THE ARCHDIOCESE OF SAINT PAUL AND MINNEAPOLIS

SCHOOL LAW DAY

Friday, December 7, 2012

THOU SHALT NOT SUE YOUR CHURCH-EMPLOYER

PRESENTED BY:

JENNIFER R. LARIMORE

MEIER, KENNEDY & QUINN
CHARTERED
ATTORNEYS AT LAW

SUITE 2200, BREMER TOWER
445 MINNESOTA STREET
SAINT PAUL, MINNESOTA 55101-2137

TELEPHONE (651) 228-1911
FACSIMILE (651) 223-5483
E-MAIL: JLarimore@mkqlaw.com

TABLE OF CONTENTS

		Page
I.	**INTRODUCTION**	1
II.	**CONSTITUTIONAL PROTECTION FOR CHURCH-EMPLOYERS**	1
III.	**BACKGROUND ON MINISTERIAL EXCEPTION**	3
IV.	***HOSANNA-TABOR* DECISION**	4
	A. Factual Background	5
	B. Procedural History	5
	C. Supreme Court Ruling	6
	1. Ministerial Exception Exists and has Constitutional Roots	6
	2. Application of the Ministerial Exception to Perich	6
V.	**APPLICATION OF THE MINISTERIAL EXCEPTION IN GENERAL**	8
	A. "Robust" Defense	8
	B. Applies to Federal and State Claims	8
	C. Applies Regardless of Remedy Sought	8
	D. Applies to Limited Employers	8
	E. Use a Holistic Analysis to Determine Who Qualifies as a Ministerial Employee	9
VI.	**TIPS FOR APPLYING THE MINISTERIAL EXCEPTION TO CHURCH-AFFILIATED SCHOOLS AND THEIR EMPLOYEES**	11
	A. Physical Surroundings	11
	B. School's Mission and Purpose	11
	C. Employee's Title and Substance of the Position	12
	D. Employee's Job Duties	14

THOU SHALT NOT SUE YOUR CHURCH-EMPLOYER

PRESENTED BY JENNIFER R. LARIMORE

I. Introduction

Churches and church-affiliated employers, such as schools, can be subject to lawsuits and claims based on their employment decisions. Those lawsuits can raise claims of wrongful termination or illegal discrimination.

Church-employers, including Catholic schools, have an important, and often overlooked, constitutional defense to such claims: the ministerial exception. When it applies, the ministerial exception is a robust defense against claims brought by employees.

This year the United States Supreme Court addressed, for the first time, the ministerial exception in its unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694 (2012). The decision was hailed as a victory for churches and called the most important religious-freedom decision in decades.

II. Constitutional Protection for Church-Employers

Both the United States and Minnesota Constitutions protect religious freedom. The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

U.S. Const. amend. I. The first half of that provision is better known as the Establishment Clause; the second half is known as the Free Exercise Clause. Both of these Religion Clauses apply to the States by virtue of the Fourteenth Amendment's Due Process Clause. *Shagalow v. State, Dep't of Human Servs.*, 725 N.W.2d 380, 388 (Minn. Ct. App. 2006) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)), *review denied* (Minn. Feb. 28, 2007).

Many state constitutions recognize and protect religious freedom, including Minnesota's constitutions. Article I, Section 16 of the Minnesota Constitution provides:

> The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

The Minnesota Supreme Court has held that the constitutional protection for religious freedom in the Minnesota Constitution is "distinctively stronger" than the federal constitution. *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990). The court explained that while the First Amendment limits government action at the point of *prohibiting* the exercise of religion, Section 16 of the Minnesota Constitution reaches further and precludes even an *infringement* on or an *interference* with religious freedom. *Id.* As a result, government actions that may not constitute an outright prohibition on religious practices (thus not violating the First Amendment) could nonetheless infringe on or interfere with those practices, thereby violating the Minnesota Constitution. *Id.*

Furthermore, unlike the First Amendment, Section 16 expressly limits the governmental interests that may outweigh religious liberty. *Id.* Only the government's interest in peace or safety or against acts of licentiousness will excuse an imposition on religious freedom under the Minnesota Constitution. *Id.* Conversely, the Free Exercise Clause of the First Amendment has been interpreted to allow varied government interests to justify such an imposition. *See id.* (citing cases where government interest outweighed individual interest under the First Amendment).

Note: State constitutions often contain broader for religious freedom than the federal constitution. Churches facing lawsuits must be careful to preserve, raise, and argue defenses under both constitutions.

III. Background on Ministerial Exception

In recognition of these important religious liberty principles, courts have generally taken a "hands off" approach on internal church matters. The United States Supreme Court has long recognized that civil courts have no jurisdiction over "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 80 U.S. 679, 733 (1871).

There is no aspect more important to this religious freedom than a church's ability to select its ministers. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (prohibiting government interference with the "freedom to select the clergy"). Thus, a minister cannot sue, in civil court, to force a church to accept or retain him as a minister. *See Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (court cannot require church to hire unqualified chaplain); *Kedroff*, 344 U.S. at 119 (court cannot transfer authority from one bishop to another); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708–09, 713, 721–23 (1976) (court cannot reinstate bishop who was removed by religious hierarchy).

> **Note:** The federal constitution thus carries special protection for church ecclesiastical decisions. Even if a claim does not fit squarely under the ministerial exception because it does not involve an employee, a Church defendant may still have other religious-liberty defenses such as the ecclesiastical abstention doctrine or church autonomy doctrine.

The lower courts have taken these principles, enunciated by the United States Supreme Court, and applied them to ministers and to other employees who carry out important religious functions. This rule has been called the "*ministerial exception*," and it has been applied frequently in discrimination and wrongful termination claims.

The ministerial exception was first recognized by the Fifth Circuit Court of Appeals 40 years ago in *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972). The ministerial exception is thus a long-established doctrine. It gives great protection to religious autonomy and is based on the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. *Hosanna-Tabor*, 132 S. Ct. at 702. It is founded on the principle that "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698,704 (7th Cir. 2003).

Allowing courts to review personnel decisions by church-affiliated institutions involving a ministerial position permits courts to involve themselves in the internal workings of a church. That is prohibited by the First Amendment. The Eighth Circuit has aptly explained the problem with such intervention by the civil courts:

> Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts, for to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made. This is precisely the kind of judicial second-guessing of decision making by religious organizations that [the First Amendment] forbids.

Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991).

Like their federal counterparts, Minnesota's state courts have prohibited the government from interfering or inquiring into a religious group's doctrinal decisions and interests, including the employment of its employees. *See Geraci v. Eckankar*, 526 N.W.2d 391, 399–401 (Minn. Ct. App. 1995) (concluding that gender discrimination and reprisal claim brought by church's computer programmer against a church was barred because the termination decision was doctrinally related), *review denied* (Minn. Mar. 14, 1995), *cert. denied* 516 U.S. 818 (1995); *see also Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 435 (Minn. 2002) ("[S]tate may not inquire into or review the internal "decision-making" or governance of a religious institution."). Thus, explained the Minnesota Court of Appeals, a court could never "review claims by a pastor related to her appointment and discharge . . . because these were 'fundamentally connected to issues of church doctrine and governance and would require court review of the church's motives' for discharge." *Doe v. Lutheran High Sch. of Greater Minneapolis*, 702 N.W.2d 322, 327 (Minn. Ct. App. 2005) (quoting *Black v. Snyder*, 471 N.W.2d 715, 720 (Minn. Ct. App. 1991), *review denied* (Minn. Aug. 29, 1991)).

IV. *Hosanna-Tabor* Decision

The United States Supreme Court considered these religious liberty principles in *Hosanna-Tabor Evangelical Lutheran Church & School*, 132 S. Ct. 694 (2012).

A. Factual Background

Hosanna-Tabor involved a Lutheran church and school and one of its teachers. Hosanna-Tabor Evangelical Lutheran Church and School is a member congregation of the Lutheran Church-Missouri Synod. Hosanna-Tabor operated a small school in Michigan, which offered a "Christ-centered education" to students in Kindergarten through Eighth Grade. *Id.* at 699.

The Synod classified its teachers as either "called" or "lay." "Called" teachers are viewed as having been divinely called to their vocation and, after being called and completing additional academic and theological training, receive the formal title, "Minister of Religion, Commissioned." "Lay" teachers on the other hand were not trained by the Synod and were not required to be Lutheran. *Id.* at 699–700.

The claimant in *Hosanna-Tabor* was a "called" teacher, Cheryl Perich. To become a called teacher, Perich completed the additional training and had received a certificate of admission into the teaching ministry. During her time at Hosanna-Tabor, Perich taught Kindergarten and then Fourth Grade. Her duties included teaching math, language arts, social studies, science, gym, art and music. She taught a religion class four days a week, led students in prayer and devotional exercises each day, attended a weekly school-wide chapel service, and led that chapel service herself twice each year. *Id.* at 700.

Perich became ill in June 2004 and was later diagnosed with narcolepsy. Due to her illness, she began the 2004–2005 school year on leave. In January 2005, the congregation voted to offer Perich a "peaceful release" from her call, which included an offer to pay a portion of her health insurance in exchange for her resignation. Perich refused the offer and sought to return to work in February. She presented herself at the school on the February 22, 2005, the day that she was medically cleared to return to work. The school told her to leave. *Id.*

On April 10, 2012, the congregation voted to rescind Perich's call. She was sent a letter of termination the next day. *Id.*

B. Procedural History

Perich filed a charge with the Equal Employment Opportunity Commission, claiming that she had been terminated in violation of the American with Disabilities Act. *Id.* at 701. The EEOC sued Hosanna-Tabor. *Id.*

The district court dismissed the case on summary judgment, invoking the "ministerial exception" under the First Amendment. The Sixth Circuit Court of Appeals vacated that decision because it determined that Perich was not a minister under the

exception. The appeals court remanded the matter back to the trial court to determine the merits of the claim. Hosanna-Tabor petitioned for certiorari to have the United States Supreme Court hear the case. *Id.* at 701–02.

C. Supreme Court Ruling

The United States Supreme Court issued a unanimous decision in January 2012. The High Court recognized a ministerial exception, ruled that it was rooted in both the Establishment Clause and the Free Exercise Clause of the First Amendment, and held that Perich qualified as a "minister" under that exception.

1. Ministerial Exception Exists and has Constitutional Roots

The Supreme Court held that there is a ministerial exception, citing a long history of law dating back to the Magna Carta in 1215. The Court explained that if the government tries to force a church to accept or retain an unwanted minister or punishes it for failing to do so, the government interferes with the church's internal governance and deprives the church of control over who will personify its beliefs. *Id.* at 706. Such an action, ruled the Court, would violate the Free Exercise Clause and the Establishment Clause. *Id.* It violates the Free Exercise Clause because it prevents the religious group from shaping its own faith and mission through its appointments. And it violates the Establishment Clause, because the government cannot be involved in ecclesiastical decisions. *Id.*

2. Application of the Ministerial Exception to Perich

Having determined that a ministerial exception existed, the Court next examined whether it applied to Perich. *Id.* at 707.

The Court considered four factors in determining whether Perich was a minister. First, it looked at whether Hosanna-Tabor held Perich out as a minister. The Court observed that she had been issued a "diploma of vocation," accorded the title "Minister of Religion, Commissioned," and was tasked with performing her work "according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures." *Id.* In addition, the congregation prayed for her and periodically reviewed her ministry skills and responsibilities.

Second, the Court looked at what the title meant. The Court explained the process by which Perich had become a minister, noting that she had received additional theological training and had to fulfill numerous requirements which took more than 6 years to complete. *Id.* Once those requirements were completed, Perich had to be elected by the Congregation, signaling their recognition of "God's call to [Perich] to teach."

Third, the Court observed that Perich held herself out as a minister by accepting the formal call to religious service and by claiming a special housing allowance on her taxes for ministerial employees. *Id.* at 707–08.

Fourth, the Court considered Perich's job duties and asked whether those job duties "reflected a role in conveying the Church's message and carrying out its mission." The Court observed:

- Hosanna-Tabor expressly charged her with "lead[ing] others toward Christian maturity" and "teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church."

- Perich taught her students religion four days a week and led them in prayer three times a day.

- Once a week, Perich took her students to a school-wide chapel service, and—about twice a year—she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible.

- During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning.

These tasks led the Court to conclude that Perich "performed an important role in transmitting the Lutheran faith to the next generation." *Id.* at 708. The Court reached that conclusion, even though, Perich had tasks similar to lay teachers and even though she spent a significant amount of her time performing secular duties. The Court explained that the amount of time spent performing religious functions was not dispositive:

> The issue before us, however, is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.

Id. at 709.

In light of its analysis of those four factors, the Court ruled that Perich was a ministerial employee and that, as such, her employment discrimination suit was barred.

V. Application of the Ministerial Exception in General

Application of the ministerial exception is subject to certain general considerations.

A. "Robust" Defense

When the ministerial exception applies, the stated reason for the termination does not matter. All that matters is that the employee was a ministerial employee. *See id.* ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone."). Where it applies, the ministerial exception is "robust" and "precludes any inquiry whatsoever" into the reasons behind a church or religious employer's decision to hire or terminate a ministerial employee. *E.E.O.C. v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991). Thus, the reason for termination is simply not relevant; all that matters is that the employee was a ministerial employee.

B. Applies to Federal and State Claims

The ministerial exception applies to block claims brought by covered, ministerial employees, regardless of whether the claims are based on federal or state law. *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999) ("Just as there is a ministerial exception to Title VII, there must also be a ministerial exception to any state law cause of action that would otherwise impinge on the church's prerogative to choose its ministers or to exercise its religious beliefs in the context of employing its ministers.").

C. Applies Regardless of Remedy Sought

The exception applies regardless of the remedy sought or the reason for the termination. *Hosanna-Tabor*, 132 S. Ct. at 709.

D. Applies to Limited Employers

The ministerial exception applies to churches and to church-related institutions, including church-affiliated schools.

Note: Local, state, and federal anti-discrimination laws may apply despite the Supreme Court's recognition of the ministerial exception.

E. Use a Holistic Analysis to Determine Who Qualifies as a Ministerial Employee

As explained above, in *Hosanna-Tabor*, the Supreme Court identified 4 factors to consider when determining whether the ministerial exception applies: 1) the employee's formal title (i.e., did the employer hold the employee out as a minister), 2) the substance reflected in that title, 3) the employee's use of the title (i.e., did the employee hold himself or herself out as a minister), and 4) the employee's "important religious functions." *Id.*

These factors are important, but there is no "rigid formula" for determining when the ministerial exception applies. *Id.*

It is particularly clear that the formal title or ordination status of the employee does not, standing alone, determine whether the ministerial exception applies. Indeed, no circuit has made ordination status or a formal title determinative of the ministerial exception's applicability. *Id.* at 714 (Alito, J., concurring). The Minnesota Court of Appeals has also acknowledged that "[o]ne need not be an actual ordained minister to fall within the [ministerial] exception." *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350, 355 (Minn. Ct. App. 2004). Thus, while a ministerial title is undoubtedly relevant, it is neither necessary nor sufficient.[1]

Case law suggests that the fourth factor—whether the employee's job duties "reflect[] a role in conveying the Church's message and carrying out its religion"—is likely the most important. *Hosanna-Tabor*, 132 S. Ct. at 708. Even before *Hosanna-Tabor*, the consensus among courts applying the ministerial exception was to use that sort of a functional approach, and nothing in the Supreme Court's decision in *Hosanna-Tabor* upset that consensus. *Id.* at 714 (Alito, J., concurring); *see, e.g.*, *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (a ministerial employee is one who holds a position that "important to the spiritual and pastoral mission of the church"); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996) (The "exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission."); *Coulee*

[1] Focusing solely on the title will ultimately lead to unequal treatment between faiths. Not all religious faiths use titles, operate in a hierarchical manner, or recognize the concept of formal ordination. *See Hosanna-Tabor*, 132 S. Ct. at 713–14 & 714 n.3 & n.4 (Alito, J., concurring).

Catholic Sch. v. Labor and Indus. Rev. Comm'n, 768 N.W.2d 868, 882 (Wis. 2009) (applying the exception to employees holding a position that is "important to the spiritual and pastoral mission of the church").

Minnesota courts have similarly applied a functional analysis and looked at job duties to determine whether the ministerial exception applies. For example, the Minnesota Court of Appeals has held that "[w]hether an employee is covered by the ministerial exception or is secular *depends upon the function of the position*." *Egan*, 679 N.W.2d at 355 (quotation omitted) (emphasis added).

Applying these principles, courts have held that the following types of employees at religious-affiliated employers may be protected by the ministerial exception: principals,[2] elementary school teachers,[3] theology teachers,[4] musical directors,[5] faith formation directors,[6] and others.[7]

---

[2] *Pardue v. Center City Consortium Schools of Archdiocese of Washington*, 875 A.2d 669, 677 (D. C. Cir. 2005) (holding that principal's discrimination claims were barred by ministerial exception); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192 (Conn. 2011); *Sabatino v. St. Aloysius Parish*, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996).

[3] *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, No. 97-2648, 1998 WL 904528 (4th Cir. Dec. 29, 1998) (applying ministerial exception to bar former church elementary teacher from bringing claims of discrimination against church); *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F.Supp.2d 858, 870 (E.D. Wisc. 2004) (holding that the ministerial exception applied to an elementary school teacher because the school required the teacher to integrate Native American culture and religion into her classes, she participated in and sometimes led the school's religious ceremonies and cultural activities, and she helped develop her students spiritually); *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 2011 WL 6119336, at *9 (Cal. App. 4 Dist. 2011) (holding that preschool teacher's claims were barred by ministerial exception where teacher taught religion, led students in prayers every day, and led chapel services); *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195 (Mich. 1995) (holding that an elementary school teacher's discrimination claims were barred by the First Amendment, and even though the balance of her duties was teaching secular subjects, the teacher's overall duties were "inexorably intertwined with the primary function of defendants' school, which is the education of its students consistent with the Catholic faith"); *Weishuhn v. Lansing Catholic Diocese*, 787 N.W.2d 513, 517–19 (Mich. Ct. App. 2010) (teacher who taught math in 5th through 8th grades and religion in 6th through 8th grades was ministerial employee); *Coulee Catholic Sch.*, 768 N.W.2d 868 (holding that 1st grade teacher's age discrimination claim was constitutionally barred).

[4] *Powell v. Stafford*, 859 F. Supp. 1343, 1345 (D. Colo. 1994) (theology teacher at a Catholic high school precluded from bringing an age discrimination claim).

[5] *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006) (non-ordained musical director performed "ministerial function" by selecting what music to play during mass).

[6] *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878 (Wis. 2012).

[7] *Schleicher v. The Salvation Army*, 518 F.3d 472 (7th Cir. 2008) (employees who helped run adult rehabilitation center, led prayer and worship singing, and sold goods in thrift shop were considered ministers since their duties had a "spiritual dimension" under the Salvation Army's religious tenets); *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004) (a cook, whose duties included religious worship and ritual that were central to Jewish belief and ritual, was a minister for purposes of ministerial exception); *Adams v. Indiana Wesleyan Univ.*, 2010 WL 2803077, at *9 (N.D. Ind. July 15, 2010) (university professor and department head was ministerial employee).

Note: Although courts in the past have held that the ministerial exception protects such employees, independent analysis and a case-by-case determination is required. Schools should not assume that all principals or elementary school teachers are covered by this exception.

VI. Tips for Applying the Ministerial Exception to Church-Affiliated Schools and their Employees

Clearly, the ministerial exception provides churches and church-affiliated organizations, such as Catholic schools, with an important defense against employment-based claims.

The ministerial exception is not limited to schools, and it does not apply automatically to all school employees. Nonetheless, school-employers are encouraged to consider whether the ministerial exception applies to any of its employees. They should take a holistic approach to that analysis and consider a variety of factors, with special emphasis on the employee's duties. Areas to consider include, but might not be limited to:

A. Physical Surroundings

- Where does the employee work?
- What religious iconography exists in the employee's immediate work area (e.g., classroom) or in the surrounding areas?

B. School's Mission and Purpose

- Does the school have a religious mission or purpose?
    - The Supreme Court recognized that Hosanna-Tabor offered a "Christ-centered education."
- What evidence exists to reflect that mission or purpose?
    - Do the school's student or employee handbooks and policies reflect a religious mission?
    - Do the handbooks incorporate codes of conduct or ethical requirements that are based on or refer to religious beliefs or religious values?

- Do the school's promotional and advertising materials focus on the religious nature of the school? Do they give particular emphasis to faith formation or a Catholic community? What about websites and social media sites?

- What faith-based objectives does the school have, and how have those objectives been communicated to the employee?

- Is faith formation an important part of the school day? How are faith and faith formation incorporated into the curriculum?

C. Employee's Title and Substance of the Position

- What is the employee's title? Compare:

  - High School Mathematics Teacher v. Theology Professor
  - Catholic School Kindergarten Teacher v. Daycare Aide
  - Custodian v. Director of Faith Formation

- Does the offer letter or employment agreement include religious-based requirements or statements?

  - In *Hosanna-Tabor*, the congregation prayed that God would bless the teacher's "ministrations."

  - Standard Statement regarding distinction between secular employment and church employment

Statement Regarding Ethical Standards

Employees of the parish and school are considered employees of the Catholic Church. Employment in and by the Church is substantially different from secular employment. Church employees must conduct themselves in a manner that is consistent with and supportive of the mission and purpose of the Church. Their behavior must not violate the faith, morals, or laws of the Church or the Archdiocese of St. Paul and Minneapolis, nor can it embarrass the Church or give rise to scandal. Although specific positions may not require the employee be a Catholic, it is expected that all employees respect Catholic doctrine and religious practices. Reasonable accommodations for the religious practices of employees not of the Catholic faith will be provided.

- Does the job description indicate that this employee fulfills an important religious mission?
    - Factors to consider:
        - Must the employee be a knowledgeable and practicing Catholic?
        - Does the position require advanced training in Catholic beliefs?
        - Does the job description account for the various religious duties that the employee has (see below for more information)?
- What codes of conduct and policies govern the employee? (E.g., Pastoral Code of Conduct and the Code of Ethics for the Catholic School Teacher.)

Handbooks can reference Justice in Employment standards

As stated in the Justice in Employment policies, "conduct which is inconsistent with the faith, morals, teachings and laws of the Catholic Church" is grounds for disciplinary action, up to and including immediate discharge.

Handbooks can reference the Code of Pastoral Conduct

Employees are also expected to be familiar with and adhere to the Code of Pastoral Conduct.

Handbooks can reference additional applicable ethical codes

All teachers at the school are expected to adhere to the Code of Ethics for the Catholic School Teacher as developed by the National Catholic Education Association.

- Does the school provide, pay for, or require continuing education or general training relating to Catholic teaching and doctrine?
    - Though not dispositive, this can be important. If an employee has additional or continuing training in Catholic teaching and doctrine, including training on instructing

students on such issues, an outside fact-finder—like a court—is more likely to conclude that the employee plays an important role in transmitting the faith to the next generation.

- Do performance reviews include any assessment of the employee's religious functions?

D. Employee's Job Duties

- Consider, starting with as broad a perspective as possible, what role the employee plays in transmitting the faith to the next generation?

- Has the employee identified ways (preferably in writing) in which they incorporate faith and faith-based objectives into daily activities and the curriculum? (E.g., performance-based reviews, other assessments, even newsletters or other communications to students and parents).

- Does the employee lead prayers or devotional exercises?

- How are prayers and devotional exercises incorporated into the day? How frequently?

- Is the employee required to attend mass, liturgies, or para-liturgies? What role, if any, does the employee play?

- Is the employee required to participate in religious celebrations?

- How are sacraments and Catholic rituals incorporated into the day and does the employee participate?

- Does the employee have any role in teaching students about Catholic faith, teachings, or rituals?

    - E.g., Teaching students about Baptism, prayers, the Sign of the Cross, Advent and Christmas, and Lent and Easter; reading the Bible together; reciting prayers; singing devotional songs.