to be controlled.

(3) A statement that the educational institution, in its charter or catalog, or other official publication, contains an explicit statement that it is controlled by a religious organization or an organ thereof, or is committed to the doctrines or practices of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

(4) A statement that the educational institution has a doctrinal statement or a statement of religious practices, along with a statement that members of the institution community must engage in the religious practices of, or espouse a personal belief in, the religion, its practices, or the

doctrinal statement or statement of religious practices.

(5) A statement that the educational institution subscribes to specific moral beliefs or practices, and a statement that members of the institution community may be subjected to discipline for violating those beliefs or practices.

(6) A statement that is approved by the governing body of an educational institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings.

(7) Other evidence establishing that an educational institution is controlled by a religious organization.

b. We'll watch for these regs to be published in final form - in the meantime, it might be wise to make sure your school hits some of these marks

I. Implementation Plan: How to eat an elephant (when you already have 3 on your plate)

1. Form a workgroup. What parts of the administration are involved?

a. **Title IX Coordinator:** Responsible for overall Title IX compliance program and can help identify staffing and training needs

b. **General counsel / legal counsel:** Legal compliance issues

c. **Student Affairs:** Intersection with Title IX complaints and conduct violations that no longer need to be handled under Title IX processes;

d. **Director of Human Resources:** Employee conduct issues, sexual harassment, etc., that must now be handled under Title IX or Title IX and Title VII (Civil Rights Act)

e. **Provost's Office:** May be necessary to revise Faculty Handbook, faculty contracts

f. **Information Technology** may need to be brought in. Either party has the right to participate in the live hearing from a different room (without the other party present)

2. Develop a timeline - August 14 is only 73 days away

a. Developing drafts

b. Arranging for training

c. Communication with groups or administrators who will have to buy-in

3. Identify staffing needs

a. Investigator

b. Title IX Coordinator

c. Party advisors

- d. Decision-maker (hearing)
- e. Decision-maker (appeal)
- f. Informal resolution leader
- 4. Move forward with training ASAP
- 5. Begin drafting policy
 - a. Input from representatives of constituencies
 - b. Insights derived during training
 - c. Be sure to take state laws into account
 - d. Plan any meetings that will be necessary in order to get Board approval as required

J. Actual Implementation

- 1. Be ready to tweak what isn't working well
- 2. Keep your eyes out for problems that others are having - learn from their mistakes instead of yours

IV. Campus Security - Liability Notes

A. Structuring campus security

- 1. Only 38% of private institutions employ sworn police officers for campus security
- 2. Armed or unarmed? United Educators recommends less arming of officers as a means to decrease institutional risk ("arming" includes weapons such as batons and tasers)
- 3. Uniforms and officer dress
 - a. Professional but not intimidating
 - b. Will the mere arrival of officers on the scene inflame or escalate the situation?

B. Oversight

- 1. Track allegations of officer misconduct - do you have officers with multiple complaints or discipline?
- 2. Re-train, re-assign or remove when necessary. Studies have shown that officer training can help with implicit or unconscious bias
- 3. In an informal study by United Educators, 25% of the losses it paid for officer misconduct were attributable to officers previously cited for use of excessive force, racial profiling, or insubordination

C. Off-campus patrolling

1. Off-campus patrolling increases institutional risk (unnecessarily?)
 - a. United Educators' informal study indicated that 38% of the claims relating to campus security were for off-campus incidents
 - b. Those off-campus incidents accounted for 67% of UE's losses
2. Is it necessary?
 - a. Security officers have a duty to the school and the campus community
 - b. Let local law enforcement to do their jobs
 - c. MOU may call for campus security who are sworn officers to provide backup in emergency situations
3. Does your liability insurance cover off-campus patrols?