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## General Personnel Issues

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# GENERAL PERSONNEL ISSUES

WILLIAM T. HOPKINS, Esq.\*

With respect to the employer-employee relationship in religious organizations, there are several laws that *may be* applicable to employees of the church. I say *may*—it is rather interesting, you would expect that you are either covered by the FLSA or you are not, you are either covered by the Age Discrimination Employment Act or you are not—it sort of reminds me of the young priest who was traveling between parishes to say mass on a Sunday morning. He was stopped for running a stop sign. He went to court to present his position and he said, “Judge, I was coming to the stop, I had my brake on, I slowed down to a snail’s pace, I had enough time to look both ways, it was totally clear. Yes, I rolled through the stop sign but I was going so slow it was like I was stopped.” The judge picked up his gavel and said, “Young man, please come up to the bench.” The priest approached the bench and the judge started tapping on his head. The judge said, “Tell me, do you want me to slow down, sir, or do you want me to stop?”

The point is that you would expect either to be covered by these laws or not. As we go through here, you are going to find out that you may be covered or not depending on a lot of different factors contemplated by each of the laws that I will refer to.

I would like to start with the National Labor Relations Act because our firm handles a lot of NLRA issues. You are probably all well acquainted with the case of *National Labor Relations Board v. Catholic Bishop of Chicago*.<sup>1</sup> It is the leading case that everybody looks at to find out whether your employees can legally form a union and require the church to bargain with them as a group under the NLRA.

Now this case has a special significance to us because it came out of the Fort Wayne/South Bend Diocese. Because it came out of our own diocese we have something to finish this story off with that will probably surprise some of you. The NLRB attempted to exercise jurisdiction over the lay teachers at the South Bend schools. The Supreme Court decided

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\* Gallucci, Hopkins & Theisen.

<sup>1</sup> 440 U.S. 490 (1979).

that the National Labor Relations Board could not exercise its jurisdiction over lay teachers in parochial schools who are responsible for teaching both religious and secular subjects. The Court reasoned that if the NLRB were allowed to exercise such jurisdiction then serious First Amendment problems could arise. Therefore, the Court ruled, it would only approve the exercise of NLRB jurisdiction in the area where the exercise of that jurisdiction is based upon a clear showing of congressional intent.

Because Congress did not go out and say lay teachers in parochial schools are intended to be covered under the NLRA, the Supreme Court says we are not going to cover it. The distinction the Supreme Court drew was that these lay teachers were responsible for teaching not only secular but also religious matters. Now, subsequent to the *Catholic Bishops* decision, numerous cases have come down from the NLRB and the federal court system regarding the exercise of NLRB jurisdiction under similar circumstances. In 1987, in the *Jewish Day School*<sup>2</sup> decision, the NLRB refused to extend its jurisdiction over lay school teachers who taught both secular and non-secular subjects by deciding that it would not interject itself into situations which may require the in-depth analysis of religious factors. So the NLRB, believe it or not, took what the Supreme Court said and broadened it. This is the first time in my 12 years of working in front of the NLRB that I have seen them liberalize anything in favor of employers.

The Supreme Court's decision dealt with religious employers of lay teachers. The *Jewish Day School* decision is different from the Supreme Court *Catholic Bishops* case because it applies to any school, whether religiously owned or not, any school whose purpose and substantial function is to propagate a religious faith regardless of whether the church owns it or not.

Because the teachers in these schools, like the teachers in *Catholic Bishops* serve a dual purpose, both secular and religious, the Board determined that it would not exercise jurisdiction over those disputes stating it will not review "the motive behind a school's conduct and the subjects affecting teachers about which a school must bargain." The Board will take a hands-off approach with schools that deal with religious issues or teach religious precepts.

The Board believed the resolution of such disputes could lead to an intrusion upon the religious freedom protected by the free exercise clause. Thus, it is pretty clear that if the lay teachers are teaching religious matters, their employer will not be subject to the NLRA.

Now something you all may not know about the *Catholic Bishops*

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<sup>2</sup> 283 N.L.R.B. 106 (1987).

case is that Bishop McManus of Fort Wayne/South Bend was dealing back in the late 1970's with a situation in which his teachers wanted, to a great degree, to be organized by the union. Of course, this lawsuit like most lawsuits took several years to get to the Supreme Court. So the Bishop made a decision to bargain with the union anyway during the pendency of the case. Again, I do not know how many people here have the same situation, but in the Fort Wayne/South Bend Diocese the school and the Bishop do in fact bargain with the lay teachers' union for the high schools. They do not bargain with any union for the teachers below the high school level, however. Nevertheless, perhaps in an attempt to appease the teachers or to respond to the pressures being placed on Bishop McManus, right now the Fort Wayne/South Bend Diocese in fact bargains with the lay teachers' union. His successor, Bishop D'Arcy, is really in the same position that Bishop McManus was, in that he bargains with them on a regular basis even though he is not required to do so. It does make for some interesting bargaining times.

Last year in the *Hanna Boys Center*<sup>3</sup> case the National Labor Relations Board was petitioned to exercise jurisdiction over child care workers, recreational assistants, cooks, cooks' helpers, maintenance employees, plumbers, electricians, gardeners and custodians, all of whom were employed by a not-for-profit charitable institution founded by two priests to serve as a residential facility for boys whose home environment was not conducive to their educational needs.

In responding to the petition, the facility objected on the basis that the jurisdiction should not be maintained because of the dual purpose exemption. That is, these boys were receiving secular education as well as religious education. While the Board found that the Center offered a wide range of educational and religious training for the boys who lived at the facility, it asserted jurisdiction over the petitioning child care workers along with all the other employees because it found that the child care workers were not truly involved in religious education. Instead of accepting the priest's characterization of these workers' responsibilities as being akin to those of lay teachers in the parochial school system, the Board likened the child care workers' non-secular duties to those of dormitory monitors whose primary function was to supervise the boys as opposed to teaching them.

So from the most recent cases, it is pretty evident that the NLRB will exercise jurisdiction over lay employees where those groups do not, in fact, teach religious education. Whether any particular group is or is not exempt from the NLRA is going to depend upon what you as the school attorneys can establish as the primary function and goal of the group.

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<sup>3</sup> 284 N.L.R.B. 121 (1987).

Title VII of the Civil Rights Act prohibits discrimination in employment based upon an individual's race, color, religion, sex, or national origin. There are certain exceptions to those proscriptions based on what is called a *bona fide* seniority system and also a merit system set up with objective standards as well as what is called a *bona fide* occupational qualification. For our purpose I will limit the discussion to the religiously-based employment decisions and the exceptions set forth in the law related to religion. Similar to the situation described in the *Catholic Bishops* decision, to avoid the problem of forcing constitutional conflicts based upon first amendment free exercise clause issues, Congress specifically excluded religious employers from liability under Title VII for employment decisions based on religious factors.

The constitutionality of this exemption was recently reexamined and upheld by the Supreme Court in *Corporation of Presiding Bishop v. Amos*.<sup>4</sup> The case involved an employee of a religious affiliated non-profit gymnasium who was discharged because it became apparent he had lost his position of good standing in his church. Now, I am not sure how many of you have read this *Amos* case in detail but what it amounted to was a janitor who would not keep up his tithe with the Jesus Christ Latter Day Saints. They found out about him not maintaining his tithe and they fired him for it. From the statistics I have been able to read, if they did that with the Catholic religion we would have very few employees, particularly in relation to other religions. At least that is what I read in the news.

The way the *Amos* case came to the Supreme Court is interesting and bears review because I think you, as attorneys for the Diocese, feel that *Amos* grants this great religious exemption and Title VII does not cover us. To destroy this misconception, I would like to walk through with you what I understand to be the way this case got to the Supreme Court and what the Supreme Court found.

Now, *Amos* started out in a federal district court. The district court had determined that the religious employer's exemption under Section 702 of Title VII was unconstitutional. There really was not a question at that point in time before the district court about whether the reason for the discharge was the tithing or not. The question for the district court was, is the religious exemption provision of Title VII constitutional or not?

The court of appeals below upheld the district court and said that the exemption allowed religious employers to discriminate on religious grounds when making hiring and firing decisions related to non-religious jobs. The Supreme Court reversed and upheld the constitutionality of the

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<sup>4</sup> 483 U.S. 327 (1987).

congressional exemption granted to religious employers by deciding that the exemption did not advance religion as applied to secular employees of a religious employer, but rather, minimized governmental interference with a religious employer's decision making process. For this reason the Supreme Court held in *Amos* that a religious employer can make religiously based employment decisions involving employees engaged in non-profit secular activities without fear of reprisal under the guise of a Title VII discrimination suit.

What this says is, if you, the diocese, can establish that this person was fired because of a religious reason, you are entitled to the exemption. But how do you get there? The *Amos* case was very simple. It was essentially stipulated he was fired for *not* tithing. Now think about the reality of firing an employee who performs only secular functions, like a janitor. Are you going to come up with as the reason for the firing that this guy did not give enough to the church so we fired him? No. The reason will normally be, "He is not doing his job." So take a look at what the case stands for and take a look at what the practical reality of Diocesan employees being fired within the diocese is. The opportunity for a pure religious reason to be the reason a secular working employee is fired is really not that great.

It is nice to know that there is a religious exemption out there, but I think realistically the opportunity for the Catholic Church to be able to rely on such an exemption is not going to be that great in practice. I would like to move past this and get into pure Title VII and age discrimination and talk about what your responsibilities are.

The *Martin v. United Way of Erie County*<sup>5</sup> case provides clear evidence that a religious or quasi-religious employer does not operate on a plateau immune from federal scrutiny. Mary Martin was a part-time assistant communications director for a charitable non-profit organization, United Way. She was over forty years old which placed her within the protection of the Age Discrimination and Employment Act. When her employer advertised for an employee to fill a new full-time position, Martin submitted her application. She was never given an interview for the position by the employer. She was later told that the advertised position would not be filled due to a job restructuring. Not willing to leave well enough alone however, Martin's boss also told her that she would not have been considered for the position anyway because she did not possess the young and pretty image required for the new opening. I can tell you will be surprised at the result. To add insult to injury, the non-profit employer later hired two males—are we lucky enough to have the attorney who defended the United Way here—who Martin claimed possessed in-

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<sup>5</sup> 829 F.2d 445 (3d Cir. 1987).

ferior skills to her own to fill two other new positions. When the employer told Martin that there would be no full-time positions available to her, she resigned. One week later the employer hired a slender young woman to fill the full-time position for which Martin had originally applied. Needless to say, Martin went to a lawyer and the result was that a suit was filed.

After the district court granted the employer summary judgment, the appellate court overturned and held that Martin had presented a cause of action against her non-profit employer based upon both the Age Discrimination and Employment Act and Title VII. The court found that both the ADEA and Title VII applied to non-profit charitable organizations provided that the requisite jurisdictional requirements were established.

Now if we have any employment lawyers out there you will know what the jurisdictional requirements are, if you are in the United States and doing business, you are probably covered. In all sincerity, whenever we have had the opportunity to raise a jurisdictional argument, it just never flies. You are either employing fifteen people or you're not. If you have fifteen people employed, the court, the Board or the EEOC is going to find some way to find that you are engaged in interstate commerce. You are not going to get around it. Suffice it to say your church will, in all probability, be covered by the Age Discrimination and Employment Act as well as Title VII.

I would like to move on to the Fair Labor Standards Act. This is one that is almost amusing, but I think it is a law that is going to have a significant impact for churches in the future, a lot more impact than we have right now. As most of you with private business or labor law experience are aware, the Fair Labor Standards Act generally requires that employers with business enterprises engaged in interstate commerce maintain certain employment records and pay their employees according to certain minimum guidelines. In most situations, the Fair Labor Standards Act requires the payment of a federally prescribed minimum wage which currently is \$3.35 per hour. I know Mr. Kennedy is interested in increasing it, and I know there is a bill in Congress to increase it to \$4.50 per hour. In all likelihood we are going to have an increase in the minimum wage. All employees paid on an hourly basis must receive pay equal to "time and a half" for all time worked over forty hours in a week. A week is defined as seven consecutive days.

Again, people who are not familiar with the FLSA may think that a week is a week. Believe it or not that is not the case with the FLSA. Let me give you an example. Say you have continuous operation where individuals work on what is called a rotating week. In other words, an individual will work seven days straight and then have four days off and then come back for six days work and then have two days off and then go back on six. So in other words they will work Saturdays, Sundays, literally

seven days straight.

Under the rules and regulations developed by the Fair Labor Standards Act, and the Department of Labor, there is a way that a person can work seven straight days and not be entitled to overtime after 40 hours.

The Equal Pay Act comes within the Fair Labor Standards Act and prohibits discrimination on the basis of sex with regard to employees who perform equal work under similar conditions. Again, you may all have heard of the comparable work issue which, by and large to my knowledge, is pretty well dead in the United States today. You may hear a lot about it, and there may be a lot of practical problems raised, but by and large the legal issue of comparable worth is not viable today. However, equal pay for equal work certainly is and if you have two employees both of whom are doing the same job and the female is paid less than the male, you are going to have trouble defending that under the current law.

The Equal Pay Act makes exceptions for pay differentials based on seniority systems, merit systems, production based systems, or other objectively measured bases as long as they are not sex-related. There are also exemptions from the overtime provisions of the Fair Labor Standards Act for certain employees including professional, administrative and *bona fide* executive employees. I would like to briefly discuss with you an outline of what these exemptions mean, particularly the executive and administrative.

An employee may qualify as a *bona fide* business executive in one of two ways. In the first instance the employee's primary duties must be management related, meaning that among other things he or she must have authority to hire and fire or to effectively recommend hiring and firing and he must customarily and regularly exercise discretionary powers in the course of conducting his work while directing at least two people. He or she cannot devote more than twenty percent of his time to work not directly or closely related to managerial duties. An example that comes to my mind immediately is restaurant supervisors. They may make pizzas or prepare food twenty percent of the time, but if they have two employees under them and their primary obligation is to manage, they would be an executive employee exempt from the FLSA as long as they made a minimum of \$155 per week.

Another exemption, a second means for gaining the exemption for a *bona fide* executive employee is what is called the highly salaried executive. While you may believe the first executive we talked about, by today's standards, did not receive very high pay, a highly salaried executive under the FLSA receives an equally unimpressive amount. An executive receiving as little as \$250 per week will qualify as a highly paid executive. Now in order to qualify as a highly paid executive, in addition to the \$250 a week that you have to receive, your basic primary obligation must be to manage at least two people. However, here the amount of time which can

be allocated to ministerial duties, for example making pizzas or preparing food, is in the order of fifty percent.

That comes into play a lot when you have hands-on supervisors. Again, going back to the Catholic Church, the issue can arise in many different situations. Usually it arises for maintenance, electricians, essentially supervisors over groundskeepers and that sort of thing. But you do have the opportunity, at least from the legal perspective, of defending your supervisory pay and not paying overtime after forty hours a week if you pay the supervisor \$250 or more a week.

Diocesan employees who perform their job duties strictly within the religious office, meaning the chancery, the rectory, the convent, are generally exempt from the FLSA provisions of record keeping, minimum wage and overtime pay since the work they do is not normally done for a common purpose relating to either money-making businesses of the church or operations like schools. Maintenance people, child care workers, everyone except teachers at a school come within the ambit of the Fair Labor Standards Act if you are otherwise covered by the Act.

The clerical, secretarial, janitorial and maintenance employees performing work solely within the chancery, rectory or convent are not covered under the FLSA. Those same individuals, however, when they step into a school to push a broom around, or to do maintenance, or secretarial or clerical work, are covered. Now let me tell you how ridiculous that can be. In Fort Wayne/South Bend a manager under the Bishop decided to take the maintenance people from the chancery and once a week move them over to the school. So one week they clean up the school, the next week they clean up the chancery. The Department of Labor determined that when they were cleaning up the chancery they were not eligible for overtime, but when they were over at the school they were eligible for overtime after forty hours. That is the way the Department of Labor works. As ridiculous as that seems, that is the way they will interpret the law, at least in Indiana.

Naturally, all volunteers, those who donate their time or perform other services for the diocese without promise or expectation of payment are also not covered under the FLSA.

Parochial, elementary and secondary school employees, unlike those working at the chancery, are covered by the FLSA. Members of religious orders, priests, nuns, brothers, are all exempt. Lay teachers who are certified and engaged in teaching are exempt even if they spend a considerable amount of time engaged in coaching of athletics or acting as advisors in various educational activities. However, unless a teacher makes at least \$250 per week, the teacher may lose exempt status if more than twenty percent of his or her hours worked in any work week is spent doing non-essential, non-teaching duties. Again, I do not know where you are from, sometimes teachers are paid more than that, sometimes teachers are be-

ing paid pretty close to that. It is just something for you to look at as you review the employment practices of the diocese.

School administrative employees including superintendents, deans, department heads or other administrators who use discretion and judgment in matters of curriculum establishment and the maintaining of academic standard are exempt from the FLSA if they devote no more than twenty percent of their hours to the ministerial activities I referred to earlier. All other school employees essentially are covered under the FLSA.

Outside of the school setting, any business enterprise or activity performed for a common business purpose by a religious or a non-profit organization which otherwise meets the jurisdictional requirements of FLSA is covered. Perhaps the best example of such a enterprise can be found in the case of *Tony and Susan Alamo Foundation v. Secretary of Labor*<sup>6</sup> decided by the Supreme Court in 1985. The Alamo Foundation was a non-profit religious organization incorporated under the laws of California for the purpose of ministering to the needy and performing other charitable works. It derived the bulk of its income through a number of commercial businesses it operated ranging from service stations to construction companies to hog farms. The Foundation's businesses were staffed in a large part by its associates who were former drug addicts and derelicts the Foundation had converted and rehabilitated. The associates were given room and board and other non-cash benefits for their services. When brought into court over its failure to comply with the Fair Labor Standards Act, the Foundation claimed, among other things, that as a non-profit organization it was exempt from coverage and that its associates were not employees under the Fair Labor Standards Act.

The Supreme Court denied the Foundation's position and held that the FLSA's goal of assuring a minimum level of benefits for employees engaged in the manufacture or flow of goods in interstate commerce applied to commercial activities of religious and not-for-profit organizations. Regarding the Foundation's associates, the Supreme Court found them to be employees under an economic reality test by noting they were dependent upon the Foundation's support and must necessarily have expected to receive some benefit in exchange for their services regardless of whether the benefits were paid in cash or kind.

What the *Alamo Foundation* case teaches us is that even though a diocese may be a non-profit tax exempt organization, the FLSA applies to any enterprise it enters into that has a common business purpose which places it in competition with for-profit enterprises.

If your diocese maintains such an enterprise or an elementary or sec-

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<sup>6</sup> 471 U.S. 290 (1985).

ondary school system, you should be aware of the FLSA and I caution you to do just that. Check through the FLSA particularly for the record keeping requirements that apply.

There is one last thing before I leave the FLSA that I think needs to be said, and that is that complying with the FLSA is not an onerous burden as a general rule. Likewise, paying equal pay for men and women to perform the same work without differentiation based upon sex should come as a matter of course, not as a burden. So I think from a moral position a diocese ought to be complying with the FLSA.

I would now like to cover the AIDS discrimination issue. Of course, it is important to stress the emergence of AIDS victims as a new class of individuals protected under the Rehabilitation Act of 1973. As you are most probably aware this act requires that agencies or organizations that receive federal funding not discriminate against handicapped individuals who are otherwise capable of performing job-related duties. The Act's requirements extends to non-profit religious organizations which receive federal funding.

In the case of *Chalk v. United States District Court of California*<sup>7</sup> a complaint was maintained by a school teacher who was identified as having AIDS. His school employer ordered him out of the classroom and into a job function which would limit his contact with students. Because the teacher felt he was otherwise qualified to continue performing his job, he sought injunctive relief under the Rehabilitation Act of 1973.

Although the district court noted the uncertainty surrounding the possibility of the teacher infecting students with AIDS, it refused to enjoin the employer's reassignment decision. The appellate court reversed, and ordered that the teacher be reinstated to his classroom duties pending a further hearing into whether the teacher's casual contact with his students incident to his teaching duties in the classroom posed a significant risk of harm to the students.

Religious employers faced with such a moral dilemma must be cognizant, therefore, of the fact that the Rehabilitation Act's proscriptions may apply to them if they maintain an agency or a program which is the recipient of federal funds. The scope of the coverage of the Rehabilitation Act has recently been enlarged by the passage of the Civil Right Restoration Act which is another matter unto itself.

The final two topics I would like to cover in the outline are the Immigration Act and the Tax Reform Act of 1986 dealing with health and welfare and pension plans. The Immigration Act has been in effect since 1986; since its inception I have noticed many practical things that have come to the forefront with the people I represent. Because this includes

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<sup>7</sup> 840 F.2d 701 (9th Cir. 1988).

the diocese, these are things I think it is important for you to be aware of. The first is that in all probability a lot of small companies do not comply with it anyway. Employers with ten, twenty, or fifty employees simply have neither the time nor the awareness to comply with the thing. They do not know what they have to do despite everything that has been printed in the papers.

You are all probably aware it is important to get the I-9 form signed by the new employee; that includes employees within your own law firm. Let me give you an example how broad in scope this law is. Suppose one of your clients hired his son to push a broom around his office part-time. The son left to go to school in the fall and the Department of Labor, not the Immigration people, came in and looked through the records. The employer is more than happy to talk about how his son worked with him and the Department of Labor guy says, "Where is your I-9 form on your son?" A \$250 fine later will help the employer remember to get his son's signature. I know that sounds ridiculous but let me tell you about the law. You have to show the government investigator the I-9 form. If you do not have the I-9 form, you will pay the price. If you think you are safe because you are a law firm, you are not.

I am telling you, get those I-9 forms signed and make sure your diocese gets those I-9 forms signed. They have to be signed within three days of hiring the employee. It is not a matter that six months ago you hired somebody and now you are going to have them come in and sign, you are at risk with these people if the forms are not signed within three days after they have been hired.

Another practical pointer with respect to the Immigration Act is that many employers feel that the best way to prove their case is when they hire an employee, say bring your driver's license and bring your passport and bring whatever evidence you have that complies with I-9. We will make a copy of it, stick it in your file and then when the Department of Labor comes around, we will have the I-9 and we will have copies of the background information. Now that makes a lot of sense unless you make a mistake. If you make a mistake and the investigator is going through your records and he finds copies for everybody but ten employees, you are dead as to those ten employees. The I-9 form does not require you, and the law does not require you to keep copies of the information that you looked at to verify the I-9 form. So you can look at their driver's license and you can look at their passport, but that does not mean you have to make copies of them.

What many employers do, particularly employers who go through a large number of employees during the year, is not make copies of the backup information. So when the Department of Labor comes in all they have is the I-9. If the investigator asks just say, yes, we have a procedure with our personnel department and our procedure is that they have to

show them the information or they do not sign. It is up to the diocese to determine whether they want to make copies of those things and attach them to the I-9s or not. I just want to suggest to you that some people could end up getting in trouble because they only made copies of the information for some employees.

The Immigration Reform Act is a strict liability type statute. It does not matter whether you have exercised good faith, it does not matter whether you in fact know the person who is working for you is an American citizen. Knowledge is no defense. The only thing that is a defense is to provide those I-9 forms. Of course, the potential penalty can be significant, anywhere from \$250 to \$2,000 for each I-9 form that does not comply with what the Department of Labor requires and the penalties get stiffer.

My last topic concerns employee benefit plans maintained by the church. While many of us are aware that employee benefit plans maintained by churches are exempt from requirements of the Employees Retirement Income Security Act of 1974 ("ERISA"), such plans must nonetheless qualify for favorable tax treatment under the Internal Revenue Code if the employees benefiting from the plan are to enjoy favorable tax treatment of their benefits. In its never ending zeal to close loopholes and to maximize tax revenue, Congress passed the Tax Reform Act of 1986. One of the most troublesome provisions of that Act from both a legal and business perspective is the new Section 89 which has been added to the Internal Revenue Code. Although the new law passed over 18 months ago, the IRS has yet to even issue proposed regulations on Section 89. Thus, in this area employers including the church are going to have to venture very cautiously.

Once Section 89 becomes effective, a health plan or a group term life insurance plan must satisfy five requirements or all employees covered by the plan will be taxed on the actual value of the benefits provided to the employees. The five requirements are: (1) the plan has to be in writing; (2) the employees' rights under the plan must be legally enforceable; (3) the employees must be provided reasonable notification of the benefits available in the plan; (4) the plan must be maintained for the exclusive benefit of the employees; and (5) the employer must establish the plan with the intention of maintaining it indefinitely.

These requirements should be explained more fully and possible methods of compliance should be discussed in the long-awaited Treasury Regulations to be issued under Section 89. Churches should be aware of these requirements now, however, so that efforts may be commenced to ensure compliance.

To let you know the significance of this law, if a benefit is not in compliance, if your health insurance as of January 1 is not covered under this plan, and your janitor has open heart surgery in February, March or

April of 1989, the value of the cost for those health insurance benefits is taxable.

Section 89 will also add new non-discrimination requirements with respect to coverage of, and benefits for, highly compensated and non-highly compensated employees. The requirements should not have a great impact on the church health and life plans simply because it is unlikely that the church would have employees who fall within the law's definition of highly compensated. I have yet to meet a priest who makes \$50,000 a year, but that does not mean in future years they will not.

In conclusion, lay and clerical observers alike are generally aware of the limitations which the first amendment places on government's ability to regulate religion. In recent years, however, the line drawn by the first amendment has become increasingly narrow. Society, the legislative branch, the executive branch and the judiciary, have suddenly and pervasively encroached upon religious institutions. In the field of employment law in particular, the church cannot ignore the many obligations imposed upon it by federal law.

#### QUESTIONS AND ANSWERS

**JOE DIVITO, DIOCESE OF ST. PETERSBURG:** On the Title VII exemptions, we have had situations where the janitor, the housekeeper, the priest or someone else gets fired, puts down employer St. Mary's Church. The department does its thing, sends the forms out and one of the first questions is, "Do you have fifteen or more employees?" The answer is, "No." How safe are we in relying on the definition of employee as being the parish versus the diocese? Do we look at the parish who writes the checks or the diocese who is the real employer?

**MR. HOPKINS:** I think very simply, whoever writes the checks.

**JOE DIVITO, DIOCESE OF ST. PETERSBURG:** Even if it is not an entity. I think in those cases where you are separately incorporated it is probably very easy, you are safe. But in a diocese that does not have separate corporations, the parish is a non-entity.

**MR. HOPKINS:** It would be similar to a division in a corporation. I do not see any problem with that at all.

**BERNIE HUGER, ARCHDIOCESE OF ST. LOUIS:** Is there any church plan exemption with respect to Section 89?

**MR. HOPKINS:** No. The church exemption deals with ERISA and it is very clear that church plans are not covered under ERISA.

**BERNIE HUGER, ARCHDIOCESE OF ST. LOUIS:** But on the COBRA requirements—there is an exemption on that?

MR. HOPKINS: COBRA is not covered. COBRA is part of ERISA, the church does not have to comply with COBRA. What we are talking about is the tax exempt status of a benefit received by the employee. The church is exempt from ERISA and COBRA. The church, as a non-profit organization, is tax exempt. What we are talking about is whether the employee who receives the benefit is going to be taxed on the value of the benefit or not. It is an employee thing. That is why Section 89 does apply, no question about it. If the church does not do it right the employee is going to get hit. It can have a devastating impact on the employees.

GINO MARCHETTI, DIOCESE OF NASHVILLE: On the fifteen employees, one problem we ran into and maybe as a footnote, Title VII as I understand it gives the minimum limits for protecting employee rights but individual states may enact, and in fact have legislation which reduces that jurisdictional coverage. In Tennessee we only require eight individuals to be covered by the state acts and I think some get down to even two employees.

MR. HOPKINS: I think that realistically employees today enjoy more coverage under state laws than federal. Where are the California lawyers? They are probably crying right now. You get hit for punitive damages. You know AIDS in San Francisco—the San Francisco law on AIDS is that if you do not hire somebody because of AIDS, he can recover punitive damages, triple damages, attorney's fees and emotional distress under a San Francisco ordinance. Talk about punitive, they want to make sure people do not use AIDS as a basis for employment decisions.

JOEL BLASS, DIOCESE OF BILOXI: I am suffering from emotional distress right now by not having the benefit of the exemption under ERISA for a church plan. I have been using that and I hope you tell me that I am not totally wrong.

MR. HOPKINS: You have the consolation of religion and the solace of friends and that is it. You do not enjoy the exemption. What I am saying is—how is the church going to have income? It is going to become more commercial. You have to seek ways to bring money in so you can improve the schools. The only way you can do that is to become more commercial. The churches are going to have to act like private employees more and more, of necessity. If I leave you with nothing else, the point I want to make is that they ought to try to comply with these laws now because in five years, ten years they will have to anyway. It is easier to get used to a routine of complying with the laws than to make a massive change later. There is nothing worse to an employer who has the best secretary in the world and who has been paying her a salary that would knock your eyes out, for the Department of Labor to come in and say,

“Hey, she is not exempt, you owe her time and a half for the last two years.”

If it was an onerous requirement, if it was something that was difficult for the church to comply with, then you have to look at alternatives. You have to look at legislation, you have to look at ways to avoid the potential pitfalls. What we are talking about are minimums, minimum wage, overtime after forty hours, those sorts of things—things that morally should not be objectionable by any diocese. I think the church should be leading the way in these matters.