

Federal Labor Laws

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II. Structure and Jurisdiction of the Labor Management Relations Act and the National Labor Relations Board

A. Overview of the Labor Management Relations Act¹

1. The heart of the Labor Management Relations Act is § 7, which defines the basic rights of workers and unions under the law. Section 7 states:

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, and shall also have² the right to refrain from any or all of such activities

- a. Although there are only four basic rights (the rights to organize, bargain collectively, engage in protected concerted activity, and refrain) the interpretation and enforcement of these rights is the principal purpose of federal labor law.
 - b. The remainder of the Act, and related Board and court interpretations, provide meaning and limitations to these essential rights.
2. The enforcement of the basic § 7 rights and the limitation of specific forms of employer and union activity are the subjects of § 8, which defines a series of unfair labor practices.
 - a. Section 8(a) specifies five specific types of employer unfair labor practices, while § 8(b) identifies seven union unfair labor practices. There is one category of unfair labor practice, in § 8(e) involving “hot cargo” agreements, that prohibits certain forms of joint employer and union activity.
 - b. The remaining subsections clarify obligations of the parties, define the standards of collective bargaining and limit specific activities in significant ways.

¹ 29 USCA § 151, *et seq.*

² 29 USCA § 157.

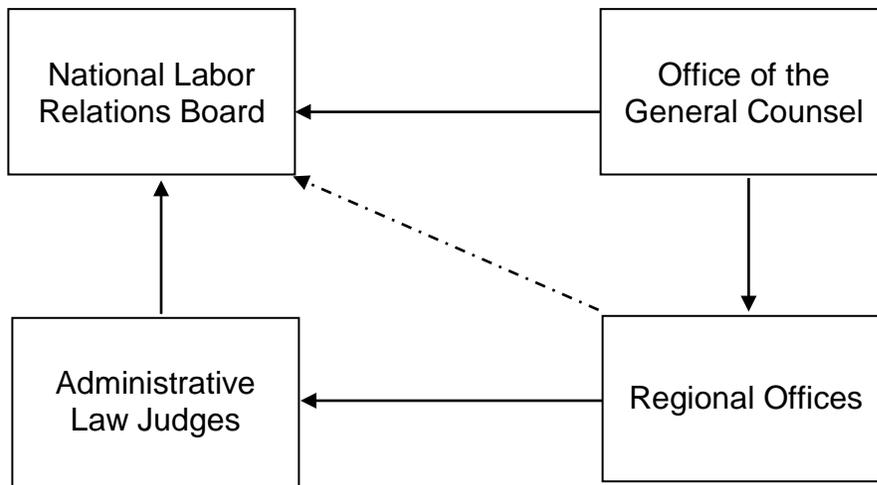
3. While §§ 7 and 8 of the Labor Management Relations Act define the substantive rights and obligations of employees, employers, and unions, the remaining sections of the original NLRA, as now amended, add limitations and clarifications of specific issues concerning the interpretation and enforcement of the law.
 - a. The preceding sections of the law include a general statement of the public policy underlying the Act (§ 1), define terms used in the Act (§ 2), and create and empower the National Labor Relations Board and its office of the General Counsel (§§ 3 through 6). While these provisions may seem innocuous, they can be very important in how the law applies to different classes of workers.
 - b. Sections 9 and 10 outline the procedures followed by the NLRB in the administration of the Act. Section 9 defines the procedures for handling "Representation" or "R" cases, in which the issue is whether and on what terms a particular union is the appropriate bargaining agent for a specified group of workers. Section 10 provides the procedures for prosecution of unfair labor practice charges, or "C" cases.
 - c. The remaining sections of the original NLRA, as now amended, add limitations and clarifications of specific issues (e.g. administrative and investigatory procedures) concerning the interpretation and enforcement of the law.
4. The Taft-Hartley amendments to the original National Labor Relations Act added additional titles to the original act that extend the operation of the law into a broader pattern of regulation of labor-management relations.
 - a. Title II of the Act creates the Federal Mediation and Conciliation Service, an agency that monitors the collective bargaining process and provides mediation and arbitration services on a voluntary basis. That title also provides for direct governmental intervention in so-called "national emergency" disputes.
 - b. Title III of the Act covers matters involving potential judicial and criminal intervention in labor relations. Title III creates the right of unions to sue and be sued, outlaws certain forms of extortion, and restricts the extent to which unions may control negotiated pension and benefit funds.
 - c. A final section (in fact, the final section) of Taft-Hartley is significant. Section 502 is the "Saving Provision" which makes it clear that a worker cannot be forced to work without consent. Moreover, it states that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work" shall not be deemed a strike. Although this section has been interpreted narrowly, it is an important tool in the protection of workers against certain health and safety hazards.

B. Structure of the National Labor Relations Board

1. Diagram One -- The National Labor Relations Board: The agency charged with the administration and enforcement of the Labor Management Relations Act is the National Labor Relations Board (NLRB or "the Board"). However, the "Board" actually has two meanings. In one sense, the NLRB is the entire agency with enforcement duties under the Act. But the "Board" is also a five-member panel, which oversees representation cases and ultimately adjudicates unfair labor practice cases.

Diagram One

The National Labor Relations Board



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- a. As a descriptor of the entire agency, the Board includes four major components. The first is the five-member panel also known as the Board. The second is the Office of the General Counsel. There are also Regional Offices which handle the first stages of both representation and unfair labor practice cases, and the Administrative Law Judges (ALJ), who function as hearing examiners in unfair labor practice cases.
 - b. The five-members of the "Board" are Presidential appointments who serve for five year terms, with one of the members designated by the President as chairperson. The Board sits as a review body in both representation and unfair labor practice cases, and its orders are binding on the ALJ's and Regional offices administering the law. The Board also has rule-making authority through which it establishes generally applicable standards for the enforcement of the law. Most cases heard by the Board are decided by panels made up of three of the five members.

- c. The General Counsel is also a Presidential appointment designated to serve for a four year term of office. The General Counsel is the principle prosecutor of unfair labor practice cases and is responsible for the supervision of the Regional Offices.
- d. The daily administration of the law is handled by the Regional Offices of the NLRB, which investigate unfair labor practice charges, conduct representation case investigations and elections, and otherwise serve as the primary contact of the agency with covered employers and employees. While the General Counsel is responsible for the supervision of the Regional Offices, in practice the Regions act as agents of the Board in representation cases and agents of the General Counsel in unfair labor practice cases.
- e. Fact-finding hearings and initial determinations of unfair labor practice cases are conducted by hearing officers known as Administrative Law Judges, or "ALJs." While the ALJs are technically independent of Board supervision (they are civil servants), they are bound to follow the interpretations of the five-member Board.
- f. General information about the National Labor Relations Board, including biographical information about the current members and the General Counsel can be obtained from the Board website, www.nlr.gov.

C. Jurisdictional Standards of the National Labor Relations Board

- 1. Whether a case will be heard by the NLRB depends on three distinct standards of jurisdiction:
 - a. First, there must be subject matter jurisdiction over the type of activity involved. The NLRB is empowered to regulate only those activities covered by the law. Jurisdiction of the NLRB is based on two specific types of cases, representation cases and unfair labor practice cases.
 - 1) Representation cases include all cases in which the question before the Board is whether or on what terms a group of covered employees are to be represented by a labor organization.
 - 2) Allegations that an employer or union violated one or more of the specific unfair labor practice provisions of the law are the second basis for NLRB subject matter jurisdiction. A substantial percentage of charges alleging unfair labor practices are dismissed because individuals believe that the Board regulates all labor disputes. Only specific types of conduct constitute grounds for unfair labor practice charges.

- b. Second, a number of important sectors of the economy, and large numbers of employees, have been "defined out" of the law through § 2 of the Act, and through Board and court interpretation of the jurisdiction of the Board. These exclusions are discussed in more detail in Subsection D, *below*.
 - c. Finally, for an employer to be within the jurisdiction of the NLRB it must meet the jurisdictional tests established by Congress and the Board. While Congress granted the Board the broadest possible federal jurisdiction (jurisdiction over "industries affecting commerce"), the Board has elected not to accept jurisdiction over certain enterprises and very small employers, even if those employers are involved directly or indirectly in interstate commerce. The jurisdictional standards of the NLRB are discussed in Subsection 2, *below*.
2. NLRB Jurisdictional Standards.
- a. The Constitutional basis for enactment of the National Labor Relations Act is the Interstate Commerce Clause³ which grants to Congress the authority to regulate matters directly or indirectly affecting interstate commerce. Prior to the 1930's, the interstate commerce clause had been interpreted narrowly, allowing Congressional intervention only in those matters of commerce, such as the railroad industry, where the impact on multiple states was direct and obvious.
 - b. Employer Constitutional challenges alleging that Congress exceeded its authority in enacting the NLRA were rejected by the U.S. Supreme Court in the landmark case of *NLRB v. Jones & Laughlin Steel Corporation*.⁴ In subsequent decisions, the Court accepted the principle that the necessary impact on interstate commerce could be either direct or indirect as long as there was a substantial impact. With these decisions, the potential jurisdiction of the Board over private sector employers, workers and unions is broad.
 - c. Despite the breadth of its potential jurisdiction, the NLRB exercises some discretion in exerting its jurisdiction over businesses in which the impact on interstate commerce is marginal.
 - 1) The gaming industry provides an interesting example of the discretionary power of the NLRB to assert jurisdiction. For many years, the Board has refused to

³ Constitution of the United States of America, Article I, § 8.

⁴ 301 U.S. 1, 57 S.Ct. 615 (1937).

exert its jurisdiction over horse and dog racing,⁵ but it does exercise jurisdiction over casinos.⁶

2) An Iowa case illustrates the difficulty with an industry exception to jurisdiction. To survive bankruptcy, an Iowa racetrack expanded its operations to include casino gambling, specifically slot machines. While some employees were engaged in work specifically related to the racetrack operations of the employer (horse barn and track maintenance) and others were engaged in work specifically related to the casino (slot machine technicians), many jobs supported both enterprises (housekeepers, kitchen employees, food servers, parking attendants, etc.). Because the bulk of the revenues of the enterprise were derived from the casino operations, the NLRB asserted jurisdiction over these employees.⁷

d. In most cases, however, the Board will accept jurisdiction if the employer involved meets specific monetary standards. While there have been occasional changes in the standards, for the most part, the Board fixed its basic test of jurisdiction in 1958.⁸ For most industries, Board jurisdiction will be established under the following monetary tests:⁹

- 1) Non-retail businesses: \$50,000 in direct or indirect, inflow or outflow of business in interstate commerce. The \$50,000 threshold cannot be established exclusively through indirect inflow or outflow.
 - a) The direct or indirect, inflow or outflow measure is a basic means of determining whether an employer has a sufficient impact on interstate commerce.
 - b) Direct outflow is the sales of goods or services outside the state in which the employer operates. Indirect outflow is sales to other enterprises within the same state that meet the jurisdictional standards of the Board. Direct and indirect outflow may be combined to meet the standards.

⁵ See, e.g., *Eatz v. IBEW Local 3, DME Unit*, 973 F.2d 64 (2nd Cir. 1992).

⁶ *El Dorado Club*, 151 NLRB 579 (1965).

⁷ *Prairie Meadows Racetrack and Casino*, 324 NLRB 550 (1997).

⁸ *Siemens Mailing Service*, 122 NLRB 81 (1958).

⁹ Office of the General Counsel, NLRB. *An Outline of Law and Procedure in Representation Cases*, Chapter 1. Superintendent of Public Documents. Washington DC. (2004).

- c. Direct inflow is the purchase of goods and services from outside the state, while indirect inflow is the purchase of goods or services from other enterprises that meet the jurisdictional standards.
- 2) Retail business: \$500,000 in annual gross volume of business. In applying any of the annual gross volume of business standards, there must be evidence that some portion of the \$500,000 must involve interstate commerce.
 - 3) Office buildings: \$100,000 in annual gross revenue, of which \$25,000 is derived from businesses engaged in commerce under any of the other standards.
 - 4) Instrumentalities, links and channels of interstate commerce: \$50,000 annual gross revenue.
 - 5) Public utilities: \$250,000 annual gross volume of business, or jurisdiction may be established under the non-retail standard.
 - 6) Transit systems: \$250,000 annual gross volume.
 - 7) Taxicab companies: \$500,000 annual gross volume.
 - 8) Radio, TV, telegraph and telephone companies: \$100,000 annual gross volume.
 - 9) Newspapers: \$200,000 annual gross volume.
 - 10) National defense contractors: Any substantial impact on national defense.
 - 11) Hotels: \$500,000 annual gross revenue.
 - 12) Hospitals: \$250,000 annual gross revenue.
 - 13) Nursing homes and extended care facilities: \$100,000 annual gross revenue.
 - 14) Private educational institutions: \$1,000,000 in annual gross revenue.
 - 15) Apartment houses: \$500,000 in annual gross revenue.
 - 16) Symphony orchestras: \$1,000,000 in annual gross revenue.
 - 17) Social service organizations: \$250,000 in annual gross revenue.

- 18) Jurisdiction over businesses in the District of Columbia is plenary, while jurisdiction in other territories of the United States is established under the appropriate monetary standards.
- e. If there is some evidence that the employer is engaged in interstate commerce but the employer refuses to provide information sufficient to determine whether the monetary standards are met, the Board will assert jurisdiction.¹⁰
 - f) In computing annual gross volume of business, a problem may arise in determining whether income received by an employee directly from a customer should be counted as part of the employer's gross revenues. Apparently, fares paid to a taxi driver are counted as part of the employer's gross volume of business,¹¹ but tip income paid directly to waiters or exotic dancers is not.¹²
 - g. Because of the discretionary power of the NLRB to accept or reject jurisdiction over employers, a gap in the law existed prior to the enactment of the Landrum-Griffin Act in 1959.
 - 1) The NLRA preempts state regulation of matters and businesses falling within the scope of the act. Under the preemption doctrine, the states are precluded from exercising jurisdiction over those employers that the Board could regulate under its Congressional grant of power.
 - 2) For small businesses, the preemption doctrine and the discretionary jurisdiction of the NLRB created a gap in coverage. Certain employers were immune from state labor relations law because they fell within the statutory definition of employers under the NLRA. However, if the NLRB rejected jurisdiction over these employers, they also became immune from federal regulation.
 - 3) This dilemma was resolved with the Landrum-Griffin Act, which made it clear that the states had the authority to exercise jurisdiction over any employers over which the NLRB rejected jurisdiction as of August 1, 1959.

¹⁰ *Tropicana Products*, 122 NLRB 121 (1958).

¹¹ *Supreme, Victory & Deluxe Cab Cos.*, 160 NLRB 140 (1966).

¹² *Temptations*, 337 NLRB No. 35 (2001); *Love's Wood Pit Barbecue Restaurant*, 209 NLRB 220 (1974).

D. Exclusions and exemptions from coverage under the LMRA

1. Employers or employees in the following industry groups are excluded from the law, either by definition or by Court interpretation. A number of issues may arise concerning the application of these exemptions in particular cases.
 - a. Public sector employers are excluded by § 2(2).
 - 1) Occasionally, disputes arise concerning quasi-public entities. If a business is created by the state and is administered by individuals who are directly accountable to the public or to public officials, it may be considered a public entity that is excluded from the law.¹³
 - 2) A government contractor will not be exempt if it otherwise meets the definition of employer, even if the government agency has substantial control over conditions of employment.¹⁴
 - 3) The Board has exercised jurisdiction over a private contractor of the federal Transportation Security Administration that provides airport security and screening services under the Aviation and Transportation Security Act.¹⁵ The Board rejected an argument that national security interests should preclude Board jurisdiction.¹⁶
 - 4) The status of Native American Tribal Councils as employers has undergone a number of changes over the past thirty years. When the issue of jurisdiction over Native American tribal activities first arose, the Board declined to assert jurisdiction over tribal activities conducted on tribal lands, relying on the governmental role of the tribal council, irrespective of whether the activities involved represented commercial or governmental enterprise.¹⁷ Subsequently, the Board modified its position by exerting jurisdiction over tribal activities that were

¹³ *NLRB v. Natural Gas Utilities District of Hawkins Cty., Tenn.*, 402 U.S. 600 (1971).

¹⁴ *Management Training Corp.*, 317 NLRB 1355 (1995), *abandoning, Res-Care, Inc.*, 280 NLRB 670 (1986). *But, see, ARA Services, Inc. v. NLRB*, 71 F.3d 129 (4th Cir. 1995).

¹⁵ 115 Stat. 635 (2001).

¹⁶ *Firstline Transportation Security*, 347 NLRB No. 40 (2006).

¹⁷ *Fort Apache Timber Co.*, 226 NLRB 503 (1976)(commercial activity); *Southern Indian Health Council*, 290 NLRB 438 (1988)(governmental functions).

located off of the tribe's reservation.¹⁸ The distinction between the nature and location of tribal activities was revisited in 2004. The Board now asserts jurisdiction over Native American owned and operated commercial enterprises.¹⁹ However, if the activity involves traditional tribal or governmental function, the Board will use its discretionary power and decline jurisdiction.²⁰

- b. Employers and employees covered by the Railway Labor Act are excluded by §§ 2(2) and 2(3) of the National Labor Relations Act. The jurisdictional line between the two laws can be somewhat amorphous. For example, UPS and Federal Express both operate ground and air shipping services. In cases argued the same day, the NLRB accepted jurisdiction over the ground services of UPS but referred the question of Railway Labor Act jurisdiction over the ground services of Federal Express to the National Mediation Board. The distinction was based in part on the long-standing NLRB jurisdiction over UPS as a ground carrier.²¹
- c. Agricultural laborers, domestic or household workers, persons employed by immediate family members, supervisors, and independent contractors are excluded by § 2(3).
 - 1) The determination of whether work is agricultural is made on the same basis as under the Fair Labor Standards Act.²²
 - 2) The definition of being "employed by his parent or spouse" has evolved through various court and board decisions. Simply being "related" is no longer sufficient grounds for exclusion.²³ Being financially dependent or residing with the owner or manager of a business will result in exclusion from employee status.²⁴ Being the recipient of special wages or

¹⁸ *Sac & Fox Industries*, 307 NLRB 436 (1992).

¹⁹ *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004).

²⁰ *Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004).

²¹ *Compare, United Parcel Services, Inc.*, 318 NLRB 778 (1995), *enf'd, United Parcel Service, Inc v. NLRB*, 92 F.3d 1221 (1996) *with Federal Express Corp.*, 317 NLRB 1155 (1995). *See also, DHL Worldwide Express, Inc.*, 340 NLRB 1034 (2003).

²² 29 USC § 203(f). *See, Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996).

²³ *International Metal Products Co.*, 107 NLRB 65 (1953).

²⁴ *Pandick Press Midwest, Inc.*, 251 NLRB 473 (1980).

privileges is also cause for not being included in a bargaining unit.²⁵ It may also be determined that family members are outside the “community of interest” necessary for inclusion in an appropriate bargaining unit.²⁶

- 3) For determining whether an individual is an employee or an independent contractor, the Board applies the common law test of agency. In applying this test, a number of factors must be considered to determine an individual’s status. These include the extent of the employer/principal’s right of control over the details of the work of the employee/contractor, whether the employees operate a business independent of the employer, whether the work is an essential component of the employer’s business, whether the employee must obtain special training or experience or whether necessary training is provided by the employer, whether the employee does business in the name of the employer, and the extent of entrepreneurial opportunity for gain or loss.²⁷
- d. Since the Taft-Hartley amendments in 1947, supervisors have been removed from the definition of employees for purposes of protections under the National Labor Relations Act.
- 1) For purposes of the NLRA, a supervisor is one having the authority to act on behalf of the employer to “hire, suspend, transfer, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or to effectively recommend such action”²⁸ While meeting any one of the specific tests is sufficient to classify a person as a supervisor, the responsibility must be more than a routine or clerical matter.²⁹ Whether there is sufficient authority is determined on a case-by-case basis.

²⁵ *Holthouse Furniture Corp.*, 242 NLRB 414 (1979).

²⁶ *NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985).

²⁷ *Roadway Package Systems, Inc.*, 326 NLRB 842 (1998).

²⁸ 29 USCA § 152(11).

²⁹ *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 US 889 (1949); *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331 (1st Cir. 1948).

- 2) The burden of establishing that an individual is a supervisor falls on the party seeking to exclude the individual.³⁰
 - 3) A number of cases concerning the authority of nurses to direct other employees in matters pertaining to patient care have raised questions about this type of supervisory authority. The Supreme Court has ruled that for a nurse to “responsibly direct” the work of less skilled workers with respect to patient care is sufficient to meet the supervisory test. The authority of the nurse does not have to extend to authority over other aspects of the employment status of the other workers. However, to be a supervisor, the nurse must be in a position to exercise independent judgment concerning the patient care activities of the other workers.³¹
 - 4) Similar issues have arisen in cases involving college faculty members. Appointment to a position as a department chairperson does not automatically result in the classification of that person as a supervisor. Similarly, incidental supervision of a person outside of the bargaining unit will not require a determination of supervisory status, nor will supervision of a graduate assistant.³²
- e. Managerial and confidential employees are excluded by Board interpretation of § 2(3).
- 1) Managerial employees are those who have a substantial role in the formulation of employer policies even though they might not otherwise meet the definition of supervisors.³³ Depending on their actual authority, university faculty members may be classified as managerial employees.³⁴
 - 2) Confidential employees with a “labor nexus” are excluded from bargaining units but are not deprived of

³⁰ *Bennett Industries*, 313 NLRB 1363 (1994).

³¹ *NLRB v. Health Care & Retirement Corp.*, 511 US 571 (1994); *NLRB v. Kentucky River Community Care*, 532 US 736, (2001); *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006).

³² *Detroit College of Business*, 296 NLRB 318 (1989); *Fordham University*, 193 NLRB 134 (1971).

³³ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757 (1974).

³⁴ *NLRB v. Yeshiva University*, 444 U.S. 672, 100 S.Ct. 856 (1980).

the other rights of employees under the law.³⁵ The “labor nexus” test is met if the individual assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policy in the field of labor relations.³⁶

- 3) Individuals who work for an employee-owned business may also be excluded from coverage. Exclusion is based on whether the employees, as a group of shareholders have an effective voice in formulating corporate policies.³⁷
- f. Employees of church-operated schools and other institutions may be excluded by Board and Supreme Court interpretations of the First Amendment and the jurisdiction of the LMRA.
- 1) In its landmark decision on this issue, the Supreme Court determined that Board jurisdiction over certain religious schools would contradict the First Amendment Freedom of Religion.³⁸
 - 2) The exemption applies when the nature of the operation is directly related to the religious mission of the entity. If the relationship between the activity involved is only tangentially related to the religious mission, the Board may assert jurisdiction.³⁹
 - 3) The Board has also considered the effect of the Religion Freedom Restoration Act (RFRA)⁴⁰ in determining its ability to assert jurisdiction. Under the RFRA, government action that substantially burdens free exercise of religion is prohibited unless the government shows a compelling reason for its action. However, the NLRB has determined that its exercise of jurisdiction over church-related institutions of higher

³⁵ *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 102 S.Ct. 216 (1981).

³⁶ *B.F. Goodrich Co.*, 115 NLRB 722 (1956).

³⁷ *Citywide Corporate Transportation, Inc.*, 338 NLRB 444 (2002).

³⁸ *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

³⁹ *Saint Elizabeth Hospital v. NLRB*, 715 F.2d 1193 (7th Cir. 1983).

⁴⁰ 42 USCA § 2000bb-1.

education does not substantially burden free exercise of religion.⁴¹

- g. When an individual provides employment-type services for an employer, but is primarily connected to that employer for other reasons, the individual may not be considered an employee. For example, the relationship between a disabled janitor and a sheltered workshop is considered by the board to be primarily rehabilitative and therefore excluded from the definition of an employee.⁴²
 - 1) Similarly, unpaid staff members of a public radio station were considered volunteers rather than employees.⁴³
 - 2) Graduate assistants are considered students rather than employees.⁴⁴ However, residents, interns and fellows who have completed their degrees are employees.⁴⁵
- h. Occasional problems exist with international operations.
 - 1) Although the general rule is that a foreign enterprise doing business in the United States is subject to the laws of this country, there are limits. For example, if a foreign employer employees foreign workers who are only coincidentally in the United States (as is some shipping operations), the Board may lack jurisdiction.⁴⁶
 - 2) International organizations such as the World Bank are exempt from Board jurisdiction.⁴⁷
 - 3) If U.S. business entities are engaged in business in other countries, they are generally beyond the reach

⁴¹ *Carroll College, Inc.*, 350 NLRB No. 30 (2007), *enforcement denied*, *NLRB v. Carroll College*, 558 F.3d 568 (D.C. Cir. 2009).

⁴² *Brevard Achievement Center*, 342 NLRB 982 (2004).

⁴³ *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999).

⁴⁴ *Brown University*, 342 NLRB 483 (2004), *overruling New York University*, 332 NLRB 1205 (2000). *But, see, New York University*, 356 NLRB No. 7 (2010), in which the majority of the panel found compelling reasons for reconsideration of the decision in *Brown University*.

⁴⁵ *Boston Medical Center Corp.*, 330 NLRB 152 (1999), *overruling, Cedars-Sinai Medical Center*, 223 NLRB 251 (1976).

⁴⁶ *Benz v. Compania Naviera Hidalgo, SA*, 353 U.S. 138, 77 S.Ct. 126 (1957).

⁴⁷ *Herbert Harvey, Inc.*, 171 NLRB 238 (1968).

of the NLRB, even if the employees involved were hired in and paid from the United States.⁴⁸ An exception to this rule may exist when the location of the work is not subject to the jurisdiction of another national government.⁴⁹

- h. Other classifications of employees are entitled or subjected to unique treatment under the law, even though they are covered. Specifically, the Board is restricted in the determination of bargaining units for plant protection personnel (§9(b)(3)) and professional employees (§9(b)(1)).

E. Reconciling federal and state jurisdiction over labor relations

1. Under the Supremacy Clause of the United States Constitution, when Congress acts within the scope of its authority, the states are prevented from regulating the same conduct. This fundamental rule of law has application for labor relations in the United States. The National Labor Relations Act was enacted by Congress through the authority granted by the interstate commerce clause of the Constitution. As a result, the scope of the NLRA limits the ability of the states to enforce laws dealing with the same matters regulated by the NLRA.
2. The Supreme Court has established specific guidelines to define the extent to which state laws are preempted by the scope of the National Labor Relations Act. There are also specific exceptions under which the states are free to act irrespective of the potential scope of the National Labor Relations Act.
3. Under the Supreme Court decision in *San Diego Building Trades Council v. Garmon*,⁵⁰ federal supremacy over state law with respect to labor relations is clear. With the *Garmon* decision, the Court ruled that a state is prohibited from regulating any activity that is even arguably within the scope of the NLRA. The states may still exercise their police power to maintain public health and safety, but may not regulate activities that are potentially covered by the NLRA. For example, broad state restrictions on the right to picket could not be enforced, but the states can act in the event of violence on a picket line.
 - a. Since the basis for the NLRA is the interstate commerce clause, federal law takes precedence over state law for matters covered by the NLRA for all employers engaged in interstate commerce, irrespective of size. However, since the

⁴⁸ *Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168 (3rd Cir. 2004); *Computer Sciences Raytheon*, 318 NLRB 966, (1995); *RCA Oms*, 202 NLRB 228 (1973).

⁴⁹ *Alcoa Marine Corp.*, 240 NLRB 1265 (1979). See also, *NLRB v. Dredge Operators*, 19 F.3d 206 (5th Cir. 1994).

⁵⁰ 359 U.S. 236 (1959).

actual scope of the NLRA is limited by the discretionary use of jurisdictional standards by the NLRB, there are many small employers that are exempt from NLRB jurisdiction although they are engaged directly or indirectly in interstate commerce.

- b. This gap was closed by the Landrum-Griffin amendments to the National Labor Relations Act. Now, the states are free to exercise jurisdiction over employers if the NLRB has used its discretionary authority to reject jurisdiction.
4. While *Garmon* prevents state regulation of all matters even arguably within the scope of the NLRA, there are some matters that are left unregulated by federal law. Under more recent interpretations of federal preemption, the Court has ruled that the states are prevented from enforcing laws regulating such activities if it is clear that the intent of federal law is to leave the matter unregulated.⁵¹ For example, a state may not enjoin bargaining tactics employed by a union that are neither protected nor prohibited by federal law.
5. In some areas, federal law specifically authorizes the states to act with respect to labor relations. For example, under § 14(b) of the NLRA, states may enact so-called “right-to-work” laws, prohibiting the negotiation of union security agreements. There are other areas in which federal and state jurisdiction is shared. For example, suits to enforce collective bargaining agreements may be brought in either state or federal court, although federal principles of law must be applied in enforcing those agreements, even if those federal principles contradict the applicable state law.⁵²
6. Section 10(a) of the NLRA includes a provision that permits the NLRB to enter into agreements with state agencies under which NLRB jurisdiction in certain industries may be ceded to the state, if the state has relevant law consistent with the NLRA. The Supreme Court has interpreted this provision narrowly, allowing cession of jurisdiction only where the relevant state law has provisions parallel to those of the NLRA.⁵³ The Board has consistently refused to exercise its authority to enter into such agreements, denying cession agreement unless the provisions in state law are substantially identical to the NLRA.⁵⁴

⁵¹ *Machinists v. WERC*, 427 US 132 (1976).

⁵² *Charles Dowd Box Co. v. Courtney*, 368 US 502 (1962); *Teamsters v. Lucas Flour Co.*, 369 US 571 (1962).

⁵³ *Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301 (1949).

⁵⁴ See, e.g., *Produce Magic, Inc.*, 318 NLRB 1171 (1995).