United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 25, 2013

TO: Jonathan B. Kreisberg, Regional Director
Region 1

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Northeast Patients Group d/b/a
Wellness Connection of Maine
Cases 01-CA-104979; 01-CA-106405

133-0100-0000-0000
133-5900-0000-0000
177-2484-1201-5000
177-2484-1225-1200
240-0150-0000-0000
240-1767-0000-0000
280-0180-0000-0000

These cases were submitted for advice as to (1) whether the Board should assert jurisdiction over an enterprise that grows, processes, and retails medical marijuana; and (2) whether workers who process marijuana that has already been cultivated and harvested by other workers are agricultural laborers and therefore not "employees" under Section 2(3) of the Act. We conclude that an enterprise that is involved in the medical marijuana industry is within the Board's jurisdiction if it otherwise meets the Board's monetary jurisdictional standards, and that the Board should assert jurisdiction over this type of business enterprise. We further conclude that the workers here, who are primarily involved in marijuana processing activities that are not agricultural, are employees under the Act. Accordingly, the Region should make merit determinations on the underlying charges and issue complaint, absent settlement, on any meritorious charge allegations.

FACTS

Wellness Connection of Maine (the Employer) grows, processes, and retails medical marijuana products. Production and processing of marijuana occur at the Employer's Auburn, Maine facility. The Employer also operates four dispensaries in the state of Maine at which it retails its products. Its out-of-state purchases and gross revenue satisfy the Board's nonretail and retail jurisdictional standards. The United Food and Commercial Workers International Union (UFCW), Region 1-Northeastern has alleged that, from January to May 2013, the Employer violated

Sections 8(a)(1) and 8(a)(3) of the Act by engaging in unlawful surveillance, interrogation, and retaliatory discipline and discharge.[1]

A. The Employer's operations

The Employer is Maine's largest medical marijuana dispensary operator, serving 3,000 of the state's 4,500-plus dispensary customers.[2] The Employer conducts a year round operation, growing and harvesting marijuana plants approximately every two weeks, processing the plants, and selling medical marijuana products to customers at its retail dispensaries. The Employer grows and processes marijuana at its indoor facility in Auburn, Maine, where it employs 3 production assistants and 8 processing assistants. Though production assistants and processing assistants are different job classifications with different job descriptions, there has been some occasional crossover in tasks.

The Employer's production assistants are primarily responsible for tasks performed during the growing cycle of the cannabis plant.[3] The growing cycle lasts approximately 19 weeks and involves cultivating and harvesting the cannabis plants. The plants are then hung in a drying room for approximately 10 days. After this period, the plants are moved into the processing area.

Processing assistants are primarily responsible for tasks performed during the processing stage.[4] The Employer has developed extensive protocols and training for its processing operation. First, the processing assistants rough trim the dried cannabis plant by hand, removing large leaves and stems. Next, the processing assistants run the remainder of the plant through a machine called a "twister." The twister uses a rotational vacuum and cutting process to remove the remaining stems and leaves from the buds, which have the most medicinal value. The buds are then trimmed once more by hand to remove any remaining small leaves and visible stems.

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[1] The Region has not yet made merit determinations on the unfair labor practice charges.

[2] Seth Koenig, *Federal Prohibition of Medical Marijuana Continue to Handcuff Now-Legal Industry in Maine,* Bangor Daily News, Sept. 6, 2013, *available at* https://bangordailynews.com/2013/09/06/health/federal-prohibition-of-medical-marijuana-continues-to-handcuff-now-legal-industry-in-maine/.

[3] Processing employees assist in cultivation tasks on rare occasions.

[4] Prior to March 1, 2013 production assistants assisted in processing tasks on an as needed basis but no longer do so.

Any mold or seeds are also removed. The buds are weighed, packaged, and labeled, and the packaged product is entered into inventory to be sent to the Employer's dispensaries, where it is sold to customers.

Some of the byproducts of this process are packaged as a product called "baker's mix." Baker's mix consists of finely ground leaves and flowers. It is used by customers to create "edibles," which are sweet or savory foods and beverage products that contain the baker's mix as an active ingredient.

Additionally, between January and March 2013, the Employer used the byproduct to create two additional products, keif (or kif) and tincture. Keif is created by sifting plant matter through screen sifters. What remains is then spooned or funneled into individual containers for sale to customers. Tincture is a liquid form of marijuana created by combining quantities of natural glycerin and baker's mix into a crock pot, cooking it for twelve to fourteen hours, straining or pressing it, and bottling it.

B. The medical marijuana industry

The Controlled Substances Act (CSA) prohibits the possession, cultivation, and distribution of marijuana.[5] Despite this federal prohibition, eighteen states and the District of Columbia have passed laws authorizing the production, sale, and use of medical marijuana.[6] One report estimates that the state-authorized medical marijuana industry is currently worth approximately $1.5 billion and could grow to $6 billion in 2018.[7] The medical marijuana industry is primarily regulated at the state level. However, the Occupational Safety and Health Administration (OSHA) has conducted investigations and cited companies in the industry, including the Employer.[8]

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[5] 21 U.S.C. § 801.

[6] *See* Robert A. Mikos, *Preemption Under the Controlled Substances Act,* 16 J. Health Care L. & Pol'y 5, 5 n.1 (2013).

[7] Chris Walsh, *US Medical Marijuana Sales to Hit $1.5B in 2013, Cannabis Revenues Could Quadruple by 2018*, Medical Marijuana Business Daily, Mar. 21, 2013, https://mmjbusinessdaily.com/us-medical-marijuana-sales-estimated-at-1-5b-in-2013-cannabis-industry-could-quadruple-by-2018/; *see also* See Change Research Strategies, *State of Legal Marijuana Markets 2011*, http://www.mpp.org/assets/pdfs/library/SeeChange_MedMarijuanaMkts.pdf.

[8] *See* OSHA Inspection 893552.015 – Wellness Connection of Maine, *available at* https://www.osha.gov/pls/imis/establishment.inspection_detail?id=893552.015.

The UFCW, among other labor unions, organizes and represents workers in the marijuana industry.[9] Specifically, in 2011, the UFCW created a division called the "Medical Cannabis and Hemp Division," one of four industry divisions within the union.[10] The UFCW says that it currently represents thousands of medical cannabis workers in six states and the District of Columbia.[11]

In Maine, the Maine Medical Use of Marijuana Act,[12] passed in 2009, allows medical marijuana dispensaries to provide qualified patients with marijuana for medical purposes. Some estimate that marijuana is now the highest value cash crop industry in Maine, surpassing the size of Maine's wild blueberry industry, at a value of approximately $78 million.[13] The medical marijuana industry in Maine is highly regulated by Maine's Department of Health and Human Services (DHHS), which has published a comprehensive set of rules.[14] These rules require that all employees obtain a registry identification card from DHHS before affiliating or beginning work at a dispensary.[15] DHHS conducts background checks during the application process

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[9] *See* Samuel P. Jacobs and Alex Dobuzinskis, *Marijuana Industry Provides Hope For Shrinking Labor Unions*, Huffington Post, Feb. 5, 2013, http://www.huffingtonpost.com/2013/02/06/marijuana-industry_n_2627699.html; *see also*, Stu Woo, *Teamsters Organize Medical Marijuana Workers*, Wall Street Journal, Sept. 21, 2010, *available at* http://online.wsj.com/news/articles/SB10001424052748703305004575504370924866534.

[10] Molly Redden, *Unions Have High Hopes for Weed Workers*, The New Republic, Feb. 5, 2013, *available at* http://www.newrepublic.com/article/112323/marijuana-legalization-draws-unions-and-doj-too; *see also* UFCW, Who We Are/Our Structure (last visited Oct. 17, 2013), http://www.ufcw.org/about/our-structure/.

[11] *See* Ramona Du Houx, *UFCW supports legislation to regulate cannabis production to protect workers*, Maine Insights, May 14, 2013, http://maineinsights.com/perma/ufcw-supports-legislation-to-regulate-medical-cannabis-production-to-protect-workers.

[12] Me. Rev. Stat. tit. 22, §§ 2421–2430.

[13] Koenig, *supra* note 2.

[14] Code Me. R. 10-144, Ch. 122.

[15] *Id.* at §8.

and then on a continuing annual basis.[16] Dispensaries are required to have written personnel policies, procedures and files, job descriptions, and employment contract policies; maintain an alcohol and drug-free workplace policy; and contract with an approved employee assistance program, among other requirements.[17]

With respect to enforcement of the federal marijuana prohibition, the Department of Justice (DOJ) issued guidance memos in October 2009 and June 2011, which advised federal prosecutors that it was not an efficient use of federal resources to prosecute "individuals whose actions are in clear and unambiguous compliance with existing state law providing for the medical use of marijuana."[18] In August 2013, DOJ issued a memo to federal prosecutors stating its enforcement priorities along with the guidance that medical marijuana operations in compliance with strong state regulatory systems would potentially allay the threat to such priorities.[19] DOJ also announced that it would not presently seek to preempt recent Colorado and Washington laws authorizing recreational use of marijuana.[20]

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[16] *Id.*

[17] *Id.* at §6.

[18] Memorandum from Deputy Attorney General David W. Ogden to selected United States Attorneys (October 19, 2009) ("Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana") *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf; Memorandum from Deputy Attorney General James M. Cole to United States Attorneys (June 29, 2011) ("Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use"), *available at* http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf.

[19] Memorandum from Deputy Attorney General James M. Cole to all United States Attorneys (Aug. 29, 2013) ("Guidance Regarding Marijuana Enforcement"), *available at* http://www.justice.gov/iso/opa/resources/305201382913275685 7467.pdf (listing enforcement priorities as including, among other things, preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; and preventing state-authorized marijuana from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity).

[20] Press Release, U.S. Department of Justice, "Justice Department Announces Update to Marijuana Enforcement Policy" (Aug. 29, 2013), http://www.justice.gov/opa/pr/2013/August/13-opa-974.html.

ACTION

We conclude that an enterprise that is involved in the medical marijuana industry is within the Board's jurisdiction if it otherwise meets the Board's monetary jurisdictional standards, and that the Board should assert jurisdiction over this type of business enterprise. We further conclude that the Employer's processing assistants are employees under the Act. Accordingly, the Region should make merit determinations on the underlying charges and issue complaint, absent settlement, on any meritorious charge allegations.

A. Whether the Region should assert jurisdiction over the Employer

The Supreme Court has "consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause."[21] The language of Section 2(2) of the Act "vests jurisdiction in the Board over any 'employer' doing business in this country save those Congress excepted with careful particularity."[22]

Section 14(c)(1) of the Act empowers the Board, by decision or rule making, to exercise discretion to decline jurisdiction where it determines that the effect of a labor dispute on commerce is "not sufficiently substantial to warrant the exercise of its jurisdiction."[23] However, the proviso to Section 14(c)(1) also provides that the Board may not decline to assert jurisdiction over any labor dispute in which it would have asserted jurisdiction according to the standards in existence on August 1, 1959.[24]

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[21] *NLRB v. Reliance Fuel Oil Corp.,* 371 U.S. 224, 226 (1963) (emphasis in original).

[22] *State Bank of India v. NLRB,* 808 F.2d 526, 531 (7th Cir. 1986), cert. denied 483 U.S. 1005 (1987).

[23] *See Hirsch v. McCulloch,* 303 F.2d 208, 212 (D.C. Cir. 1962) (holding that Board could not, on basis of advisory opinions, decline to exercise jurisdiction over labor dispute involving class or category of employers without first promulgating a rule or holding a hearing to establish rule of decision).

[24] *See Leedom v. Fitch Sanitarium, Inc.,* 294 F.2d 251, 255-56 (D.C. Cir. 1961) (listing Board jurisdictional standards existing on August 1, 1959).

During its history, the Board has declined to exercise jurisdiction over certain classes and categories of employers, including non-profits and charitable organizations, small intrastate firms, and the horseracing and dogracing industries. The Board has generally relied on findings that an employer was small, local, and did not significantly affect commerce[25] or that a state or foreign entity exerted significant control or regulation over an employer.[26] In the unique situation of the horseracing and dogracing industries, the Board relied heavily on the fact that the industry was characterized by temporary and sporadic employment, making administration of the Act difficult and the effect of a labor dispute on commerce slight.[27]

Almost all of the Board's historical declinations have been either reversed by the Board[28] or significantly narrowed.[29] The Board no longer generally declines

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[25] *See, e.g., Evans & Kunz, Ltd.*, 194 NLRB 1216 (1972) (declining to assert jurisdiction over a law firm composed of some four to six attorneys where the firm confined most of its activities to the practice of law solely within Arizona).

[26] *See, e.g.,* Horseracing and Dogracing Industries, Declination of Assertion of Jurisdiction, 38 Fed. Reg. 9537 (April 17, 1973) (codified at 29 CFR 103.3) (declining Board jurisdiction over horseracing and dogracing industries, in part, because state laws set tracks' racing dates and determined percentage share of the gross wagers that went to the state; the states licensed employees and retained the right to effect the discharge of employees whose conduct jeopardized the integrity of the industry; and a "unique and special relationship" existed between the states and these industries because the industries constituted a substantial source of state revenue).

[27] *See* Horseracing and Dogracing Industries, Declination of Assertion of Jurisdiction, 38 Fed. Reg. 9537 (April 17, 1973) (codified at 29 CFR 103.3); *see also Chicago Mathematics & Science Academy*, 359 NLRB No. 41, slip op. at 11 (Dec. 14, 2012).

[28] *See, e.g., St. Aloysius Home*, 224 NLRB 1344, 1345 (1976) ("the only basis for declining jurisdiction over a charitable organization is a finding that its activities do not have a sufficient impact on interstate commerce to warrant the exercise of the Board's jurisdiction"); *Lighthouse for the Blind of Houston*, 244 NLRB 1144, 1145 (1979) (Board will no longer distinguish between profit and nonprofit organizations for jurisdictional purposes); *Foley, Hoag & Eliot*, 229 NLRB 456, 456-57 (1977) (overruling Board's previous determination that it should decline to exercise jurisdiction over certain law firms); *Kansas AFL-CIO*, 341 NLRB 1015, 1018-19 (2004) (adopting ALJ decision rejecting respondent's argument that because it was engaged primarily in state lobbying activities the Board should decline jurisdiction).

[29] *See, e.g., Delaware Park*, 325 NLRB 156, 156 (1997) (finding that workers involved with a slot machine operation at a racetrack were not in the horseracing industry);

jurisdiction where a state or foreign entity exerts significant control.[30] Further, the Board has rejected multiple efforts to apply this type of exclusion in a variety of situations where there is significant state regulation or control.[31]

We conclude that an enterprise involved in the medical marijuana industry, such as the Employer, that otherwise meets the Board's monetary jurisdictional thresholds, is within the Board's jurisdiction because: (1) the Board has clear authority to assert jurisdiction; (2) a labor dispute involving the industry could have a substantial effect on interstate commerce; and (3) policy considerations do not compel the Board to decline.

The Board, like Congress, has the authority to regulate the marijuana industry, even where production and consumption is intended to be wholly intrastate.[32]

Empire City at Yonkers Raceway, 355 NLRB 225, 227 (2010) (holding that combined racetrack and casino operation was primarily a casino and therefore asserting jurisdiction).

[30] *See, e.g., Management Training Corp.*, 317 NLRB 1355, 1357-58 (1995) (in determining whether the Board should assert jurisdiction over an employer with close ties to an exempt government entity, the Board will only consider whether the employer meets the definition of "employer" under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards); *State Bank of India*, 229 NLRB 838, 842 (1977) (holding that there is no public policy or policy of the Act which justifies the Board to continue to decline jurisdiction on the ground that the employer is an "agency" or "instrumentality" of a foreign state); *cf. Temple University*, 194 NLRB 1160, 1161 (Board declining jurisdiction where direct state control of a non-profit university was so extensive as to make it a quasi-public institution).

[31] *See, e.g., Chicago Mathematics & Science Academy*, 359 NLRB No. 41, slip op. at 10-11 (Dec. 14, 2012) (rejecting argument that the Board should discretionarily decline jurisdiction over charter schools because of extensive state involvement where respondent received 80 percent public funding, where teachers were required to be certified under the state school code and participate in the same assessments required of public school teachers, and respondent was subject to a variety of state statutes); *Volusia Jai Alai*, 221 NLRB 1280, 1280 (1975) (rejecting argument that the Board should use its discretion to decline jurisdiction over the Jai Alai industry where the State required that all employees be licensed and that 85% be state residents, retained power to approve all managerial employees and directly employed people on site in order to maintain the integrity of the game and the betting procedures, as well as to guarantee that the game was being played according to the rules).

Additionally, the Employer here purchases sufficient out-of-state supplies as to meet the Board's nonretail standard and has gross revenue sufficient to meet the Board's retail standard. Not only is this particular Employer sufficiently involved in interstate commerce, but the medical marijuana industry as a whole is large, growing, and is not confined to state borders. Thousands of people are employed in the industry, some of whom are represented by unions and covered by collective bargaining agreements. A labor dispute at this Employer or in the industry could adversely affect out-of-state suppliers or interstate channels of commerce. Additionally, labor unrest could interfere with the federal government's regulation of the interstate marijuana market, including preventing the diversion of marijuana from states that authorize it to states that do not.

Further, the Board is not precluded from asserting jurisdiction merely because the Employer's business is highly regulated by the state of Maine. The Board has asserted jurisdiction in industries with similarly strict state regulatory regimes.[33] And the Board's assertion of jurisdiction here can function concurrently with state regulation.[34] Additionally, the Employer operates year-round with a steady workforce, and therefore this case does not present the unique circumstance posed by the sporadic employment relationships existing in the horseracing and dogracing industries.[35]

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[32] *Gonzales v. Raich*, 545 U.S. 1, 19 (2005) (finding the Controlled Substances Act squarely within Congress' commerce power because "production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity").

[33] *See El Dorado Club*, 151 NLRB 579, 582-83 (1965) (rejecting arguments from casinos and the state of Nevada that the unique nature of the gambling industry demands that the state remain free from interference created by application of the Act, and that the Board's assertion of jurisdiction could prevent the state from effectuating dismissal of employees for cheating or similar activities); *Volusia Jai Alai*, 221 NLRB at 1282 (1975) (rejecting argument that the Board should decline jurisdiction because of significant state regulation where all employees had to be licensed prior to working and a certain percentage had to be state residents because, unlike horseracing and dogracing, the unit was characterized by a stable work force with regard to hours, duration of employment, and tenure).

[34] *El Dorado Club*, 151 NLRB at 583 (noting that union representation of casino workers under the Act had not interfered with the state's imposition and administration of the strict standards required in the industry).

[35] *Chicago Mathematics & Science Academy,* 359 NLRB No. 41, slip op. at 11 (2012) (stating that the decision to exclude horseracing and dogracing industries from the

Finally, it is appropriate for the Board to assert jurisdiction here even though the Employer's enterprise violates federal laws. DOJ, which is charged with enforcing the federal law prohibiting the possession, cultivation, and distribution of marijuana, has indicated that it will not prosecute medical marijuana companies such as the Employer unless they undermine enforcement priorities such as preventing the diversion of marijuana from states where it is legal under state law to other states. This federal policy towards state-level marijuana legalization efforts creates a situation in which the medical marijuana industry is in existence, integrating into local, state, and national economies, and employing thousands of people, some of whom are represented by labor unions or involved in labor organizing efforts despite the industry's illegality. Moreover, another federal agency, OSHA, has exercised jurisdiction over employers in the medical marijuana industry, including the Employer, notwithstanding that such enterprises violate federal law. We also note that the Board continues to assert jurisdiction over employers who violate another federal law, the Immigrant Reform and Control Act (IRCA), by employing persons not authorized to work in the United States.[36] Any limitations on the Act's applicability

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Board's jurisdiction "was tailored to the unique circumstances of the horseracing and dogracing industries, including, notably, the pattern of short-term employment, which minimized the industries' impact on commerce and posed obstacles to the potential effectiveness of the Board's oversight," factors not present at a charter school); *cf.* Horseracing and Dogracing Industries, Declination of Assertion of Jurisdiction, 38 Fed. Reg. 9537 (April 17, 1973) (stating that "the sporadic nature of the employment in [the horseracing and dogracing] industries encourages a high percentage of temporary part-time workers and results in a high turnover of employees and a relatively unstable work force," which minimizes those industries' impact on commerce and "also gives us pause with respect to the effectiveness of any proposed exercise of our jurisdiction in view of the serious administrative problems which would be posed….").

[36] *See, e.g., Mezonos Maven Bakery*, 357 NLRB No. 47, slip op. at 2-4 (2011).

in the immigration context have been strictly remedial in nature.[37] That the Employer is violating one federal law, does not give it license to violate another.[38]

For the foregoing reasons, it is within the Board's authority to assert jurisdiction over the Employer, and the Board should not decline to assert jurisdiction.

B. Whether the processing assistants are statutory employees

The Act's protections extend only to workers who qualify as employees under Section 2(3) of the Act. The term employee does not include any individual employed as an "agricultural laborer." Since 1946, Congress has directed the Board to derive the meaning of the term "agricultural laborer" from the definition of "agriculture" supplied by Section 3(f) of the Fair Labor Standards Act (FLSA).[39]

Under Section 3(f) of the FLSA, "agriculture" includes agriculture in both a primary and secondary sense. Primary agriculture is "the cultivation and tillage of the soil…the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities."[40] Secondary agriculture is any other work "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."[41]

In determining whether practices are secondary agriculture, the line between practices that are and are not performed as an "incident to or in conjunction with"

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[37] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151-52 (2002) (affirming Board's finding that employer violated Section 8(a)(3) of the Act by discharging an unauthorized immigrant worker, and Board's orders that it cease and desist its NLRA violations and conspicuously post a notice detailing employees' rights and its prior unfair labor practices; but finding backpay award inappropriate, as that would "condone prior violations of the immigration laws" and "encourage future violations").

[38] *See, e.g., Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 939 (8th Cir. 2013) (affirming employer wage liability despite federal immigration law violations and stating "breaking one law does not give license to ignore other generally applicable laws").

[39] *Bayside Enterprises, Inc. v. NLRB,* 429 U.S. 298, 300 n.6 (1977).

[40] 29 U.S.C. § 203(f); *see Farmers Reservoir & Irrigation Co. v. McComb,* 337 U.S. 755, 762 (1949).

[41] *Id.*

farming operations is not susceptible to precise definition.[42] However, the Department of Labor regulations provide that generally a practice is incident to or in conjunction with farming operations only if it constitutes "an established part of agriculture," "is subordinate to the farming operations involved," and "does not amount to an independent business."[43] Additionally, processes that are "more akin to manufacturing than to agriculture" are not incident to or in conjunction with farming operations.[44]

A determination as to whether practices are incident to or in conjunction with farming operations requires an examination and evaluation of all relevant factors.[45] One of the most important factors is the type of product resulting from the practice. If the raw or natural state of the commodity has been changed, this is a strong indication that the practice is not agricultural work.[46] The legislative history suggests that this marks the dividing line between processing as an agricultural function and processing as a manufacturing operation.[47]

For example, the Supreme Court has found that tobacco bulking[48] and sugar milling[49] substantially transform the product and therefore are not secondary agriculture. Likewise, the First Circuit Court of Appeals early on determined that the process of stemming tobacco—removing the central vein or rib from the tobacco leaf—changes its form and marks the line between exempt secondary agriculture and non-exempt manufacturing work.[50] In contrast, stripping tobacco from the stalk; grading, cracking, shelling, and cleaning peanuts; and cleaning, grading, sorting, and drying

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[42] 29 C.F.R. § 780.144.

[43] *Id.*

[44] *Id.*

[45] 29 C.F.R. § 780.145.

[46] 29 C.F.R. § 780.147.

[47] *Id.*; *see also Maneja v. Waialua Agr. Co.*, 349 U.S. 254, 268 (1955).

[48] *Mitchell v. Budd*, 350 U.S. 473, 475, 481 (1956).

[49] *Maneja v. Waialua Agr. Co.*, 349 U.S. at 264-65.

[50] *Puerto Rico Tobacco Mktg. Co-op. Ass'n v. McComb*, 181 F.2d 697, 698-99 (1st Cir. 1950).

fruits and vegetables are examples of activities that may be merely preparation for market and therefore incident to or in conjunction with farming operations.[51] These activities may therefore be secondary agriculture, within the scope of the Section 3(f) exclusion.[52]

Other factors that are relevant to determining whether a practice is incident to or in conjunction with arming operations include: the value added to the product as a result of the practice and the length of the period during which the practice is performed; whether products are sold under the producer's own label;[53] the general relationship of the practice to farming; the size of the operations and respective sums invested in land, buildings and equipment for regular farming and for performance of the practice; the amount of the payroll for each type of work; the number of employees and the amount of time they spend in each of the activities; the extent to which the practice is performed by ordinary farm employees and the amount of interchange of employees between the operations; the amount of revenue derived from each activity; the degree of industrialization involved; and the degree of separation established between the activities.[54]

Here, we conclude that the Employer's processing operation is not incident to or in conjunction with its farming operation, and therefore is not secondary agriculture, because the processing operation transforms the cannabis plants from their raw and natural state and therefore is more akin to manufacturing than agriculture.[55] Further, a consideration of the remaining factors demonstrates that the processing functions are not subordinate to the Employer's farming operations.

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[51] 29 C.F.R. § 780.151.

[52] *Id. See also Pictsweet Mushroom Farm*, 329 NLRB 852, 853 (adopting Regional Director's decision that workers engaged in slicing mushrooms were engaged in secondary agriculture in part because the raw, natural state of the mushrooms is essentially unchanged by slicing).

[53] 29 C.F.R. § 780.147.

[54] 29 C.F.R. § 780.145.

[55] Our conclusion is not dependent on the fact that the Employer produced kief and tincture when several of the alleged unfair labor practices occurred. Although the kief and tincture production processes clearly transform the raw and natural cannabis product, our conclusion is based on the Employer's current operation, which does not involve any production of kief or tincture.

The Employer's processing operation transforms cannabis plants from their raw and natural state. These processing functions involve a significant breakdown of the raw plant into its component parts as well as a process that creates a mix of finely ground leaves and buds. Thus, plants that have been dried for 10 days are rough trimmed by hand and run through a twister machine that removes additional stems and leaves from the buds; the buds are removed from the twister and trimmed once more by hand; and the buds and other byproduct (baker's mix) are separately packaged and sold in the Employer's dispensaries. These processes are certainly as transformative, if not significantly more so, than removing the central vein or rib of the tobacco plant.[56]

In addition, the Employer's processing functions are not subordinate to the Employer's farming operations. The Employer currently employs only 3 production assistants to perform primary agricultural duties, while it employs 8 processing assistants to perform its processing functions.[57] The Employer's facility has separate areas for production and processing.[58] It has invested in equipment for processing, including twister machines, and has created extensive protocols and training regimens for processing and packaging its product.[59] Further, the Employer's processing functions which transform raw cannabis plant into retail products used by consumers for medicinal use add significant value to the product, rather than simply preparing it for market.[60] Also, the Employer ultimately retails the product under its own label.[61]

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[56] *See Puerto Rico Tobacco Mktg. Co-op. Ass'n*, 181 F.2d at 702 ("[T]he leaf certainly was not in its natural state after its central vein or rib was removed."); *Mitchell v. Budd*, 350 U.S. at 481 ("the bulking process changes and improves the leaf in many ways and turns it into an industrial product").

[57] *See* 29 C.F.R. § 780.145 (factors to be considered in determining whether a practice is incidental to or in conjunction with farming operations include the "amount of the payroll for each type of work" and the "number of employees and the amount of time they spend in each of the activities").

[58] *Id.* (a factor to be considered in determining whether a practice is incidental to or in conjunction with farming operations include the "degree of separation" established between the practice at issue and farming activities).

[59] *Id.* (factors to be considered in determining whether a practice is incidental to or in conjunction with farming operations include the "size of the operations" and the respective sums invested in "land, buildings and equipment for the regular farming operations" and in "plant and equipment for performance of the practice").

[60] *See* 29 C.F.R. § 780.147 (value added to the product as a result of the practice).

That there is some crossover in tasks between production assistants and processing assistants does not change our determination that the Employer's processing work is nonagricultural work rather than secondary agricultural work.[62] We recognize that where a worker is engaged in both primary agricultural work and nonagricultural work, the Board imposes a "substantiality" requirement to determine whether the nonagricultural work is substantial enough to warrant coverage of the Act. Here, there is no question that processing assistants engage in processing functions for a substantial amount of their work time.[63]

In summary, the Employer's processing function is not merely preparation for market, but rather is a valuable part of its operation that utilizes significant labor and equipment to transform cannabis plants from their natural state into retail medical marijuana products. We therefore conclude that the Employer's processing assistants are statutory employees entitled to the full protection of the Act.

Accordingly, the Region should make merit determinations on the underlying charges and issue complaint, absent settlement, on any meritorious charges.

/s/
B.J.K.

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[61] *Id.* (that products resulting from the practice are sold under the producer's own label rather than under that of the purchaser may furnish an indication that the practice is conducted as a separate business activity rather than as part of agriculture).

[62] *See Mario Saikhon, Inc.*, 278 NLRB 1289, 1292 (1986) (finding that the employees engaged in the field packing operation were statutory employees, notwithstanding that some of them occasionally filled in as cutters or pickers doing primary agricultural activities).

[63] *Camsco Produce Co., Inc.*, 297 NLRB 905, 908 n. 18 (1990) (where an employee is engaged regularly in both primary agricultural work and nonagricultural work, a small amount of nonexempt work would be "inadequate to tip the scales" to bring the employee within the protection of the Act; in such cases, the Board properly imposes a substantiality requirement) (internal citations omitted).