Before December of 2014, religious colleges and universities could generally assume that under the National Labor Relations Board's (NLRB) “substantial religious character” test, the NLRB would decline to assert jurisdiction over them because of their religious missions. The Board's Pacific Lutheran University decision, however, changed the NLRB standard to assert jurisdiction over religious educational institutions.

The Board held that it would assert jurisdiction unless an institution (1) currently holds itself out as “providing a religious educational environment” and (2) “holds out” those employees that a union seeks to represent “as performing a specific role in creating or maintaining the university’s religious educational environment.”

Many religious colleges and universities hold themselves out as “providing a religious educational environment”—and therefore meet the first prong of this jurisdictional test—but now a new question has been presented: Does the institution hold out its faculty members as performing a specific role in creating or maintaining its religious educational environment? The analysis of this question is particularly important for adjunct faculty members, because they are currently among the most popular union targets for organizing.

NLRB regional directors are invoking Pacific Lutheran to assert jurisdiction over bargaining units at religious colleges and universities. The NLRB's Regional Director (RD) for Region 13 (Chicago) issued a decision on June 1, 2015, asserting jurisdiction over St. Xavier University, the oldest of the 16 Mercy colleges and universities in the world and the oldest chartered Roman Catholic educational institution in Chicago.

Not surprisingly, the RD held that St. Xavier met the first prong.

The RD also exercised jurisdiction over a proposed bargaining unit consisting of adjunct faculty members, finding that St. Xavier lacked any religious selection criteria or creed-adherence requirements for those employees, and that St. Xavier did not sufficiently hold them out as having specific roles in creating or maintaining the religious nature of the school. The RD elected to exercise jurisdiction over even those adjunct faculty teaching in the Department of Religious Studies. The RD also concluded that there was no evidence showing that those “adjuncts are expected to serve as religious advisors to students, propagate the tenets of the Sisters of Mercy, engage in religious training, or conform to the tenets of Catholicism in the course of their job duties.” However, the RD excluded adjuncts teaching in the Pastoral Ministry Institute, which provides “ministerial preparation of lay ecclesial ministers, deacon couples and vowed religious leaders.”
The Regional Director of Region 6 (Pittsburgh) issued a decision on June 5 in the case of Duquesne University of the Holy Spirit, which also involved a proposed bargaining unit of adjunct professors. The RD of Region 6 held that the NLRB could exercise jurisdiction over the university with respect to the proposed bargaining unit of adjunct faculty members. She found that "there is a lack of evidence that adjuncts are informed of any requirement of participation with respect to conveying or supporting the Employer’s [religious] mission. Further ... there is no evidence that such religious duties are conveyed to adjuncts, or are a consideration in hiring, job performance, the course content of adjuncts, or the continued contractual renewal of any adjunct."

These cases are in significant tension with NLRB v. Catholic Bishop of Chicago, the decision of the Supreme Court of the United States in 1979 which held that the First Amendment prohibited interpretation of the National Labor Relations Act to cover "teachers in church-operated schools." We can expect the NLRB and various federal courts of appeal—and perhaps even the Supreme Court—to address these First Amendment issues in subsequent appeals or even in additional NLRB cases. In the meantime, however, the NLRB’s regional directors are expected to continue to attempt to exercise jurisdiction over an increasing number of religious educational institutions. Because a religious mission alone is no longer sufficient for the NLRB to decline jurisdiction, those institutions should consider carefully whether they are prepared for organizing efforts among adjunct faculty, full-time faculty, and operational staff employees.

As the NLRB asserts broader jurisdiction, it should also be noted that the NLRB changed its rules in April of 2015 to accelerate union elections. The median time to election after the filing of a representation petition has gone from 38 days to 24 days under new rules intended to give a tactical advantage to unions, which can choose when to file election petitions, and to shorten employers' opportunities to respond. Since April 14, 2015, the number of petitions has increased by 1712 percent over the year before, and unions have won 68 percent of all elections.

To prepare for the organizing activity already underway by the Service Employees International Union and other unions, religious colleges and universities should examine the role of faculty members in reference to the religious mission of the institution, and how faculty members are described to the public in reference to that religious mission. University publications and employment documents might be clarified to show the responsibility of faculty to support the religious mission. Religious higher educational institutions should confer with their labor counsel to analyze the NLRB’s potential assertion of jurisdiction and to prepare a response to union organizing activities.