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Labor Relations Law in the Cannabis Industry:

Sorting Through the Confusing Interplay Between State and Federal Law

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States across the country are legalizing the medical and adult recreational use of marijuana and cannabis products. The newly legitimate business of cultivating, preparing, and distributing cannabis products creates jobs and profits—by some

estimates the industry generated more than $50 billion dollars in sales[1] and employed almost a quarter million people in 2020.[2]

Labor unions in the United States have struggled to grow, or even to maintain, membership in the private sector workforce, with rates of unionization outside of the public sector at record low levels.[3] The areas in which labor unions have done best are industries that are highly regulated and are difficult to move from state to state, such as utilities, health care institutions, and telecommunications.[4] The cannabis industry, which is highly regulated and, for now, limited in its ability to operate outside the state in which it is licensed and authorized, fits this model well and, unsurprisingly, has become a target for union organizational efforts.

The legal landscape surrounding union organizing and employee representation in the cannabis industry is surprisingly complex. The interaction of federal law with state and local licensing processes that, in some cases, requires cannabis companies to enter into arrangements with unions has created, and will likely continue to create, confusion in an industry that is already accustomed to dealing with the grey areas of state and federal law overlap and contradiction. This article attempts to highlight and outline how some of these complexities impact labor relations in the industry.

1. Labor Relations Law in the Private Sector

The National Labor Relations Act (NLRA or "the Act") is the primary federal law that governs private sector labor relations in the United States. Passed at the height of the Great Depression when labor disputes threatened an already weak economy, the NLRA states that it is the policy of the United States to "mitigate and eliminate"

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[1] *Chart: US Cannabis Industry's Economic Impact Could Hit $130 Billion by 2024*, MARIJUANA BUSINESS DAILY (July 21, 2020), https://mjbizdaily.com/chart-us-cannabis-industrys-economic-impact-could-hit-130-billion-by-2024/ (last visited Jan. 28, 2021).

[2] Bruce Barcott et al., *Cannabis Jobs Report: Legal Cannabis Now Supports 243,700 Full-Time American Jobs*, LEAFLY (Feb. 7, 2020), https://www.leafly.com/news/industry/243700-marijuana-jobs-how-many-in-america (last visited January 28, 2021).

[3] *See Union Members Summary*, United States Bureau of Labor Statistics (Jan. 22, 2021), https://www.bls.gov/news.release/union2.nr0.htm (last visited Jan. 28, 2021).

[4] *Id.*

certain "substantial obstructions to the free flow of commerce." It does this by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[5] In other words, the goal of the NLRA was to reduce the number and frequency of labor disputes that disrupted the economy by encouraging collective bargaining where appropriate.

The NLRA seeks to accomplish these goals in three specific ways. First, the Act protects employees from retaliation by their employers when the employees act together concerning work related issues. Section 7 of the Act allows employees to engage in concerted activity, with or without a formal labor union, "for the purpose of collective bargaining or other mutual aid or protection."[6] Therefore, Section 7 gives employees significant protections, so long as they are acting in concert with at least one other employee. Thus, employees are allowed to discuss wages and working conditions among themselves and with third parties, join together to request changes to wages and working conditions, and engage in a number of other activities without their employer terminating their employment.

Second, the Act provides an orderly mechanism to determine when an employer must recognize a labor organization as the representative of a group of employees. Before the NLRA, an employer was free to recognize or not recognize a union that claimed to speak for a group of employees, and a large number of pre-NLRA strikes involved demands that the employer bargain with a particular union. Under Section 9 of the Act, the National Labor Relations Board (NLRB or "Board") examines such claims and, if appropriate, holds an election among the employees to determine whether a majority of employees in an appropriate unit wish to designate a labor organization as their representative.[7] If the NLRB determines that a majority does wish to be represented by the union, then it certifies the union as the exclusive bargaining representative of the employees. It also provides for a systematic procedure by which employees can reject representational status from an existing labor organization.[8] A key feature of the NLRA is that the choice about whether a union

[5] 29 U.S.C. § 151.

[6] 29 U.S.C. § 157.

[7] 29 U.S.C. § 159.

[8] 29 U.S.C. § 159(e)(1).

should represent a group of employees lies with the employees, not with the employer or the labor organization.[9] Thus, as a general rule, an employer may not enter into an agreement with a labor organization concerning employee representation unless a majority of the employees have demonstrated, either through a formal vote or by some other means, that they wish to represented by the labor organization.

Finally, if a labor organization represents a group of employees, the NLRA requires both the labor organization and employer to bargain in good faith over "wages, hours, and terms and conditions of employment."[10] Neither side is compelled to reach an agreement on any specific term, but both sides must entertain all proposals with an open mind and with a desire to reach an agreement.[11]

2. Preemption of State and Local Labor Laws

While the NLRA itself is silent as to whether it preempts state laws relating to labor relations, the United States Supreme Court has held that the Act exclusively governs all activity "arguably" prohibited or protected by the NLRA and that states may not legislate in such areas.[12] Moreover, the Court has also held that states may not legislate in areas that Congress intended to leave unregulated.[13] For example, the Court has held that a municipality's refusal to renew a taxi service's operating license until it resolved a labor dispute was unlawful because it intruded into the collective bargaining process that Congress intended to be free from government regulation.[14] Most recently, the Court held that California could not indirectly regulate speech concerning unionization by imposing spending restrictions on the use of state funds.[15]

State and local governments, therefore, are generally not allowed to get involved in union representation issues covered by the NLRA. Thus, as a general rule, state law

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[9] The Act makes a specific exception to this rule for employers engaged primarily in the building and construction industry. 29 U.S.C. § 158(f).

[10] 29 U.S.C. § 158(d).

[11] *Id.*

[12] San Diego Building & Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

[13] Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132, 149 (1976).

[14] Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986).

[15] Chamber of Commerce v. Brown, 554 U.S. 60 (2008).

cannot mandate rules for union activity or recognition in the private sector that differ from those that apply under the NLRA. Nor, as a general rule, may states take steps to encourage or discourage union activity in private sector employment.[16]

An exception to NLRA preemption exists, however, when a state acts as a "market participant."[17] The Supreme Court held that "[w]hen a state owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA because pre-emption doctrines apply only to state regulation."[18] Thus, when the state undertakes a major construction project it can require that contractors who bid on the job be subject to various agreements with labor unions, often known as "Project Labor Agreements."[19] Several governmental entities that lease property have required lessors to enter into "Labor Peace Agreements" (LPA) that give labor unions preferential access to workers for the purposes of organizing.[20]

However, the NLRA does not apply to all employment relationships in the United States. It excludes from the definition of "employer" governmental entities, railroads, airlines, and organizations that are too small to affect interstate commerce.[21] Agricultural laborers, domestic service employees, independent contractors, and supervisors are excluded from the Act's definition of "employee."[22] States are generally

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[16] *See generally* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2006).

[17] Building and Construction Trades Council et al. v. Associated Builders & Contractors of Massachusetts/Rhode Island et al., 507 U.S. 218 (1993).

[18] *Id.* at 227.

[19] *Id.*

[20] For example, in 2014 The Board of Port Commissioners of the City of Oakland adopted Resolution No. 14-18 entitled "Resolution Adopting a Labor Peace Agreement Policy for Airport Concession Tenancy Agreements" https://www.portofoakland.com/wp-content/uploads/2016/07/Labor-Peace-Agreement-Policy-PDF.pdf; *see also generally* John Logan, *Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California*, University of California Institute for Labor and Employment (2003), https://escholarship.org/uc/item/7zt5b18b.

[21] 29 U.S.C. § 152(2).

[22] 29 U.S.C. § 152(3).

free to regulate labor relations among employers and employees who are not covered by the NLRA.

3. Administrative Structure of the NLRB

The structure and procedure under the NLRA are also important for understanding the context in which questions concerning the cannabis industry arise. The NLRA establishes the NLRB, which consists of five members appointed by the President for staggered terms of five years each.[23] The Board administers the Act primarily by deciding cases brought to it by the General Counsel. The General Counsel is appointed by the President for a four-year term and is not under the control of the Board itself.[24] The General Counsel has the "final authority" with respect to investigating charges and issuing complaints under the Act and for prosecuting such complaints before the Board.[25] Therefore, the General Counsel initially interprets the Act when deciding whether to issue a charge and move forward with a complaint. The General Counsel's office regularly produces advice memoranda for the NLRB's regional offices. In difficult cases, these memoranda inform the regional offices, and, upon publication, the general public about the legal rationale. If the General Counsel does not present a matter to the Board, the Board never issues a decision on the matter and no court has the opportunity to review such a decision.

4. State Cannabis Industry Laws Favoring Organized Labor

Marijuana (cannabis) is still classified as a Schedule 1 substance under the Federal Controlled Substances Act; along with heroin, LSD, ecstasy, methaqualone, and peyote, it is considered, under federal law, a drug with no currently accepted medical use and a high potential for abuse.[26] Nonetheless, as of January 2021, only six states

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[23] 29 U.S.C. § 153(a).

[24] 29 U.S.C. § 153(d).

[25] *Id.*

[26] Drug Enforcement Admin., U.S. Dep't of Justice, Drug Scheduling, https://www.dea.gov/drug-scheduling (last visited January 22, 2021).

maintained complete criminalization of cannabis, and the regulated use of the substance was fully legal in fifteen states.[27]

The states that have legalized medical and/or adult recreational use of cannabis have constructed elaborate licensure and tax structures to regulate the industry.[28] A number of these regulatory regimes have included provisions that encourage, or even require, that employers in the cannabis industry enter into certain arrangements with labor organizations.

For example, New York requires that applicants for a license in the medical marijuana industry enter into and maintain an LPA with a bona fide labor organization that is actively engaged in representing or attempting to represent its employees.[29] New York defines an LPA as an agreement between the applicant and a labor organization that prohibits the labor organization and members from engaging in picketing, work stoppages, boycotts, and any other economic interference with the business. [30] California law also requires that applicants for a cannabis license promise to enter into an LPA as a condition of getting the license but does not specifically define what an LPA is for those purposes.[31]

New Jersey law similarly requires that applicants for a cannabis license "submit an attestation signed by a bona fide labor organization stating that the applicant has entered into an LPA with such bona fide labor organization."[32] In addition, the law also provides that in reviewing permits, the licensing authority shall give priority to applicants that are party to a collective bargaining agreement with a labor organization

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[27] Map of Marijuana Legality by State, DISA (2021), https://disa.com/map-of-marijuana-legality-by-state (last visited January 22, 2021).

28 *See generally* Lewis Koski, *America's Cannabis Industry: Balancing Strong Regulation with Businesses' Desire for Accountability*, FORBES (Sept. 13, 2019), https://www.forbes.com/sites/lewiskoski/2019/09/03/americas-cannabis-industry-balancing-strong-regulation-with-businesses-desire-for-accountability/?sh=720a660a3ed2 (last visited January 22, 2021).

[29] N.Y. PUB. HEALTH LAW § 3365(1)(D)(iii).

[30] N.Y. PUB. HEALTH LAW § 3360(14).

[31] CAL. BUS. & PROF. CODE § 26051.5.

[32] N.J. STAT. ANN. § 24:6I-7.2(e).

that already represents cannabis workers.[33] The New Jersey law goes even further, however, and provides that unless the applicant enters into an actual collective bargaining agreement within 200 days after a dispensary opens, its license will be suspended.[34]

In an attempt to avoid federal preemption, several of these state laws are drafted to take advantage of the "market participant" exception to NLRA preemption. New York, for example, recites that the required LPA "protects the state's proprietary interests." These states seem to be asserting that they are *in* the cannabis business, not simply regulating it. Given the repeated tax revenue justification for legalizing cannabis, this may not be far from the truth.[35] It would be politically interesting, however, for a state to assert in court that it is actively participating in the cannabis market as opposed to just regulating it.

While some aspects of these laws may well be preempted by the NLRA, to date there have been no formal legal challenges to the requirements. Given the current status of the cannabis business under federal law and the politics surrounding it, even disappointed applicants denied state licenses may hesitate to turn to federal court. They may be reluctant to use federal law to protect a right to manufacture and sell a product that is illegal under that same federal law. One advocacy organization has written to the NLRB General Counsel's office requesting that the General Counsel bring legal action to invalidate these state laws, but, so far, they have not done so.[36]

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[33] *Id.*

[34] *Id.*

[35] *See generally* Jeff Chapman et al., *Can Revenue from Legalizes Recreational Marijuana Help Close State Budget Gaps?* (Dec. 8, 2020), https://www.pewtrusts.org/en/research-and-analysis/articles/2020/12/08/can-revenue-from-legalized-recreational-marijuana-help-states-close-budget-gaps.

[36] Letter from Raymond J. LaJeunesse, Jr., Vice President & Legal Dir. of Nat'l Right to Work Legal Defense Found., to Peter B. Robb, Gen. Counsel of the NLRB, Labor-Peace Agreements, Mandatory Collective Bargaining and State Interference with Employees'Fundamental Section 7 Rights (Mar. 19, 2020), https://www.nrtw.org/wp-content/uploads/2020/03/Letter-to-General-Counsel-FINAL-3-19-20.pdf (last visited January 22, 2021). With the ouster on January 20, 2021 of NLRB general counsel Peter Robb, there seems little chance that the office will take any action on this matter.

5. The Applicability of the NLRA to Cannabis Industry Workers

There are strong arguments that many of the state laws mandating certain types of union arrangements in the cannabis industry are preempted by the NLRA. If the NLRA doesn't apply to employees in this industry, however, then there would be no threat of preemption. There are two primary arguments that the NLRA does not apply to this industry. The first, that the federal Controlled Substances Act prohibits the entire industry and that, therefore, those involved should not be protected by federal laws, is unlikely to prevail. The second however, that many or most employees in the cannabis industry are excluded from the NLRA's protection because they are "agricultural laborers," is currently the prevailing view of the NLRB's General Counsel and is well supported in decades of decisional law.

a. Illegal Activities

An argument with initial appeal is that because the Controlled Substances Act outlaws the possession and distribution of cannabis, federal laws such as the NLRA should not be used to protect lawbreakers. Although the issue of the NLRA's applicability has not been directly addressed by a court, the proposition has been rejected in the context of other federal employment statutes. For example, courts that have allowed employees in the cannabis industry to bring a claim for unpaid overtime under the Fair Labor Standards Act have explicitly rejected the argument that the Controlled Substances Act precluded such a claim.[37]

Moreover, in 2013 the NLRB's Office of the General Counsel issued an advice memorandum concluding that the NLRB had jurisdiction over a marijuana cultivator despite the fact that the business itself was illegal under the Controlled Substances Act.[38] In that advice memorandum, the General Counsel's office concluded that:

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[37] *See, e.g.*, Kenney v. Helix TCS, Inc., 939 F.3d 1106 (2019); *see also* Greenwood v. Green Leaf Lab LLC, No. 3:17-cv-00415-PK, 2017 WL 3391671 (D. Or. July 13, 2017).

[38] Advice Memorandum from the NLRB Office of the Gen. Counsel to Jonathan B. Kreisberg, Regional Director of Region 1, Northeast Patients Group d/b/a Wellness Connection of Maine Cases 01-CA-104979; 01-CA-106405 (Oct. 25, 2013), https://www.managementmemo.com/files/2014/08/01_CA_104979_10_25_13_.pdf (last visited January 22, 2021).

> [I]t is appropriate for the Board to assert jurisdiction here even though the Employer's enterprise violates federal laws. DOJ, which is charged with enforcing the federal law prohibiting the possession, cultivation, and distribution of marijuana, has indicated that it will not prosecute medical marijuana companies such as the Employer unless they undermine enforcement priorities such as preventing the diversion of marijuana from states where it is legal under state law to other states. This federal policy towards state-level marijuana legalization efforts creates a situation in which the medical marijuana industry is in existence, integrating into local, state, and national economies, and employing thousands of people, some of whom are represented by labor unions or involved in labor organizing efforts despite the industry's illegality.[39]

Echoing court decisions, the memo concluded: "That the Employer is violating one federal law, does not give it license to violate another."[40]

An advice memorandum from the office of the NLRB's General Counsel is not, by itself, law; it is merely a decision by the prosecuting arm of the agency to assert jurisdiction. That decision could be rejected by the NLRB or by a reviewing court. Nonetheless, the reasoning of the argument, consistent with analogous court cases, indicates that the NLRA likely applies to employers in the cannabis industry even though those employers are violating another federal law. Thus, the illegality of the underlying business operations likely does not mean that states can avoid preemption arguments as they encourage or mandate certain organized labor arrangements as a condition of licensure in the cannabis industry.

b. Agricultural Workers

There is, however, a second avenue by which states may argue that their efforts on behalf of organized labor in the cannabis industry are not preempted by the NLRA. The NLRA provides that the term "employee" as used in the Act "shall not include an individual employed as an agricultural laborer."[41] If workers in the cannabis industry

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[39] *Id.* at 10.

[40] *Id.* at 11.

[41] 29 U.S.C. § 152(3). The origins and effect of this exclusion, particularly its role in maintaining and exacerbating racial inequality in the United States, has been the subject of considerable scholarship. *See, e.g.*, Juan F. Perea, *The Echoes of Slavery, Recognizing the Racist Origins of Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L. J. 95 (2011).

are "agricultural laborers" then the states are free to regulate labor relations between them and their employers, including potentially mandating forms of collective bargaining different than those under the NLRA. The precise contours of what exactly qualifies as "employed as an agricultural laborer" has been subject to some debate over the years, and that debate has gained new life in the era of legalizing the cannabis industry.

In the first several years of the Act's existence, the NLRB addressed the scope of the agricultural laborer exemption on several occasions; in 1940, the NLRB summarized it as follows in the case of *Park Floral*:

> An agricultural laborer, within the meaning of Section 2(3), is a person employed by the owner or tenant of a farm on which products in their raw or natural state are produced (1) to perform services on such farm in connection with the cultivation of the soil, the harvesting of the crops, the nursing, feeding, or management of livestock, bees, and poultry, or other ordinary farming operations; or (2) to perform services in connection with the processing of the products produced, or the packing, packaging, transportation or marketing of such products in their raw or natural, or processed state, as an incident to ordinary farming operations, as distinguished from manufacturing or commercial operation.[42]

In that case, the Board held that "persons employed to cultivate plants and flowers in commercial greenhouses, to perform other services in connection with the operation of these greenhouses, such as tending to the heating and watering facilities, or to pack, package, transport, or market the floral products grown are not agricultural workers."[43]

Beginning in 1946, however, and remaining largely unchanged every year thereafter, Congress included language in an appropriations rider directing that no money be spent:

> [T]o organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935, and as amended by the Labor-Management Relations Act, 1947, and *as defined in section*

[42] Park Floral, 19 NLRB 403, 414 (1940).

[43] *Id.*

> *3(f) of the Act of June 25, 1938 [i.e., Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(f)].*"[44]

Section 3(f) of the FLSA more precisely defines its agricultural exclusion than does the NLRA. The FLSA defines "agriculture" as:

> [F]arming in all its ranches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities...the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."[45]

Since the advent of this annual rider, the NLRB has used this broader definition and declined to exercise jurisdiction over disputes involving, for example, employees who grow flowers[46] or who slice and process mushrooms.[47]

The United States Supreme Court, however, has held that even the agricultural exemption under the FLSA is limited. The Court has held that employees who bulk (or ferment) tobacco[48] and who mill sugar cane into sugar[49] are not "agricultural employees" because they significantly transform the natural product from its raw state. As the Court noted "a process that results in such important changes is 'more akin to manufacturing than to agriculture.'"[50]

With the rise of the cannabis industry, and organized labor's keen interest in representing employees in that industry, the NLRB is once again addressing the scope

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[44] *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, 128 Stat. 2510 (emphasis added).

[45] 29 U.S.C. § 203(f).

[46] William H. Elliott & Sons Co., 78 NLRB 1078, 1078-80 (1948); Hershey Estates, 112 NLRB 1300, 1301 (1955).

[47] Pictsweet Mushroom Farm, 329 NLRB 852, 853 (1999).

[48] Mitchell v. Budd, 350 U.S. 473, 475 (1956)

[49] Maneja v. Waialua Agr. Co., 349 U.S. 254, 268, 274-75 (1955).

[50] Mitchell v. Budd, 350 U.S. 473, 482 (1956)

of the Act's exemption of "agricultural laborers." Shortly after states began decriminalizing and then legalizing marijuana, the Board's General Counsel initially asserted jurisdiction over industry employees in a number of cases.[51] More recently, however, the General Counsel's office and at least one regional director have declined to take up matters involving workers in the cannabis industry, citing the agricultural laborer exemption in the Act.

In an advice memorandum dated October 21, 2020 and released to the public January 25, 2021, the Office of the General Counsel advised a regional director to dismiss claims involving two employees who worked in indoor cannabis grow rooms.[52] The advice memo concluded that "although the two employees work in indoor grow rooms akin to greenhouses, which the Board has previously distinguished from traditional exempt agricultural work, they are exempt because they each substantially engage in the primary agricultural functions of harvesting, pruning, and sorting of plants."[53] The case, therefore, never went forward.

Similarly, in a decision dated October 23, 2020, the Acting Regional Director for Region 1 of the NLRB declined to direct an election among a group of employees who worked in various positions at a cannabis cultivation processing facility.[54] The union had initially sought an election conducted by the Massachusetts State Board of Labor Relations, but the employer argued that the NLRA, not state law, applied. In response, the union filed a petition with the NLRB and promptly asserted that it should be dismissed because the employees were excluded under the Act. The Regional Director closely examined the duties of each job category and concluded that most, but not all, were agricultural laborers under the Act. Because the union had stated that it did not wish to represent a bargaining unit smaller than the entire unit for which it had petitioned, the Regional Director dismissed the petition.

Given that neither of these matters proceeded beyond the initial stages, the NLRB itself has not issued any ruling concerning application of the Act to the cannabis industry. Until an appropriate case reaches the Board, or the Board engages in

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[51] N.E. Patients Group LLC, 1- CA-104979, 1-CA-106405 (Advice Memo, Oct. 25, 2013); High Level Health, 27-CA-146734, (Advice Memo, July 31, 2015). Both cases were resolved before reaching the full NLRB.

[52] Agri-Kind, 04-CA-260089 et. al. (case closing email) Date: Wednesday, October 21, 2020.

[53] *Id.*

[54] New England Treatment Access, LLC, 01-RC-264290 (October 20, 2020).

rulemaking, there is unlikely to be a definitive ruling on the precise scope of the Act's agricultural laborer exemption as it applies to the evolving cannabis industry. However, the recent decisions at lower levels of the agency not to assert jurisdiction over at least some employees in the industry indicate that many employees in the cannabis industry will not be covered by the NLRA.

6. State Laws Regarding Non-NLRA Labor Relations

There are several ramifications to the NLRB's current position that many or most workers in the cannabis industry are not within the scope of the NLRA. First, such employees may be covered by state laws that regulate non-NLRA employees. Second, and perhaps more important, state laws that favor unionization would not be preempted by federal law, leaving far more room for states to push unions than otherwise would be the case.

While the preemptive force of the NLRA is quite broad, precluding most state laws related to collective bargaining in the private sector, states are free to regulate collective bargaining in areas not covered by the NLRA. Eleven states—Arizona,[55] California,[56] Idaho,[57] Kansas,[58] Maine,[59] Louisiana,[60] Massachusetts,[61] New Jersey,[62] Nebraska, [63] New York, [64] Oregon, [65] and Wisconsin [66] —include at least some agricultural workers in their laws concerning collective bargaining. Employees working at cannabis companies in those states would have procedures for designating union

[55] ARIZ. REV. STAT. ANN. §§ 23-1381–1395.

[56] CAL. LAB. CODE §§ 1153–1155.

[57] IDAHO CODE §§ 22-4101–22-4113.

[58] KAN. STAT. ANN. §§ 44-818–44-831.

[59] ME. STAT. tit. 26, §§ 1321–1334.

[60] L.A. REV. STAT. ANN. §§ 23:881–23:889.

[61] MASS. GEN. LAWS Ch. 150A § 5A.

[62] N.J. Const. Art. 1, Sec. 19.

[63] NEB. REV. STAT. §§ 48-901–48-911.

[64] N.Y. LAB. LAW §701.

[65] OR. REV. STAT. §§ 662.805–662.825.

[66] WIS. STAT. §§ 111.01(2)(6)(c) & 111.115(3).

representatives and protections for engaging in concerted activity at the workplace. Employees in the other 39 states would not have such protections.

Importantly, for states like New Jersey, New York, and California that explicitly encourage or require employers to deal with unions as a condition of licensure, the chances of such laws being preempted by the NLRA are significantly reduced. States are free to regulate agricultural workers who are excluded by the NLRA.[67] However, the marginal status of cannabis workers as "agricultural laborers" may undercut the argument against preemption. As noted above, neither a court nor the NLRB itself has addressed the issue. The Supreme Court has held that states are prohibited from regulating activities that are "at least arguably protected" or "arguably prohibited" by the Act.[68] A court addressing the preemption issues could conclude that the status of workers in the cannabis industry is "arguable" under the NLRA because lower level decisions by a regional director and the General Counsel are not binding precedent.

Conclusion

More states are likely to legalize marijuana for medical and adult recreational use. Organized labor, long struggling in the private sector, sees an opportunity in this new highly regulated industry to reverse some of the losses of the past decades. As the industry grows and different states experiment with more or less aggressive approaches to labor relations within the industry, litigation is likely to increase, resulting in an initial period of uncertainty followed by a more settled legal landscape. Until that landscape arrives, employers in the cannabis industry need to balance state and federal laws with their practical business plans and opportunities in order to navigate the shifting terrain.

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[67] Giorgi v. Pa. Labor Relations Bd., 293 F. Supp. 873, 875 (E.D. Pa. 1968); Wilmar Poultry co. v. Jones, 430 F.Supp. 573, 576-78 (D. Minn. 1977); United Farm Workers Org. Comm. V. Super. Ct. of Monterey County, 4 Cal. 3d 556, 564-65 (1971). *See generally* Arthur N. Read, *Let the Flowers Bloom and Protect the Workers Too*, 6 U. PA. J. LAB. & EMP. L. 525, 532 n. 22 (2004).

[68] San Diego Building Trades v. Garmon, 359 U.S. 236 (1977).

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