



# Federal Appeals Court Reworks Legal Test To Determine Faculty's Union Status

Insights

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In a unanimous opinion, a federal appeals court just rejected the National Labor Relations Board's "subgroup majority status rule" for determining when college and university faculty members are to be deemed managers and therefore excluded from coverage under the National Labor Relations Act (*University of Southern California v. NLRB*). The rule, first articulated in the Board's 2014 *Pacific Lutheran* decision, required that a faculty subgroup (e.g. nontenure faculty) seeking to organize must have majority control of any committee that made managerial decisions before the Board would find that subgroup to be managers.

By rejecting the Board's "subgroup majority status rule," yesterday's D.C. Circuit Court of Appeals decision dispensed with the Board's reliance on "crude headcounts" and held that the proper test is for the Board to assess whether the faculty members at issue are "structurally included within a collegial faculty body to which the university has delegated managerial authority." Colleges and universities should familiarize themselves with this decision and its potential impact on faculty bargaining units.

## **In Or Out: Faculty Managerial Status Under *Pacific Lutheran***

In 1980, the Supreme Court held in *Yeshiva University* that faculty members who exercise "effective recommendation or control" over university policies are "managerial" and therefore excluded from coverage under the Act. Following many years of unclear guidance as to what types of faculty were managerial, the Board endeavored to create a more predictable framework in *Pacific Lutheran*.

There, the Board articulated that its review of faculty-decision making would look at five general areas: (1) academic programs; (2) enrollment management policies; (3) finances; (4) academic policies; and (5) personnel policies and decisions. Of the five, the first three were considered "primary" and the final two "secondary." The Board's analysis of each of the five areas was largely driven through an analysis of faculty participation on university committees.

Where faculty committees exercised "actual control or effective recommendation" over decision-making in the areas of inquiry, faculty members were more likely to be managerial. Underpinning the Board's analysis, however, was a bright-line rule requiring the challenged faculty subgroup to constitute a majority of a committee: "if faculty members do not exert majority control, the Board will not attribute the committee's conduct to the faculty." Absent that committee majority, the

committee's actions were not attributed to the faculty subgroup—contingent faculty in *Pacific Lutheran*—and the Board found them to be “employees” under the Act.

### **How Did We Get Here?**

In 2015, SEIU Local 721 petitioned to represent full and part-time non-tenure track faculty in the University of Southern California's Roski School of Art and Design. USC objected to the union's representation on the grounds that the petitioned-for faculty members were managers. The Regional Director overruled USC's objections based on *Pacific Lutheran*, finding that the school failed to establish that the faculty actually or effectively exercised control over decision making because the non-tenure track faculty did not constitute a majority of university committees.

The Board adopted the decision and ordered the election. Following the union's certification as the bargaining representative, USC refused to bargain and challenged the certification in the D.C. Circuit, which issued its decision on March 12.

### **Subgroup Majority Status Rule Ignores “Collegial” Structure Of University Governance**

USC's principal argument on review was that the Board's “subgroup majority status rule” conflicted with SCOTUS's holding in *Yeshiva University*—which turned not on the aggregation of power among faculty subgroups, but on the actual role played by the faculty as a collective body. The D.C. Circuit agreed, finding that *Yeshiva* had emphasized collegiality among faculty and its operation as a collective unit.

In its instruction to the Board, the court held that the Board should examine the structure and operation of the faculty as well as the duties they are assigned. The court required the Board to consider two issues: “whether a faculty body exercises effective control and, if so, whether based on the faculty's structure and operations, the petitioning subgroup is included in that managerial faculty body.” By merely determining which faculty subgroup had majority status, the Board's “subgroup majority status rule” conflicted with Supreme Court precedent, and therefore the D.C. Circuit denied enforcement and remanded to the Board for further proceedings.

Despite disagreeing with the Board on the subgroup majority status rule and remanding the case to the Board, the D.C. Circuit did endorse other parts of the Board's *Pacific Lutheran* analysis in. First, the court found that the Board's “effective control” test, which requires that a faculty committee's recommendation be “almost always” followed and “routinely” adopted “without independent review” was permissible. Second, the court rejected USC's argument that the Board's primary and secondary factors “inappropriately relegates academic and personnel polices to secondary status while elevating finances to primary status.” Instead, the court held, such designations are based on the fact that the primary factors tend to impact the university as a whole, align faculty with management, and affect the university's “product.”

Finally, the Court held that *Pacific Lutheran's* detailed standards for effective control, five articulated decision-making areas, and prioritization of those areas was an appropriate exercise of the Board's

discretion. In sum, while USC's challenge was successful, much of *Pacific Lutheran* was accepted and endorsed by the Court.

### **What Colleges And Universities Need To Know**

Yesterday's decision represents a meaningful change in the way in which the Board and the courts will review the appropriateness of faculty units moving forward. Nonetheless, because the D.C. Circuit affirmed other elements of the *Pacific Lutheran* analysis, it may still be very difficult to prove that adjuncts, contingent, and non-tenured faculty are within the managerial exception.

Institutions with faculty unions or those in the midst of organizing efforts should review their shared-governance structure and other *Pacific Lutheran* standards to determine what, if any, faculty will be considered managerial. Moreover, because the D.C. Circuit has ordered the Board to reassess its decision, it is possible that the current Trump Board will adhere to *Pacific Lutheran* or replace it with a new test.

Colleges and universities should continue to monitor this and other Board decisions affecting higher education. We will continue to assess the situation and provide necessary updates, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. For further questions, contact your Fisher Phillips attorney or any member of our [Higher Education Practice Group](#).

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