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Overview of U.S. Labor Law

The protection of the rights of employees in the workplace, including the right to organize and engage in collective bargaining, is governed by the body of law known as labor law.

In the United States, modern labor law began with the Norris-LaGuardia Act of 1932, which outlawed contracts that required employees to agree, as a condition of employment, not to join a labor union (“yellow dog” contracts), and which restrained the power of federal courts to issue injunctions in labor dispute cases. In 1935, Congress passed the National Labor Relations Act, which established a mechanism for unions to establish their bargaining authority, required employers to deal with unions duly authorized as employee representatives, and prohibited employers from discriminating against employees who engaged in concerted activity. Other labor law initiatives include the Labor Management Relations Act of 1947, which regulates certain activities by labor organizations, and the Labor-Management Reporting and Disclosure Act of 1959, which regulates labor activities and establishes a set of internal union democracy safeguards.

Although union membership among employees in the private sector has been in decline since 1956, the NLRA remains relevant and vital to the modern workplace and the national labor market. The NLRA continues to define and protect employee rights in the workplace and the processes of union organizing and collective bargaining.

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The Basics

Q 1.1 What is “labor law”?

Labor law is the body of law that protects the rights of employees to organize and engage in collective bargaining and that regulates the relationship between employers, employees, and the labor organizations representing them. The primary labor law governing employment in private companies in the United States is the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, which is also known as the Wagner Act. The NLRA applies to employers who meet the minimum jurisdictional standards established by the National Labor Relations Board. Labor organizations (often called unions) are voluntary associations that represent employees in collective bargaining with their employers for employer-supplied dues or fees.

Unions, on behalf of groups of employees, act as intermediaries between employees and their employers and negotiate collective bargaining agreements with respect to their terms and conditions of employment. Employers and employees are covered by certain provisions of the NLRA even if the employees are not represented by a union. Employees have the right to engage in certain group activities, more commonly referred to as “concerted activities,” related to their employment whether or not there is a union on the scene. Labor law also intersects with a number of other federal and state laws, including free-speech laws, property and trespass laws, and antitrust laws.

Q 1.1.1 How does “labor law” differ from “employment law”?

Although the terms “labor law” and “employment law” are often used interchangeably, “labor law” normally refers to the collective aspects of the law of the employment relationship—that is, those aspects dealing with the relations between unions, employers, and employees.

The term “employment law” normally refers to individual aspects of the law of the employment relationship—that is, those aspects that provide protections for, and in some cases are restrictions on, employees whether or not they are represented by or are members of unions. The states through their contract, tort, and agency law and particular statutes are active in this area. In addition, Congress has passed a number of employment laws, including the Fair Labor Standards Act of 1938, which establishes minimum wages and requires payment of overtime pay for work in excess of a forty-hour workweek. Beginning in the 1960s, Congress enacted laws prohibiting discrimination on the basis of protected categories such as race, gender, religion, disability, age, and national origin; a statute protecting occupational health and safety; whistleblower protections in particular areas; and a measure regulating retirement and welfare benefit plans. This set of state and federal laws, focused primarily on the relationship between employers and individual employees, makes up the body of rules that is generally referred to as “employment law.”

Legislative Framework

Federal Statutes

Q 1.2 What are the principal labor laws that govern employment in the private sector?

There are three main federal statutes that regulate employee collective bargaining rights, labor management relations, collective bargaining agreements, and labor organizations in the United States:

- (1) the NLRA (Wagner Act of 1935, 29 U.S.C. § 151 *et seq.*);
- (2) the LMRA (Taft-Hartley Act of 1947, 29 U.S.C. § 185 *et seq.*); and
- (3) the LMRDA (Landrum-Griffin Act of 1959, 29 U.S.C. § 401 *et seq.*).

These statutes substantially occupy the field of labor management relations and preempt state laws touching upon these issues.

Q 1.2.1 What does the NLRA provide?

The NLRA (the Wagner Act) was enacted in 1935 to protect the rights of employees to organize and engage in collective bargaining with their employers. In passing the NLRA, Congress declared a public policy to protect employees' rights and encourage collective bargaining. It requires covered employers to bargain with unions that are recognized as the legitimate representatives of workers. These principles are underscored in the two most commonly invoked sections of the NLRA: section 7 and section 8(a). Section 7 sets out the rights of employees:

- to organize;
- to form, join, or assist labor organizations;
- to bargain collectively through representatives; and
- to engage in other concerted activities.

Section 8(a) sets out prohibited employer labor practices. These include:

- interfering with employees' section 7 rights;
- dominating or interfering with the formation of a union;
- discriminating in regard to hire, tenure, or any other term and condition of employment to discourage the exercise of section 7 rights;

- retaliating against employees for filing unfair labor practice charges or testifying during certain hearings; and
- refusing to bargain collectively with employees' labor representatives.

The NLRA established the NLRB to oversee the development of federal labor law and resolve particular labor management disputes. The NLRB regulates unfair labor practices and the process of representative selection.

Q 1.2.2 What does the LMRA provide?

Pent-up demand for wage increases after World War II led to a wave of strikes and rising inflation. In an attempt to curb claimed abuses of union power, Congress passed the LMRA in 1947. The original Wagner Act saw the problem of interference with section 7 rights principally as a matter requiring protection from employer unfair labor practices. The LMRA amended the NLRA to prohibit unfair labor practices by unions (now found in section 8(b) of the NLRA).

Specifically, the LMRA outlawed secondary boycotts and “closed shops” (where only union members were eligible for hire). Congress sought to limit compulsory unionism in a number of respects. In addition to the prohibition of the closed shop, it amended section 7 to include the right “to refrain” from collective activity and allowed states to pass so-called right-to-work laws prohibiting union shops (where all of an employer’s employees in a particular bargaining unit are required to join or contribute to a union once hired). The LMRA amendments also added section 8(c) to clarify that partisan employer speech would not be considered an unfair labor practice:

The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.

The LMRA also included provisions on enforcement of collective bargaining agreements (section 301), employer payments to union representatives (section 302), and remedies for union unfair labor practices (sections 10(l) and 303).

Q 1.2.3 What does the LMRDA provide?

Enacted in 1959, the LMRDA, in addition to implementing internal union democracy safeguards dealing principally with the relationship between the union and its members, created two additional union unfair labor practices—one closing down the “hot cargo” loophole, which had permitted unions to compel neutral employers to agree in advance to boycott struck products, and the other regulating recognitional and organizational picketing by labor organizations.

State Right-to-Work Laws**Q 1.2.4 What is a “right-to-work” law?**

A right-to-work law is a state statute that prohibits employers and unions from requiring employees to join a union or pay the equivalent of union dues.

Before the LMRA, unions and employers subject to the NLRA could agree to a closed shop, meaning employees at unionized workplaces could be required to become members of the union as a condition of their employment. If, for whatever reason, the employee ceased to be a member of the union, his or her employment could be terminated. The LMRA outlawed closed shops, but permits “union shops,” which require new employees to join a union, or pay union dues, within a certain period of time after hire. In a union shop, the employer must terminate any employee expelled from the union for failure to pay dues, but need not terminate an employee expelled from the union for any other reason. The LMRA also permits the “agency shop,” in which employees must pay the equivalent of union dues but are not required to formally join a union.

The LMRA authorizes individual states to outlaw union shops and agency shops for employees who work in that state. Unions can represent employees in right-to-work states, but such employees cannot be forced to join a union or to pay the equivalent of union dues; nor can their employment be terminated for joining or refusing to join a union.

NLRA Jurisdiction

Covered Employees

Q 1.3 What kinds of employees are covered by the NLRA?

Broadly speaking, an employee is an individual who works for an employer for payment and who performs his work under the employer's control. The statutory term "employee" under the NLRA specifically includes any individual whose work has ceased, either as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.¹ The definition specifically excludes certain individuals, as elaborated below.

Q 1.3.1 Do you have to be a member of a union to be protected by the NLRA?

No. Even for unrepresented employees, the NLRA guarantees important workplace rights. Employees are guaranteed protection of the rights outlined in section 7 of the NLRA, regardless of whether they are represented by an outside labor representative. In addition to the right to organize or join a union, section 7 gives employees the right, among other things, to:

- (1) talk together about working conditions;
- (2) attend meetings about a union or workplace issues;
- (3) read or distribute pamphlets in non-work areas before and after work, or during breaks or lunch periods;
- (4) wear union insignia;
- (5) sign union authorization cards;
- (6) sign a petition or file a grievance about work issues;
- (7) talk to co-workers about wages;
- (8) refuse to support a union; and
- (9) solicit other employees to engage in the foregoing.

There may also be limits on the employer's ability to require, as a condition of employment, that employees give up their right to engage in concerted activity.

Excluded Employees

Q 1.4 Which workers are excluded from coverage under the NLRA?

The NLRA's definition of "employee"² specifically excludes:

- (1) agricultural laborers;
- (2) employees in domestic service;
- (3) anyone employed by his/her parent or spouse;
- (4) independent contractors;
- (5) supervisors;
- (6) anyone employed by an employer subject to the Railway Labor Act, as amended; and
- (7) anyone who is employed by a person who does not meet the definition of "employer."

An "employer" is generally defined as an individual or business that engages employees to perform work in exchange for wages or salary.³ The definition of "employer" is discussed more fully in Q 1.5 below.

Additionally, certain other types of employees not expressly excluded in the NLRA are not included in the definition of "employee," such as managerial employees and confidential employees.

Q 1.4.1 Who qualifies as an "agricultural laborer" excluded under the NLRA?

Employees who regularly perform nonagricultural work are not "agricultural laborers" and are covered under the NLRA.⁴ The NLRB borrows the definition of "agriculture" from section 3(f) of the Fair Labor Standards Act. This definition of agriculture contains a primary meaning, including actual farming activities such as cultivation, tilling, growing, and harvesting, and a secondary meaning, including practices performed as incident to or in conjunction with farming operations.⁵ Secondary agricultural functions, such as packing, sorting, grading, and storing, are incidental practices that do not change the employer's product or enhance its value, but are simply part of preparing the product for marketing.⁶ Employees that perform such

incidental practices will be covered under the NLRA if the employees regularly handle any amount of farm commodities produced by a farmer other than the employer.⁷

Some states have their own labor relations laws that govern agricultural employees excluded from the NLRA. For example, California has a state Agricultural Labor Relations Act, which regulates unfair labor practices, representation issues, and collective bargaining for farm workers. Idaho, Kansas, and Arizona have similar laws relating to the rights of farm workers. Moreover, other states, such as Hawaii and Wisconsin, regulate labor relations in the farm industry under more general labor relations statutes.

Q 1.4.2 Who qualifies as an employee in “domestic service” excluded under the NLRA?

The “domestic service” exemption under the NLRA applies to any domestic assistant directly employed in the service of a homeowner or resident at his home. The homeowner or resident must control the wages, hours, and terms and conditions of the domestic assistant’s employment. The exemption does not apply to in-home workers employed by a for-profit corporation that provides housekeeping services for elderly, low-income, emotionally disturbed, or mentally or physically disabled individuals.⁸

Q 1.4.3 What does it mean under the NLRA for an individual to be “employed by a parent or spouse”?

The exclusion of individuals employed by a parent or spouse applies to the children and spouses of sole proprietors and of co-partners. The exclusion also extends to children and spouses of individuals who have substantial stock interests in closely held corporations. To determine the applicability of this exception, the NLRB looks beyond what may be a nominal employer to the actual employer, which is “the one who possesses actual authority and concomitant responsibility to determine labor policy and bargain collectively with the employees’ representative.”⁹

Q 1.4.4 What is the test to determine whether an individual is an “independent contractor” excluded under the NLRA?

The NLRB applies common law agency principles to determine whether an individual is an independent contractor. Independent contractor status is determined in light of all of the incidents of the relationship between the parties, “with no one factor being decisive.”¹⁰ The factors include:

- (1) whether the work performed is an essential part of the company’s regular business;
- (2) whether the person is engaged in an occupation or business that is distinct from the company’s regular business;
- (3) the length of time for which the person is employed or contracted;
- (4) the skill required in the particular occupation;
- (5) whether the company provides the tools and instrumentalities necessary to perform the work;
- (6) the method of payment, whether by the time worked or by the job;
- (7) the extent to which the company controls the details of the work;
- (8) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer’s direction or by a specialist without supervision;
- (9) whether the parties believe they are creating an employment relationship;
- (10) whether the employer performs the same type of work performed by the contracted individuals; and
- (11) whether the person has significant entrepreneurial opportunity for gain or loss.¹¹

Q 1.4.5 Who is a “supervisor” excluded under the NLRA?

Section 2(11) of the NLRA defines a supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline

other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action,” as long as his or her authority is not merely routine or clerical but requires the use of independent judgment.¹² The test for determining supervisory status is:

- (1) whether the individual has the authority to engage in any of the twelve functions listed in section 2(11) of the NLRA;
- (2) whether the exercise of such authority requires the use of independent judgment; and
- (3) whether the employee holds the authority in the interest of the employer.¹³

An employee who holds the authority to engage in any of the twelve functions is a supervisor, even if he or she has not yet exercised the authority.¹⁴

Q 1.4.6 Who qualifies as an employee of an entity subject to the Railway Labor Act?

For a complete discussion of the Railway Labor Act and which employees it does and does not cover, see chapter 9. See also QQ 1.6.4 and 1.6.5 below.

Q 1.4.7 Who is a “managerial employee” excluded under the NLRA?

Although not expressly excluded from coverage under the NLRA, managerial employees generally are not included in the definition of “employee” under Supreme Court precedent.¹⁵ Managerial employees are those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer and those who have discretion in the performance of their jobs independent of their employer’s established policy.”¹⁶ Thus, discretionary authority to make or implement policy for the employer is the linchpin. In evaluating whether an employee is managerial, the NLRB considers the individual’s actual job duties, authority, and relationship to management, rather than his or her job title.

Some examples of positions that the NLRB has held to be “managerial” include: staff nurses who directed nursing assistants in providing care to patients because they exercised managerial judgment that they acquired through their professional training;¹⁷ a university’s faculty members who helped formulate fundamental university interests when recommending or implementing its policies;¹⁸ and a purchasing/inventory controller who was able to commit her employer’s credit.¹⁹

Q 1.4.8 Who is a “confidential employee” excluded under the NLRA?

Those who qualify as “confidential employees” because they assist and act in a confidential capacity to persons who exercise managerial functions regarding labor relations are excluded from the definition of “employee” under the NLRA.²⁰ Notably, an employee is not a confidential employee unless there is a nexus to labor relations functions.²¹ Moreover, employees who simply have access to confidential non-labor materials, such as confidential financial or business information or personnel records, are not considered confidential employees and are not excluded.²²

Some examples of employees who are considered labor-nexus “confidential employees” include: a personnel/payroll administrator; an executive secretary to the employer’s general manager; and a human resources officer who investigates employee discipline issues.

Other Employees

Q 1.4.9 Does the definition of “employee” under the NLRA exclude contingent or temporary employees?

Generally, contingent or temporary employees are covered by the NLRA.²³ However, such workers may be excluded from particular bargaining units under NLRB decisions.²⁴

Q 1.4.10 ... undocumented aliens?

Aliens with or without permission to work in the United States are covered by the NLRA.²⁵ An employer that violates the NLRA

with respect to undocumented aliens may be subject to unfair labor practice charges and remedial NLRB action. However, there may be limits on the NLRB's authority to award reinstatement or backpay to those who do not have permission to work in the United States.²⁶

Q 1.4.11 ... retired employees?

The NLRA's definition of "employee" does not include retired employees.²⁷ Thus, the employer's obligation to bargain collectively with representatives of its employees does not extend to current retirees. However, retirees can properly be represented by a union that represents active employees for certain purposes.

Q 1.4.12 ... "salts"?

Individuals who engage in salting, commonly referred to as "salts," are paid union organizers trying to gain employment in order to obtain direct access to employees for organizing purposes and to circumvent the restrictions employers may legally place on non-employee union organizers from entering the workplace. Historically, employers could deny employment to applicants discovered to be salts.²⁸ In a victory for unions, the U.S. Supreme Court ruled that salts applying for jobs are "employees" under the NLRA, and therefore an employer may not fire, refuse to hire, or otherwise discriminate against an individual solely because he or she works for a union.²⁹ Salting is further discussed at Q 3.22.1.

Covered Employers

Q 1.5 Who is an "employer" subject to the NLRA?

In general, an employer is an individual or business that engages employees to perform work in exchange for wages or salary. The NLRA defines "employer" as "any person acting as an agent of an employer, directly or indirectly," but excludes those entities discussed below (see Q 1.6).³⁰ Recently, the Office of General Counsel has advocated a more expansive definition of "employer" by seeking to broaden the circumstances under which entities will be deemed to be "joint-employers."³¹ Entities meeting the definition of joint employer generally are covered by the NLRA.

Because the NLRA's jurisdiction is based on the Commerce Clause of the U.S. Constitution, the NLRB exercises jurisdiction only over matters that substantially affect interstate commerce. The NLRB has established very modest financial thresholds to determine whether an employer substantially affects commerce; few employers fall below those thresholds. For a complete list of the NLRB's jurisdictional standards, consult the Basic Guide to the NLRA, which can be found on the NLRB's website.³²

Q 1.5.1 Who is an "agent of an employer" under the NLRA?

The NLRA provides, "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."³³ In interpreting the NLRA, courts and the NLRB apply common law rules of agency. A person is an agent of the employer if, "under all the circumstances, employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management."³⁴ Thus, a supervisor acting under apparent authority may be treated as an agent of the employer, even if his or her actions run counter to instructions. In some circumstances, third parties who are independent contractors for the employer, such as accountants, consultants, employment agencies, and security guards, may be considered agents of the employer for certain purposes under the NLRA.³⁵

Excluded Employers

Q 1.6 Which employers are not subject to the NLRA?

The federal government, Federal Reserve Banks, state governments and their political subdivisions, entities covered by the RLA, and labor organizations expressly are not subject to the NLRA. These express exclusions, as well as others, are addressed below.

Q 1.6.1 Are there any exceptions to the rule that the federal government is not subject to the NLRA?

The Postal Reorganization Act of 1970 incorporated the NLRA's provisions, though it did not amend the NLRA itself. Thus, employees of the U.S. Postal Service, an independent establishment of the federal government with its own board of governors, have collective bargaining rights. Under the PRA, the NLRB has the authority to determine appropriate bargaining units, supervise elections, and investigate unfair labor practice allegations. However, the PRA maintains the ban on strikes by federal employees.³⁶ No other federal government employees are covered by the NLRA.

Q 1.6.2 Even though federal and state governments are not subject to the NLRA, do their employees have collective bargaining rights?

Federal employees are covered by the Federal Service Labor-Management Relations Act, 5 U.S.C. § 7101 *et seq.*, which is administered by the Federal Labor Relations Authority. Employees covered by the statute may organize and engage in limited collective bargaining (excluding wages). They may not, however, engage in strikes or slowdowns. Many state and local government employees have enacted labor relations laws allowing union organization and collective bargaining; the general rule is that government employees at any level do not have the right to strike.

Q 1.6.3 When is an entity a “political subdivision” of a state?

The NLRA excludes states and political subdivisions of states from its definition of employer. The term “political subdivision” encompasses more than merely counties and municipalities. The U.S. Supreme Court has held that an entity is a political subdivision of a state if it: (1) is created directly by the state so as to constitute a department or an administrative arm of the government; or (2) is administered by individuals responsible to public officials or the general electorate.³⁷ The second criterion is met, for example, if a controlling majority of the entity's board of directors is appointed by public officials. An entity is responsible to the general electorate only if the composition of

the group of electors eligible to vote for the entity's governing body is sufficiently comparable to the electorate for general political elections in the state. The NLRB, thus, may exercise jurisdiction over an entity even if it performs primarily public functions. For example, while the NLRB does not exercise jurisdiction over traditional public schools, it has exercised jurisdiction over two public charter schools because each school was operated by a non-profit corporation, and the school's board of directors was not subject to direction or dismissal from public officials or the general electorate.³⁸

Q 1.6.4 Which employers are subject to the RLA and thus excluded from the NLRA?

The RLA applies to common carriers, such as railroads and airlines, engaged in interstate or foreign commerce. If an entity is subject to the RLA, it is excluded from the NLRA's definition of "employer."³⁹

Q 1.6.5 How is the determination made as to whether an entity is subject to the RLA?

The NLRB will determine whether an entity is subject to the RLA when a petition is filed or a charge alleging unfair labor practices raises this jurisdictional issue. In order to determine whether an employer is subject to the RLA, a hearing is held at the regional office level of the NLRB, and the record is sent to the Executive Secretary. The NLRB may submit the record to the National Mediation Board, which has jurisdiction under the RLA, to determine whether the employer is subject to the RLA. Typically, the NLRB defers to the NMB's determination as to whether an employer is subject to the RLA.

If the NMB has rejected jurisdiction in the past, the burden is on the party asserting current NMB jurisdiction to establish jurisdictionally significant changes since the prior NMB decision.⁴⁰

For further discussion of the RLA, see chapter 9.

Other Employers

Q 1.6.6 Are labor organizations subject to the NLRA in their capacity as employers?

Labor organizations are specifically excluded from the NLRA's definition of "employer," "other than when acting as an employer." In other words, when a union acts as an employer, it is subject to the NLRA, and its employees are entitled to the NLRA's protections. Typically, the NLRB must exercise its jurisdiction over unions when the unions are acting as employers, unless to do so, in a particular case, would not effectuate the NLRA's policies.⁴¹

Q 1.6.7 Are Native American–owned and –operated enterprises subject to the NLRA?

Enterprises owned and operated by Native American tribes are sometimes subject to the NLRA. Formerly, the NLRB held that tribes and their enterprises located on reservations were exempt from the NLRA's definition of "employer" as government entities. There were only two exceptions to this rule: (1) when the self-directed enterprise is located off the reservation grounds; or (2) where an enterprise located on the reservation is not wholly owned or controlled by the tribe.

In 2004, the NLRB abandoned the on/off reservation analysis.⁴² Instead, the NLRB considers the function, rather than the ownership or location, of the enterprise. The NLRB will not assert jurisdiction when an enterprise serves a traditional or governmental function, but the NLRB will assert jurisdiction over purely commercial enterprises that substantially affect interstate or foreign commerce.

The NLRB's abandonment of the on/off reservation analysis has been challenged by Native American tribes, members of Congress, and the Department of the Interior. In July 2011, a federal district court in Oklahoma held that the NLRA did not give the NLRB jurisdiction over commercial enterprises run by Native American tribes on reservation lands. The court noted that the NLRA is silent as to whether the NLRB has jurisdiction over Native American tribes and that long-standing principles provide that ambiguities in a federal statute must

be resolved in favor of Native American tribes. The court held that the NLRA's silence on the issue of the NLRB's jurisdiction did not establish congressional intent to strip Native American tribes of their inherent authority to govern their own territory. The district court enjoined the NLRB from exercising any such jurisdiction and the NLRB appealed to the Tenth Circuit.⁴³ The district court and Tenth Circuit allowed the Acting General Counsel to file an amended complaint directly with the NLRB.⁴⁴ The NLRB disagreed with the Oklahoma district court's holding and held that the Board could assert jurisdiction over Native American tribes unless:

- (1) the law "touche[d] exclusive rights of self-government in purely intramural matters";
- (2) the application of the law would abrogate treaty rights; or
- (3) the statutory language or legislative history of the law suggested that Congress did not intend the law to apply to Indian tribes.

If none of these three exceptions is present, the NLRB can assert jurisdiction unless policy considerations weigh against taking jurisdiction.⁴⁵ The NLRB found that none of the exceptions applied and no policy considerations weighed against exercising jurisdiction over the Chickasaw Nation's operation of the WinStar World Casino, which had primarily non-Indian employees and patrons and which advertised both in and outside the tribe's jurisdiction. The Chickasaw Nation appealed the NLRB's decision to the U.S. Court of Appeals for the Tenth Circuit.⁴⁶ U.S. Representative Kristi Noem (R-SD) and U.S. Senator Jerry Moran (R-KS), along with other members of Congress, introduced bills that would clarify that the NLRA does not give the NLRB jurisdiction over Native American tribes on reservation lands.⁴⁷ The Department of the Interior also wrote to the General Counsel of the NLRB expressing the department's position that the NLRB lacks such jurisdiction.⁴⁸

Q 1.6.8 Are religious institutions subject to the NLRA?

Generally, the NLRB accords "employer" status under the NLRA to religiously affiliated institutions when their purpose is not to promote the religion or its values, but to achieve some other commercial or social end. As such, hospitals with religious affiliations typically are subject to the NLRA.⁴⁹

Religious primary and secondary schools, on the other hand, are usually not “employers” under the NLRA. The NLRB and the federal courts use different standards to determine whether religiously affiliated colleges and universities are “employers” under the NLRA. The D.C. Circuit Court of Appeals has held:

A school is exempt from NLRB jurisdiction if it: (1) holds itself out to students, faculty and the community as providing a religious educational environment; (2) is organized as a “nonprofit”; and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.⁵⁰

The court later affirmed that this is not an intrusive inquiry; it ensures that schools claiming exemptions are “*bona fide* religious institutions,” while avoiding NLRB inquiry into the substance and contours of their religious beliefs and missions.⁵¹

The NLRB asserts, however, that it must carefully examine the religious nature of the college environment to determine whether propagation of a religious faith is the primary purpose of the college or whether the college’s purpose and function are primarily secular.⁵² Opponents of the NLRB’s “substantial religious character” test assert that such stringent review is unconstitutional under the religion clauses⁵³ of the U.S. Constitution because the review requires the NLRB to engage in improper inquiry into the school’s religious doctrine and make unlawful judgments regarding the school’s good-faith statements regarding its religious purposes.

Future decisions in this area may be influenced by the U.S. Supreme Court’s 2012 ruling in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.⁵⁴ In that case, the Supreme Court held that a religious organization’s choice to hire or fire a teacher who had been ordained as a minister was protected from anti-discrimination laws because “the Free Exercise Clause . . . protects a religious group’s right to shape its own faith and mission through its appointments . . . [and] the Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions.”⁵⁵ The opinion could be read to support a broad deference to religious organizations to shape their

staff through religious appointments. However, the ruling could also be construed narrowly to support the NLRB's more stringent review into the secular or religious nature of an academic environment where professors are not ordained as ministers.

NLRB precedent is inconsistent as to whether non-teacher employees, such as custodians, are covered by the NLRA.⁵⁶

Foreign Jurisdiction

Q 1.7 Does the NLRB have jurisdiction over labor disputes involving foreign countries?

The NLRB will not assert jurisdiction over disputes that arise in a foreign country, even if U.S. employees are involved. For example, the NLRB held that telephone equipment installers employed on projects in Iran or other foreign countries were not subject to the terms and conditions of a particular collective bargaining agreement.⁵⁷

Notes

1. 29 U.S.C. § 152(3).
2. *Id.*
3. *Id.* § 152(2).
4. *Id.* § 152(3).
5. Camsco Produce Co., 297 N.L.R.B. 905, 906 (1990).
6. *Id.* at 906.
7. *Id.* at 908.
8. See 2 JOHN E. HIGGINS, JR., THE DEVELOPING LABOR LAW 2425–26 (ABA 6th ed. 2012 & Supp. 2013) [hereinafter DEVELOPING LABOR LAW].
9. Foam Rubber City No. 2 of Fla., Inc., 167 N.L.R.B. 623, 624 (1967).
10. FedEx Home Delivery, 361 N.L.R.B. No. 55 (2014).
11. NLRB v. United Ins. Co., 390 U.S. 254 (1968); BKN, Inc., 333 N.L.R.B. 143 (2001); see, e.g., FedEx Home Delivery, 361 N.L.R.B. No. 55 (2014) (finding drivers to be employees and not independent contractors under the NLRA because FedEx exercised control over the drivers' work; the drivers were not engaged in a distinct business; the work of the drivers was done under FedEx's direction; the drivers were not required to have special skills; FedEx established, regulated, and controlled the rate of the drivers' compensation; and the work of the drivers was part of the regular business of FedEx).
12. 29 U.S.C. § 152(11); see also, e.g., Entergy Miss., Inc., 357 N.L.R.B. No. 178 (2011).
13. NLRB v. Health Care & Ret. Corp., 511 U.S. 571, 573–74 (1994); see also Modesto Radiology Imaging Inc., 361 N.L.R.B. No. 84 (2014) (holding that team leaders who reported to facility manager were not supervisors because they did not exercise independent judgment in setting employee schedules and there was no evidence of direct correlation between team leaders' evaluation scores of other employees and increased wages); GGNSC Springfield LLC v. NLRB, 721 F.3d 403 (6th Cir. 2013) (nurses were supervisors because they had discretion to choose whether to address misconduct by doing nothing, providing a verbal warning, or issuing a written memorandum that was a step in the company's progressive discipline program).
14. Fred Meyer Alaska, Inc., 334 N.L.R.B. 646, 649 n.8 (2001).
15. NLRB v. Bell Aerospace Co., 416 U.S. 267, 289 (1974).
16. Gen. Dynamics Corp., 213 N.L.R.B. 851, 857 (1974).
17. Schnurmacher Nursing Home v. NLRB, 214 F.3d 260, 268 (2d Cir. 2000).
18. NLRB v. Yeshiva Univ., 444 U.S. 672, 682 (1980).
19. Concepts & Designs, Inc., 318 N.L.R.B. 948, 957 (1995).
20. NLRB v. Hendricks Cnty. Rural Elec. Membership Corp., 454 U.S. 170 (1981).

21. Greyhound Lines, Inc., 257 N.L.R.B. 477, 480 (1981).
22. See Brodart, Inc., 257 N.L.R.B. 380, 384 n.10 (1981); see also Fairfax Family Fund, Inc., 195 N.L.R.B. 306, 307 (1972).
23. “Temporary” or “contingent” workers, also known as “on-call” or “casual” workers, are employees hired on a temporary basis to fill full-time or part-time jobs, with the understanding that their employment may be terminated at any time. The NLRB has found that temporary workers may not be deprived of NLRA rights. See Tamphon Trading Co., 88 N.L.R.B. 597 (1950) (ruling that “shipping stevedores” are casual employees who may not be deprived of rights under the NLRA); Yellow Freight Sys., Inc. v. NLRB, 37 F.3d 128 (3d Cir. 1994) (an employer violated section 8(a)(3) by refusing to hire as a regular employee a casual driver because of membership and association with the union); Mediplex of Conn., Inc., 319 N.L.R.B. 281, 295 (1995) (employer violated sections 8(a)(1) and 8(a)(3) when it discharged a temporary employee for union activity).
24. The test for determining the eligibility of temporary or contingent employees to participate in a bargaining unit is whether or not they have an uncertain tenure. See Marian Med. Ctr., 339 N.L.R.B. 127 (2003). Temporary or contingent employees who are retained beyond their original term of employment and whose employment is thereafter for an indefinite period can be included in a bargaining unit. See MJM Studios of N.Y., 336 N.L.R.B. 1255 (2001). On the other hand, employees that are employed for one job only, or for a set duration, or that have no substantial expectancy of continued employment and are notified of this fact, must be excluded from the bargaining unit. See NLRB v. SRDC, Inc., 45 F.3d 328 (9th Cir. 1995); Kinney Drugs, Inc. v. NLRB, 74 F.3d 1419, 1427 (2d Cir. 1996); See’s Candy Shops, Inc., 202 N.L.R.B. 538 (1973).
25. Sure Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984).
26. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002); Palma v. NLRB, 723 F.3d 176 (2d Cir. 2013) (refusing to award backpay to an undocumented alien even when the alien did not obtain job through fraudulent means).
27. Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 167 (1971).
28. NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995).
29. *Id.*
30. 29 U.S.C. § 152(2).
31. See, e.g., Notice and Invitation to File Briefs, Browning-Ferris Indus., Case 32-RC-109684 (2014); Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing McDonald’s Franchisee, Case 02-CA-093893 et al. (2014).
32. See NLRB, Basic Guide to the National Labor Relations Act (1997), at 34. This pamphlet is available at www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf.
33. 29 U.S.C. § 152(13).

34. Facchina Constr. Co., 343 N.L.R.B. 886, 893 (2004); *see also, e.g.*, Pratt (Corrugated Logistics), LLC, 360 N.L.R.B. No. 48 (2014) (finding labor relations consultant was agent of employer because managers instructed employees to meet with consultant on company time, and consultant listened to employee complaints and promised changes “real soon”).
35. 2 DEVELOPING LABOR LAW, *supra* note 8, at 2570–71.
36. *Id.* at 2230.
37. NLRB v. Natural Gas Util. Dist. of Hawkins Cnty., Tenn., 402 U.S. 600 (1971).
38. Chi. Mathematics & Sci. Acad., 359 N.L.R.B. No. 41 (2012); Pilsen Wellness Ctr., 359 N.L.R.B. No. 72 (2013). The NLRB has not established a “bright-line rule” regarding charter schools. Whether the NLRB will exercise jurisdiction over a particular charter school will depend on the legal framework that governs the school’s specific relationship with its state and local governments. Chi. Mathematics & Sci. Acad., 359 N.L.R.B. No. 41 (2012).
39. 29 U.S.C. § 152(2).
40. 2 DEVELOPING LABOR LAW, *supra* note 8, at 2357.
41. Office Emps. Int’l Union, Local No. 11, AFL-CIO v. NLRB, 353 U.S. 313, 318–20 (1957).
42. San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055 (2004), *aff’d*, 475 F.3d 1306 (D.C. Cir. 2007).
43. Chickasaw Nation v. NLRB, No. 11-cv-506, 2011 U.S. Dist. LEXIS 105675 (W.D. Okla. July 11, 2011).
44. Chickasaw Nation d/b/a WinStar World Casino, Case No. 17-CA-025031.
45. Chickasaw Nation, 359 N.L.R.B. No. 163 (2013) (internal citations omitted).
46. These decisions were remanded for consideration in light of NLRB v. Noel Canning, 134 S. Ct. 2550 (2014). *See, e.g.*, Order, NLRB v. Nat’l Cong. of Am. Indians, No. 17-CA-025031 (10th Cir. July 22, 2014).
47. Tribal Labor Sovereignty Act of 2013, H.R. 1226, S. 1477, 113th Cong. (2013).
48. Letter from Patrice H. Kunesh, Deputy Solicitor-Indian Affairs, Dep’t of Interior, to Lafe Soloman, Acting Gen. Counsel, National Labor Relations Board (Dec. 7, 2011), *available at* <http://turtletalk.files.wordpress.com/2011/12/nlrb-12-7-11.pdf>.
49. 2 DEVELOPING LABOR LAW, *supra* note 8, at 2334–36. Note also that the NLRA was amended in 1974 to extend the NLRB’s jurisdiction to employees of all “health care institutions.” *Id.*
50. Carroll Coll., Inc. v. NLRB, 558 F.3d 568, 572 (D.C. Cir. 2009) (internal quotation marks and citations omitted).
51. *Id.*
52. Pac. Lutheran Univ., 361 N.L.R.B. No. 157 (2014) (holding Board will not decline to exercise jurisdiction over faculty members at a religious institution unless the institution demonstrates first that it holds itself out as providing a religious educational environment, and second that it holds out the petitioned-for faculty members as performing a religious function).

53. The “Establishment Clause” and the “Free Exercise Clause,” U.S. CONST. amend. I.

54. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

55. *Id.* at 706.

56. *Compare* *Hanna Boys Ctr.*, 284 N.L.R.B. 1080 (1987) (finding NLRB could exercise jurisdiction over non-teachers at residential facility run by Roman Catholic diocese), *with* *St. Edmund’s Roman Catholic Church*, 337 N.L.R.B. 1260 (2002) (finding NLRB could not exercise jurisdiction over custodians who worked at a church or at the two schools operated by the church).

57. *GTE Automatic Elec., Inc.*, 226 N.L.R.B. 1222 (1976).