

# Let the Flowers Bloom And Protect the Workers Too

By Arthur N. Read

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## **Let the Flowers Bloom And Protect the Workers Too**

**By Arthur N. Read** [Endnote 1](#)

At the February 2003 Journal of Labor and Employment Law “Workers on the Fringe” conference at the University of Pennsylvania Law School, I was asked to address the topic of the relationship between the legal status of the most marginalized workers and organizing the traditionally unorganized.

### **I.** **Fundamental NLRA Protections Are Denied to Marginalized Workers**

The National Labor Relations Act (NLRA)<sup>1</sup> sets forth the fundamental rights of workers protected under the NLRA in Section 7 of the Act. That provides that:

*Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....<sup>2</sup>*

The categories of workers most consistently marginalized in the law in this country include: those persons legally classified as “agricultural” workers<sup>3</sup> and “domestic service”

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<sup>1</sup> 29 U.S.C. § 151, *et seq.*

<sup>2</sup> NLRA Section 7, 29 U.S.C. § 157. Originally enacted July 5, 1935, ch. 372, § 7, 49 Stat. 452.

This section was amended in 1947 as part of the Taft-Hartley amendments to insert a provision that they have right to refrain from joining in concerted activities with their fellow employees. June 23, 1947, ch. 120, title I, § 101, 61 Stat. 140. Section 7 as amended continues:

“ . . . aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.”

29 U.S.C. § 157.

<sup>3</sup> *See*, Michael H. LeRoy and Wallace Hendricks, Should "Agricultural Laborers" Continue To Be Excluded From the National Labor Relations Act?, 48 *Emory L.J.* 489 (Spring 1999).

workers.<sup>4</sup> In addition, workers classified as independent contractors, temporary or contingent workers are regularly denied the same protections as other workers.<sup>5</sup>

Section 2 of the NLRA defines employees covered by that act by providing:

The term “*employee*” ... shall not include any individual employed as an *agricultural laborer*, or in the *domestic service* of any family or person at his home, ... or any individual having the status of an *independent contractor*....<sup>6</sup>

[Emphasis added].

Increasingly undocumented foreign-born workers without lawful employment authorization are similarly denied fundamental protections of other workers. The United States Supreme Court in its March 2002 decision in Hoffman Plastic Compounds, Inc. v. NLRB,<sup>7</sup>

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<sup>4</sup> See, Peggie R. Smith, Organizing the Unorganizable: Private Paid Household Workers And Approaches To Employee Representation, 79 *N.C. L. Rev.* 45 (December 2000).

<sup>5</sup> See, Catherine Ruckelshaus and Bruce Goldstein, From Orchards to the Internet: Confronting Contingent Worker Abuse, National Employment Law Project, Farmworker Justice Fund, Inc. (2002). Available at: <http://nelp.org/docUploads/pub120%2Epdf> (Last checked November 15,2003).

See also, Bruce Goldstein, Catherine Ruckelshaus, Larry Norton, Brent Garren, Subcontracting: The Legal Framework, Appendix A From Orchards to the Internet: Confronting Contingent Worker Abuse, *supra*. Available at: <http://nelp.org/document.cfm?documentID=222> and <http://nelp.org/docUploads/goldsteinlegal%2Epdf> (Last Checked November 15, 2003).

See also, Commission on the Future of Worker-Management Relations, The Future of Worker-Management Relations--Final Report, (1994) at pp. 61-70. Available at: <http://www.ilr.cornell.edu/library/keyWorkplaceDocuments/government/federal/futuremang.html> and <http://www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/DunlopCommissionFutureWorkerManagementFinalReport.pdf>.

<sup>6</sup> NLRA Section 2(3), 29 U.S.C. § 152(3)

<sup>7</sup> The U.S. Supreme Court decision in Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002), has seriously undercut arguments for legal protections for undocumented foreign born workers.

See, Rebecca Smith, Amy Sugimori, Ana Avendaño, and Marielena Hincapiè, Undocumented Workers: Preserving Rights and Remedies after Hoffman Plastic Compounds v. NLRB, National Employment Law Project (April 2003). Available at: <http://nelp.org/iwp/rights/organize/nlghoff040303.cfm> and <http://nelp.org/docUploads/wlghoff040303%2Epdf> (Last checked November 15, 2003).

significantly eroded protections for undocumented foreign-born workers without lawful employment authorization by ruling that although such persons were employees protected under the NLRA they were not entitled to recover under the back-pay damage provisions of the NLRA.<sup>8</sup>

## **II.** **A Strategic Approach Toward Addressing the Marginalization of Agricultural Workers**

This article grows out of continuing reflections on the development of effective strategies to confront the legal marginalization of “agricultural”<sup>9</sup> and undocumented foreign-born workers<sup>10</sup> which deny them fundamental protections available to other workers. It also attempts

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*See also*, General Accounting Office, Collective Bargaining Rights: Information on the Number of Workers With and Without Collective Bargaining Rights GAO-02-835 (September 2002) at pages 3-4. The report estimates that undocumented alien workers potentially directly affected by the Hoffman decision number 5.5 million. *See*: <http://www.gao.gov/new.items/d02835.pdf>. (Last checked November 15, 2003).

<sup>8</sup> Had the *Hoffman Plastics* decision been rendered at a time other than the post-September 11, 2001 political environment, a simple legislative amendment by Congress to the Immigration and Nationality Act would likely have been sufficient to undo the negative consequences of that decision. The United States Solicitor General and federal agencies were united in informing the Supreme Court that the administration supported the position of the National Labor Relations Board which the Supreme Court overturned. *See*, Transcript of Oral Argument January 15, 2002 by Assistant Solicitor Paul R. Q. Wolfson before the Supreme Court at pages 27-28. The Transcript is available at: [http://a257.g.akamaitech.net/7/257/2422/30jan20021630/www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/00-1595.pdf](http://a257.g.akamaitech.net/7/257/2422/30jan20021630/www.supremecourtus.gov/oral_arguments/argument_transcripts/00-1595.pdf). (Last checked November 15, 2003).

<sup>9</sup> A principal point of this article is to urge a change in the definition of “agricultural laborer.” This can be accomplished most directly through removing the annual federal appropriation rider requiring the usage of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, definition of agriculture by the NLRA in determining this issue and returning to a much more limited definition of excluded agricultural laborers. Alternatively, or additionally, the same step can be taken under state labor and employment laws.

<sup>10</sup> Although the percentage of agricultural laborer who are undocumented is a constant subject of dispute, it is unquestionable that a large percentage of the agricultural labor force is undocumented.

*See*, Findings from the National Agricultural Workers Survey (NAWS): A Demographic and Employment Profile of United States Farmworkers. U.S. Department of Labor, Office of the

to encourage new localized experimentation and alternative approaches to the failure of existing labor law to adequately protect the rights to self-organization of workers.<sup>11</sup>

**A. Identifying Barriers to the Expansion of Labor Protections under the NLRA to Agricultural Workers**

It would seem at first blush that advocates for the rights of agricultural workers should focus their energies on simply arguing for removing the agricultural labor exemption from the NLRA as the approach that would most fully protect the rights of agricultural workers.<sup>12</sup>

In fact, however, such a strategy would be unlikely to be successful in the foreseeable future given the overwhelming political power of agricultural employers in Congress. Moreover,

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Assistant Secretary for Policy, Office of Program Economics, Research Report No. 8 at p. 22 March 2000. Available at: [http://www.dol.gov/asp/programs/agworker/report\\_8.pdf](http://www.dol.gov/asp/programs/agworker/report_8.pdf). That report estimated that in 1997-98, 52 percent of hired farmworkers lacked work authorization. *Id* at p. 22.

On September 23, 2003 identical proposed legislation for the legalization of most undocumented agricultural laborers – the “Agricultural Job Opportunity, Benefits, and Security Act of 2003” (“AgJOBS”)- were introduced in both the Senate (S. 1645) and in the House of Representatives (H.R.3142). The draft legislation is the result of years of negotiations between agricultural employers and farm worker advocates. By mid-November 2003 S. 1645 had obtained 45 co-sponsors in the Senate. The proposed legislation offers the first hope since September 11, 2001 of changing the legal status of most current agricultural workers in the country. Supporters of the proposed legislation in announcing the proposal on September 23, 2003 estimated that the bill would benefit 500,000 agricultural workers. *See*, “UFW Announces Historic Compromise” at <http://www.ufw.org/H2Aanalysis.htm> and cached copy at [http://friendsfw.org/Legislation/Immigration/AgJobs/UFW\\_H2Aanalysis.pdf](http://friendsfw.org/Legislation/Immigration/AgJobs/UFW_H2Aanalysis.pdf) (November 24, 2002).

<sup>11</sup> For other commentators seeking to overcome the destructive effects of current federal labor law preemption over state initiatives to more effectively protect workers rights *see*:

- David A. Morand, Questioning The Preemption Doctrine: Opportunities For State-Level Labor Law Initiatives, 5 *Widener J. Public L.* 35 (1995).
- Henry H. Drummonds, The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace, 62 *Fordham L. Rev.* 469, 523-28 (1993).
- Michael H. Gottesman, Rethinking Labor Law Preemption: State Laws Facilitating Unionization, 7 *Yale J. On Reg.* 355, 356 (1990).

<sup>12</sup> *See*, LeRoy and Hendricks, 48 *Emory L.J.* 489. For example, *see*, S.284, H.R. 4179, 4408, 4789, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1975).

unless carefully implemented it would have a strong potential to undercut rights won by the United Farm Workers of America, AFL-CIO for agricultural workers subject to the California Agricultural Labor Relations Act.<sup>13</sup>

Virtually every labor practitioner who has represented workers subject to the NLRA is fully aware of the critical failure of the NLRA to adequately protect the rights of workers subject to the NLRA.<sup>14</sup>

Representation case procedures compelling an employer to recognize and bargain with an exclusive bargaining agent do not exist for farmworkers outside of a limited number of jurisdictions.<sup>15</sup> Therefore, extension of such procedures to agricultural workers (even if wholly

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<sup>13</sup> California Agricultural Labor Relations Act (ALRA), California Labor Code Sections 1140-1166.3, officially, referred to as the “Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975” as amended. This is available from the California Agricultural Labor Relations Board (ALRB) website, <http://www.alrb.ca.gov/> at <http://www.alrb.ca.gov/statutes/alra.pdf>. Regulations thereunder are also available on the ALRB website.

<sup>14</sup> The delays inherent in NLRB elections are particularly serious in agricultural industries with any seasonal element to the labor force needs. The California ALRA has tried to address this problem directly. The California ALRA requires that elections may only be conducted when at least 50% of the peak labor force is employed and provides that an election must be conducted within seven (7) days of a timely petition supported by authorization from 50% of the workforce at the time of the petition. *See*, Cal. Lab. Code § 1156.3(c). Where a strike has occurred the California ALRB is expected to exercise due diligence to attempt to conduct an election within 48 hours of the petition. *See*, Herman B. Levy, *The Agricultural Labor Relations Act of 1975—La Esperanza De California Para El Futuro*, 15 *Santa Clara L. Rev.* 783, 796–798 (1975).

The Pennsylvania Labor Relations Act (PLRA), 43 P.S. § 211.1 *et seq.*, has a similar provision requiring the Pennsylvania Labor Relations Board (PLRB) to hold an election within 20 days after a request by either party. Section 7(c) of the PLRA, 43 P.S. §211.7(c).

The California ALRA further provides a make whole remedy for employer failure to bargain violations that the NLRB has held Congress failed to authorize under the NLRA. *See*, Cal. Labor Code § 1160.3. *Compare*, Ex-Cell-O Corp., 185 N.L.R.B. 108 (1970), *rev'd sub nom. Int'l Union UAW v. NLRB*, 449 F.2d 1046 (D.C. Cir. 1971). *See also*, Tidee Products, Inc., 194 N.L.R.B. 1254 (1972). *See*, Levy, 15 *Santa Clara L. Rev.* at 802-803

<sup>15</sup> *See*, discussion below in Section [III\(B\)](#).

inadequate for seasonal workforces)<sup>16</sup> would appear to be a net plus were it not for the negative impact on farmworkers in California and those other jurisdictions where agricultural laborers excluded from the NLRA have utilized state law protections.

Under existing law and procedures, simply removing the exemption of agricultural laborers from protections under the NLRA would preempt the jurisdiction of the California Agricultural Labor Relations Board (ALRB) over workers.<sup>17</sup> This would risk undercutting hard won victories of California farm workers under the California ALRA after what will soon be 30 years of ALRA jurisdiction over agricultural workers. Such a huge percentage of agricultural laborers work in California that any such approach would be clearly counterproductive.<sup>18</sup>

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<sup>16</sup> See, discussion by attorney Marc Linder as part of a discussion of a “Second Reconstruction for Farm Workers” as to issues in amending the NLRA to include farm workers:

“The NLRA would ... have to be amended to accommodate the need for quick elections, union access to employers’ property, and secondary boycotts as has been done under the California Agricultural Labor Relations Act.”

Marc Linder, Migrant Workers and Minimum Wage: Regulating the Exploitation of Agricultural Labor in the United States, p. 302 (Westview Press, 1992).

<sup>17</sup> The scope of preemption under existing law of the continued functioning of the California Agricultural Labor Relations Board if the exemption for agricultural laborers was removed from the NLRA is demonstrated by the decision of the United States Court of Appeals for the Ninth Circuit in Bud Antle v. Barbosa, 45 F.3d 1261 (9<sup>th</sup> Cir. 1995), *cert. denied* 515 U.S. 1159 (1995). The court there held that:

So-called "Garmon preemption," named for San Diego Building Trades Council v. Garmon, 359 U.S. 236(1959), preserves the primary jurisdiction of the NLRB by prohibiting the states from regulating activities that are at least arguably protected by § 7 of the NLRA or arguably prohibited by § 8 of that statute. *See id.* at 247; accord Wisconsin Dep't. of Industry v. Gould, Inc., 475 U.S. 282, 286 (1986).

45 F.3d at 1361.

<sup>18</sup> Although the methodology of the U.S. Department of Agriculture Agricultural Statistics Service (NASS) Census of Agriculture is flawed, it does provide some objective employer provided data as to the size of the reported employee payroll and the number of positions in agriculture. The last period for which this data is currently available is 1997. That data indicates that nearly 23% of the reported agricultural payroll was in California and that the top 20 states in terms of agricultural payroll are as follows:

Moreover, the potential scope of current NLRA preemption could jeopardize other retaliation protections for agricultural workers which have built up under state law unless the scope of NLRA preemption is reconciled with such other protections.<sup>19</sup>

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1997 Census of Agriculture, Geographic Area Series, States - Table 5. Hired Farm Labor Workers and Payroll: Top 20 States 1997			
Hired farm labor	farms	workers	\$1,000 payroll
United States	650,623	3,352,028	14,841,036
20 top States	394,488	2,378,126	11,311,183
California	36,450	549,265	3,392,577
Florida	12,199	124,969	925,607
Texas	55,912	193,484	785,447
Washington	13,598	251,395	771,003
North Carolina	18,984	126,934	487,395
Oregon	12,798	124,420	478,595
Wisconsin	25,179	96,482	409,009
Michigan	14,481	95,865	369,145
Pennsylvania	14,055	66,295	362,811
Illinois	23,876	76,607	344,362
New York	11,563	61,589	336,357
Minnesota	27,434	99,439	334,790
Iowa	33,016	94,147	316,779
Ohio	19,017	78,450	314,865
Kansas	20,660	60,431	306,410
Nebraska	21,469	68,312	300,578
Georgia	12,267	66,310	285,883
Idaho	9,410	63,415	270,843
Colorado	9,394	46,072	263,603
Arizona	2,726	34,245	255,124

<sup>19</sup> The NLRA as a practical matter has no injunctive remedies for terminated discriminated workers. Other protections under state and federal law in the context of retaliation can be far broader. For example, although it would not be preempted the federal Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. § 1801 *et seq.*, authorizes equitable relief including injunctions for retaliation in violation of that Act. *See*, 29 U.S.C. § 1854.

Similarly, in July 1980 11 farmworkers fired by a New Jersey farming operation and their labor organization were able to file an action in equity under N.J.S.A. Const. Art. I, Sec 19 for a temporary restraining order to reinstate workers as a result of organizing and won a Consent Injunction reinstating eleven workers. *See*, El Comite de Trabajadores Unidos de Sunny Slope v. Sunny Slope Farms, Inc., Superior Court of New Jersey, Chancery Division, Docket No. \_\_\_\_\_ (July 1980). *See also*, Richard A. Goldberg and Robert F. Williams, Farmworkers'

**B. Expanding Protections for “Agricultural” Laborers While Limiting Federal NLRA Preemption of Effective State Laws**

The proposed solution to his dilemma is to:

1. Seek to expand and protect the effectiveness of protections for labor organizing under state and territorial laws and other federal laws for persons denied NLRA protection as agricultural laborers.<sup>20</sup>
2. Have the NLRB decline to exercise jurisdiction over workplaces including employees “arguably” subject to the NLRA,<sup>21</sup> where such workers would otherwise be adequately protected under state or territorial laws covering such employees.
3. Remove the NLRA annual appropriation rider requiring the NLRB to utilize the Fair Labor Standards Act (FLSA) definition of agricultural laborers under the NLRA.<sup>22</sup>

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Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights, 4 *Rutgers L. J.* 729 (1987).

<sup>20</sup> It is well established that state regulation of agricultural workers excluded from the NLRA is not preempted by the NLRA. See, Giorgi v. Pennsylvania Labor Relations Board, 293 F. Supp. 873, 875 (E.D. Pa. 1968); Willmar Poultry Co. v. Jones, 430 F. Supp 573 (D.Minn.1977). See also, NLRB v. Committee of Interns and Residents, 556 F.2d 810 at fn. 5 (2nd Cir. 1977), and United Farm Workers Organizing Committee v. Superior Court, 4 Cal. 3d 556, 483 P.2d 1215, 94 Cal. Rptr. 363 (1971) (En Banc).

See, discussion in Section [III](#) below as to expanding protections under other laws.

<sup>21</sup> See, footnote 17 above.

<sup>22</sup> See, John A. Bourdeau, Who Are "Agricultural Laborers" Exempt From Coverage of National Labor Relations Act § 2(3) (29 USCS § 152(3), 130 A.L.R. Fed. 1 at § 2a(1997).

In Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 762–763 (1949), the Supreme Court set forth two distinct branches of the FLSA definition of agriculture:

First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in the primary meaning. Second, there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with “such” farming operations.

See also, 29 CFR 780.105.

4. Narrowly redefine by NLRB regulation “agricultural laborers” excluded as employees from protections under the NLRA, while declining to exercise such expanded NLRB jurisdiction where state and territorial laws adequately protect the rights of such persons.

5. Such a redefinition of “agricultural laborers” should build upon initial NLRB jurisprudence from 1939-1946, prior to the imposition of the NLRB appropriation rider requiring the utilization of the FLSA definition of agriculture.<sup>23</sup>

**C. Limiting the Scope of NLRA Preemption of Effective State Laws**

The proposed process builds on existing statutory authority vested in the National Labor Relations Board to decline and to cede its jurisdiction over categories of workers and cases.<sup>24</sup> Instead of the federal labor law wholly preempting state enforcement of laws to protect the labor rights of employees, federal labor policy would set minimum standards of protections which state agencies would be expected to meet in order to operate in this arena.

Such modified preemption would be more similar to federal preemption as applied in other areas of law such as Section 18 of the Occupational Safety and Health Act.<sup>25</sup>

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<sup>23</sup> See, discussion below in Section [IV\(B\)](#).

<sup>24</sup> See, NLRA § 10 (a), 29 U.S.C. § 160(a). See also, NLRA § 14(c), 29 U.S.C. § 164(c).

<sup>25</sup> Section 18 of the Occupational Safety and Health Act at 29 U.S.C. § 667 provides:

**State Jurisdiction and State Plans**

(a) Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.

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(c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgement –

- (1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,
- (2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6 which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,
- (3) provides for a right of entry and inspection of all workplaces subject to the Act which is at least as effective as that provided in section 8, and includes a prohibition on advance notice of inspections,
- (4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,
- (5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,
- (6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,
- (7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and
- (8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

(d) If the Secretary rejects a plan submitted under subsection (b), he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing.  
29 U.S.C. § 667.

Other federal statutes have been designed as part of federal and state enforcement schemes which do not preempt further local regulation. *See*: Federal Insecticide, Fungicide and

**D. Proposed Actions to be Taken Under the National Labor Relations Act**

**1. Promulgation of Regulations Under Sections 10(a) and 14(c) of the NLRA**

The National Labor Relations Board should promptly promulgate regulations and procedures<sup>26</sup> for exercising its power under Section 10(a) of the NLRA<sup>27</sup> to enter into agreements

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Rodenticide Act (FIFRA), 7 U.S.C. Secs.136-136y. The Environmental Protection Agency (EPA) Administrator may give a state primary enforcement responsibility for pesticide use violations if it has adopted adequate pesticide laws and regulations and meets other requirements set forth in the Act. If a state with primary enforcement responsibility is not adequately enforcing pesticide use regulations, the Administrator may rescind that responsibility, in whole or in part. 7 U.S.C. Secs.136w-1 and 136w-2.

<sup>26</sup> In Produce Magic, 318 N.L.R.B. 1171 (1995) two dissenting NLRB members (Chairman Gould and Member Browning) argued for a public comment procedure for considering petitions for ceding jurisdiction to a state agency. Their dissent noted:

Before ruling on the cession petition, we believe that the Board should seek further public comment. Although we recognize that prior Board cases have interpreted the 10(a) proviso narrowly, we are concerned that such decisions have effectively rendered the proviso a nullity, as evidenced by the absence of any cession agreements since the proviso was added by the 1947 amendments.

... Given that a cession agreement with one State might lead to requests for similar agreements from other States, we would publish a Federal Register notice soliciting comments on Local 890's petition from all interested persons. Accordingly, we dissent from our colleagues' denial of Local 890's cession petition.

318 N.L.R.B. at 1172-73.

<sup>27</sup> 29 U.S.C. § 160(a). That section provides:

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.*

with states and territories (including the Commonwealth of Puerto Rico)<sup>28</sup> to cede NLRB unfair labor practice jurisdiction to such agencies of states or territories over cases in industries other than mining, manufacturing, communications, and transportation<sup>29</sup> “...unless the provision of the

Emphasis added.

<sup>28</sup> Puerto Rico by Constitution (PR CONST Art. II, §§ 17 and 18) and by statute (Puerto Rico Labor Relations Act, 29 L.P.R.A. § 61 *et seq.*) protects the rights of works to organize. Puerto Rico does not exempt agricultural workers from the protections of its labor relations statutes.

<sup>29</sup> Standard Industrial Classification (SIC) Divisions readily indicate for most industries whether they would be subject to Section 10(a) or not. They are:

<b>SIC</b>	<b>Industry</b>	<b>Subject to Sec. 10(a)</b>
01-09	Agriculture, forestry, & fishing (01-09)	TRUE
10-14	Mining (10-14)	FALSE
15-17	Construction (15-17)	TRUE
20-39	Manufacturing (20-39)	FALSE
40-49	Transportation & pub. utilities (40-49)	FALSE
48	Communication (48)	FALSE
50-51	Wholesale trade (50-51)	TRUE
52-59	Retail trade (52-59)	TRUE
60-67	Finance, insurance, & real estate (60-67)	TRUE
70-89	Services (70-89)	TRUE
91-97	Public administration (91-97)	TRUE
99	Nonclassifiable establishments (99)	TRUE

Those industries which are likely subject to Section 10(a) to the extent that they are subject to NLRA jurisdiction are:

<b>SIC</b>	<b>Industry</b>	<b>SIC</b>	<b>Industry</b>
01	Agricultural Production Crops	67	Holding And Other Investment Offices
02	Agricultural Production Livestock	70	Hotels And Other Lodging Places
07	Agricultural Services	72	Personal Services
08	Forestry	73	Business Services
09	Fishing, Hunting, And Trapping	75	Auto Repair, Services, And Parking
15	General Building Contractors	76	Miscellaneous Repair Services
16	Heavy Construction, Ex. Building	78	Motion Pictures
17	Special Trade Contractors	79	Amusement & Recreation Services
20	Food And Kindred Products	80	Health Services
51	Wholesale Trade-Nondurable Goods	81	Legal Services
52	Building Materials & Garden Supplies	82	Educational Services
53	General Merchandise Stores	83	Social Services
54	Food Stores	84	Museums, Botanical, Zoological Gardens
55	Automotive Dealers & Service Stations	86	Membership Organizations

State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of th[e NLRA] or has received a construction inconsistent therewith.<sup>30</sup>

The NLRB in the course of this regulatory process should consider the degree of consistency required between the specific state or territorial unfair labor practice provision and the NLRA in order to meet this standard. The language of Section 10(a) of the NLRA would also appear to permit the NLRB to retain jurisdiction over specific unfair labor practice sections that it did not believe the state or territorial law reflected with sufficient fidelity while permitting the NLRB to defer its jurisdiction to the state or territorial agency where the matter did not involve such unfair labor practice provisions.

In a significant number of workplaces it is not uncommon for some workers to be covered as employees under the NLRA while others are excluded as agricultural laborers.<sup>31</sup> Such

<b>SIC</b>	<b>Industry</b>	<b>SIC</b>	<b>Industry</b>
56	Apparel And Accessory Stores	87	Engineering & Management Services
57	Furniture And Home furnishings Stores	88	Private Households
58	Eating And Drinking Places	89	Services, Nec
59	Miscellaneous Retail	91	Executive, Legislative, And General
60	Depository Institutions	92	Justice, Public Order, And Safety
61	Non-depository Institutions	93	Finance, Taxation, & Monetary Policy
62	Security And Commodity Brokers	94	Administration Of Human Resources
63	Insurance Carriers	95	Environmental Quality And Housing
64	Insurance Agents, Brokers, & Service	96	Administration Of Economic Programs
65	Real Estate	97	National Security And Intl. Affairs
		99	Non-classifiable Establishments

Its placement in the SIC Code structure would theoretically make the status of SIC Code 20 Food And Kindred Products (Food Processing) questionable, but the history of the NLRA would likely indicate that it was intended to be included in enterprises subject to Section 10(a) of the NLRA.

<sup>30</sup> Section 10(a) of the NLRA, 29 U.S.C. § 160(a).

<sup>31</sup> As will be discussed more fully below at text accompanying footnote 64, the Pennsylvania Labor Relations Board (PLRB) has consistently since 1956 asserted jurisdiction under the Pennsylvania Labor Relations Act (PLRA), 43 P.S. § 211.1 *et seq.*, over the mushroom industry and greenhouse horticultural specialty workers despite the exclusion of such workers as

cessation agreements under Section 10(a) of the NLRA should be promptly be entered into with states and territories with appropriate procedures for protecting rights of classes of workers (specifically including agricultural workers) who are currently excluded from protections under the NLRA to the extent that the same employers may have other employees in covered workplaces subject to the NLRA.<sup>32</sup>

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“agricultural laborers” under the NLRA and a parallel provision of the PLRA excluding agricultural workers, 43 P.S. § 211.3(d).

After a PLRA election was held amongst employees of a mushroom industry employer, the employer attempted to overcome the overwhelming vote in favor of the labor organization by asserting that a significant percentage of its workers were not agricultural laborers and were subject to the exclusive jurisdiction of the National Labor Relations Board under the NLRA.

The resulting certified bargaining unit excluded workers who regularly interacted with bargaining unit members who were agricultural workers, because such workers regularly handled some outside product of other mushroom producers. In the Matter of the Employes of Blue Mountain Mushroom Company, Inc., PLRA-R-97-6-E (PLRB, December 15, 1998), *affirmed sub nom. Blue Mt. Mushroom Co. v. Pennsylvania Labor Rels. Bd.*, 735 A.2d 742 (Pa. Cmwlth. 1999), *appeal denied* 567 Pa. 716 (2001).

The same issue arises regularly in other workplaces where employers have packinghouses that pack product including product produced by other employers. The resulting exclusion of such packinghouse workers from a PLRA certified bargaining unit undermines the ability of a labor organization to effectively represent the rights of all employees of an employer. *See, In the Matter of the Employes of Kaolin Mushroom Farms, Inc.*, PLRA-R-93-9-E (Hearing Examiner Order, July 6, 1993) (excluding packers, shippers, and maintenance shop personnel as subject to NLRB jurisdiction). *See*, subsequent Order of PLRB certifying bargaining agent affirmed at: Kaolin Mushroom Farms v. Pennsylvania Labor Rels. Bd., 702 A.2d 1110 (Pa. Commw. Ct. 1997), *appeal dismissed as improvidently granted*, 555 Pa. 692, 722 A.2d 1059 (1998). Although the Kaolin Workers Union now has a collective bargaining agreement there is no existing mechanism to force the employer to include within the bargaining unit such workers who are subject to NLRB jurisdiction.

<sup>32</sup> It would be theoretically possible for the NLRB to determine that it would cede unfair labor practice jurisdiction, while retaining authority to determine certain unfair labor practice issues if the state tribunal’s law were deemed to be not sufficiently consistent with the NLRA as to that specific provision. Alternatively, the State tribunal could agree to apply NLRA law to employees covered by the NLRA and the NLRB could establish procedures to retain jurisdiction to review such claims. (This could operate in much the same manner as would a deferral to arbitration).

The Pennsylvania PLRA, 43 P.S. § 211.1 *et seq.*, offers an interesting example of a statute that is substantively very similar to the NLRA, but with the single significant difference

Such agreements should include agreements with the California Agricultural Labor Relations Board to cede jurisdiction over employees “arguably” subject to the NLRA who are employed by employers in California subject to the California Agricultural Labor Relations Act.<sup>33</sup> A ceding of jurisdiction under Section 10(a) of the NLRA to the California ALRB will likely require the NLRB to rethink the degree to which the provisions of the California ALRA as applied by the California ALRB need to be *identical* to the NLRA as applied by the NLRB.<sup>34</sup>

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that unfair labor practice charges must be filed within six weeks rather than six months. An agreement ceding jurisdiction could retain sufficient residual NLRB jurisdiction to consider unfair labor practice claims otherwise untimely under Pennsylvania law. Alternatively, the PLRB could agree by regulation to utilize the NLRA’s time limits for workers subject to NLRA jurisdiction. *See*, PLRA § 8(c), 43 P.S. § 211.8(c) providing “...No order shall award back pay from a period more than six weeks prior to the time of the filing of the complaint.”

<sup>33</sup> The California ALRA attempted to avoid any conflict with the NLRA by adopting a definition of covered agricultural employees mirroring the NLRB FLSA derived definition of excluded agricultural laborers under the NLRA. *See*, Cal. Lab. Code § 1140.4. Nonetheless, the potential for differing interpretations of the FLSA standard has resulted in conflict between the ALRB and the NLRB. *See*: Bud Antle v. Barbosa, 45 F.3d 1261; Produce Magic, 311 N.L.R.B. 1277 (1993) (Produce Magic I); and Produce Magic, 318 N.L.R.B. 1171 (Produce Magic II).

<sup>34</sup> As to the California ALRA as initially enacted *see*: Levy, 15 *Santa Clara L. Rev.* at 785–788 (1975). The ALRA has been amended in 1976, 1978, 1979, 1980, 1983, 1994, 2001, 2002, and 2003. It is beyond the scope of this article to review the full current status of the ALRA. Fundamentally, however, it is critical to note that it has been uniquely crafted to responding to the specific administrative problems of effective protections for agricultural laborers excluded from the NLRA.

Professor David Morand has pointed out that:

State laws are not required to be "consistent" with federal laws; section 10(a) allows the NLRB to cede jurisdiction "unless" the law of the state in question is "inconsistent" with federal law. The consistent or inconsistent distinction is an important one that could substantially affect future rulings, yet it is often treated as if it were a distinction without a difference. The phrase "unless inconsistent with" is by definition significantly broader than "consistent with." For example, Black's Law Dictionary defines "inconsistent" as follows: "mutually repugnant or contradictory. Contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other; as, in speaking of 'inconsistent defenses,' or the repeal by a statute of 'all laws inconsistent herewith.'" The definition of "consistent" in Black's is not antonymous with "inconsistent." "Consistent" is defined as "having agreement with itself or something else; accordant; harmonious; congruous; compatible;

This issue may not be easily resolved since the only recent consideration by the NLRB of Section 10(a) of the NLRA involved a rejection of a request by the California ALRB for the NLRB to cede jurisdiction to it.<sup>35</sup> Nonetheless, as part of a rethinking of the degree to which a state law must conform to federal law and the degree to which the state could agree to apply federal law to NLRA covered employees it might be possible to resolve such differences.<sup>36</sup>

Perhaps even more significantly, Section 14(c)(1) of the NLRA allows the Board to decline to assert jurisdiction over a labor dispute "...where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction."<sup>37</sup> Where a bargaining unit has been established under a state's labor relations act or where a "question concerning representation" has arisen in such a workplace with a potential bargaining unit including persons excluded from the NLRA as agricultural workers, the NLRB could utilize its power under Section 14(c)(1) of the NLRA to decline jurisdiction over the

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compilable; not contradictory." Thus "inconsistent" denotes a more restricted class of situations than does "not consistent."

*See, Morand, 5 Widener J. Public L. at 66-69 text accompanying footnotes 186-189.*

<sup>35</sup> Produce Magic, 318 N.L.R.B. at 1172.

<sup>36</sup> A formalized process could identify specific concerns with the state law which the state could then determine if it was prepared to address legislatively. Alternatively, the NLRB could retain jurisdiction to hear specific categories of unfair labor practices for workers subject to the NLRA.

<sup>37</sup> Section 14(c)(1) of the NLRA, 29 U.S.C. § 164(c)(1). That section states:

(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

As to current jurisdictional standards, *see*: NLRB Representation Case Handling Manual, An Outline of Law and Procedure - Chapter 1. Jurisdiction available at:

[http://www.nlr.gov/nlr/legal/manuals/outline\\_chap1.pdf](http://www.nlr.gov/nlr/legal/manuals/outline_chap1.pdf) and  
[http://www.nlr.gov/nlr/legal/manuals/outline\\_chap1.asp](http://www.nlr.gov/nlr/legal/manuals/outline_chap1.asp).

workers subject to the NLRA in order to permit the state or territorial agency to assert jurisdiction over all workers in that workplace including those who might arguably be subject to NLRB jurisdiction.<sup>38</sup> This should include workplaces with employees subject to the California Agricultural Labor Relations Board.<sup>39</sup>

Consideration should also be given as to entering more broadly into agreements under NLRA Section 10(a) with those state and territorial agencies which have the capacity to provide protections to workers subject to the NLRA. Agreements for federal funding to such state and territory agencies as part of such agreements could be further explored.

**2. Removal of the Federal Appropriation Rider Requiring Usage of the FLSA Definition of Agriculture.**

As suggested above, after the NLRB has established procedures for declining expanded jurisdiction over agricultural laborers where there are adequate state or territorial laws covering workers who might be arguably subject to the NLRA, Congress should remove the annual appropriation rider tying the definition of employees excluded from the NLRA as agricultural laborers to the FLSA definition of agriculture. Thereafter, the NLRB should exercise its authority upon removal of appropriation riders defining agriculture to promulgate regulations narrowly defining agricultural laborers excluded from protections under the NLRA.<sup>40</sup> The

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<sup>38</sup> Such an approach applied to the Pennsylvania PLRA would permit the PLRB to determine the appropriate scope of bargaining units at such workplaces without have to artificially exclude workers otherwise appropriately included simply because of such workers being subject to the NLRA. *See*, footnote 31 above.

<sup>39</sup> NLRA Section 14(c) 29 U.S.C. § 164(c) would allow the NLRB to defer to the California ALRB in workplaces with employees clearly excluded from the NLRA without having to resolve all issues as to the degree of similarity and differences between the California ALRA and the NLRA.

<sup>40</sup> It is important to understand that the sequence of steps suggested here is critical to not upset the balance of state labor regulation which has already occurred. A change in the federal NLRA definition of agricultural workers without a companion ceding of jurisdiction to state agencies which have regulated employees previously treated as agricultural workers under federal law

agricultural laborer exemption should be consistent with the early standards developed by the NLRB prior to the initial adoption of the current appropriation rider requiring the usage of the FLSA definition of agriculture.<sup>41</sup> In particular, workers in indoor “horticultural specialty” operations such as greenhouses and mushroom operations should not be treated as agricultural laborers.<sup>42</sup>

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could be disruptive of existing collective bargaining arrangements particularly in California, but potentially in other jurisdictions as well.

<sup>41</sup> This issue is discussed extensively below in Section [IV\(B\)](#).

<sup>42</sup> The importance of agricultural workers employed in horticultural specialty operations is that many more of these positions offer year round employment opportunities in which labor organizing is more likely to occur.

The U.S. Department of Agriculture Agricultural Statistics Service (NASS) *1997 Census of Agriculture* included a special *1978 Census of Horticultural Specialties* (which includes products in addition to those produced in indoor greenhouse or mushroom operations). Data on the top 20 states therein (by payroll) is as follows:

Table 49. Selected Production Expenses for Horticultural Operations by State: 1998				
		Hired Labor		
	Area	Operations	Payroll	Employees
			(\$1,000)	
Rank		Total	Total	Total
	United States	19,876	3,603,812	376,194
1	California	1,827	738,560	62,276
2	Florida	2,042	482,738	40,923
3	Michigan	1,048	232,807	25,979
4	Oregon	1,061	211,111	25,853
5	Pennsylvania	1,092	197,006	18,873
6	Texas	687	160,674	15,753
7	Ohio	880	146,800	14,928
8	Illinois	562	103,639	9,742
9	North Carolina	853	93,542	11,658
10	New York	805	87,885	8,818
11	Washington	555	83,488	14,203
12	Connecticut	295	82,723	7,279
13	New Jersey	606	80,949	6,767
14	Tennessee	500	61,357	6,210
15	Georgia	398	58,798	5,952
16	Colorado	277	55,496	6,423
17	Wisconsin	570	55,459	7,867

Only outdoor hand harvest agricultural laborers employed directly by employers engaged only in farming the land and performing no secondary food processing activities should be excluded from protections as agricultural laborers.<sup>43</sup>

**III.**  
**Expanding Protections for the Right of Agricultural Laborers Currently Excluded from the NLRA to Organize**

It is critical to note as a threshold matter that the right of all workers, including agricultural and domestic workers excluded from protection under the NLRA, to collectively withhold their services or otherwise to engage in collective activity exists independently of whether or not that right is specifically protected under the NLRA. This right has foundations

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Rank		Total	Total	Total
18	Minnesota	385	55,008	7,352
19	Alabama	270	53,303	5,939
20	Virginia	387	50,795	5,808

<sup>43</sup> See, footnote 22 above. The NLRB has narrowly interpreted primary agriculture to exclude many operations that might generally be assumed to be agricultural in nature. See, Produce Magic, 311 N.L.R.B. 1277 where the NLRB affirmed findings of its Regional Director that:

This leaves for determination the status of cutter-packers. The act of severing the lettuce from the ground plainly is “harvesting” and, therefore, those who perform this work are agricultural laborers while they are doing so. The videotape introduced into evidence reveals that the cutter both severs the lettuce and trims off any excess from the bottom. This work accounts for 50 percent of each cutter-packer’s workday. The remainder of each cutter-packer’s day is spent in the packing function. Approximately 25 percent of packing is comprised of “sleeving,” wherein the packer wraps the lettuce head before inserting the head into a carton. Such work, I find, is analogous to traditional packing operations which, as in *Mario Saikhon*, [278 N.L.R.B. 1289, 1291 (1986), and [*Employer Members of*] *Grower-Shippers [Vegetable Assn.]*, [230 NLRB 1011 (1977)], is performed in the field but, nevertheless, does not constitute primary agriculture.

The record establishes that approximately 75 percent of the Employer’s packing operation is comprised of “naked pack” operations, wherein the packer may have occasion to “trim” by hand excess or dead leaves before inserting the lettuce heads directly into the carton. This trimming and packing function is precisely the kind of activity which the Board found did not constitute primary agriculture in *Mario Saikhon*, *supra*, and *Grower-Shipper*, *supra*, and I so find here.

under the 13<sup>th</sup> amendment to the United States Constitution.<sup>44</sup> It also has foundations under the

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<sup>44</sup> Under sufficiently aggravated conditions, attempted employer interference with employee's rights to withhold services would raise issues of slavery in violation of the 13<sup>th</sup> amendment to the United States Constitution or peonage under 42 U.S.C. § 1994. which provides:

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void

42 U.S.C. § 1994.

See, Baher Azmy, Unshackling the Thirteenth Amendment: Modern Slavery and A Reconstructed Civil Rights Agenda, 71 *Fordham L. Rev.* 981, 1044 and at. n.354 (December 2002). Azmy states:

In the 1920s and 1930s, labor activists had developed a full theory of Thirteenth Amendment protections of labor rights, which included the right to organize, strike and bargain collectively.,n.354

n.354 ...The labor movement had, over previous years, modest success in courts advancing these theories. See, e.g., *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 65 (1927) (Brandeis, J., dissenting) (stating that an injunction against a sympathy strike "reminds [one] of involuntary servitude"); *Hopkins v. Oxley Stave Co.*, 83 F. 912, 937 (8th Cir. 1897) (declaring that denial of right to strike amounted to unconstitutional wage slavery); *Arthur v. Oakes*, 63 F. 310, 319-20 (7th Cir. 1894) (Harlan, Circuit Justice) (overturning part of anti-strike injunction in part because workers enjoyed Thirteenth Amendment right to "confer with each other upon the subject of the proposed reduction in wages"); *Kemp v. Div. No. 241 Amalgamated Ass'n of St. & Elec. Ry. Employees of Am.*, 99 N.E. 389, 392 (Ill. 1912) (overturning, partly on Thirteenth Amendment basis, an injunction prohibiting union from calling a strike); see also *Local 232, U.A.W.A. v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 251 (1949); *U.S. v. Petrillo*, 68 F. Supp. 845, 849 (N.D. Ill. 1946) ("Under the Thirteenth Amendment the right of any worker to leave his employment at will or for no reason at all is protected and that right is inviolate."), *rev'd* on other grounds, 332 U.S. 1, 13 (1947) ("The Union contends that the statute ... violates the Thirteenth Amendment in that it imposes a form of compulsory service or involuntary servitude.").

1<sup>st</sup> amendment to the United States Constitution.<sup>45</sup>

**A. Recognition of Fundamental Labor Rights in the Norris LaGuardia Act of 1932**

In 1932 Congress adopted the Norris LaGuardia Act (NLA).<sup>46</sup> The Norris LaGuardia Act not only included provisions intended to prevent federal courts from issuing injunctions to enjoin labor disputes, but also included as Section 2 thereof a declaration of public policy in labor matters.<sup>47</sup> Significantly, unlike the subsequent NLRA, the Norris LaGuardia Act had no exemption for agricultural laborers from its provisions.

The declaration of public policy in the Norris LaGuardia Act includes:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that *he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*; therefore, the

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<sup>45</sup> There is a potential First Amendment Constitutional argument where there is state involvement in preventing workers from collectively expressing their grievances. See, Babbitt v. United Farm Workers, 442 U.S. 289 (1979) where the Court noted that

... the Constitution guarantees workers the right individually or collectively to voice their views to their employers, see Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979); cf. Madison School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 173 -175 (1976)....

<sup>46</sup> Norris LaGuardia Act of 1932, ch. 90, 47 Stat. 70, codified as amended at 29 U.S.C. §§ 101-115.

See also, Baher Azmy, 71 Fordham L. Rev. at 1044 n.358 as to early proposed versions of the Norris LaGuardia Act explicitly basing the legislation in the 13<sup>th</sup> Amendment to the U.S. Constitution.

<sup>47</sup> 29 U.S.C. § 102.

following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.<sup>48</sup>

[Emphasis Added].

The substantive content of the provisions of the Norris LaGuardia Act are also apparent in Section 3 of the Act<sup>49</sup> which provides:

**Sec. 103.** - Nonenforceability of undertakings in conflict with public policy; “yellow dog” contracts

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following: Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.<sup>50</sup>

Largely as a result of the passage of subsequent labor legislation the content of the substantive protections of labor rights under the federal Norris LaGuardia Act have not been tested. Nonetheless, there is a significant argument that the Norris LaGuardia Act confers

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<sup>48</sup> Norris LaGuardia Act, Section 2, 29 U.S.C. § 102.

<sup>49</sup> Norris LaGuardia Act, Section 3, 29 U.S.C. § 103.

<sup>50</sup> Norris LaGuardia Act, Section 3, 29 U.S.C. § 103.

substantive protections on all workers, including agricultural and domestic workers excluded from the NLRA.<sup>51</sup>

**B. Recognition of Fundamental Labor Rights of Federally Excluded Workers in State Law**

Because the Norris LaGuardia Act only restrained federal courts rather than state courts in the issuance of injunctions, parallel state Norris LaGuardia Acts (NLA) were adopted in numerous states and territories.<sup>52</sup> Court in three states --Wisconsin,<sup>53</sup> Washington,<sup>54</sup> and

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<sup>51</sup> Kayce R. Compton, Defeating The Agricultural Exemption: The Norris LaGuardia Act As A Means For Collective Action For Agricultural Labor, 74 *N.D. L. Rev.* 509 (1998).

It is beyond the scope of this article to answer the question of whether under Cort v. Ash, 422 U.S. 66 (1975) and subsequent decision as to implied causes of action a direct federal cause of action to enforce the substantive provisions of the Norris LaGuardia Act can be maintained for agricultural workers excluded from the NLRA. However, a preliminary examination of this issue would strongly suggest that the correct answer is that such an action should be able to be maintained.

<sup>52</sup> Numerous states have adopted state laws limiting injunctions in labor disputes. *See*, W. J. Dunn, Applicability of Norris-La Guardia Act and Similar State Statutes To Injunction Action By Private Complainant, 29 *A.L.R.2d* 323 (1953). *See also*, Compton, 74 *N.D. L. Rev.* at 511, fn. 16. A few of these statutes incorporated public policy provisions similar to those in the federal Norris LaGuardia Act.

<sup>53</sup> The first state to address this issue was prior to the enactment of the NLRA in 1935. *See*, Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Manufacturing Company, 256 *N.W.* 56, 60-61 (Wis.1934). *See also*, Wis. Stat. Ann. §§ 103.51-.62.

<sup>54</sup> The next state to address this issue was Washington State. *See*, Krystad v. Lau, 400 P.2d 72, 83 (Wash. 1965) construing Washington state's Norris LaGuardia Act. Wash. Rev. Code Ann. Secs.49.32.011-.020. *See also*: Garza v. Patnode, 65 *Lab. Cas.* ¶ 52,570 (1971) holding that in Washington state protections extend to farm workers; Bravo v. Dolsen Cos., 888 P.2d 147, 155 (Wash. 1995) (holding that the Washington's NLA and the public policy of the state gives farm workers the right to strike, and engage in other concerted activity to improve their working conditions, without employer retaliation.). *But see*, International Union of Operating Engineers v. San Point Country Club, 519 P.2d 985, 988 (Wash. 1974) (no employer duty to bargain). *See also*, Peter B. Gonick, Bravo v. Dolsen Cos.: Shoring Up Employer Bargaining Power by Sandbagging Nonunion Workers, 70 *Wash. L. Rev.* 203, 210 (1995) written before the Washington Supreme Court decision reversing an earlier Washington Court of Appeals decision denying rights to agricultural workers. Bravo v. Dolsen Cos., 862 P.2d 623 (Wash. Ct. App. 1993)), *revsd.* 70 *Wash. L. Rev.* 203, 210 (1995). *See also*, Culinary Workers & Bartenders Union No. 596 v. Gateway Cafe, Inc., 588 P.2d 1334, 1345 (Wash. 1979).

Oregon<sup>55</sup> -- have held that the language of state statutes modeled on the Norris LaGuardia Act was sufficient to confer substantive protected rights on workers, including agricultural workers excluded from the NLRA.

A similar argument could potentially be made under the federal Norris LaGuardia Act or under the public policy provisions of other state anti-injunction statutes.<sup>56</sup> Among other states with such public policy provisions in anti-injunction statutes modeled on the federal Norris LaGuardia Act are: Idaho,<sup>57</sup> Indiana,<sup>58</sup> and Minnesota.<sup>59</sup>

As in Oregon the Pennsylvania “Labor Anti-injunction Act”<sup>60</sup> public policy declarations<sup>61</sup> do not exclude agricultural laborers,<sup>62</sup> although the Pennsylvania Labor Relations Act (PLRA)

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<sup>55</sup> The third state to address this issue was Oregon which construed Or. Rev. Stat. § § 662.010-.130 (1997). The Oregon courts similarly held farm workers protected by the Oregon state Norris LaGuardia Act. *See, Rauda v. Oregon Roses, Inc.*, 935 P.2d 469 (Or. Ct. App. 1997), *appeal denied Rauda v. Oregon Roses, Inc.*, 329 Or 265, 986 P2d 1157 (1999). The court in Rauda specifically determined that an exemption of agricultural workers from the state’s equivalent of the NLRA did not deprive them of protections under the state Norris LaGuardia Act. 935 P.2d at 473.

<sup>56</sup> *See, Compton*, 74 *N.D. L. Rev.* 509.

<sup>57</sup> Idaho Code § 44-701.

<sup>58</sup> Burns Ind. Code Ann. § 22-6-1-2.

<sup>59</sup> Minn. Stat. § 185.08.

<sup>60</sup> Pennsylvania “Labor Anti-Injunction Act,” 43 P.S. § 260.9a *et seq.*

<sup>61</sup> 43 P.S. § 260.9b(a) provides:

(a) Under prevailing economic conditions developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor or their agents in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

which was modeled on the federal Wagner Act does exempt agricultural laborers.<sup>63</sup> Significantly, the Pennsylvania Supreme Court has upheld the Pennsylvania Labor Relations Board's treatment of mushroom and greenhouse workers as non-agricultural workers protected under the PLRA.<sup>64</sup>

Similarly, most of the other states that adopted state labor relations acts modeled on the Wagner Act include exclusions in those acts of agricultural workers.<sup>65</sup> Such state acts exemption for agricultural workers is not necessarily the same as that under the NLRA. See, Willmar Poultry Co. v. Jones, 430 F. Supp 573.

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43 P.S. § 260.9b(a). The author is unaware of any attempt to date to argue that the Pennsylvania equivalent of the Norris LaGuardia Act provides substantive protections for agricultural laborers exempt from protections under the Pennsylvania Labor Relations Act. However, Rauda v. Oregon Roses, Inc., 935 P.2d 469, would support an argument that it does.

<sup>62</sup> Employees [sic] are defined under the Pennsylvania Labor Anti-Injunction Act as:

The term "employee" is declared to include all natural persons who perform services for other persons, and shall not be limited to the employes of a particular employer, and shall include any individual who has ceased work as a consequence of, or in connection with, any matter involved in a labor dispute.

43 P.S. § 206c(c).

<sup>63</sup> Pennsylvania Labor Relations Act (PLRA), 43 P.S. § 211.1 *et seq.*, at § 211.3(d), definition of "employee."

<sup>64</sup> See, Vlasic Farms, Inc. v. Pa. Labor Rels. Bd., 565 Pa. 555, 777 A.2d 80 (2001) and the prior decisions of the Pennsylvania Commonwealth Court in Blue Mt. Mushroom Co. v. Pennsylvania Labor Rels. Bd., 735 A.2d 742 (Pa. Cmwlth. 1999), *appeal denied* 567 Pa. 716 (2001), and Vlasic Farms, Inc. v. Pennsylvania Labor Rels. Bd., 734 A.2d 487, 489-90 (Pa. Cmwlth. 1999).

Pennsylvania produces nearly half the mushrooms in the country and employs thousands of workers in its mushroom industry in Southeastern Pennsylvania. In the Matter of the Employees of Grocery Store Products Company, (PLRB, Case #22, 1956), the Pennsylvania Labor Relations Board first held that mushroom workers were not agricultural laborers within the meaning of the Pennsylvania Labor Relations Act. The PLRB has consistently asserted jurisdiction over mushroom workers since 1956.

<sup>65</sup> This includes: Colorado, C. R. S. A. § 8-1-101 *et seq.*; Connecticut, C.G.S.A. § 31-101, *et seq.*; Michigan, M. C. L. A. 423.1 *et seq.*; Minnesota Labor Relations Act, M. S. A. § 179.01 *et seq.*; North Dakota, NDCC 34-12-01 *et seq.*; Rhode Island, RI ST § 28-7-3 *et seq.*; Utah, U.C.A. 1953 § 34-20-2 *et seq.*; Vermont, 21 V.S.A. § 1502; West Virginia, W. Va. Code, § 21-1A-2.

Several state constitutions confer substantive protections on workers generally without an exclusion of agricultural workers.<sup>66</sup> In New Jersey a state constitutional provision providing that "Persons in private employment shall have the right to organize and bargain collectively" was held to be sufficient to have equity court fashion remedies including procedures for determination of collective bargaining representatives.<sup>67</sup> Missouri also has a state constitutional provision without any subsequent enacting legislation.<sup>68</sup>

Hawaii<sup>69</sup> and Puerto Rico<sup>70</sup> are amongst jurisdictions which recognize agricultural workers organizing rights together with those of other workers without distinction both by state constitution and by statute.

Some "right to work" states have Constitutional and/or statutory provisions which could provide a basis for protection of agricultural workers organizing rights.<sup>71</sup> The Florida Constitution states as to the "Right to work":

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The

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<sup>66</sup> See, Goldberg and Williams, 4 *Rutgers L. J.* 729, 730-732. See also, LeRoy and Hendricks, 48 *Emory L.J.* at pp. 517-537.

<sup>67</sup> N.J. Const. Article 1, ¶ 19. See, Comite Organizador de Trabajadores Agricolas (COTA) v. Molinelli, 552 A.2d 1003 (N.J. 1989).

<sup>68</sup> See, MO. Const. Art I, § 29 ("That employees shall have the right to organize and to bargain collectively through representatives of their own choosing").

<sup>69</sup> See, HRS Const. Art. XIII, § 1 (1978) and Title 21 Hawaii Revised Statutes, Chapter 377, 21 HRS § 377-1, et seq.

<sup>70</sup> See, Puerto Rico Const. Art. II, §§ 17-18, 29 Laws of Puerto Rico § 62.

<sup>71</sup> States with "Right to Work" laws include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.

The language of the individual state or constitutional provision is critical. The Nevada "right to work" law provides no protections for workers discriminated against because they have joined union. See, NRS § 613.230 .

right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.<sup>72</sup>

Florida reinforces this right by statute providing:

Employees' right of self-organization.--Employees shall have the right to self-organization, to form, join, or assist labor unions or labor organizations or to refrain from such activity, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.<sup>73</sup>

Similarly, Arkansas by both its constitution<sup>74</sup> and statute<sup>75</sup> protects the right to work in terms which may be utilized to protect agricultural workers. Wyoming has provisions under its constitution<sup>76</sup> and its statutes<sup>77</sup> which are protective of workers rights and which do not distinguish between agricultural and non-agricultural workers. Although its language is far more

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<sup>72</sup> Fla. Const. Art. I, § 6

<sup>73</sup> Florida Statutes, Chapter 31, §447.03.

<sup>74</sup> Ark. Const. Amendment 34, § 1 provides in part:

No person shall be denied employment because of membership in or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union; nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union, or because of resignation from a labor union; nor shall any person against his will be compelled to pay dues to any labor organization as a prerequisite to or condition of employment.

<sup>75</sup> A.C.A. § § 11-3-301 *et seq.*

<sup>76</sup> Wyo. Const. art. 1, § 22:

The rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service and to promote the industrial welfare of the state.

<sup>77</sup> WY ST § 27-7-101 provides:

It is hereby declared to be the policy of the state of Wyoming that workers have the right to organize for the purpose of protecting the freedom of labor, and of bargaining collectively with employers of labor for acceptable terms and conditions of employment, and that in the exercise of the aforesaid rights, workers should be free from the interference, restraint or coercion of employers of labor, or their agents in any concerted activities for their mutual aid or protection.

limited the Oklahoma Constitution provides at least some constitutional protection for union membership.<sup>78</sup>

Other states with statutory “right to work” provisions include language which may protect agricultural workers from employer discrimination for union activities. These states include: Georgia,<sup>79</sup> North Carolina,<sup>80</sup> South Carolina,<sup>81</sup> Texas,<sup>82</sup> and Virginia.<sup>83</sup>

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<sup>78</sup> Okl. Const. Art. XXIII, § 1A(B)(1) provides:

B. No person shall be required, as a condition of employment or continuation of employment, to:

1. Resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization;

<sup>79</sup> O.C.G.A. § 34-6-20 *et seq.* which provides:

No individual shall be required as a condition of employment or continuance of employment to be or remain a member or an affiliate of a labor organization or to resign from or to refrain from membership in or affiliation with a labor organization.

O.C.G.A. § 34-6-21. *See also*, O.C.G.A. § 34-6-6 providing:

It shall be unlawful for any person, acting alone or in concert with one or more other persons, to compel or attempt to compel any person to join or refrain from joining any labor organization or to strike or refrain from striking against his will by any threatened or actual interference with his person, immediate family, or physical property or by any threatened or actual interference with the pursuit of lawful employment by such person or by his immediate family.

<sup>80</sup> N.C. Gen. Stat. § 95-78 provides:

The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association.

*See also*, N.C. Gen. Stat. § 95-83 (Recovery of damages by persons denied employment).

<sup>81</sup> S.C. Code Ann. § 41-7-10 (It is hereby declared to be the public policy of this State that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization).

<sup>82</sup> Tex. Lab. Code § 101.001 *et seq.*, Tex. Lab. Code § 101.051 *et seq.*

Some other jurisdictions, including New York, do not exclude agricultural workers from state constitutional protections,<sup>84</sup> but have excluded them from implementing legislation.<sup>85</sup>

A few states with California<sup>86</sup> as the prime example have specifically have adopted laws to regulate the labor rights of agricultural workers.<sup>87</sup> One of the most recent states to adopt an agricultural work specific law is Maine.<sup>88</sup>

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<sup>83</sup> Va. Code Ann. § 40.1-58 (It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization).

<sup>84</sup> NY Const. Art I, § 17 (“Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.”). This provision could arguably protect agricultural workers despite the like of implementing legislation.

<sup>85</sup> See, New York State Labor Relations Act, NY CLS Labor § 701(3)(a) (excluding individuals employed as farm laborers from the definition of “employees” covered by the state Labor Relations Act).

<sup>86</sup> See, footnote 13 above relating to the California Agricultural Labor Relations Act.

<sup>87</sup> See, LeRoy and Hendricks, 48 *Emory L.J.* at. 518-529.

See also, discussions *infra* of provisions of the law of Massachusetts, Wisconsin, and Washington. 48 *Emory L.J.* at 518-520.

<sup>88</sup> See, 26 M. R. S. A. § 1321 *et seq.* (1997).

It is declared to be the public policy of this State and it is the purpose of this chapter to promote the improvement of the relationship between agricultural employers and their employees by providing a uniform basis for recognizing the right of agricultural employees to join labor organizations of their own choosing and to be represented by those organizations in collective bargaining for terms and conditions of employment. It is also the public policy of this State and the purpose of this chapter, by encouraging voluntary agreements between agricultural employers, employees and their organizations, to limit industrial strife, promote stability in the farm labor force and improve the economic status of workers and businesses.

26 M. R. S. A. § 1323 provides

Agricultural employees have the right to self-organize; to form, join or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Agricultural employees also have the right to refrain from such activities except to the extent that this right may be affected by an agreement requiring membership in a labor organization as a

Unfortunately, at least some of the states outside of California with agricultural worker specific labor laws, were designed to restrict the rights of agricultural workers.<sup>89</sup> States with such agricultural specific provisions include: Arizona,<sup>90</sup> Kansas,<sup>91</sup> Idaho,<sup>92</sup> South Dakota,<sup>93</sup> and Louisiana.<sup>94</sup>

Other state statutes might contain policy declarations as to labor rights which do not exclude agricultural workers.<sup>95</sup>

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condition of employment as authorized in section 1324, subsection 1, paragraph B.

26 M. R. S. A. § 1325 has detailed additional agricultural specific provisions.

<sup>89</sup> See, LeRoy and Hendricks, 48 *Emory L.J.* at pp. 517-537.

See also, discussions *infra* of provisions of the law of Massachusetts, Wisconsin, and Washington. 48 *Emory L.J.* at 518-520.

<sup>90</sup> See, LeRoy and Hendricks, 48 *Emory L.J.* at 524-529. Arizona, Section 23-1381 *et seq.* of the Arizona Revised Statutes.

<sup>91</sup> See, LeRoy and Hendricks, 48 *Emory L.J.* at 521-524, discussion of Kan. Stat. Ann. § 44-818 (1993).

<sup>92</sup> See, Idaho Agricultural Labor Act, ID ST § 22-4101 *et seq.* (1972).

<sup>93</sup> The South Dakota Constitution provides as to all persons:

... The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization.

SD CONST Art. 6, § 2.

South Dakota statutes SD ST § § 60-10-6 to 60-10-6, and SD ST § § 60-10-4 to 60-10-7 are specific to agricultural workers and intended to restrict agricultural organizing activity.

<sup>94</sup> See, La. R.S. 23:881 *et seq.*

<sup>95</sup> This article does not purport to comprehensively review all state laws which could be the basis for arguing for a state public policy protecting rights of workers excluded from protections under the NLRA.

The judicial development of tortious wrongful discharge in violation of public policy claims may also provide alternative sources of protection for agricultural workers. This would be particularly true if the state wrongful discharge law was prepared to recognize a right grounded in the federal Norris LaGuardia Act since that public policy is national.

Finally, specific retaliation protections of a number of federal or state statutes may be triggered by retaliation against workers engaged in concerted activity where the issues raised include issues for which there are statutory retaliation protections.<sup>96</sup>

**C. Recognition of Fundamental Labor Rights In International Law**

The right of workers to organize collectively is a fundamental human right recognized by the United States as a principle of international law.<sup>97</sup> Amongst the treaties protecting those rights are:

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It is also significant to note that seasonal agricultural workers (including H-2A temporary nonimmigrant workers) terminated from employment might be able to argue that at common law employment for a period of time was not like the common law employment at will standard.

<sup>96</sup> Amongst statutes with retaliation protections for agricultural workers are: FLSA, 29 U.S.C. § 215(a)(3) and 29 U.S.C. § 216(b); AWPAA, 29 U.S.C. § 1855(a).

General civil rights statutes may also provide retaliation protections.

<sup>97</sup> See, Brief of Amicus Curiae: Labor, Civil Rights and Immigrants' Rights Organizations in the United States, Appendix C, Table 1, Inter-American Court of Human Rights, In the Matter of Request for Advisory Opinion Submitted By the Government of the United Mexican States, OC-18/03. Available at: <http://www.nelp.org/docUploads/Brief%20to%20interamerican%20court%2Epdf> (Last checked November 15, 2003). Brief authored by: attorneys Rebecca Smith of the National Employment Law Project, Professor Sarah Cleveland, Amanda Levinson and Emily Rickers of the University of Texas School of Law, Professor Beth Lyon of Villanova University School of Law, Ana Avendano of the National Immigration Law Center and D. Michael Dale of the Northwest Worker Justice Center.

On September 17, 2003 the Interamerican Court of Human Rights issued its Advisory Opinion in OC-18/03 holding:

1. That States have the general obligation to respect and guarantee fundamental rights. With this proposition, they must adopt positive measures, avoid taking initiatives that limit or restrain a fundamental right, and suppress measures and practices that restrict or weaken a fundamental right.
2. That noncompliance by a State, by means of any discriminatory treatment, with the general obligation to respect and guarantee human rights, brings with it international responsibility.
3. That the principle of equality and non discrimination possesses a fundamental character for the safeguard of human rights in international law as well as in internal law.

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4. That the fundamental principal of equality and non discrimination forms part of general international law, in that it applies to all States, independently of whether or not it is a part of a particular international treaty. In the present stage of evolution of international law, the fundamental principal of equality and non discrimination has risen to the level of jus cogens.

5. That the fundamental principal of equality and non discrimination, presented with imperative character, brings with it erga omnes obligations of protection that bind all States and generate effects with respect to third persons, including private individuals.

6. That the general obligation to respect and guarantee human rights binds States, independent of any circumstance or consideration, including the alien status of persons.

7. That the right to due process of law must be recognized in the framework of minimum guarantees that must be afforded to all migrants, independent of their alien status. The full breadth of the intangibility of due process includes all matters and all persons, without any form of discrimination.

8. That the migrant qualify of a person cannot constitute justification to deprive him of the enjoyment and exercise of his human rights, among them labor rights. A migrant, at the moment of taking on a work relationship, acquires rights by being a worker, that must be recognized and guaranteed, independent of his regular or irregular situation in the State of employment. These rights are the consequence of a labor relationship.

9. That the State has the obligation to respect and guarantee human labor rights of all workers, independent of their condition as nationals or foreigners, and to not tolerate situations of discrimination that prejudice them, in labor relationships that are established between private persons (employer-employee). The State must not permit that private employers violate the rights of workers, or that a contractual relationship weakens minimum international standards.

10. That workers, by being entitled to labor rights, must be able to count on all adequate means to exercise them. Undocumented migrant workers have the same labor rights that correspond to the rest of workers in the State of employment, and the State must take all necessary measures for this to be recognized and complied with in practice.

11. That States cannot subordinate or condition the observation of the principal of equality before the law and non discrimination in consequence of the objectives of its public policies, whatever these may be, including those of migrant character.

Interamerican Court of Human Rights Advisory Opinion OC-18/03. Published in Spanish at: [http://www.corteidh.or.cr/SERIE\\_A/Serie\\_a\\_18\\_esp.doc](http://www.corteidh.or.cr/SERIE_A/Serie_a_18_esp.doc). It will be available in English at: [http://www.corteidh.or.cr/serie\\_a\\_ing/index.html](http://www.corteidh.or.cr/serie_a_ing/index.html).

American Declaration of the Rights and Duties of Man (ADHR or American Declaration), Article XXII Right of Association.<sup>98</sup>

American Convention on Human Rights (ACHR or American Convention), Art. 16.1-16.2.<sup>99</sup>

Organization of American States (OAS) Charter, Article 45(c) & 45(g).<sup>100</sup>

International Covenant on Civil and Political Rights, Article 22.<sup>101</sup>

International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 8.<sup>102</sup>

International Labour Organization (ILO) Declaration on Fundamental Principles and

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<sup>98</sup> American Declaration of the Rights and Duties of Man (ADHR), OAS Res. XXX, International Conference of American States, 9th Conf., OAS Doc. OEA/Ser. L/V/I. 4 Rev. XX (1948).

<sup>99</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

<sup>100</sup> Charter of the Organization of American States, Apr. 30, 1948, arts. 45(c) and 45(g), 2 U.S.T. 2394, 2422, 119 U.N.T.S. 3.

Article 45(c) provides that Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws. . . . ”

<sup>101</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>102</sup> International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). Article 8 provides that:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

Rights at Work, art. 2.<sup>103</sup>

North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States (NAALC), Articles 2 and 4.<sup>104</sup>

Universal Declaration of Human Rights (UDHR), Article 23.4

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<sup>103</sup> International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, art. 2 (June 18, 1998), 37 I.L.M. 1233 (1998). Available at: [http://echo.ilo.org/pls/declaris/DECLARATIONWEB.static\\_jump?var\\_language=EN&var\\_pagename=DECLARATIONTEXT](http://echo.ilo.org/pls/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT)

The ILO has identified four “core” worker rights that are internationally recognized as fundamental human rights. The other core rights are freedom of association, and the prohibition against forced and child labor. These four fundamental rights are supported by eight ILO conventions.

This includes conventions: relating to nondiscrimination in employment, e.g., ILO Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960); and those relating to freedom of association, e.g., ILO Convention Concerning Freedom of Association and Protection of the Right to Organize (No. 87), July 9, 1948, 68 U.N.T.S. 16 (entered into force July 4, 1950); Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (No. 98), July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951).

*See in particular*, ILO Convention 87, Article 2, and ILO Convention 98, Article 1.1.

Without addressing the binding force of the Declaration of Fundamental Principles and Rights at Work, the International Labour Organization, Committee On Freedom Of Association, in Case No. 2227 on November 20, 2003 found the U.S. Supreme Court decision in *Hoffman Plastics*, supra, to be inconsistent with international law. *See* copy of decision at: [http://friendsfw.org/international/ILO\\_COFA\\_Hoffman.pdf](http://friendsfw.org/international/ILO_COFA_Hoffman.pdf).

<sup>104</sup> Canada-Mexico-United States: North American Agreement on Labor Cooperation, Pub. L. No. 103-182, 107 Stat. 2057, 32 Int'l Legal Materials 1499 (1993). *See*: <http://www.naalc.org/english/infocentre/NAALC.htm>.

International Covenant on Economic, Social and Cultural Rights, Article 8<sup>105</sup>

The enforceability of such international law provisions is beyond the scope of this article, but it is important to realize that the rights of agricultural workers are protected under international law.<sup>106</sup>

#### **IV. Treatment of Agricultural Workers Under the NLRA**

The National Labor Relations Act (NLRA) since its inception as the Wagner Act has excluded persons employed in “agricultural labor.”<sup>107</sup> Although this definition has been a consistent element of the NLRA since its inception, it has been construed to exclude more

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<sup>105</sup> The International Covenant on Economic, Social and Cultural Rights, Article 8 provides that:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

<sup>106</sup> See, Human Rights Watch, UNFAIR ADVANTAGE: Workers' Freedom of Association in the United States under International Human Rights Standards, August 2000. Available at: <http://www.hrw.org/reports/2000/uslabor/>

An interesting issue to explore in a state with a broad public policy approach toward tortious wrongful discharge claims would be whether any international law agreements could provide a public policy basis for challenging a discharge.

<sup>107</sup> §2(3), 49 Stat. 450 (1935). See, 29 U.S.C. §152(3).

persons as agricultural laborers since 1946 than had been initially treated as agricultural laborers by the NLRB.<sup>108</sup>

**A. Historical Basis for Exclusion of Agricultural Workers from the NLRA and other New Deal Legislation**

Considerable legal scholarship has been devoted to the efforts to plumb the legislative history of the 1935 Wagner Act and other contemporaneous New Deal legislation which included exemptions for “agricultural” workers.<sup>109</sup>

The first New Deal legislation to include protections for the right to organize was contained in the 1933 National Industrial Recovery Act (NIRA).<sup>110</sup> The NIRA was subsequently declared unconstitutional by the United States Supreme Court in 1935 in Schechter Poultry Corp. v. United States.<sup>111</sup> That legislation had *no* statutory exclusion of agricultural laborers.<sup>112</sup>

Senator Wagner’s original bill for a National Labor Relations Act was introduced in 1934<sup>113</sup> and included no exclusion of agricultural labor.<sup>114</sup> In legislative hearings thereon in the Senate and House committees agricultural labor was hardly discussed.<sup>115</sup> Despite the absence of

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<sup>108</sup> This earlier more limited view by the early NLRB of what constituted agricultural labor is relevant both to alternative interpretations of similar language in state laws and to the possibility that Congress would free the NLRB of the annual appropriation rider requiring it to use the FLSA definition of agriculture. *See*, discussion in Section II above.

<sup>109</sup> *See*: Austin Morris, Agricultural Labor and National Labor Legislation, 54 Cal. L. Rev. 1939, 1951-56 (1966); Maurice Jourdan, Note, The Constitutionality of the NLRA Farm Labor Exemption, 19 *Hastings L.J.* 384, 384-386 (1968); Marc Linder, Migrant Workers and Minimum Wage: Regulating the Exploitation of Agricultural Labor in the United States, 126-175 (Westview Press, 1992).

<sup>110</sup> 48 Stat. 195 (1933).

<sup>111</sup> Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

<sup>112</sup> *See*, Morris, 54 Cal. L. Rev. at 1945-1948.

<sup>113</sup> S. 2926, 73<sup>rd</sup> Cong., 2d Sess. (1934). H.R. 8423, 73<sup>rd</sup> Cong., 2d Sess. (1934).

<sup>114</sup> *See*, Morris, 54 Cal. L. Rev. at 1951.

<sup>115</sup> Some testimony focused on the urgent need for farm worker protections under the Wagner

any explanation therefore, the Senate Committee on Education and Labor reported out the bill two months later with an exclusion from the definition of employee of “any individual employed as an agricultural laborer.”<sup>116</sup> No definition thereof was contained therein. Senator Wagner’s bill was not acted on further in the 73<sup>rd</sup> Congress.

In 1935 Senator Wagner reintroduced his bill.<sup>117</sup> The Senate Report mentioned that agricultural laborers, domestic servants, and persons employed by parents or spouse had been excluded for “administrative reasons.”<sup>118</sup>

The minority report of the House Committee on Labor, included an impassioned plea for

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Act. *See*, Morris, 54 *Cal. L. Rev.* at 1953. In Hearings Before the Committee on Education and Labor, U.S. Senate, 73<sup>rd</sup> Congress, Second Session, on S.2926, March 29, 1934. The only discussion of employers of agricultural laborers was entirely in the context of small farm employers’ ability to function under the act. For example, Arthur F. Thompson, secretary and manager of the Manufacturers Association of Racine, Wisconsin, testified that:

“... the measure is extended to every farmer in the State of Wisconsin who has a hired man or any domestic help, and he is subject to all the drastic provisions and penalties of the act. I can well sense the difficulty which farmers will have in understanding the purpose of this act. I appreciate, of course, that the act ostensibly is based upon principles of interstate commerce but, if constitutional at all, it may well be extended to a farmer growing crops with the ultimate view of disposing of the same in an interstate transaction.” Hearings, p. 967.

Similarly, Fred Brenckman, The National Grange, testified that he was worried about inclusion of farm labor. He asserted that farmers only grossed \$827 per farm. He added:

“In light of these facts, it would manifestly be absurd to place hired farm labor in the same category with the industrial labor, and to give the proposed national labor board jurisdiction over the farmer's hired help. If farm labor is poorly paid in the United States today, then it can be said with emphasis that the farmer and his family are still more poorly paid. After we have restored the purchasing power of the farmer and converted agriculture from a losing to a gainful venture, it will be in plenty of time for the Government to talk about regulating the conditions of farm labor.” Hearings, p. 1000.

<sup>116</sup> *See*, S. Rep. No. 1184, 73<sup>rd</sup> Cong., 2d Sess. 1 (1934). *See also*, Morris, 54 *Cal. L. Rev.* at 1952.

<sup>117</sup> S. 1958, 74<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1935). *See also*, H.R. 6288, 74<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1935).

<sup>118</sup> *See*, Morris, 54 *Cal. L. Rev.* at 1953.

the inclusion of farm labor.<sup>119</sup> The author of the minority report, Rep. Vito Marcantonio introduced an amendment to the Wagner Act on the floor of the House of Representatives to strike the exemption for agricultural workers.<sup>120</sup> The articulated opposition thereto focused on the small family farmer.<sup>121</sup>

The Wagner Act as finally enacted contained no definition of an “agricultural laborer.”<sup>122</sup> Similarly, the Social Security Act as originally enacted in the 74th Congress similarly excluded “agricultural labor” without defining it.<sup>123</sup>

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<sup>119</sup> See, Morris, 54 *Cal. L. Rev.* at 1953-1954; 74<sup>th</sup> Cong. 1<sup>st</sup> Sess. Report No. 969, pp. 27-28 (May 20, 1935) to accompany H.R. 7978; 74th Cong. 1<sup>st</sup> Sess. Report No. 972 (May 21, 1935) to accompany S.1958; 74th Cong. 1<sup>st</sup> Sess. Report No. 1147 (June 10, 1935) to accompany S.1958.

<sup>120</sup> See, Debates in the House on S. 1958, 79 Cong. Rec.-- House 9668, 9720 *et seq.*, June 19, 1935.

<sup>121</sup>In speaking in opposition thereto Rep. Boileau stated:

"I oppose this amendment most emphatically . . . I grant there may be some sections of the country where it would be desirable to permit the organization of share-croppers or tenant farmers or other types of agricultural labor, but in the vast sections of the Middle West, especially in those States where the farms are smaller and more or less of a family affair, where only the family is employed on the farm except with occasional employment of others, it would be very unfortunate to permit the organization of casual farm employees. In some States of the Union, especially in the Middle West, the farmers seldom employ more than one or two employees, and then for only seasonal employment. I do not believe that it is advisable to bring them within the scope of the bill."

79 Cong. Rec.-- House 9668 at 9721, June 19, 1935.

<sup>122</sup> §2(3), 49 Stat. 450 (1935).

<sup>123</sup> Social Security Act of 1935, 49 Stat. 625 (1935). See, 54 *Cal. L. Rev.* at 1956, fn. 76. Regulations promulgated by the United States Treasury Department, Bureau of Internal Revenue and the Social Security Board included no reference to labor in “horticultural” specialties as agricultural labor.

“The term...includes all services performed-- (a) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, or the raising, feeding or management of livestock, bees, and poultry....”

Likewise, as originally introduced on May 24, 1937, the Fair Labor Standards Act contained no definition of the agricultural laborers excluded from protections thereunder and merely provided for the term “agricultural laborer” to be defined by the “Fair Labor Standards Board” which was proposed to administer the FLSA.<sup>124</sup>

**B. Initial NLRB Interpretation of the Wagner Act Agricultural Exemption**

It is significant to review the National Labor Relations Board’s (NLRB) early interpretation and application of legislative intent of the scope of the 1935 Wagner Act exclusion of “agricultural laborers” which was not otherwise explicitly defined either therein or in the legislative history thereof. It was the NLRB which was required without statutory guidance as to the meaning of the term “agricultural laborer” under the NLRA until 1946<sup>125</sup> to interpret and apply the legislative intent of the 1935 United States Congress which had exempted “agricultural laborers” from the protections of the NLRA.<sup>126</sup> Federal courts routinely defer to the

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1 Fed. Reg. 4-5 (1936) (Treasury Department); 1 Fed. Reg. 1767 (1936) (Internal Revenue Service); 2 Fed. Reg. 1278 (1937) (Social Security Board). *See*, Morris, 54 *Cal. L. Rev.* at 1958, fn. 84.

<sup>124</sup> S. 2475, 75<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1937). H.R. 2700, 75<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1937). *See*, 54 *Cal. L. Rev.* at 1959, fn. 86. *See*, John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 *Law and Contemporary Problems* 464, 474, 483-487 (1939).

The current definition of agriculture in the FLSA at § 3(f), 29 U.S.C. §213(f), including the harvesting of “horticultural commodities” was not enacted until June 25, 1938. *See*, 52 Stat. 1060, 1067 (1938). *See*, Forsythe, *supra* at 474, 483-487.

<sup>125</sup>As will be discussed more fully below, beginning July 26, 1946, with the passage of the National Labor Relations Board Appropriation Act of 1947, 60 Stat. 698, Congress has included in the Board's annual appropriation act a proviso directing the Board to apply the definition of "agriculture" found in section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. §203(f), in construing the term "agricultural laborer." *See*, Bayside Enterprises v. NLRB, 429 U.S. 298, 300 and fn. 6 (1977).

<sup>126</sup>As early as 1939 the food processing industry in particular sought to introduce amendments to the Wagner Act of 1935 to define agricultural labor “broadly enough to cover practically every industry allied to agriculture.” 54 *Cal. L. Rev.* at 1964. *See*, S.1550, 76<sup>th</sup> Cong.,

interpretations of administrative agencies especially in the initial implementation of the statutory language.<sup>127</sup>

In 1937 the United States Supreme Court upheld the Constitutionality of the National

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1<sup>st</sup> Sess. (1939). Hearings conducted on legislative proposals during 1939 allowed such interests an opportunity to articulate rationales for broadened exemptions from the NLRA. *See, Hearings on S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, and S. 2123 Before the Senate Committee on Education and Labor, 76<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1939). See also, 54 Cal. L. Rev. at 1964-1974.*

Agricultural industry spokespersons attempted to articulate an idyllic view of small farm agricultural life in which harmony between the small farmer and his employees made labor organizing protections unnecessary. For example:

“Those employees live in small communities, many of them are housewives, *they work portions of the year....* The workers and the farmers are thrown into daily close contact with one another, in many cases they eat at a common table, their children attend the same schools, they bow down together in religious worship; in other words, there is that unity of contact between the farm labor even in these packing houses, and the farmers, that you do not find in industrial centers....

“The mechanized theories of industry do not fit in agriculture, the rigidity of operations does not fit. Agricultural labor is seasonal and widely scattered and closely connected with the family of the farmers. Most of them are daughters or sons or cousins or relatives of the farmers.

“The need for collective bargaining does not exist where 1 employer has to deal with only 1 or 2 employees...Where a few persons are employed on a firm or in a packing shed...there is very little likelihood of any labor dispute arising which needs collective bargaining as means of settlement.” [Emphasis added].

Testimony of Ivan McDaniel, Hearings on S. 1550 at 3638-39, 76th Cong., 1st Sess. (1939); 54 Cal. L. Rev. at 1969.

Agricultural industry spokespersons in the 1939 hearings heavily emphasized that coverage under the NLRA would impose unbearable hardships on farmers, because of the perishable nature of agricultural commodities, the consequent need for uninterrupted harvesting and preparation for market, lack of control over weather, production, prices, and markets. 54 Cal. L. Rev. at 1970-1972.

<sup>127</sup>*See, Udall v. Tallman*, 380 U.S. 1, 16 (1965) holding deference to the interpretation of an administrative agency is important. The court held:

“[p]articularly...when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.” *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396, 408 (1961).

Id.

Labor Relations Act of 1935.<sup>128</sup> It was not until after that, the NLRB confronted its first cases about the definition of agricultural laborer under the NLRA.<sup>129</sup>

In 1939 the NLRB rejected an attempt to apply exemptions under the FLSA<sup>130</sup> for individuals “employed within the area of production” in the packing of agricultural commodities to exempt packinghouse operations laborers from the NLRA as agricultural laborers.<sup>131</sup>

The first NLRB decision to address the application of the Wagner Act exclusion of “agricultural laborers” to laborers in relationship to cultivation in greenhouses was Park Floral Company.<sup>132</sup> The NLRB held in applying the term “agricultural laborer” as used in the Act:

We have had occasion in several cases to interpret the term “agricultural laborer” as used in the Act. What we have said may be epitomized, as follows: An agricultural laborer, within the meaning of Section 2(3), is a person employed by the owner or a 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 crops, the nursing, feeding, or

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<sup>128</sup> NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

<sup>129</sup> *See, Morris*, 54 *Cal. L. Rev.* at 1957. An overwhelming percentage of the early NLRB cases defining agriculture arose in the context of arguments by packing and processing operations that their employees were exempt from the NLRA as agricultural laborers. *See, 54 Cal. L. Rev.* at 1957-1963.

<sup>130</sup> *See, FLSA* at 29 U.S.C. §213(a)(10).

<sup>131</sup> North Whittier Heights Citrus Association, 10 N.L.R.B. 1269 (1939), enforced sub nom., North Whittier Heights Citrus Association v. NLRB, 109 F.2d 76 (9<sup>th</sup> Cir. 1940), cert. denied, 310 U.S. 632 (1940).

In enforcing the decision, the Ninth Circuit attempted to harmonize the exclusion of agricultural laborers with the exclusion of persons employed by a parent or spouse. The court noted that parents and spouses were excluded because in this classification “...there never would be a great number suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain. The court found the common denominator between this exclusion and the exclusion of agricultural and domestic workers applied only if the exclusion were not enlarged beyond “the usual idea the term suggests.” The court noted: “when every detail of farming from plowing to delivering the produce to the consumer was done by the farmer and his ‘hired man’, this common denominator was present.” North Whittier Heights Citrus Association v. NLRB, 109 F.2d at 80.

<sup>132</sup> Park Floral Company, 19 N.L.R.B. 403, 413-414, 5 L.R.R.M. 514 (1940).

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 product in their raw or natural, or processed state, as an incident to ordinary farming operations, as distinguished from manufacturing or commercial operations.

Under this construction of the statute, *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 such as tending to the heating and watering facilities, or to pack, package, transport, or market the floral products grown, are not agricultural laborers. *The cultivation in which they engage is not done on a farm, nor are the services which they perform incident to ordinary farming operations. Planting, care, and growing of the plants and flowers have been removed from the farm and from the natural conditions which there obtain, and are carried on under artificial conditions and as a specialized process. Growing is done in soil-filled containers kept in glass-covered, heat-regulated houses. Production is continuous throughout the year and not affected by the change of the seasons. The work in the greenhouses is industrial in nature rather than agricultural in the common understanding of that term.* With respect to the services performed in operating the heating and watering facilities, in packing, packaging, transporting, and marketing the products, and in other similar activities, such work is not agricultural in nature, nor is it, in view of what has been stated above, incident to ordinary farming operations.<sup>133</sup>

[Emphasis added].

In 1940 the NLRB applied the principles enunciated by it in relationship to greenhouse workers in holding for the first time that mushroom harvesting workers were not to be considered agricultural laborers under NLRA. Great Western Mushroom Company.<sup>134</sup> The NLRB held:

...the growing of mushrooms by the respondent is carried on under artificial conditions more like cultivation in green houses than on a farm. The mushrooms are grown in enclosed houses under controlled conditions of heat and moisture. The crop is not seasonal, but is so regulated by the respondent as to maintain a constant output of mushrooms throughout the year. For these reasons, the growing of mushrooms and the work incidental thereto is not agricultural in nature in the common understanding of the term.<sup>135</sup>

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<sup>133</sup> Park Floral Company, *supra*.

<sup>134</sup> Great Western Mushroom Company, 27 N.L.R.B. 352, 357-359, 7 L.R.R.M. 72 (1940)

<sup>135</sup> Great Western Mushroom Company, 27 N.L.R.B. at 359. The NLRB in Great Western Mushroom Company, 27 N.L.R.B. at 358, made detailed findings of fact about the nature of the

Following the Great Western Mushroom Company decision, the NLRB twice affirmed its position that mushroom harvesting and growing laborers were not to be considered agricultural workers.

In Knaust Brothers, Inc.,<sup>136</sup> the NLRB reaffirmed its definition of agricultural laborers from the earlier Park Floral Company, decision and held mushrooms harvesting worker to be industrial rather than agricultural laborers. The NLRB held:

...the growing of mushrooms under such conditions is not agricultural in nature as that term is commonly understood. *Mushroom growing, as practiced by the Company, does not depend upon climate, temperature, rainfall, or other conditions which affect the growing of crops under ordinary circumstances. It is, in fact, very similar to the production which goes on in industrial plants under controlled and artificial conditions at the will of the producer.* The Company has cited provisions of the Federal Social Security Act and of the Internal Revenue Code<sup>137</sup> in support of its contention that its employees are agricultural laborers. We cannot consider the definitions contained therein as controlling in this case.

Knaust Brothers, Inc.<sup>138</sup>

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controlled cultivation conditions in the mushroom operation. Amongst the findings of the NLRB were:

The mushroom houses are artificially heated in the winter and artificially cooled and moistened in the summer, and the air within the houses is kept in constant circulation by the usage of electric fans in order to maintain a uniform temperature above all the shelf-beds. Also, the beds themselves are watered whenever they become dry. In addition to controlling the conditions under which mushrooms are grown, the respondent so arranges the output of the mushroom houses that mushrooms are picked daily, and the respondent thus obtains a steady and constant supply of mushrooms throughout the year.

*Id.*

<sup>136</sup> Knaust Brothers, Inc., 36 N.L.R.B. 915, 917-918, 9 L.R.R.M. 183 (1941).

<sup>137</sup>Footnote 3 to Knaust Brothers, Inc., 36 N.L.R.B. at 918, fn.3 stated:

Section 209 (1) (3) of the Federal Social Security Act and Section 1426 (h) (3) of the Internal Revenue Code define agricultural labor to include all services “performed...in connection with the raising or harvesting of mushrooms.”

<sup>138</sup> Knaust Brothers, Inc., supra. The NLRB therein relied upon its prior decisions in Park Floral Company, supra, and Great Western Mushroom Company, supra.

In its final decision on mushroom growing before passage of the July 18, 1946 Congressional appropriations rider mandating usage of the Fair Labor Standards Act definition of agriculture, the NLRB in 1945 in Indiana Mushroom Company,<sup>139</sup> again reaffirmed “the term ‘agricultural laborer’ as commonly understood refers to a person employed on a farm in the cultivation of the soil, including the harvest of crops.”<sup>140</sup> In Indiana Mushroom Company, the NLRB again held mushroom growing workers to be industrial workers subject to the NLRA.<sup>141</sup>

The NLRB decisions in relationship to greenhouse and mushroom workers viewed these operations as markedly distinguishable from the unique character of the traditional seasonal agricultural operations involving the outdoor cultivation of the soil which were dependent upon

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<sup>139</sup> Indiana Mushroom Company, 60 N.L.R.B. 1065, 16 L.R.R.M. 22 (1945)

<sup>140</sup> Indiana Mushroom Company, 60 N.L.R.B. at 1068, 16 L.R.R.M. at 23, citing In the Matter of Pepeekeo Sugar Company, 59 N.L.R.B. 1532, (1945).

<sup>141</sup> The factual findings of the NLRB about the growing of mushrooms in Indiana Mushroom were:

The growing of mushrooms is a highly specialized and scientific business. The entire process is conducted in sheds and building by employees, each of whom is trained to perform a particular operation. The first step is the preparation of a compost from horse manure, straw, and chemicals. This compost is then placed in growing boxes and put in a dark room which is called a growing room. The room is then closed tightly and live steam is turned on in order to sterilize the air and soil and to kill all rodents and bugs. Thereafter, spawn is planted in the growing boxes and from 12 to 21 days after the planting, casing soil is placed in the growing boxes. Approximately 57 days after the growing boxes are filled, the first mushrooms are ready for picking. After these are harvested the holes left by the stems of the extracted mushrooms are filled and more mushrooms continue to grow in the same mushroom beds. Several crops or flushes of mushrooms are thus obtained from one filling, the cycle lasting approximately 90 days from the time the first growing boxes are filled until they are ready for a new filling. The filling of the growing boxes in the various growing rooms is staggered at such intervals that the Company obtains a constant supply of mushrooms throughout the entire year. In order for mushrooms to grow, the temperature in the growing room must be controlled and the growing boxes watered daily. Growing rooms are kept at temperatures between 55 and 65 degrees Fahrenheit. This is done by heating the rooms in the winter and artificially cooling them in the summer.

Indiana Mushroom Company, 60 N.L.R.B. at 1067.

weather and uncontrollable production conditions which it perceived had been the basis for the consensus for exclusion of agricultural workers from the Wagner Act as enacted in 1935.<sup>142</sup>

### C. NLRB Appropriations Rider of 1946

Beginning July 26, 1946, with the passage of the National Labor Relations Board Appropriation Act for 1947,<sup>143</sup> 60 Stat. 698, Congress has included in the Board's annual appropriation act a proviso directing the Board to apply the definition of "agriculture" found in section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. §203(f), in construing the term "agricultural laborer."

In 1950 in *Michigan Mushroom Co.*,<sup>144</sup> the NLRB abandoned its coverage of mushroom workers as employees protected by the NLRA because of the Congressional mandate for the NLRB to employ the Fair Labor Standards Act definition of agriculture. This definition provided that "agriculture" includes:

“...the production, cultivation, growing and harvesting of any agricultural or horticultural commodities....”

The NLRB concluded that it was thereafter required to respect the U.S. Department of Labor's treatment of mushroom harvesting workers under the Fair Labor Standards Act as agricultural workers.

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<sup>142</sup> See, Morris, 54 *Cal. L. Rev.* at 1964-1974; North Whittier Heights Citrus Association v. NLRB, *supra* (9<sup>th</sup> Cir.).

See also, initial definitions of agricultural labor under the Social Security Act of 1935: 1 Fed. Reg. 4-5 (1936) (Treasury Department); 1 Fed. Reg. 1767 (1936) (Internal Revenue Service); 2 Fed. Reg. 1278 (1937) (Social Security Board). See, Morris, 54 *Cal. L. Rev.* at 1958, fn. 84.

<sup>143</sup> National Labor Relations Board Appropriation Act for 1947, 60 Stat. 698.

<sup>144</sup> 90 N.L.R.B. 119, 26 L.R.R.M. 1279 (1950),

Nowhere does the Congressional Record of the 1946 floor debates reflect any consciousness of the impact on “horticultural” workers in greenhouses and mushroom operations of the adoption of the FLSA definition of agriculture.<sup>145</sup>

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<sup>145</sup> See, 92 Congressional Record, 79<sup>th</sup> Cong., 2<sup>nd</sup> Sess., debates on H.R. 6739, *Making Appropriations for the Department of Labor, the Federal Security Agency, and related independent agencies, for the fiscal year ending June 30, 1947, and for other purposes*. 92 Congressional Record--House, pp. 6689-6694, June 11, 1946; 92 Congressional Record--House, pp. 8656-8662, July 11, 1946 ; 92 Congressional Record--Senate, pp. 8733-8747, July 12, 1946; 92 Congressional Record--House, pp. 9144-9151, July 16, 1946; 92 Congressional Record--Senate, p. 9292, July 18, 1946; 92 Congressional Record--House, p. 9494, July 19, 1946; 92 Congressional Record--Senate, pp. 9514-9515, July 20, 1946.

California food packing operations had sought to reverse the assertion by the NLRB of jurisdiction over food processing operations. See, North Whittier Heights Citrus Association, 10 NLRB 1269 (1939), *enforced sub nom. North Whittier Heights Citrus Association v. NLRB*, 109 F.2d 76 (9<sup>th</sup> Cir., 1940), *cert. denied*, 310 U.S. 632 (1940).

Representative Elliott of California introduced what became amendment number 39 (“the Elliott Amendment”) to the labor appropriation providing “...no funds shall be used...in connection with bargaining units composed in whole or in part of agricultural laborers as defined in the Social Security Act...” 79<sup>th</sup> Cong., 2<sup>nd</sup> Sess. Congressional Record--House, June 11, 1946, pp. 6689. Debate over the next month in the House and Senate over this proposal focused exclusively on its impact on removing coverage from an estimated 1 million food processing workers who had been covered under the NLRA, but who would not be covered under the Social Security Act definition.

The Senate repeatedly refused to agree to the provision with its members arguing passionately in favor of protection of such workers. Finally, on July 19, 1946 (after the annual appropriation for a year ending in June 30, 1947 was already overdue) the conference committee agreed instead to an appropriations rider which referred to the Fair Labor Standards Act definition of agriculture in lieu of the Social Security Act definition. 79<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 92 Congressional Record--House, p. 9494, July 19, 1946.

The Senate agreed after being assured by their representatives on the Conference Committee that unlike the Elliott Amendment this definition was a “much narrower definition” and that “...one of the members and the counsel of the National Labor Relations Board...said that it might require a few minor changes in their present procedure and definition, but that they would be very minor....” 79<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 92 Congressional Record--Senate, pp. 9514-9515, July 20, 1946.

Other floor statements in the Senate indicated an understanding that the proposed language was not intended to adversely effect the rights of covered food processing workers.

Renewed attempts in the 80<sup>th</sup> Congress during consideration of Taft-Hartley amendments to redefine agricultural laborers in order to restrict coverage of food processing workers were

V.

**Conclusion: Both State and Federal Governments Could Better Protect the Organizing Rights of Marginalized “Agricultural” Laborers**

As agricultural production becomes increasingly similar to industrial production in terms of the demand for labor, the likelihood of spontaneous concerted activities by workers to improve their terms and conditions of employment is also increasingly likely.

Mushroom and greenhouse industries which often operate on a year-round basis have more in common with industrial operations than they do with the kinds of idealized small family farm employers who argued for exclusion from NLRA coverage at the time of the passage of the Wagner Act in 1935.<sup>146</sup>

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unsuccessful. *See*, Morris, 54 *Cal. L. Rev.* at 1974-1976, fn. 138.

<sup>146</sup> The record before the Pennsylvania PLRB and the Pennsylvania Supreme Court in the *Vlasic Farms* case (footnote 64 above) holding mushroom workers to be protected under the Pennsylvania PLRA including testimony from Dr. Thomas Juravich who was qualified as “an expert in the field of sociology of work and the labor process.”

Dr. Juravich, testified that from the sociological perspective a significant indicator of an industrial rather than an agricultural form of production is the centralized nature of production rather than the decentralized nature of production common to agriculture. The mushroom production facilities of the employer were referred to as plants and each “double” was assigned a number much like a factory. Production space was measured in square footage rather than in acres and materials for production are brought to the worker more than the worker to the materials. Each worker is given an assigned work space of limited dimensions in which he may work for a period of hours. Each picking worker is expected to perform a limited number of motions in the harvesting of mushrooms and is able to move his tools and picking baskets so as to perform all motions at any point in time on a single horizontal plane. There are many similarities in terms of the centralization of work area between the work of a construction worker such as a brick layer and a mushroom picker.

A further significant indicator of an industrial rather than an agricultural form of production was the development of artificial mushroom varieties which can be only grown indoors in a carefully regulated artificial environment on a very regular production cycle. Agricultural producers may frequently perform research in order to develop specialized agricultural products for greater productivity. The focus in development for commercial mushroom production, however, has not only been on the development of mushroom cultivars and strains which are highly productive, but also on the development of a product which can be produced in a relatively rapid period of time indoors on a year round basis despite adjustments which must be made in the internal environment because of outside environmental conditions. The naturally

It is the responsibility of state and national governments to design mechanisms to protect the basic rights of such workers to act collectively to deal with employers about their terms and conditions of employment.

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occurring wild genetic ancestor of this mushroom cannot be grown under the artificial conditions permitting indoor commercial mushroom production. A similar process of development of specialized products suitable for a high division of labor occurred in the shift from craft production to industrial manufacturing where such things as garments or furniture were changed in order to be adaptable to factory type production. The transformation from the harvesting of wild mushrooms to the development of a mushroom for commercial production has followed a similar process.

The jobs involved in mushroom production by the employer appeared to require very specific skills. This was demonstrated by formal on the job training programs by the employer for job positions, including those of harvesters and by detailed job descriptions for at least 12 different kinds of jobs. The existence of jobs requiring specific skills rather than generalized skills is more indicative of an industrial than an agricultural production process.

A further indicator of the industrial rather than simply agricultural nature of the process involved in commercial production of mushrooms is the extent to which the mushroom picker is expected to perform duties which would more typically be those of a food processing employee. The mushroom harvester is not only expected to distinguish between mature and not mature mushrooms as would many agricultural hand harvesters, but he is also expected to sort mushrooms of fresh market quality from those of lower quality. Even more importantly the mushroom harvester does not use his knife to harvest the mushroom, but instead to cut or process the mushroom to a marketable size product. Mushroom harvesters for the employer harvested mushrooms which required no further food processing other than weighing and "overwrapping" with plastic. This food processing similarity includes a concern for cleanliness and sterility in the environment that has more in common with food processing than typical agricultural harvesting.

The non-seasonal nature of mushroom production and, in particular, both the attempt to stagger production so as to maintain nearly constant production levels and the constant year round work force levels of major mushroom producers such as the employer were significant indicators of an industrial type production rather than an agricultural type production.

The predictable work expectations of a mushroom worker from day to day and week to week show a greater similarity to an industrial or manufacturing work process than they do to an agricultural work process. This includes the predictability of such things as permanent employment, assigned daily work schedules, assigned work locations, unimportance of outside weather especially rain, uniform work temperatures, predictable minimum work or picking quotas, predictable work tasks and limited work movements.

*See, Vlastic Farms, Inc. v. Pennsylvania Labor Relations Board*, Supplemental Reproduced Record (R.1b-53b), Supreme Court of Pennsylvania, No. 0059 E.D. Appeal Docket 1999.

Encouraging local state experimentation to design mechanisms responsive to particular needs of workers and employers would better serve effectively protecting rights of such workers. This would be particularly true if it were accomplished within a national framework that set minimum standards expected to be met in protecting such rights.

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<sup>1</sup> Note on the author:

Arthur N. Read has been the General Counsel of a Pennsylvania based legal services program, Friends of Farmworkers, Inc. (<http://www.friendsfw.org>) since 1982.

He is a 1976 J.D. graduate of New York University Law School and is admitted to practice in New York, Pennsylvania and New Jersey. From 1976 to 1979 he was an associate in New York City at the law firm of Eisner, Levy, Steel and Bellman, P.C. From 1974-1979 he was a member of the New York City National Lawyers Guild Labor Committee and worked both representing unions and rank and file workers and groups through Eisner, Levy, Steel and Bellman, P.C. in New York City. From 1979 to 1982 he was a staff attorney with Camden Regional Legal Services, Farmworker Division practicing both in New Jersey and Pennsylvania. During the period 1979 - 1983 he was vice-president and then president of the National Organization of Legal Services, UAW affiliate at Camden Regional Legal Services.

For the past nearly 25 years he has primarily represented migrant and seasonal farm workers and mushroom workers. He has been a trainer and instructor at numerous continuing legal education programs since 1978.

In 1980 he brought the first New Jersey case raising claims for protection for agricultural workers under the provisions of Article 1, Section 19 of the New Jersey Constitution. Over the past 20 years, Mr. Read has represented virtually every complainant worker and petitioning labor organization in the mushroom industry before the Pennsylvania Labor Relations Board. For the past 10 years he has represented the only union of harvesting workers in the mushroom industry in Pennsylvania, the Kaolin Workers Union, affiliated with Unión de Trabajadores Agrícolas y del Hongo (UTAH also known as the “United Mushroom and Agricultural Workers Union”).

The author’s involvement in such litigation and advocacy is disclosed in accordance with rule for those who may be considered “special pleaders.” *See*, Douglas, Law Reviews and Full Disclosure, 40 *Wash. L. Rev.* 227, 228 (1965).