

Agricultural Laborers: Their Inability to Unionize Under the National Labor Relations  
Act

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## I. INTRODUCTION

Since the enactment of the National Labor Relations Act (NLRA), agricultural laborers have been excluded from its protection to organize workers and form unions for the purpose of collectively bargaining with employers. Employees who engage in collective bargaining are able to band together to bargain with employers for better wages, a safer working environment, fringe benefits and other terms and conditions of employment.<sup>1</sup> The NLRA protects this bargaining process and the parties involved.

Agricultural laborers are one of only two classes of workers excluded from the protection of the NLRA.<sup>2</sup> Although agricultural laborers are not protected under the NLRA because of their exclusion from the definition of “employee,” there is no mention that agricultural laborers are forbidden from forming unions.<sup>3</sup> But without the protection offered by the NLRA, farmers do not have to recognize the union nor will they face any consequences in failing to so recognize in contrast with employers in other industries.<sup>4</sup> This lack of protection leads to agricultural laborers not forming unions because of the backlash they could face from employers without any recourse to protect themselves from retaliatory practices or the general refusal of employers to bargain.<sup>5</sup>

While agricultural laborers have been excluded from the NLRA since the beginning, there are many reasons why this should no longer be so. First, these are marginalized workers subject to harsh working conditions and treatment and were the

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<sup>1</sup> 29 U.S.C. § 151 (1947).

<sup>2</sup> 29 U.S.C. § 152(3) (1978).

<sup>3</sup> *Id.*

<sup>4</sup> 29 U.S.C. § 158 (1974).

<sup>5</sup> *Id.*

type of workers Congress intended to protect.<sup>6</sup> Second, agriculture is changing. The industry is no longer made up of only small family farms with few laborers outside the family working in the fields; rather, much of the food today comes from large vertically integrated companies who are more closely akin to industrial companies than small family farms.<sup>7</sup> Third, the low wages and hazardous working conditions agricultural laborers are exposed to could be rectified through the use of a bargaining agent who could negotiate with employers for higher wages and greater safety standards. Lastly, farmers are granted the right to form associations to strengthen their position in the market.<sup>8</sup> Granting farmers freedom of association while denying that same right to agricultural laborers seems a gross injustice that can only be resolved by allowing agricultural laborers to organize. If agricultural laborers were included under the NLRA, several problems may arise that would need to be addressed. Most notably, the competition created in the agricultural industry due to relaxed standards in immigration laws and the need for greater enforcement of those laws.

Unions have been met with great opposition in most industries and agriculture has not proven to be any different. Farmers do not want unions in their fields, the most important reason being that unions go on strike. Harvesting crops is very time sensitive and crops are perishable, if unions go on strike both farmers and the public could be

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<sup>6</sup> Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to be Excluded from the National Labor Relations Act?* 48 EMORY L.J. 489, 492-96 (1999).

<sup>7</sup> Victoria V. Johnson, Casenote, *Did Old MacDonald Have a Farm?* Holly Farms Corp. v. National Labor Relations Board, 69 U. COLO. L. REV. 295, 303 (1998).

<sup>8</sup> 7 U.S.C. § 291 (2011).

adversely affected.<sup>9</sup> Another reason farmers oppose unionization is because in many instances farmers hire independent contractors to provide laborers to work in their fields and if unions were present, farmers would have to pay a greater premium to these independent contractors supplying the labor.

Federal law does not protect the unionization of agricultural workers, but several states have provided such protection. The statute that provides the greatest protection for agricultural laborers is in California where the state legislature sought to fill a gap left by the NLRA. The California state statute was enacted for many of the same reasons, and those involved in the labor movement believe it is time for agricultural laborers to be included under the NLRA. In contrast, in Arizona, the state legislature wanted to keep unions out of agriculture and therefore the state statute addresses many of the concerns espoused by farmers. Between the policies set forth in the NLRA, the California state statute and the Arizona state statute it becomes clear that a comprehensive federal statute that attempts to address the concerns of agricultural laborers and employers alike will be no easy undertaking and may explain why Congress has been unable or unwilling to incorporate agricultural laborers into the definition of “employee” found within the NLRA.

## II. THE NATIONAL LABOR RELATIONS ACT

The NLRA gives workers “freedom of association, self-organization, and designation of representatives of their own choosing” in order to equalize the bargaining power between employers and employees in the hopes of limiting the interruptions to the

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<sup>9</sup> Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, *Inventory of Farmworker Issues and Protections in the United States*, 1 U. Pa. J. Lab. & Emp. L. 487, 493 (1998).

free flow of commerce.<sup>10</sup> The statute covers a large number of workers based on the broad definition of “employee,”<sup>11</sup> but excludes from coverage all agricultural laborers.<sup>12</sup> The NLRA does not define who these agricultural laborers are that are excluded from the right to organize, but rather Congress has instructed the National Labor Relations Boards (NLRB)<sup>13</sup> in the annual Appropriations Act that in determining who is an agricultural laborer excluded from the NLRA, to rely on the definition of “agriculture” found in the Fair Labor Standards Act (FLSA).<sup>14</sup> Agriculture in the FLSA is defined as “farming in all its branches ... and any practices ... performed by a farmer or on a farm as an incident to or in conjunction with such farming operations...”<sup>15</sup> The definition also lists specific activities to further define what would specifically be considered agricultural work.<sup>16</sup> Therefore, workers whose responsibilities are contained in the FLSA’s definition of “agriculture” are excluded from the right to organize and form unions under the NLRA.

The reasoning behind this exclusion is somewhat vague, especially considering that the bill originally proposed in the Senate did not exclude agricultural laborers from

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<sup>10</sup> 29 U.S.C. § 151 (1947).

<sup>11</sup> The term “employee” is defined as “any employee, and shall not be limited to the employees of a particular employer...” 29 U.S.C. § 152(3) (1978).

<sup>12</sup> The definition of “employee” continues that it “shall not include any individual employed as an agricultural laborer...” 29 U.S.C. § 152(3) (1978).

<sup>13</sup> The NLRB is the governmental agency charged with the implementation of the NLRA. 29 U.S.C. 153 (1982).

<sup>14</sup> *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 397 (1996); Arthur N. Read, *Let the Flowers Bloom and Protect the Workers Too – A Strategic approach Toward Addressing the Marginalization of Agricultural Workers*, 6 U. PA. J. LAB. & EMP. L. 525, 566 (2004); LeRoy & Hendricks, *supra* note 6, at 507.

<sup>15</sup> 29 U.S.C. 203(f) (2006).

<sup>16</sup> These activities include “the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities... the raising of livestock, bees, fur-bearing animals, or poultry...” *Id.*

the definition of “employee.”<sup>17</sup> There is not much mentioned about the agricultural exclusion because of the statute’s primary focus on addressing problems in the industrial sector. There is, however, a debate from in the House addressing the agricultural laborer exemption,<sup>18</sup> where an argument was made that agricultural laborers should be included because they needed the same protections as industrial workers. Agricultural labor issues were brought to light in 1935 after governmental investigations into child labor issues and the lack of clean water provided for such workers.<sup>19</sup>

In response, two possible reasons were briefly mentioned that may explain why agricultural laborers were excluded: first, in regions like the Midwest, farms are mostly family farms and should not be within the scope of the NLRA, and second there was a concern that Congress did not have jurisdiction over agricultural workers because it was questionable whether such workers were engaged in interstate commerce.<sup>20</sup> Many commentators believe that it was the former argument that led to the exclusion of agricultural workers from protection under the NLRA. Another possible reason for this exclusion as presented by some commentators is that the larger farms lobbied to have their workers excluded from the NLRA.<sup>21</sup> While not expressly stated, the most likely explanation is that Congress wanted to protect the family farmer from having to pay

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<sup>17</sup> S. 2926, 73d Cong. § 3(2), *reprinted in* 1 NLRB, Legislative History of the National Labor Relations Act, 1935 at 2 (1985).

<sup>18</sup> 79 Cong. Rec. 9668, 9720-21 (1935), *reprinted in* 2 NLRB, Legislative History of the National Labor Relations Act, 1935 at 3200-04 (1985).

<sup>19</sup> *Id.* at 3201.

<sup>20</sup> *Id.* at 3202-03.

<sup>21</sup> Johnson, *supra* n. 7 at 308 (1998).

higher wages that unions would inevitably demand of the employers.<sup>22</sup> Realizing that agriculture was important to the entire nation, Congress wanted to shield this industry from unionization, and wanted to protect the family farmer from having to pay what they could not afford. Congress did not think it necessary to equate the family farmer with big business.

A. *Who is an “agricultural laborer”?*

The broad definition of “agriculture” under the FLSA would seem to exclude from the NLRA any worker who is employed by any agricultural entity. This is not the case, however, because the Supreme Court has adopted a two-part test to determine if an employee is in fact an agricultural laborer excluded from the NLRA.<sup>23</sup> An agricultural employee will be excluded from the right to organize if he or she is engaged in either primary or secondary farming. The Supreme Court has taken the FLSA definition of agriculture and essentially limited its application based on a strict application of the statutory language. Primary farming are those tasks specifically referred to in the statutory definition of “agriculture” such as “cultivation and tillage of the soil [and] dairying.”<sup>24</sup> The rest of the definition is considered secondary farming, and therefore a worker is an agricultural laborer if the work performed is of the type that would be performed “by a farmer or on a farm as an incident to or in conjunction with such farming operations.”<sup>25</sup>

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<sup>22</sup> LeRoy & Hendricks, *supra* note 6, at 490.

<sup>23</sup> *Bayside Enters. Inc. v. N.L.R.B.*, 429 U.S. 298, 300-01 (1977).

<sup>24</sup> *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762 (1949).

<sup>25</sup> *Bayside Enters Inc.*, 429 U.S. at 301 (quoting 29 U.S.C. § 203(f) (2006)).

In one of the more recent cases to address the question of who is considered an agricultural employee, the Supreme Court in *Holly Farms Corp. v. N.L.R.B.* upheld the determination made by the NLRB that workers on live-haul chicken crews do not engage in agricultural labor and therefore are not subject to the agricultural exception from the NLRA.<sup>26</sup> The responsibility of the live-haul crew is to enter the farms of independent contractors who raise chickens supplied by Holly Farms; the chickens are then caught and caged by nine chicken catchers, moved by a forklift operator onto a truck to be transported by a truck driver to the processing plant.<sup>27</sup> These live-haul crews were not engaged in primary farming because primary farming would have been the actual raising of the poultry, which was the responsibility of the independent contractors, not the live-haul crews.<sup>28</sup>

The court then focused on whether these live-haul crews were engaged in secondary farming. In doing so, the court immediately found that that the work performed by the live-haul crews were not of the kind “performed by a farmer” because Holly Farms gave up its farmer status as soon as the chicks were delivered to independent contractors for raising.<sup>29</sup> As a result of this determination, the truck drivers were not considered agricultural laborers and were therefore not part of the agricultural exception to the NLRA and were able to unionize.<sup>30</sup>

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<sup>26</sup> *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 401 (1996).

<sup>27</sup> *Id.* at 395-86.

<sup>28</sup> *Id.* at 399-400.

<sup>29</sup> *Id.* at 400.

<sup>30</sup> *Id.* Holly Farms had conceded that the truck drivers did not work on a farm, and therefore neither of the conditions for secondary farming was present with regard to these employees.



The court then looked to whether the chicken catchers and forklift operators were engaged in work “on a farm as an incident to or in conjunction with” raising poultry.<sup>31</sup> The Supreme Court found that neither the chicken catchers nor the forklift operators “worked on a farm” because the work these employees performed were part of Holly Farms’ poultry processing operations and was not of the type of work contemplated to be included in the statutory definition of “farming.”<sup>32</sup> The Supreme Court adopted the reasoning of the NLRB in deciding that the catchers and forklift operators were not performing work “incident to or in conjunction with” the farming operations of the independent contractors.<sup>33</sup> In doing so, the Supreme Court decided that it was more important to look at the status of the employer as a farmer rather than where the laborer carried out the responsibilities of the job he or she was hired to perform. Because, as previously determined, Holly Farms was not considered a farmer by the time the live-haul crews went in to catch the chickens, the catchers and the forklift operators were not engaged in secondary farming as defined in the FLSA.<sup>34</sup> This meant that all the members of the live-haul crews were not agricultural laborers and therefore all had the right to organize under the NLRA.

The Supreme Court limited the applicability of the definition of “agriculture” in *Holly Farms* and in doing so opened up the possibility that more workers employed by large, vertically integrated employers would be able to organize.<sup>35</sup> By taking the

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<sup>31</sup> 29 U.S.C. § 203(f) (2006); *Holly Farms*, 517 U.S. at 401.

<sup>32</sup> *Holly Farms*, 517 U.S. at 401.

<sup>33</sup> *Id.* at 402.

<sup>34</sup> *Id.* at 404.

approach to look at the status of the employer rather than where the work is performed, the Supreme Court broadened the already broad definition of “employee” under the NLRA. More employees working for these vertically integrated employers will be able to experience the protection of the NLRA that has been open to industrial workers since the act was first passed in 1935. The impact of the *Holly Farms* decision is for courts to engage in an in depth analysis before deciding whether a worker is an agricultural laborer not protected by the NLRA. Switching the focus to the status of the employer rather than where the employees are performing their responsibilities will ensure greater protection for workers and a broader reach of the NLRA.

*B. Reasons supporting inclusion of agricultural laborers under the NLRA*

While the definition of “employee” has expanded to include some employees who are employed by agricultural employers, there is still the exception for agricultural laborers included in the statute and therefore there are still many workers who are unable to form unions. These may be the workers that need the most protection because they are the field workers who are subjected to abuse, poverty and hazardous working conditions.<sup>36</sup> Many commentators would like to see the NLRA extended to include agricultural laborers. The main advantage to extending the definition of “employee” to include agricultural laborers under the NLRA is that the statute has been in existence for many years, and most of the challenges that would be brought up with respect to agricultural laborers attempting to unionize have most likely already been resolved in other employment sectors allowing the NLRB and courts to rely on precedent. This will

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<sup>35</sup> *Holly Farms* is considered a “vertically integrated poultry producer” because it owns facilities at every stage of production from the hatcheries to the processing plants. *Id.* at 395.

<sup>36</sup> LeRoy & Hendricks, *supra* note 6, at 492-93.

make application of the statute to the agricultural laborers consistent with other employment sectors. Reliance on precedent would lead to predictable outcomes when labor disputes arise. Agricultural laborers still have a ways to go before they will be able to reap the benefits of the NLRA; but, if this were to happen, agricultural laborers would be able not only to unionize and have their association protected, but also would have the advantage of being able to rely on others with experience and knowledge of the NLRA and its intricacies.

Several other arguments have been presented as to why the NLRA should include agricultural laborers. First is that the agricultural laborers of today are the types of workers the NLRA was meant to protect.<sup>37</sup> The NLRA was enacted to equalize the bargaining power between employers and employees, to allow for the peaceful resolution of disputes that may arise regarding “wages, hours and working conditions,” and to remove obstructions to commerce that resulted from employers refusing to bargain with their employees chosen representatives.<sup>38</sup> Agricultural laborers typically earn low wages<sup>39</sup> and are exposed to hazardous working conditions.<sup>40</sup>

A look into the legislative history of the NLRA supports the argument that agricultural laborers should be protected under the act. While agricultural laborers were

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<sup>37</sup> LeRoy & Hendricks, *supra* note 6, at 496.

<sup>38</sup> 29 U.S.C. § 151 (1947).

<sup>39</sup> LeRoy & Hendricks, *supra* note 6, at 496; *Inventory of Farmworker Issues and Protections in the United States*, 1 U. PA. J. LAB. & EMP. L. 487, 500 (1998); Bon Appetit Management Company Foundation (Bon Appetit Management Company Foundation and United Farm Workers, Palo Alto, CA). March 2011 (stating that between 2005 and 2009 roughly a third of all farm workers earned below \$7.25 per hour), *available at* [http://www.bamco.com/uploads/documents/fwi\\_execsum\\_mar31\\_2011.pdf](http://www.bamco.com/uploads/documents/fwi_execsum_mar31_2011.pdf).

<sup>40</sup> Bon Appetit Management Company Foundation (Bon Appetit Management Company Foundation and United Farm Workers, Palo Alto, CA). March 2011, *available at* [http://www.bamco.com/uploads/documents/fwi\\_execsum\\_mar31\\_2011.pdf](http://www.bamco.com/uploads/documents/fwi_execsum_mar31_2011.pdf).

very rarely referred to, there are two key points in the legislative history that would seem to imply agricultural laborers should be able to organize under the NLRA. First, the original bill introduced in the Senate did not exclude agricultural laborers from protection under the act.<sup>41</sup> The original definition of “employee” was broader than it is in its current form and only excluded from its coverage workers replacing employees on strike.<sup>42</sup> The original definition did not expressly include agricultural laborers in its coverage, but, most importantly, it did not expressly exclude agricultural laborers from its coverage either. This supports the argument that agricultural laborers should be protected under the NLRA because the original intention was that these workers would be included in the definition of “employee.”

Second, the legislative history reveals the intent to ultimately include agricultural laborers as “employees” under the act.<sup>43</sup> Representative Connery expressed this opinion during the House debates on the bill when he said “[i]f we can get this bill through and working properly, there will be opportunity later, and I hope soon, to take care of the agricultural workers.”<sup>44</sup> The expectation in 1935 when the National Labor Relations Act was passed was that one day agricultural laborers would have the right to unionize and collectively bargain with agricultural employers for such terms of employment as wages,

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<sup>41</sup> S. 2926, 73d Cong. § 3(2) (1934) *reprinted in* 1 NLRB, Legislative History of the National Labor Relations Act, 1935 at 2 (1985); LeRoy & Hendricks, *supra* note 6, at 490.

<sup>42</sup> *Id.* (defining employee as “any individual employed by an employer under any contract of hire...”)

<sup>43</sup> 79 Cong. Rec. 9668, 9721 (1935), *reprinted in* 2 NLRB, Legislative History of the National Labor Relations Act, 1935 at 3202 (1985).

<sup>44</sup> *Id.*

benefits and other conditions of employment that were afforded to workers in industrial operations.<sup>45</sup>

These two important points from the legislative history supports the proposition that agricultural laborers should be covered under the NLRA and able to form unions. The intent of Congress was that these workers would be included eventually, and since the NLRA has been in existence for seventy-eight years, it may be time to reassess which workers the act protects. The few times agricultural laborers are mentioned in the legislative history support the view that agricultural laborers are the type of workers that Congress intended to protect under the NLRA.

One reason many commentators believe agricultural laborers were excluded from the NLRA was because Congress envisioned small family farms and did not want to burden the family farmer who had relatively few workers with having to bargain with unions that could potentially take advantage of the farmer.<sup>46</sup> While this may have been a concern when the NLRA was passed in 1935, the entities currently involved in agricultural production are not just small family farms, but include large-scale agribusinesses more closely resembling industrial corporations than the family farms. For example, in *Holly Farms*, part the reason the dispute surrounding the unionization of the live-haul chicken crews arose was because Tyson Chicken was trying to take over Holly Farms after the workers had already commenced a representation proceeding.<sup>47</sup> Tyson was a large, vertically integrated poultry producer who sought to increase its production

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<sup>45</sup> 29 U.S.C. § 151 (1947).

<sup>46</sup> 79 Cong. Rec. 9668, 9721 (1935), *reprinted in* 2 NLRB, Legislative History of the National Labor Relations Act, 1935 at 3202-03 (1985).

<sup>47</sup> Johnson, *supra* n. 7 at 303.

and market share by acquiring other companies such as Holly Farms.<sup>48</sup> Tyson's operations are typical of today's agriculture industry: large producers contracting out certain aspects in the production process while retaining control over the process and regulating each stage of production.<sup>49</sup> These larger producers who have a hand in every aspect of production, are not the types of farmers that were contemplated as needing protection from unions under the NLRA. It is these types of producers whom agricultural laborers today should be able to bargain with because of the economic power of these large vertically integrated agribusinesses. Companies that are engaged in other stages of the process beyond the farming stage are able to take advantage of the agricultural exception to the NLRA, which goes against Congressional intent.

The rate of pay agricultural laborers earn in return for their work would increase if these workers were able to organize and engage in collective bargaining with their employers. Agricultural workers in 2008 made between \$8.64 per hour and \$13.02 per hour.<sup>50</sup> The hourly wage is relatively low, especially when compared to other occupations with the ability to unionize that require similar training and working conditions. For example, construction laborers in 2008 earned between \$10.80 and \$14.95 per hour<sup>51</sup> and textile, apparel and furnishing workers earned between \$9.14 and \$18.15 per hour.<sup>52</sup>

While there is a wide range of earnings for anyone entering these three professions, the

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 303-04.

<sup>50</sup> BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2010-11 EDITION, AGRICULTURAL WORKERS, OTHER (2010) available at <http://www.bls.gov/oco/ocos349.htm>.

<sup>51</sup> BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2010-11 EDITION, CONSTRUCTION LABORERS (2010) available at <http://www.bls.gov/oco/ocos248.htm#earnings>.

<sup>52</sup> BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2010-11 EDITION, TEXTILE, APPAREL AND FURNISHING, OCCUPATIONS (2010) available at <http://www.bls.gov/oco/ocos233.htm>.

two professions that are able to unionize earn more per hour on a national level than the agricultural workers who are exempted from organizing under the NLRA. The low earnings of agricultural laborers as compared to other laborers supports a finding that the NLRA would benefit agricultural laborers and are the type of workers that were meant to be extended the right to organize. If agricultural laborers were afforded protection under the NLRA to engage in collective bargaining, the likely result would be that bargaining representatives would be able to negotiate with agricultural employers for higher wages that would lead to less of an earnings gap between agricultural laborers and laborers in other industries.

There is one major similarity between the construction industry and the agriculture industry that would seem to tip the scales in favor of affording agricultural laborers the right to unionize under the NLRA. That is that both industries hire seasonally.<sup>53</sup> The seasonal nature of agricultural work is often cited as a reason against unionization, but with the similarity in the construction industry and the ability of those workers to unionize, the seasonal nature of agricultural work should be a factor in considering whether or not to include these workers under the NLRA, but is not itself conclusive. If seasonal workers in other industries are able to unionize, the seasonal nature of agricultural work should not be a major point of opposition to allowing agricultural laborers the right to collectively bargain.

Agricultural laborers are also subject to harsh conditions because of the work that they perform and should be able to organize under the NLRA in order to bargain with their employers for better working conditions. Agricultural laborers are not always

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<sup>53</sup> MARALYN EDID, *FARM LABOR ORGANIZING: TRENDS & PROSPECTS* 103 (ILR Press 1994).

provided with access to clean drinking water<sup>54</sup> nor are there typically adequate restroom facilities for these workers to use.<sup>55</sup> Unions can help workers to gain access to sanitary facilities and clean drinking water by bargaining for these necessities with the employers.<sup>56</sup> By making these issues part of a collective bargaining agreement, unions will be able to hold employers contractually liable to follow such conditions and will thereby improve the conditions of employment for agricultural laborers who would otherwise be subject to sub-standard facilities.

Another hazardous working condition that arises for agricultural laborers is the exposure to pesticides. Agricultural laborers may be exposed to pesticides that are carcinogens or other pesticides that affect the endocrine and/or hormone systems.<sup>57</sup> Agricultural laborers, especially those who apply pesticides, are at a greater risk of acute pesticide poisoning which many times is more prevalent than it needs to be because agricultural employers do not take the kinds of precautions necessary to prevent pesticide poisoning.<sup>58</sup> Unions again can aid agricultural laborers by limiting such exposure through a collective bargaining agreement because unions would be able to bargain for certain safety precautions to be taken before workers are able to spray pesticides and can also ensure that safety gear is provided before spraying commences. Inadequate facilities and

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<sup>54</sup> Luna, *supra* note 9, at 500.

<sup>55</sup> *Id.* at n.85.

<sup>56</sup> The regulations promulgated by the Occupational Health and Safety Administration do address agricultural workplaces, but excludes agricultural laborers form a majority of the sections protecting employees. Bon Appetit Management Company Foundation (Bon Appetit Management Company Foundation and United Farm Workers, Palo Alto, CA). March 2011, *available at* [http://www.bamco.com/uploads/documents/fwi\\_execsum\\_mar31\\_2011.pdf](http://www.bamco.com/uploads/documents/fwi_execsum_mar31_2011.pdf).

<sup>57</sup> EPA PESTICIDES: HEALTH AND SAFETY (2011) <http://www.epa.gov/opp00001/health/human.htm>.

<sup>58</sup> KIMI JOHNSON, HIDDEN COSTS: FARM WORKERS SACRIFICE THEIR HEALTH TO PUT FOOD ON OUR TABLES (2002) [http://www.lri.lsc.gov/pdf/03/030100\\_capreport.pdf](http://www.lri.lsc.gov/pdf/03/030100_capreport.pdf).



pesticides are two examples of the hazardous conditions that agricultural laborers are exposed to that could be cured through the right to unionize and collectively bargain with employers. Unions would be able to protect workers from such sub-standard conditions which in turn would lead to less illness and disease that agricultural laborers would be subjected to and would increase productivity on farms because field workers will not be slowed by sickness and would be able to work more as a result.

Further, “farmers, planters, ranchmen, dairymen, nut or fruit growers” are able to form associations for the mutual benefit of all members.<sup>59</sup> These associations allow their members to work collectively in preparing their products for market.<sup>60</sup> These producers are also able to form cooperatives to market their products and maintain the “bargaining position of individual farmers” in order to prevent adverse consequences of overcrowding the market.<sup>61</sup> These agricultural producers are free to engage in concerted activity for the mutual protection of the association’s members, but agricultural laborers are exempt from asserting these same rights.<sup>62</sup> Agricultural producers are therefore able to become even stronger entities, further widening the differences in the bargaining positions between producers and agricultural laborers. The unionization of agricultural laborers would better equalize the bargaining position on each side affording laborers the protections they need against agricultural employers as they become more powerful through associations.

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<sup>59</sup> 7 U.S.C. § 291 (2011).

<sup>60</sup> *Id.*

<sup>61</sup> 7 U.S.C. § 2301 (1968).

<sup>62</sup> Luna, *supra* note 9, at 491.

Protection under the NLRA would also prove to have benefits for agricultural producers. The NLRA prohibits the use of secondary boycotts.<sup>63</sup> Secondary boycotts are when a union forces a secondary employer to cease doing business with an employer who uses non-union workers.<sup>64</sup> For example, a secondary boycott may involve a union picketing a grocery store that sells produce that was harvested by non-union workers.<sup>65</sup> Secondary boycotts can be powerful as a way of getting the public to not buy certain products because of non-union workers being employed by companies. Under certain state laws that permit unions to organize agricultural laborers, these tactics can be particularly harmful because unions are already present and can easily picket food retailers to inform the public about current labor disputes. Because of the agricultural exception under the NLRA, agricultural producers are currently vulnerable to these secondary boycotts because there are no other laws in place to prohibit such actions.

### C. *Obstacles to inclusion under the NLRA*

There are many obstacles that stand in the way of agricultural laborers being protected under the NLRA. First, agricultural laborers face strong competition from other workers who are willing to perform the difficult field labor for less money. For example, immigrants do not always require the same wage rate as American citizens.<sup>66</sup> The competition from immigrants will be a difficult obstacle to overcome before allowing agricultural laborers the ability to unionize under the NLRA because of the agricultural

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<sup>63</sup> 29 U.S.C. § 158(b)(4) (1947). This argument is discussing the benefits of the NLRA as opposed to the restrictions state laws have placed on secondary boycotts.

<sup>64</sup> LeRoy & Hendricks, *supra* note 6, at 542.

<sup>65</sup> *Id.*

<sup>66</sup> Luna, *supra* note 9, at 493.

exemption to the Immigrant Reform Control Act (IRCA).<sup>67</sup> There is also the issue of illegal immigrants who work in the agricultural sector because of the ease with which an undocumented worker may obtain fake documents. Also, an illegal immigrant can present false documents to gain employment, a practice followed by many agricultural growers and producers because of the lower wage rate that these workers are willing to work for compared to American citizens.<sup>68</sup> These workers are able to obtain work even though IRCA requires employers to authenticate all employees' documentation verifying their authorization to work in the United States because IRCA has a relaxed standard that as long as a document appears to be "reasonably genuine on its face" then the employer is able to hire the employee based on the false documents.<sup>69</sup> Another source of competition for work in the agricultural sector comes from convicts who, again, are willing to work for lower wages for performing work in agricultural fields.<sup>70</sup> This competition to procure agricultural work would make it difficult for agricultural laborers to unionize under the NLRA because agricultural laborers and organizers would have to be able to overcome other federal statutes and state and local laws. The policies currently in place do not make farm labor a significant cost of food production, as it would potentially be if unions were negotiating for the wage rates of agricultural laborers.

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<sup>67</sup> 8 U.S.C. § 1101(a)(15)(H)(ii) (2010) (the exemption applies to those workers "having residence in a foreign country which he has no intention of abandoning" and is coming perform agricultural work in the United States on a temporary basis).

<sup>68</sup> John Mead, *Binding Arbitration as a Political Tool to Remove the Agricultural Labor Exemption in the National Labor Relations Act*, 21 T.M. Cooley L. Rev. 185, 191 (2004).

<sup>69</sup> *Id.* at 192-94.

<sup>70</sup> LeRoy & Hendricks, *supra* note 6, at 501, 546 n.35 (discussing an egg farm in Iowa that employs convicts for \$6 an hour).

Another hurdle to gaining inclusion under the NLRA for agricultural laborers is the potential opposition the movement can face from those laborers working in a state that provides protection for agricultural labor unions under state law.<sup>71</sup> A few states have enacted laws offering protection to agricultural laborers, and if these agricultural laborers were then to be included under federal law, most of the rights already acquired and fought for under state law would be lost.<sup>72</sup> While protection under the NLRA would certainly be able to protect more workers than any state law can, it is still an obstacle that labor advocates would need to overcome before including agricultural laborers in the definition of “employee” under the NLRA.

Those opposing agricultural laborers inclusion under the NLRA may point to the fact that there are still family farms unable to meet union demands. This was a concern when the NLRA was first enacted, possibly leading to agriculture’s exclusion under the act, and is still a concern today. Family farms are still very prevalent in the agricultural industry, accounting for ninety-eight percent of the farms in the United States.<sup>73</sup> Of those family farms, roughly ninety percent are small family farms with a market share of just under twenty-five percent.<sup>74</sup> The operators of these smaller farms do have a serious concern about bargaining with unions and the higher cost of labor associated with unionization. Looking to other federal statutes, however, it is safe to assume that small family farms will still be excluded under the NLRA. Both the Migrant and Seasonal

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<sup>71</sup> Read, *supra* note 5 at 529.

<sup>72</sup> *Id.* at 529-30.

<sup>73</sup> U.S. DEPT. OF AGRICULTURE, STRUCTURE AND FINANCES OF U.S. FARMS: FAMILY FARM REPORT, 2007 EDITION 4 (2007) available at <http://www.ers.usda.gov/publications/eib24/eib24b.pdf>.

<sup>74</sup> *Id.* at 5, fig. 4.

Workers Protection Act (MSWPA)<sup>75</sup> and the FLSA have exclusions for family farms<sup>76</sup> and small agricultural business.<sup>77</sup> Both of these acts provide for an exemption for agricultural employers whose employees did not work a certain number of man-days<sup>78</sup> in a calendar year.<sup>79</sup> Based on the exclusion under these two statutes for small agricultural businesses and family farms, it logically follows that were agricultural laborers to be included in the definition of employee under the NLRA and able to unionize that the same exclusion found under the MSWPA and the FLSA would also be part of the NLRA. Given that the definition of agriculture in the FLSA is incorporated into the NLRA, it is reasonable to assume that the agricultural exemption for family farms and small businesses found in the FLSA would also be incorporated into the NLRA if its coverage were extended to agricultural laborers.

*D. Opposition to the NLRA being applied to agricultural laborers*

While there may be many advantages to agricultural workers being able to unionize under the NLRA, many farmers strongly oppose the idea. Under the NLRA, unions are able to utilize economic weapons to forcefully persuade employers during negotiations or during the course of a collective bargaining agreement, if one is in existence between a union and an employer,<sup>80</sup> and farmers do not want to have their

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<sup>75</sup> This statute allows farm workers to seek legal remedies for lost wages. Luna, *supra* note 9, at 496.

<sup>76</sup> Migrant and Seasonal Agricultural Workers Protection Act 29 U.S.C. § 1803 (a)(1) (1983); Fair Labor Standards Act 29 U.S.C. § 203(e)(3) (2006).

<sup>77</sup> 29 U.S.C. § 213(a)(6) (2004).

<sup>78</sup> Man-day is defined as any day in which an agricultural laborer performs not less than one hour of agricultural work. 29 U.S.C. § 203(u) (2006).

<sup>79</sup> 29 U.S.C. § 213(a)(6) (2004).

workers being able to put such economic weapons to use, especially the right to strike.<sup>81</sup> Striking during harvest season could have detrimental economic effects on farmers whose crops are perishable and not harvested at the right time.<sup>82</sup> Strikes are not always successful, but when they are, they can have a significant effect on the employer's production level and the profits that the employer will receive for his or her product.<sup>83</sup> A farmer's business could be greatly impacted by the presence of a union especially if disputes arise around harvest season. Farmers have a relatively short time period in which to harvest their crops and if their crops are not harvested at the right time, a farmer may lose a significant profit. This adverse economic effect is one of the main arguments farmers advance to oppose agricultural laborers inclusion under the NLRA.

Another reason to oppose the unionization of agricultural laborers is that labor is already a great expense for farmers and with the introduction of unions and a raise in the hourly rate of pay for agricultural laborers both farmers and consumers would face harmful economic realities. The more a farmer will have to spend on labor, the more money the public will be charged for that product. Currently, farmers and grocery retailers alike are able to charge reasonable prices to the public because of the labor system currently in place.<sup>84</sup> If unions request a substantial increase in the hourly rate paid to agricultural laborers, consumers would have to be charged more to help farmers pay their workers. Because food production impacts the nation, farmers have an interest in

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<sup>80</sup> Mead, *supra* note 68, at 198-200.

<sup>81</sup> *Id.* at 198.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 199.

<sup>84</sup> Luna, *supra* note 9, at 490.

keeping food prices down for the good of the general public that needs food to survive. Also, paying extensive wages can cause some farms to go out of business. Not all farms are large-scale operations and if wages for agricultural laborers increase significantly, it is unlikely that production will continue to be a viable source of income for the smaller farms that still need to employ laborers to work in the fields.<sup>85</sup>

Some agricultural production facilities are also seeing a decrease in the amount of agricultural labor needed to carry out operations. For example, many animal farming operations are merging which is leading to fewer farms maintaining the same production levels as fifty years ago, which leads to a reduction in the amount of labor needed at those farms.<sup>86</sup> Laborers working on animal farming operations may not need protection if there are fewer workers required for production. If one segment of an industry is not in need of protection, there is no reason to extend a federal statute to an entire industry if the industry is shrinking. Indeed, the Bureau of Labor Statistics has projected that between 2008 and 2018 the agricultural industry will see little or no change in the amount of agricultural laborers needed, with an expected decrease in the number of workers needed by 2018.<sup>87</sup> If there are less people in need of federal protection than there were fifty years ago, or even when the NLRA was first enacted, there may be a concern about why such federal protection would be necessary if there is a decrease in the number of workers that would benefit from such protection. Why should agricultural laborers be able to unionize

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<sup>85</sup> Kristen Ridley, *America's Longest-Running Family Farm Going Out of Business* (2010) <http://news.change.org/stories/americas-longest-running-family-farm-going-out-of-business> (citing the increase in costs for labor as one reason a farm has had to go out of business after over 300 years).

<sup>86</sup> The Pew Charitable Trusts and Johns Hopkins Bloomberg School of Public Health, *Putting Meat on the Table: Industrial Farm Animal Production in America, Executive Summary* (2008) <http://www.ncifap.org/bin/s/a/PCIFAPSmry.pdf>.

<sup>87</sup> BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2010-11 EDITION, AGRICULTURAL WORKERS, OTHER (2010) available at <http://www.bls.gov/oco/ocos349.htm#outlook>.

if there is no longer as great of a need for such laborers? Indeed, if the industrialization of animal farming is causing a decrease in the demand for labor, it follows that the technological advances made to benefit other types of agricultural operations would likewise lead to a decrease in the amount of labor necessary to maintain current farm productivity levels.

In forming unions, agricultural laborers would not be seeking to bargain with agricultural producers, but with farm labor contractors who exploit these laborers and perpetuate the low earnings prevalent among this group of workers. Farmers many times will hire farm labor contractors to supply laborers to work the farm.<sup>88</sup> Therefore, it is the labor contractor who hires, fires, and supervises the agricultural laborers and they are the ones to actually employ the laborers.<sup>89</sup> Farm labor contractors are also in charge of distributing wages not farmers.<sup>90</sup> The only costs these contractors incur are labor costs, or the wages they pay to the agricultural laborers for their time in the farmer's field. Labor contractors are able to maximize their own profits by not paying the agricultural laborers a fair wage for their work.<sup>91</sup> Agricultural laborers should maintain their exclusion from the NLRA because allowing agricultural laborers to bargain with the farm labor contractors would cause great devastation to a farmer's profit due to the potential increase the farmer would have to pay the labor contractors to supply labor. Essentially, if

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<sup>88</sup> 29 U.S.C. § 1802(6)-(7) (1986).

<sup>89</sup> Sean A. Andrade, *Biting the Hand that Feeds You: How Federal Law has Permitted Employers to Violate the Basic Rights of Farmworkers and How this has Begun to Impact Other Industries*, 4 U. Pa. J. Lab. & Emp. L. 601, 616 (2002).

<sup>90</sup> Marc Linder, *Crewleaders and Agricultural Sweatshops: The Lawful and Unlawful Exploitation of Migrant Farmworkers*, 23 Creighton L. Rev. 213, 215 (1989/1990).

<sup>91</sup> *Id.* at 216.



agricultural laborers were able to unionize and bargain for higher wages with the labor contractors, farmers would be adversely affected because the farmers would have to pay more money to the labor contractors for providing laborers so the labor contractors could pay the higher wages to the agricultural laborers. This in turn would lead to an adverse affect on the consumer who would also suffer by having to pay higher prices for the food they wish to consume.

Another reason for not including agricultural laborers under the NLRA is that the NLRA is a weak statute and has many of its own flaws that create problems that the agricultural industry is shielded from at this time. The NLRA does not allow for open communication between employers<sup>92</sup> and employees, which is detrimental to the workplace.<sup>93</sup> Generally, employers and employees being able to engage in direct communication with each other is believed to foster greater loyalty among the employees to the employer and also leads to greater productivity.<sup>94</sup> Any means to foster a relationship that encourages communication between employers and employees should be respected, especially if that relationship could lead to greater productivity. A reduction in productivity in any sector would be detrimental to the producers, employees and the public. This is especially so in agriculture where the public is relying on farmers for nourishment and a loss of crops for any given season would have wide reaching affects beyond just the employer and employees.

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<sup>92</sup> Using employer here to refer to farmers, therefore assuming that the farmer is responsible for all employment matters and that a farm labor contractor is not involved.

<sup>93</sup> MARALYN EDID, *supra* note 53, at 91.

<sup>94</sup> *Id.*

### III. STATE STATUTES

Agricultural laborers are not able to unionize with the same protections offered to other industries under federal law. There are, however, several states that have extended such protections to agricultural laborers including “New Jersey, Massachusetts, Wisconsin, Oregon, Kansas, Arizona and California.”<sup>95</sup> California and Arizona have passed two of the most comprehensive statutes in the country, each providing protection to agricultural labor unions while achieving different policy goals.

#### A. *California*

The California state government sought to enact a statute that focused on protecting agricultural laborers’ right to unionize and achieve equal bargaining power with their employers to address wages, working conditions and benefits. The Agricultural Labor Relations Act (ALRA) addresses issues that the NLRA does not simply because it is narrower in scope. While agricultural laborers would benefit from being included under the protections of the NLRA, the ALRA is more comprehensive in its specific attempt to protect this marginalized group of workers. As such, if agricultural laborers were to be included under the NLRA, it would be important to consider some of the differences between the NLRA and the ALRA that seek to provide the greatest amount of protection to agricultural laborers.

The ALRA was passed in 1975 and was heralded as a piece of model legislation not only because it gave agricultural laborers the right to unionize, but also because it contained provisions that many labor advocates believed addressed issues that needed to be resolved under the NLRA.<sup>96</sup> The ALRA was enacted in response to years of violent

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<sup>95</sup> LeRoy & Hendricks, *supra* note 6, at 513.

struggles between employers and agricultural laborers and after a very successful boycott campaign against table grape producers that brought the agricultural laborers' working conditions to the attention of politicians and the public.<sup>97</sup> Agricultural laborers wanted to unionize believing that unions could raise wages, create a healthier work environment, prevent employer abuse and possibly be able to enjoy fringe benefits offered to employees in other industries.<sup>98</sup>

The ALRA differs from the NLRA in many respects so as to address the unique needs of agricultural laborers that the NLRA has not yet contemplated. For instance, the ALRA has different policy concerns than the NLRA. The ALRA seeks to “encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives ...”<sup>99</sup> This policy reflects California's goal of protecting agricultural laborers, with no mention of protecting the interests of the growers or the agricultural industry as a whole.<sup>100</sup> This is in stark contrast to the policy of the NLRA, which was enacted to address industrial strife and sought to eliminate obstacles to the free flow of commerce.<sup>101</sup> The difference in the policy statements shows that while the statutes may have been enacted with the same end results in mind, that is both want to see workers able to organize and collectively bargain with employers, each statute came into existence for very different purposes. It seems California was seeking to

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<sup>96</sup> MARALYN EDID, *supra* note 53, at 48-49.

<sup>97</sup> *Id.* at 37-42.

<sup>98</sup> *Id.* at 49-50.

<sup>99</sup> CAL. LABOR CODE §1140.2 (West 2003).

<sup>100</sup> Tracy E. Sagle, *The ALRB – Twenty Years Later*, 8 San Joaquin Agric. L. Rev. 139, 146 (1998).

<sup>101</sup> 29 U.S.C. § 151 (1947).

address specific problems within an industry, knowing that agricultural laborers' interests were in greater need of protection than the growers' interests. The NLRA, on the other hand, did not want interstate commerce to be interrupted because of labor disputes between employees and employers. This could explain why the ALRA does not mention the growers' interest: because California was trying to correct the grave injustices faced by agricultural laborers instead of trying to remove obstacles to the free flow of commerce.

Another area where this can be seen is that the ALRA was enacted specifically to address a gap left by the NLRA by only extending coverage to agricultural employees.<sup>102</sup> Even though both statutes extend similar protections to employees to protect their interest in forming unions, the two statutes do differ in several respects.<sup>103</sup> The definition of "agricultural employee" under the ALRA specifically states, "nothing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act."<sup>104</sup> This definition further explains the policy behind the ALRA because it showcases the specificity with which it is to be applied and evidences the need to extend protection to agricultural laborers even if federal statutes will not protect these laborers.

Lastly, the ALRA and the NLRA differ in that the ALRA addresses the needs of unions to access growers' property to interact with agricultural laborers. The access rule that has been promulgated by the Agricultural Labor Relations Board (ALRB), the state agency charged with the responsibility of implementing the ALRA, is comprehensive and

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<sup>102</sup> LeRoy & Hendricks, *supra* note 6, at 531.

<sup>103</sup> Sagle, *supra* note 100, at 145.

<sup>104</sup> CAL. LABOR CODE § 1140.4(b) (West 2003).

details exactly when and under what circumstances unions are able to gain access to the agricultural employer's property for the purpose of educating the laborers about the benefits of joining a union.<sup>105</sup> In contrast, the NLRA does not include an access rule and only allows a union access to the employer's property if the general public has access or if there are no reasonable alternatives to contacting employees.<sup>106</sup> The difference in a union's access to employer property under the two statutes shows how conscientious the California legislature was in enacting the ALRA, being fully aware that there are many obstacles to contacting agricultural laborers especially because many are migrant workers, moving from location to location to find work, and most live on the grower's property in housing provided by the grower.<sup>107</sup> These unique aspects of agriculture make it necessary for unions to gain access to employer's property to inform the laborers about the benefits of being a union member.

California was concerned with addressing the interests of agricultural laborers and the unique situations that they face as a result of the work that they perform. The NLRA, on the other hand, is a much broader statute because it sought to protect the rights of most industrial workers by providing a comprehensive federal statute that would preserve the employee-employer relationship and reduce interruptions to the free flow of commerce. In so doing, the NLRA was unable to protect the needs of agricultural laborers. Agricultural laborers would greatly benefit from the protections of the NLRA, but only if

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<sup>105</sup> CAL. CODE REGS. Tit. 8, § 20900 (2011).

<sup>106</sup> Sagle, *supra* note 100, at 148.

<sup>107</sup> *Id.*

consideration was given to some of the rights guaranteed under the ALRA that are specific to the agricultural industry.

Under the ALRA, many agricultural laborers saw a period of time when unions helped these workers to achieve increased wages and fringe benefits that were offered to address health and safety concerns.<sup>108</sup> Some nonunion agricultural laborers benefited from the collective bargaining agreements of others because farmers, fearing unions would soon be on their property, raised wages and offered benefits comparable to those farms that were unionized.<sup>109</sup> Only a select group of agricultural laborers benefited from unionization because the unions seemed to focus on organizing only those laborers who were settled in an area.<sup>110</sup> This meant that many migrant workers were not privy to union protections.

After this success in the 1960s and 1970s, however, the agriculture industry in California saw a decline in the unionization of laborers from the 1980s through to today. There are many arguments on both sides as to why agricultural unions are experiencing a decrease in their membership. The United Farm Workers (UFW), which was at one time the biggest agricultural union in California, argue that once there was a Republican governor who was able to change the ALRB's pro-union sentiment through the appointment of new members who tended to side with growers during disputes led to the reduced number of union members.<sup>111</sup> This is perhaps the UFW's strongest reason to

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<sup>108</sup> MARALYN EDID, *supra* note 53, at 50.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Jordan T.L. Halgas, *Reach an Agreement or Else: Mandatory Arbitration under the California Agricultural Labor Relations Act*, 14 San Joaquin Agric. L. Rev. 1, 8 (2004).

explain the drop in membership after the enactment of the ALRA. Growers give a different explanation for the decrease in union membership, most notably that the employees no longer feel as though union representation is necessary. Another potential reason for the decrease in union membership is the increasing number of immigrants who are willing to work in the fields for less money.<sup>112</sup> Whatever the reason, the decrease in union membership in California would be a way for those who oppose including agricultural laborers within the definition of “employee” under the NLRA to support their proposition. The decrease in union popularity in California would go against the notion that agricultural laborers should be afforded the opportunity to unionize. Although, given the union successes immediately after the enactment of the ALRA does prove that unions in the agricultural sector would help agricultural laborers advance to a greater position economically.<sup>113</sup>

The ALRA was viewed as a progressive, model labor statute when it was first enacted. It still is the law of California, but recently laborers have not relied on it as much as when it was first enacted. The successes of the ALRA should not be overshadowed by the recent status of unions. Unions were able to achieve great victories for their members, and the notion that agricultural laborers should be afforded the right to unionize should not be forgotten just because union membership levels in one state have decreased.

#### *B. Arizona*

If agricultural laborers are granted the right to unionize on a national level, the laborers and labor organizers would most likely want a law similar to the ALRA to be

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<sup>112</sup> *Id.* at 8-9.

<sup>113</sup> For example, wages increased 120 percent leading up to and immediately following the enactment of the ALRA and in 1975, the UFW was able to secure a raise for agricultural laborers on Salinas vegetable farms from ninety cents to about two dollars an hour. MARALYN EDID, *supra* note 53, at 50.

enacted to address the agricultural laborers' needs. On the other hand, farmers and producers would most likely want a law similar to that found in Arizona to be enacted. The Arizona Agricultural Employment Relations Act (AERA) was enacted in 1972 in response to UFW attempts to organize agricultural laborers in Arizona; the AERA was an attempt to prevent agricultural laborers from unionizing.<sup>114</sup> Given its reasoning for coming into existence, it follows that many of the sections within the AERA blatantly favor agricultural employers.

The AERA differs from the NLRA more so than the ALRA does, but it does provide answers to some of the farmers' concerns that would have to be addressed if agricultural laborers were included under the NLRA. In Arizona, the AERA permits agricultural laborers the right to organize and collectively bargain for wages and terms and conditions of employment if the laborers so choose. The AERA does, however, limit the right to strike taking into account the perishable nature of crops and because of the seasonal nature of agricultural work.<sup>115</sup> These restrictions on the right to strike are beneficial to farmers because it ensures a productive harvest even in the midst of a labor dispute. The AERA better addresses the needs of the farmers because they are secure in the fact that unions will not be able to adversely affect their profit by striking during peak production seasons.

The AERA has a limited scope of application based on the limited definition of "agricultural employee" and is even further limited by interpretation the courts have given to the definition. The statute defines both "agricultural employee, permanent" and "agricultural employee, temporary" to include those employees over sixteen years of age

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<sup>114</sup> MARALYN EDID, *supra* note 53, at 62.

<sup>115</sup> ARIZ. REV. STAT. ANN. § 23-1381 (2011).



and have worked for a particular employer for the proceeding calendar year. The difference between a temporary and permanent employee is that to be considered a permanent employee, the agricultural laborer has to have worked for at least six months for that particular employer.<sup>116</sup> These definitions are further restricted by an Arizona Court of Appeals decision that interpreted calendar year to mean the consecutive period between January 1 and December 31 as opposed to meaning the 365 days prior to filing an election petition to be represented by a union.<sup>117</sup> This means that if an agricultural laborer has not worked for a farmer for at least six months from January 1 through December 31, that laborer will not be considered a permanent agricultural employee. It is an important determination as to who is considered a temporary laborer and who is permanent because this could impact the make up of the bargaining unit that the union is trying to represent, whether it is only temporary laborers, permanent laborers or both.<sup>118</sup>

One way in which unions in Arizona have addressed a problem not currently resolved in California or federally is that Arizona has unionized immigrant agricultural laborers. The Arizona Farm Workers Union (AFWU) has attempted to unionize workers in Mexico before they were sent to the United States to work as agricultural laborers.<sup>119</sup> The AFWU also negotiated an agreement with a farmer where agricultural laborers were hired to work on the farm as legal H-2A<sup>120</sup> workers as opposed to hiring undocumented

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<sup>116</sup> ARIZ. REV. STAT. ANN. § 23-1382(1) (2011).

<sup>117</sup> *Arizona Farmworkers Union v. Agricultural Employment Relations Bd.*, 712 P. 2d 960, 962 (Ariz. Ct. App. 1985).

<sup>118</sup> ARIZ. REV. STAT. ANN. § 23-1389(B) (2011).

<sup>119</sup> MARALYN EDID, *supra* note 53, at 63.

<sup>120</sup> The H-2A program is a visa program where farmers have to endure a long process before being able to obtain an immigrant workforce. Farmers first apply to the Department of Labor to seek a “certification that

immigrants.<sup>121</sup> While this may be an extremely controversial tactic, the AFWU has been able to address one of the major hurdles facing the inclusion of agricultural laborers under the NLRA. Especially significant is the agreement between the union and the farmer to seek workers using the H-2A program. If more unions were willing to follow this strategy, it would have a great impact on the ability of unions to organize agricultural laborers because undocumented workers would not be as much of an issue. These kinds of results will make sure farmers comply with labor laws, help to enforce immigration laws and ensure there is an adequate labor supply for farmers during peak seasons.

#### IV. CONCLUSION

Before agricultural laborers could be considered “employees” under the NLRA, many concerns would need to be addressed. Labor advocates who believe it is time that these workers were granted the right to freedom of association would have to be able to reconcile the right to unionize with the reality that many farmers today are hiring undocumented immigrants for lower wages than what union members would be willing to earn for the same work. The exception under IRCA as well as its current enforcement strategy would need to be reconsidered before agricultural laborers could be considered employees under the NLRA. Congress would therefore have to take these two federal statutes into account before any progress can be made for agricultural laborers to collectively bargain with their employers under the protection of the NLRA.

Agriculture remains a very powerful industry in this country and they have many concerns over agricultural laborers being able to unionize. Farmers do not want to be

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there is a shortage of farmworkers.” The farmer then has to petition what is now the U.S. Citizenship and Immigration Service to approve the requested workers. Once that request is approved, the farmer then has to apply for and receive the visas from the Department of State. Mead, *supra* note 68, at 193.

<sup>121</sup> PHILIP L. MARTIN, PROMISE UNFULFILLED: UNIONS, IMMIGRATION, AND THE FARM WORKERS 86 (2003).

subject to a loss in profits because their workers have gone on strike and refuse to harvest crops. This concern coupled with the impact it would have on the nation as a whole could undermine agricultural laborers attempts to be protected under the NLRA. Economic weapons that unions possess could potentially be detrimental to farmers and their crops, which in turn would affect consumer access to a wide variety of food products that consumers enjoy today.

State statutes that are currently in place would need to be addressed within the NLRA to avoid confusion as to what the rights of agricultural laborers actually are. The ALRA in California seeks to protect agricultural laborers from any injustices that they may have been subject to in the past, while the AERA in Arizona wants to protect farmers and their businesses. These two statutes are hard to reconcile and would need to be taken into account before the NLRA could extend agricultural laborers the right to collectively bargain. The ALRA and the NLRA have many provisions in common, but the ALRA goes through the extra steps of addressing the unique nature of agriculture that the NLRA has not yet contemplated. While the ALRA may be a good starting point on how to include agricultural laborers into the NLRA, the protections for farmers under the AERA should not be completely discounted. Farmers, even those involved in large scale productions, are a vulnerable group of employers because of the outside factors that could possibly affect their profits, for example extreme weather conditions can lead to loss of crops. In asking farmers to pay for increased labor wages without a predictable income could prove to be detrimental to farmers.

The reconciliation of these three statutes would seem to be a monstrous task. The reason for including the California and Arizona statutes in the discussion is because they

best represent the needs of the adversaries to this labor dispute. Agricultural laborers could greatly benefit from the right to unionize because they would be able to earn higher wages, they could have access to benefits such as health care that they do not currently enjoy and working conditions could be greatly improved. A further benefit is that unionization could potentially help to reduce the reliance on undocumented labor that is currently leading to greater competition within the agricultural industry for laborers. However, before agricultural laborers can get to that point, there are many issues that need to be addressed. Unionization in the agricultural industry would lead to the fairer treatment of laborers, but could lead to a negative impact on farmers. Given the importance of farming to the national economy, it is very unlikely that agricultural laborers would be protected under the NLRA without having many restrictions put on their rights so as to address the needs of farmers.

The differences between the AERA and the NLRA are more significant than those between the NLRA and the ALRA. For one thing, the right to strike is extremely limited under the AERA. The AERA does address many of the concerns farmers have for including agricultural laborers under the NLRA, mainly the perishable nature of their products and the loss of profits they would incur if their crop were not harvested on time due to a labor strike. The AERA stands in stark contrast to the ALRA, which seeks to provide protections for agricultural laborers. Rather than trying to fill a gap left by the NLRA as the ALRA has done, the AERA was an attempt by the Arizona legislature to prevent unions from organizing agricultural laborers. The differences between all three of these statutes underscore the difficult task Congress would have to undertake in order to extend coverage to agricultural laborers under the NLRA, mainly the reconciliation of the

interests of the states that already provide for some kind of protection of agricultural labor unions, the interests of the agricultural employers and the interests of the agricultural laborers.