Certain Cannabis Industry Workers Are Not "Employees" Under Federal Labor Law; Could Be Covered by Mass. Law

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In a recent decision, the Regional Director of the National Labor Relations Board (NLRB) for Region 1 (covering most of New England) found that a majority of employees of a cannabis cultivation and processing facility were "agricultural laborers" within the meaning of the National Labor Relations Act (NLRA) and therefore not subject to the jurisdiction of the NLRB. The decision means that the union can attempt to organize the workers pursuant to Massachusetts law, which unlike federal law, requires recognition of a union with a simple card check.

Under a quirk of federal labor law going back to the 1930s, farm workers – also known as agricultural workers – are exempt from federal labor law. Some states, including Massachusetts, have decided to cover agricultural workers under state law. Many other states, however, deny unionization rights altogether to these employees.

The case involved the United Food and Commercial Workers Union, Local 1445's, effort to organize the cannabis cultivation and processing facility at New England Treatment Access's (NETA) Franklin, Massachusetts facility. The union initially sought to do so under Massachusetts state labor law, which, among other things, allows for organizing of agricultural laborers through a union-friendly "card check" method of organization – instead via the NLRA's secret ballot process.

NETA contended that its employees were not agricultural laborers and therefore were subject to the NLRA, rather than Massachusetts state law. The union, seeking the benefit of Massachusetts law, argued the opposite. Thus, the Regional Director had to decide whether NETA's employees qualified as "agricultural laborers" under the NLRA – and therefore, whether federal or state law as to unionizing applied.

The Regional Director reviewed each step of NETA's cannabis production process to determine which workers, if any, were agricultural laborers. He ruled that workers involved in both "primary agriculture," such as cultivation, growing, and harvesting of agricultural or horticultural products, and "secondary agriculture," covering non-agricultural practices closely related to primary agriculture activities, were exempt from federal labor law. More specifically, those involved in the cultivation of cannabis plants inside a temperature-controlled building were found to be agricultural laborers. So, too, were workers who harvest cannabis plants and place them in bins for drying, workers who cure and dry the plans after harvest, and workers who monitor and protect the cannabis plants from pests and pathogens. By contrast, certain workers involved in R&D and data analysis, while often present in the same area as agricultural laborers, were held to be non-agricultural employees. (Retail and production employees were not part of the petition; these employees are clearly not agricultural laborers.) NETA can seek review of the decision before the full NLRB.

Cannabis growers in Massachusetts should be mindful of this new decision, as it allows a union to obtain recognition of agricultural workers once the union has obtained authorization cards signed by a majority of workers in a bargaining unit. Because card signing often happens behind the scenes, employers may not be aware of a union effort until they are presented with a demand for recognition.

The decision could haunt unions outside Massachusetts. Most states do not protect the right of agricultural workers to unionize, and without federal protection, these cannabis industry workers may not be able to organize at all.

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