

# D.C. Circuit Weighs In On NLRB Test For Adjunct Faculty Unionization

**Labor Relations Update** on **March 21, 2019**

Colleges and universities should take note of the Court of Appeals for the D.C. Circuit's recent decision in *University of Southern California v. National Labor Relations Board*, Case No. 17-1149 (D.C. Cir. Mar. 12, 2019) addressing whether non-tenure track faculty at universities are "employees" under the National Labor Relations Act ("NLRA"), giving them the right to form a union, or whether they are "managers" and thus exempt from coverage under the NLRA.

In its decision, the D.C. Circuit largely upheld the standard set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014), a 2014 decision by the Obama-era National Labor Relations Board ("NLRB" or "Board"). The D.C. Circuit took issue, however, with how the Board applied *Pacific Lutheran* to the University of Southern California's ("USC") facts. Specifically, the court rejected the Board's treatment of a faculty subgroup (e.g., adjuncts) not holding a majority of seats on a university committee (e.g., curriculum committee), so that the subgroup could not be considered "managers" (the so-called "subgroup majority status rule"). It found that such a strict rule was "a major problem" and remanded the case back to the now Republican-controlled NLRB for reconsideration.

## **Background**

The Supreme Court held in *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980) that the critical inquiry for analyzing whether university faculty are employees or managers under the NLRA is whether they exercise "effective control" over central university policies. In *Pacific Lutheran*, the Board established a "majority status rule" which measured such "effective control" based on an assessment of whether: (1) faculty were part of university committees; (2) the committees exercised decision-making power as to "central" university policies; (3) faculty constituted a majority of the committee's membership; and (4) the committee's recommendations "routinely" became "operative without independent review."

The *Pacific Lutheran* Board also defined five key areas for evaluating whether university polices generated by faculty committees are considered “central,” three of which are considered “primary” and two of which are considered “secondary.” Primary decision-making areas include academic programs, enrollment management policies, and finances, while secondary areas include academic policies, and personnel policies and decisions.

### **NLRB Decision - *University of Southern California***

In 2016, the Regional Director in Los Angeles applied *Pacific Lutheran’s* “majority status rule” to a group of non-tenure track faculty at USC. The Regional Director did not analyze whether the faculty at large comprised a majority of university committees, but instead found that, specifically, non-tenure track faculty did not constitute such a majority—creating a “subgroup majority status rule” where the non-tenured subgroup had to make up a majority of the committees. Therefore, non-tenure track faculty were held to be “employees,” not “managers.” The Board adopted the Regional Director’s findings.

### **D.C. Circuit Decision - *University of Southern California***

On appeal, the D.C. Circuit affirmed the test articulated by the Board in *Pacific Lutheran*, but took issue with the Board’s application of the “majority status rule” to a “subgroup majority status rule.” The court stated that the Board erroneously “ignore[d] the possibility that faculty subgroups [e.g., tenured faculty and adjuncts], despite holding different status within the university, may share common interests and therefore effectively participate together” to exercise joint decision-making authority over university policies.

Thus, instead of focusing on whether subgroups, like adjuncts, make-up a strict majority of committees, the court held that the Board must engage in a two-step inquiry: (1) whether a faculty body *as a whole* exercises effective control based on the *Pacific Lutheran* factors; and (2) if so, whether the petitioning subgroup is included in that managerial faculty body. The court emphasized that the Board must treat the two steps of the *Pacific Lutheran* test separately, “and may not conflate them by asking whether the petitioning subgroup alone exercises effective control.”

The court remanded the case for the Board to reapply the D.C. Circuit’s modification of the *Pacific Lutheran* test to the non-tenure track faculty at issue in *University of Southern California*.

## Takeaways

The *Pacific Lutheran* framework for determining the managerial status of university faculty lives on, but with the D.C. Circuit’s limiting gloss. The court’s rejection of the “subgroup majority rule” may make it more difficult for non-tenure track faculty to unionize because the pathway to “employee” status has been narrowed. But the full impact of the D.C. Circuit’s decision is yet unknown, as the *Pacific Lutheran* test could now be reconsidered by the Trump Board, which already has overturned several Obama-era decisions.

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