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Your School Is Religious – Does That Mean It's Exempt?

By Greg Ballew (Kansas City)

You've just received notice from your state unemployment commission that the School owes $10,000 in back unemployment taxes. You don't understand how this occurred since your religious school has always been treated as exempt from unemployment. It's only after searching your records that you see that the unemployment commission disagreed with your assertion of exempt status and your school failed to appeal the determination on a timely basis. It has now taxed you for three years of unpaid taxes, penalties, and interest. Now what?

Can A Religious-Based School Be Exempt?

One costly mistake a private, religious school can make is not knowing whether a particular law applies to it, or timely and properly asserting its rights. Unbeknownst to many religious schools, certain laws provide exemptions from coverage. These exemptions can result in no legal requirement to accommodate a disabled student, or denial of the unemployment compensation claim of a former teacher. On the other hand, if a religious school assumes that it is exempt from the National Labor Relations Act because of its "substantial religious character" and therefore believes it is immune from a union organizing effort, it should think again.

Application of exemptions are often fact intensive and can depend on whether your institution is "religious enough" for the exemption. This article is not an exhaustive discussion of exemptions, but discusses potential exemptions for private, religious schools or institutions under three employment laws: the ADA, state unemployment compensation laws, and the National Labor Relations Act.

The Americans With Disabilities Act (ADA)

Title III of the ADA applies to "commercial facilities" (which includes most privately owned, non-residential facilities) and to "public accommodations" (private businesses that are open to and serve the public). A private school which is not controlled by any particular church or religious organization is a "public accommodation" under Title III of the ADA and may be held liable for failure to comply with the law.

For example, a private, non-religiously controlled school which expelled a student for uttering expletives and becoming hysterical after accidentally cutting herself in art class was found to have denied the student the opportunity to attend class because of a disability where the student's reaction was due to an autoimmune disorder affecting her blood system. *(Thomas v. Davidson Academy).*

However, the provisions of Title III of the ADA do not apply to religious organizations or entities *controlled* by religious organizations, including places of worship. Even where a religious school serves the public, the school is exempt from the ADA Title III requirements. If, in the above example regarding a student who had outbursts in class, a church controlled the private school, the private school would have been exempt under Title III of the ADA – meaning it would have no obligation to accommodate the student.

Remember that, although religious schools may be exempt from Title III of the ADA, they may nonetheless be covered as "employers" under Title I of the ADA, which governs employers with 15 or more employees. Therefore, even though a religious school may not need to accommodate members of the public (for example, students), they still may need to make accommodations for disabled persons they employ. Moreover, religious schools may also have obligations under state or local laws that have similar requirements to ADA Title III. This is an area in which you should consult counsel for guidance.

Unemployment Compensation

Every state provides a system whereby employees who lose their jobs through no fault of their own can make a claim for temporary income payments if they are able to work and available for work. Often the unemployment system of a state is funded by a tax on employers, and an employer must pay a significant part of a former employee's claim for unemployment.

Whether such laws apply to religious schools (for taxation purposes or for purposes of claim eligibility by a former employee) depends on the state in which the school or institution operates and the facts which

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Responding To The EEOC's Criminal Background Check Initiative

By Philip Marchion (Ft. Lauderdale)

As most of our readers have probably heard by now, the EEOC seems to want all employers to discontinue, or at least significantly curtail, their use of criminal-background checks. The EEOC's Guidance outlines the agency's position on criminal-background-check policies, but leaves many important questions unanswered, particularly with respect to schools, which are often required to conduct criminal-background checks. So, what, if anything, should schools be concerned about in light of this bold policy move by the EEOC? To the surprise of some, the answer may actually be no different than what you are already doing.

What To Ask For…

First, with respect to your job application, the EEOC recommends that employers not ask about convictions. Clearly, the EEOC was not thinking of the uniqueness of the education industry when it came up with this recommendation because, if it had, it would understand that this is likely not an option for most schools. Not only do several states have statutes identifying particular offenses that preclude the hiring of school applicants, but to the extent state law does not require background screening, most accrediting entities do. Thus, schools face a conflict in evaluating the competing interests of their criminal-check obligations and the EEOC's recommendations.

One way to reconcile this situation is to ask only about convictions that are job related and consistent with business necessity. Your approach should initially include language on the application indicating that not all convictions will bar employment and you should provide space for the applicant to explain the conviction.

Next, to determine whether a particular criminal history is job related and consistent with business necessity, schools should consider three factors: 1) the nature and gravity of the offense or conduct, including the harm caused, the specific elements of the crime, and whether it was a felony or misdemeanor; 2) the time that has passed since the offense or conduct and completion of the sentence; and 3) the nature of the job held or sought.

To determine whether a certain offense is job related, you should review the essential functions of each job or classification you use. If you are hiring a controller or teacher, you may want to exclude those convicted for fraud. If you are hiring a custodian, a conviction for fraud may not be relevant, although conviction for a crime of violence likely would.

The EEOC did not provide guidance as to how old a conviction must be before it is considered irrelevant, but instead recommended that employers consider studies and recidivism data to determine the relevance of a particular conviction. To illustrate, if a teacher applicant was convicted for theft 15 years ago, but has not been convicted of a crime since, that applicant may not be statistically more likely to steal than any other applicants The opposite obviously holds true for an applicant with a recent conviction for child abuse or sexual assault.

…And How To Ask For It

Now that you have a plan in place as to what convictions you are looking for, the question remains of how to implement that plan. Our recommended approach is to make a contingent offer of employment based on successful completion of the background check, which will impact the least number of applicants. You may also consider waiting until you have identified interviewees, or running the check after excluding applicants who are not minimally qualified or have negative references.

Finally, as discussed above, some schools are required under state law to exclude applicants with certain conditions. With that said, many of you are probably wondering whether you are protected from liability simply for complying with state law. The answer, unfortunately, is unresolved. Compliance with federal law is a defense, but the EEOC takes the position that Title VII preempts state law and compliance with state requirements is not a defense to liability. Moreover, the EEOC does not provide any answers for employers that are subject to state laws or regulations.

Thus, to the extent you exclude applicants that you are not required to exclude, you may be liable. In sum, if your school is subject to stringent state requirements that apply to your applicants or employees, you may wish to seek legal counsel to ensure your criminal-check policy is, at the least, examining history that is job related and consistent with a business necessity.

For more information contact the author at PMarchion@laborlawyers.com or 954.847.4723.

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support the exemption. Religious schools should neither assume that unemployment compensation laws apply to them nor should they assume that they are automatically exempt from such laws. However, religious schools need to be aware that, in many states, there is a potential exemption to assert and that this defense should not be overlooked or, worse yet, waived.

For example, both Florida and Missouri provide an exemption for churches and organizations operated primarily for religious purposes which are operated, supervised, controlled, or principally supported by a church or convention or association of churches. Pennsylvania exempts from coverage of the unemployment compensation laws "[s]ervice performed in the employ of … an organization which is operated primarily for religious purposes …."

Despite the statutory exemption, a Pennsylvania court recently found that a Christian academy was not exempt from the unemployment compensation laws where the academy was operated primarily for educational purposes with a strong religious influence from Petra International Ministries. The court noted that the employer was legally separate from its founder, Petra, received no funding from Petra, and purchased its own facility. Thus, the court found that the academy was not operated primarily for religious purposes and was not exempt from the unemployment compensation laws.

National Labor Relations Act

The National Labor Relations Act (NLRA) is the statute which allows employees to seek union representation and collective bargaining with an employer. However, a school with a "substantial religious character" may be exempt from such unionization efforts under federal law.

The U.S. Supreme Court found that there was a significant risk that the First Amendment would be infringed when the government becomes involved in the labor disputes of religious educational institutions. Therefore, the Supreme Court narrowly construed the NLRA to find that the National Labor Relations Board (NLRB) should not exercise jurisdiction over a school with a "substantial religious character" based on First Amendment concerns. *NLRB v. Catholic Bishop of Chicago*.

Despite this Supreme Court ruling, the NLRB has nonetheless asserted jurisdiction over religious schools which it has found to be not "religious enough." In so doing, the Board considers a number of factors, including: the degree of the school's religious mission; the school's organizational structure; whether enrollment is limited to those adhering to the school's religion; the nature of required religious courses and whether instruction in the school's faith is a significant part of the curriculum; whether the school provides a comprehensive secular education and whether this or the religious component predominates; whether faculty are required to adhere to a religious faith; and the school's significant funding sources.

Under this standard, the Board has found a number of faith-based schools, including those closely affiliated with churches, to be subject to the NLRA, including such institutions as St. Xavier University and Marquette University. 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. Due to the Board's case-by-case approach, there is no bright line rule to determine when and if the Board will find that it lacks jurisdiction over a religiously affiliated school. But by paying attention to the factors that the Board considers, a school can organize itself in such a manner so as to establish a compelling case against coverage under the NLRA.

The Bottom Line

The religious character or control of a private school or institution raises unique defenses and exemptions from the application of the law. Courts and agencies often consider and recognize the application of such exemptions, including exemptions not discussed in this article, such as the ministerial exception to employment discrimination law.

Because a private religious institution has unique defenses available, don't assume that you are subject to a particular law without exploring possible exemptions. Conversely, don't presume that your school is exempt from the law because of its religious character – particularly in the application of the NLRA. By understanding which laws apply and don't apply, a private, religious school can avoid costs, headaches, and even better position itself to be found exempt.

For more information contact the author at GBallew@laborlawyers.com or 816.842.8770.

"OF COURSE IT'S A SELF-SERVING STATEMENT, I'M TESTIFYING ON MY OWN BEHALF..."

OSHA Whistleblower Protections In Schools

By Tiffani Casey (Atlanta)

The Labor Department recently strengthened its Occupational Safety and Health Act Whistleblower Program by dedicating additional funds to training its investigators, performing more thorough investigations, and reassigning responsibility for the Whistleblower Program directly to the Office of the Assistant Secretary of Labor for greater oversight of the program. Schools are covered by the OSH Act, and like most industries, should expect to see an increase in whistleblower claims under the newly-fortified program.

The DOL flexed its new muscles by taking legal action against a school for allegedly retaliating against an employee who reported safety and health concerns. The department sued Renaissance Arts and Education Inc., doing business as Manatee School for the Arts in Palmetto, Fla., seeking to reinstate a former worker with full back wages and benefits. The department's investigation found that the privately-run charter school had unlawfully and intentionally terminated the employee for reporting concerns regarding hazards in the school's two theaters.

The worker submitted a letter to his direct supervisor that addressed alleged safety hazards, specifically, improperly placed extension cords and a lack of sprinkler systems, but the school did not respond to the letter. Thereafter, the employee filed a complaint with OSHA reporting the same concerns. After OSHA communicated with the school, the employee disputed the school's response to the safety complaint; he was then notified that his position was being terminated. OSHA subsequently performed a safety inspection and cited the school for safety violations related to the employee's expressed concerns.

While educational institutions have not historically been a hotbed for OSHA issues, this recent case illustrates how whistleblowing for safety concerns has permeated the mainstream and is not limited to those industries with traditionally higher accident rates such as manufacturing and construction. Remember that the safety standards enforced under the Act apply to schools in the same way they apply to other industries, and that if an employee reports safety concerns or a violation of the standards, handling the situation in a non-retaliatory manner is essential.

The first line of defense to a whistleblowing claim for safety issues is to ensure that your school is safe and in compliance with the standards, including those requiring certain written plans, such as Hazard Communication and Emergency Action Plans. Where employees report potential safety concerns, work with them to resolve the situation. If you are faced with a disciplinary situation related to safety issues, however, contact your Fisher & Phillips attorney for guidance before taking any adverse action.

For more information contact the author at TCasey@laborlawyers.com or 404.231.1400.

Office Locations

Atlanta phone 404.231.1400	**Houston** phone 713.292.0150	**New Orleans** phone 504.522.3303
Boston phone 617.722.0044	**Irvine** phone 949.851.2424	**Orlando** phone 407.541.0888
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