Education Update

2011, No.4

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work®
www.laborlawyers.com

Is The "Post" Man Coming To Your School?

By William Blackie (Cleveland)

Imagine that on November 14, 2011, as the Director of the St. James Interdenominational Faith Academy, one of the school's teachers comes into your office and informs you that unless the school immediately posts the National Labor Relations Board notice advising employees of their rights, including the right to form a union and bargain over their wages and other terms of employment, he will file a complaint with the NLRB forcing you to post it and also seek to have the NLRB impose the full penalties allowed by law. You have never heard of such a notice. Is it really required? The school has no union and isn't the NLRB only concerned with unions? Aren't religious schools exempt from such laws? What do you do? Where do you begin?

Private schools, including private religious schools, such as the fictional St. James in the example above, are increasingly, and sometimes painfully, becoming aware that the myriad of federal labor and employment laws that they gave no thought to in the past thinking that their schools were exempt, might apply to them after all. Is this true with respect to the NLRB's new rule requiring employers to prominently post a notice which explains the rights that employees have under the National Labor Relations Act (NLRA)? The answer, as is so often the case is, "It depends." But a word to the wise….get your thumb tacks ready.

The NLRB Posting Requirement

The National Labor Relations Board (NLRB) is the federal agency charged with enforcing the NLRA – a law that guarantees the right of employees to unionize, process grievances, collectively bargain wages and benefits and if necessary, go on strike. The NLRB recently determined that employees covered by the NLRA have limited knowledge of their rights under the law and should have those rights fully explained to them in a notice posted in the workplace.

After some give and take regarding the language of the notice and how it should be communicated to employees, the NLRB adopted a final rule which goes into effect on November 14, 2011. On that date, employers covered by the NLRA must post the 11 x 17 inch notice where other notices to employees are customarily posted. Additionally, if the employer maintains its employment policies on its Internet site, then the notice must also be posted there. It is not necessary to email the notice to each employee even if the employer normally communicates to its employees by email.

Are Faith-Based School Covered?

Almost all private employers are covered by the NLRA. This is because the NLRB asserts jurisdiction over any "non-retail" business if there is a "direct or indirect inflow or outflow of at least $50,000 per year." As to private colleges and universities, the NLRB will assert jurisdiction if there are gross annual revenues of at least $1,000,000. Moreover, if two or more criteria arguably apply, the NLRB will assert jurisdiction if *either* applies. The number of employees at the school is irrelevant to a determination of whether the NLRA applies.

Contrary to what one might think, the law provides no exemption for educational or charitable institutions. Although the NLRA exempts *public* schools (which includes charter schools), private schools are considered "employers" under the NLRA – unless enforcing the law as to those employers would be unconstitutional on religious grounds.

The First Amendment to the U.S. Constitution provides that Congress shall pass no law prohibiting the free exercise of religion. As to a religious school, one might conclude that any federal regulation is inherently unconstitutional. That would be a false conclusion. Many faith-based schools often have a significant secular component to their curriculum and consequently, the fact that the school has a faith component as well, even a significant one, often is not enough to insulate the school from coverage under the NLRA.

The NLRB originally exempted schools that were "completely" religious but not those there were "merely religiously associated." In 1979, in a case in which a union sought to represent the teachers in a high school operated by the Bishop of Chicago, the U.S. Supreme Court found that the NLRB's approach did not sufficiently guarantee the rights of the school under the First Amendment.

The Court held that "church operated" schools are not within the NLRB's jurisdiction even though they were not "completely" religious. To hold otherwise, the Court reasoned, would be to inject the NLRB into an impermissible inquiry as to the school's good faith religious beliefs. Unfortunately, the Supreme Court offered no guidance as to when a school might be considered to be within the jurisdiction of the NLRB; an omission that has led to differing and confusing interpretations.

Here is an overview of the current criteria being used.

The "Substantial Religious Character" Test

The NLRB has interpreted the Supreme Court's decision in *Catholic Bishop* as requiring it to apply a "substantial religious character" test when determining whether a school is "church operated" and thus exempt from the NLRA. Under this test, the NLRB reviews several factors to determine if the school has a substantial religious character, including:

Continued on page 3

Get A Passing Grade When Employing H-1B Teachers

By Kim Kiel Thompson and Shanon R. Stevenson (Atlanta)

Employers of foreign teachers learned some hard lessons this year about following the rules for H-1B visa holders. In March, the U.S. Department of Labor Wage and Hour Division (WHD) assessed over $1.7 million in civil money penalties and ordered the payment of over $4.2 million in back wages against Maryland's Prince George's County Public Schools system for illegally reducing the wages of 1,044 foreign H-1B teachers when it required the teachers to pay H-1B filing fees.

That same month, Global Teachers Research and Resources, Inc. (an international employment company supplying foreign teachers to school districts in Georgia and other states) agreed to pay $77,958 in back wages to 22 foreign teachers for failure to pay them for employer-provided training and not keeping records of hours worked. If your school employs foreign teachers on H-1B visas, it is more important than ever to audit your compliance with the H-1B program requirements and take steps to ensure that you are not the next victim of a WHD investigation.

What Triggers An Investigation – And What Does The WHD Review?

WHD investigations usually are triggered when an H-1B employee complains about the employer's failure to pay the wage listed in the Labor Condition Application (LCA). The H-1B program allows foreign nationals to work in the U.S. in professional or specialty jobs so long as the employer obtains a certified LCA from the U.S. Department of Labor attesting that it will pay the H-1B employee at least the prevailing wage (set by the DOL based on the job duties and the location of the employment) and offer the foreign worker benefits comparable to those offered U.S. workers in the same job classification.

During an investigation, the WHD reviews 1) the Public Access documentation required under the LCA regulations (the certified LCA; a statement of how the wage rate was set; documentation showing how the prevailing wage was established; the original notices posted advising workers of the LCA filing; and a summary of the benefits offered to U.S. workers in the same occupation as the H-1B worker); 2) payroll records and dates of employment for the H-1B employee; 3) a copy of the H-1B petition submitted to the U.S. Citizenship and Immigration Services (USCIS); 4) evidence that the employer notified the USCIS if the H-1B employment was terminated prior to the end of the authorized period and that the LCA was withdrawn; and 4) the current or last known address and contact information for all H-1B employees.

The primary goal of the investigation is to determine if the employer paid the H-1B employee the wage on the LCA for all times that the LCA remained in effect (liability for not doing so can continue even after the employee was no longer employed but the LCA was not withdrawn) and to ensure the H-1B employee's wages were not docked as a result of benching or furlough.

The investigation generally includes interviewing the employer and the H-1B employees. If the DOL concludes that the employer violated the LCA requirements, in addition to assessing back pay, interest, civil money penalties and debarring the employer from using the H-1B visa program, it may monitor and continue to audit the school's compliance with the H-1B LCA requirements.

Preventive Steps Your School Should Take

Here are some steps H-1B employers can take today to reduce the risk of WHD investigations and avoid costly violations:

- pay H-1B employees the required wage as listed on the certified LCA and offer the same benefits to H-1B and U.S. workers;
- make sure that you continue to pay an H-1B employee in accordance with the LCA at all times that the LCA remains in effect so long as the employee is ready, willing and able to work. You must pay the H-1B worker even during a furlough or some other non-productive work period that results due to a decision by the employer. If conditions exist where the H-1B employee is unable to work due to conditions unrelated to employment (such as maternity leave, caring for an ill relative, or a natural disaster), the employer is not obligated to pay the required wage rate during that period provided that an employer's benefit plan or other statute (such as the Family and Medical Leave Act) does not require otherwise;
- diligently maintain and audit Public Access files for each H-1B worker. All Public Access documents must be retained for one year beyond the LCA period or, if a complaint is filed, until the complaint is resolved;
- promptly withdraw H-1Bs and LCAs when an H-1B worker is no longer employed with your school;
- pay for the reasonable cost of the H-1B worker's return transportation to his or her home country if you terminate an H-1B worker before the end of the period on the H-1B;
- ensure that any proposed material changes in the H-1B employee's job description, work schedule or salary are reviewed by your immigration attorney to determine if you must file an amended H-1B petition; and
- take a hands-on approach to filing an H-1B petition. As the H-1B petitioning employer, you sign the petition and the LCA under the penalty of perjury. Be aware of and understand your legal obligations as an H-1B employer before you sign the documents and submit the petition to the USCIS.

How would your organization fare in an WHD H-1B investigation? Are your Public Access files in order and complete? Are you paying your H-1B foreign workers as you agreed to do when you submitted the LCA? Do not wait for the WHD to show up on your doorstep with a complaint in hand. Take steps today to make sure your H-1B compliance is in order and that you can pass any WHD test with flying colors.

For more information or assistance in auditing your compliance, contact the authors at kthompson@laborlawyers.com or sstevenson@laborlawyers.com or 404.231.1400.

Is The "Post" Man Coming To Your School?

Continued from page 1

- the degree of the school's religious mission;
- the school's organizational structure;
- whether the school educates individuals regardless of their faith or limits its enrollment to those adhering to the school's religion;
- the nature of required religious courses paying particular attention to whether instruction in the school's specific faith is a significant part of the curriculum;
- whether the school provides a comprehensive secular education, and if so, whether this or the religious component predominates;
- whether faculty members are required to adhere to any particular religious faith or conduct themselves in accord with the religious tenets; and
- the school's significant funding sources.

Under this standard, the NLRB has found any number of faith-based schools, including those closely affiliated with churches, to be subject to the NLRA. In fact the NLRB readily acknowledges that in most instances it will find that a private faith-based school is subject to the NLRA. For example, in one recent case decided earlier this year, the NLRB found that St. Xavier University was subject to the jurisdiction of the NLRB noting that:

- not all of the University's trustees were required to be Catholic;
- about 90% of the school's funding came from student tuition rather than from the Sisters of Mercy with which it is affiliated;
- students were required to take religious courses but not Catholic religious courses; and,
- the faculty is not required to hold Catholic values or face discipline.

Last year, Marquette University was told by the NLRB general counsel that it would be denied exemption as it was primarily a secular institution. Similarly, this year the NLRB found that Manhattan College was subject to the NLRA even though it is affiliated with the Christian Brothers and upon dissolution, half of the assets of the college are required to be distributed to the religious order.

Factors significant to the NLRB's decision included the fact the college's bylaws provided that there be no loyalty oath or a requirement that students attend religious services or take classes in Catholic theology. Faculty are hired based on academic qualifications rather than religious affiliation. In short, the NLRB found that the school was not dedicated to the "propagation of religious faith" and thus is subject to the NLRA.

The NLRB has found private religious schools to be exempt only in rare cases such as the Jewish Day School in Washington, D.C., in which all members of the board of directors are Jewish, the board is required to maintain a liaison with Jewish community organizations, the recruitment material indicates that students are to "identify with the Jewish people," and the school's stated philosophy is to promote an "intense Jewish religious education."

The NLRB found that St. Joseph's College in Maine was outside of its jurisdiction but in that case, unlike with most private schools, the religious order, in this instance the Sisters of Mercy, maintained complete legal control of the school and occupied all the board positions.

The "Tripartite" Test

In contrast to the NLRB, some courts that have looked at the issue since the *Catholic Bishop* case – most notably the influential Circuit Court of Appeals for the District of Columbia – have developed a three-part test to determine whether the school is subject to the NLRB's jurisdiction. The factors to be examined under this test are whether the school:

- holds itself out to students, faculty and the community as providing a religious educational environment;
- is organized as a non-profit; and,
- is affiliated with, or owned, operated, or controlled directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.

Under this test, a court reviewing an NLRB decision is generally confined to looking at objective public documentation rather than an exhaustive review of the school's operations that the NLRB may have undertaken. Ordinarily, a court gives deference to an agency's determination of its own jurisdiction but when that decision arguably infringes on Constitutional rights, the court will take a harder look. Significantly, the D.C. Circuit's tripartite test generally results in a determination that a faith based school is ***not*** subject to NLRB jurisdiction.

In determining that Great Falls University was not subject to the NLRA, the court in *Univ. of Great Falls v. NLRB*, looked only to the school's publications and determined that statements in those documents such as the university was a "Catholic University sponsored by the Sisters of Providence" were enough to exempt it from jurisdiction even though, as found by the NLRB, the school provided a mainly secular education, did not require its faculty to be Catholic, Catholic students comprised only a third of the student body and its policies were not required to be consistent with Catholic beliefs. To delve deeper into the operation of the school was determined to be an impermissible violation of the school's religious protections guaranteed by the First Amendment.

Similarly, the D.C. Circuit recently found that Carroll College was not subject to the NLRA. The Court reviewed the school's:

- articles of Incorporation which declared the school to be a "Christian liberal arts college dedicated to God";
- catalogues outlining numerous Christian religious course offerings;
- the Board of Directors' Statement of Christian Purpose; and
- "other public documents" including an agreement between the school and church affirming the school's "heritage in the concern of the Church."

Carroll College is a non-profit organization "affiliated" with the Presbyterian Church and thus met all three criteria established by the D.C. Circuit.

Continued on page 4

Is The "Post" Man Coming To Your School?

Continued from page 3

Reconciling The Differing Interpretations

Unless your school is in the D.C. Circuit, and until the Supreme Court addresses the differing interpretations, a private faith-based school will generally be subject to the NLRA unless it can meet the difficult "substantial religious character" test applied by the NLRB. Indeed, the NLRB is bound only by Supreme Court rulings and thus is free to overlook the D.C. Circuit's tripartite test.

In the Manhattan College case, the NLRB went a step further hinting that if it were required to follow the D.C. Circuit test it would look beyond the public documents and conduct its own inquiry as to whether the school was truly holding itself out as providing a religious education. Clearly, the NLRB views its role as expansive and only reluctantly grants an exemption to faith-based schools.

Therefore, a review of the school's charter and bylaws should be undertaken to determine to what extent it is devoted to propagating a religious education. Are the teachers required to belong to the school's faith? Are the students required to be a certain faith and required to be instructed in that faith. Is there an endowment from the affiliated religious organization?

In our St. James example, if the school accepts students from all religious backgrounds, does not require the faculty to adhere to a particular faith, is interdenominational and not associated with a specific religious institution, it likely will be deemed to be subject to the NLRB's jurisdiction. Challenging the jurisdiction through court action is an expensive and time consuming proposition that few schools can afford to undertake.

What Happens If The School Fails To Post The Notice?

The NLRB rule provides that failure to post the notice by an employer subject to the NLRA is in itself an unfair labor practice. Worse, intentional failure to post the notice could result in a determination that the school harbors anti-union animus in connection with any other charge that might be brought.

Finally, the NLRB has indicated that the Board is free to "toll" the normal limitation period for any alleged unfair practice until the notice is actually posted. Simply stated, the failure to post the notice could result in unpleasant consequences while the issue of whether the NLRB's decision on the law's applicability to your school is being litigated. Therefore, making the correct decision at the outset is critical.

Assuming that the school is subject to the notice requirement, if 20% of the employees are not proficient in English but proficient in a different language, the notice must be posted in that language as well.

And whether there is already a union in place is totally irrelevant to determining whether the NLRB notice must be posted. In fact, the general decline of unions in the private sector is one of the key factors that led the NLRB to adopt the rule in the first place. The NLRA applies to all workers, not just those who are unionized.

If your school is subject to the notice requirement, the NLRB will provide one at no cost. It can be obtained from its website, www.nlrb.gov. Commercial providers will also make the notice available for purchase.

The Bottom Line

Whether your private faith-based school is subject to the new NLRB posting requirement is a complicated question that turns largely on the specific circumstances of the school. Consequently, before any decision is made, we suggest you consult with your employment counsel.

For more information contact the author at wblackie@laborlawyers.com or 440.838.8800.

"HERE'S YOUR PROBLEM - THERE'S A LATIN PHRASE STUCK IN YOUR WORD PROCESSOR."

Office Locations

Atlanta
phone 404.231.1400

Charlotte
phone 704.334.4565

Chicago
phone 312.346.8061

Cleveland
phone 440.838.8800

Columbia
phone 803.255.0000

Dallas
phone 214.220.9100

Denver
phone 303.218.3650

Fort Lauderdale
phone 954.525.4800

Houston
phone 713.292.0150

Irvine
phone 949.851.2424

Kansas City
phone 816.842.8770

Las Vegas
phone 702.252.3131

Los Angeles
phone 213.330.4500

Louisville
phone 502.561.3990

New England
phone 207.774.6001

New Jersey
phone 908.516.1050

New Orleans
phone 504.522.3303

Orlando
phone 407.541.0888

Philadelphia
phone 610.230.2150

Phoenix
phone 602.281.3400

Portland
phone 503.242.4262

San Diego
phone 858.597.9600

San Francisco
phone 415.490.9000

Tampa
phone 813.769.7500

Washington, DC
phone 202.429.3707

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters

We're interested in your opinion. If you have any suggestions about how we can improve the *Education Update* (or its sister publication the *Labor Letter*), let us know by contacting Suzanne Bogdan, Chair of our Education Practice Group at (954) 847-4705 or sbogdan@laborlawyers.com, or e-mail the editor at mmitchell@laborlawyers.com.

How to ensure continued receipt of this newsletter

If you would like to continue to receive our newsletters and other important information such as Legal Alerts and seminar information via email, then please take a moment right now to make sure your spam filters are set to allow transmissions from the following addresses: communications@laborlawyers.com or seminars@laborlawyers.com. If you currently receive communications from us by regular mail, and would like to begin receiving them by email, please send a request to communications@laborlawyers.com.