

From: (b) (6), (b) (7)(C)
To: [Maier, Harold A.](#); [Heller, Richard P.](#); [Fies-Keller, Cara L.](#); [Rosenberg, Joshua D.](#)
Cc: [Bock, Richard](#); [Szapiro, Miriam](#); [Dodds, Amy L.](#); [Compton, Kayce R.](#); [Shorter, LaDonna](#)
Subject: Agri-Kind, 04-CA-260089 et. al. (case closing email)
Date: Wednesday, October 21, 2020 2:42:54 PM

The Region submitted these cases for Advice as to (1) whether the two employees at issue are exempt from the Act because they are agricultural laborers; (2) whether the Board should assert jurisdiction over the Employer, a marijuana enterprise; and (3) whether remarks from an agent of the Employer violate Section 8(a)(1). We conclude that although the two employees work in indoor grow rooms akin to greenhouses, which the Board has previously distinguished from traditional exempt agricultural work, they are exempt because they each substantially engage in the primary agricultural functions of harvesting, pruning, and sorting of plants. Because this threshold conclusion requires dismissal of these charges, absent withdrawal, we do not reach the other issues presented. ^[1]

Notably, the Board has not ruled on whether employees of a marijuana enterprise are agricultural laborers or statutory employees. Although the Board has found greenhouse employees covered by the Act, see *Park Floral*, 19 NLRB 403, 413–14 (1940), Congress in 1946 began attaching an annual appropriations rider to the NLRB’s budget effectively expanding the agricultural laborer exemption. ^[2] The rider mandates that the Board use the broader definition of “agriculture” contained in the FLSA, which includes the production of “horticultural commodities” as agricultural activity and therefore exempt from the Act. ^[3] Since then, although it has not overruled its *Park Floral* decision, the Board has applied the FLSA definition to find greenhouse employees completing tasks similar to those here to be agricultural employees exempt from the Act. See, e.g., *William H. Elliott & Sons Co.*, 78 NLRB 1078, 1078-80 (1948) (rose growers who cut, watered, tied, pinched, sorted for salability, and packed roses exempt); *Hershey Estates*, 112 NLRB 1300, 1301 (1955) (employees who cut, harvested, watered, and fertilized flowers and maintained greenhouse temperature and ventilation exempt).

We conclude that the two employees at issue in this case are exempt from the Act because they perform a substantial amount of agricultural functions within the meaning of Section 3(f) of the FLSA, i.e., cultivating, growing, harvesting, and preparing for market the raw plants, a horticultural commodity. The cultivation associate spent approximately 70 percent of ^{(b) (6), (b) (7)(C)} work time harvesting, de-fanning, and skirting the plants, which included cutting plants from their stalks, taping on labels, hanging plants to be cured, pruning the plants by removing large leaves, and removing the bottoms of the plants. The trimmer cleaned, planted, harvested, and packaged the plants and spent a substantial amount of time hand-sorting buds based on their salability. The two employees both worked by hand; there is no evidence either employee used a machine. Although some of the plants went on to be further manipulated through an “extraction and infusion process” to form retail products such as concentrates, ointments, and tablets, there is no evidence

either employee engaged in such processing. Thus, the employees did not significantly transform the natural product from its raw state. *Compare Pictsweet Mushroom Farm*, 329 NLRB 852, 853 (1999) (raw state of mushrooms essentially unchanged after slicing, slicing operation not “factory-like”) *with Maneja v. Waialua Agr. Co.*, 349 U.S. 254, 268, 274-75 (1955) (sugar milling is a nonagricultural processing function that substantially transforms the raw sugar cane plant) *and Mitchell v. Budd*, 350 U.S. 473, 475 (1956) (tobacco bulking process substantially changes the physical properties and chemical content of tobacco). Consequently, the employees were engaged in primary agricultural functions. *See Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949) (primary agricultural functions under Section 3(f) include cultivation, tillage, growing, and harvesting of an agricultural or horticultural product).

Two recent cases in which Advice has found marijuana facility employees covered by the Act, *Wellness Connection of Maine*, 01-CA-104979, Advice Memo dated Oct. 25, 2013 and *High Level Health*, 27-CA-146734, Advice Memo dated July 31, 2015, are inapposite. *Wellness Connection of Maine* is factually distinct; its processing assistants used machines that transformed the raw plant into retail products, whereas the two employees here handle the plants by hand and do not substantially transform them. And, in *High Level Health*, although the functions of the water technicians were similar to the employee functions here, Advice concluded the rider-mandated definition of “agriculture” did not apply to the facts there because there had been no organizing activity and the rider’s text implicated only cases specifically involving bargaining units. Instead, Advice applied *Park Floral* and found the employees to be covered by the Act. Conversely, the two employees here were involved in formal union organizing, and filed (and later withdrew) a representation petition seeking an election. Thus, consistent with Advice’s prior application of the broader FLSA definition directed by the 1946 rider and the attendant case law, these two employees are agricultural laborers and exempt from the Act.

In sum, the Region should dismiss the allegations as to the two employees discussed here, absent withdrawal. This email closes these cases in Advice. Please contact us with any questions or concerns.

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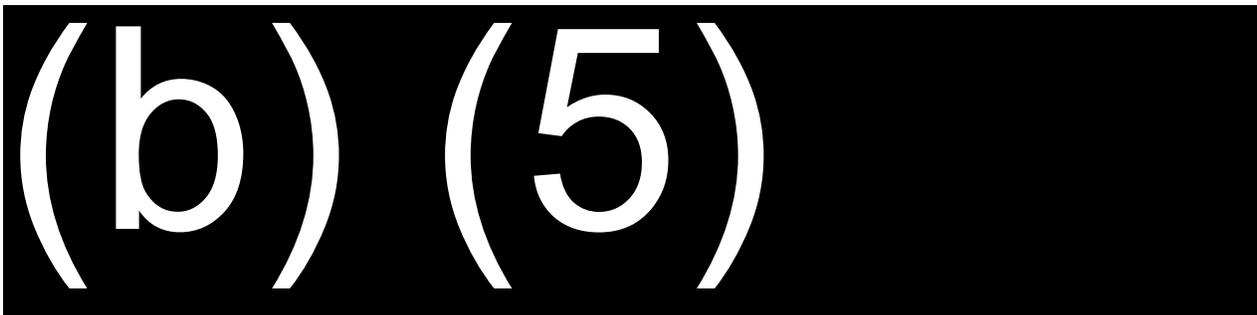
Division of Advice

(b) (5)

² The rider states in pertinent part: “*Provided*, That no part of this appropriation

shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935, and as amended by the Labor-Management Relations Act, 1947, and as defined in section 3(f) of the Act of June 25, 1938 [i.e., Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(f)” Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, 128 Stat. 2510.

³ Section 3(f) of the FLSA defines “agriculture” as “farming in all its ranches and among other things includes 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, and any practices (including any forestry or lumbering operations) 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.” 29 U.S.C. § 203(f).



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[\[3\]](#) Section 3(f) of the FLSA defines “agriculture” as “farming in all its ranches and among other things includes 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, and any practices (including any forestry or lumbering operations) 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.” 29 U.S.C. § 203(f).