# NLRA Expansion May Come With Risks For Workers

By **Daniel Johns** (January 8, 2024)

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No matter where you look these days, the workplace has been significantly affected by those charged with interpreting and applying the National Labor Relations Act.[1]

Under the direction of National Labor Relations Board General Counsel Jennifer Abruzzo, the last few years have seen a rapid expansion of the coverage of the NLRA.

From an increase in the types of workers covered by the act to an expansion of the companies found to be employers under the NLRA, Abruzzo's NLRB has moved quickly to increase labor law coverage in as many ways and to as many areas as possible.

However, it is not clear that the general counsel's vision of limitless coverage of the NLRA for all workers and individuals engaged in any activity that might plausibly be called work is without risk.

Consider a few examples.

On Oct. 27, 2023, the NLRB published a final rule on joint employment.[2] This new rule rescinds a prior rule that was put into place in 2020 and markedly increases the circumstances under which a company may be found to be a joint employer under the NLRA.

Under the new rule, a company is a joint employer if it has any direct or indirect right to control the following factors, even if never exercised:

1. Wages, benefits and other compensation;

2. Hours of work and scheduling;

3. The assignment of duties to be performed;

4. The supervision of the performance of duties;

5. Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;

6. The tenure of employment, including hiring and discharge; and

7. Working conditions related to the safety and health of employees.

Pursuant to this formulation and test, an employer that has any safety rules in effect on a worksite — such as the use of safety hats — likely would be deemed to be a joint employer for every contractor employee working at the site.

And, such a joint employment designation might make that site operator a necessary party for the purposes, not only of collective bargaining with the contractor's employees, but also

for unfair labor practice litigation.

It is not an exaggeration to suggest that this new rule will pull many more companies into NLRB proceedings as joint employers. But creating a landscape where work site operators may choose not to impose safety regulations so as to avoid joint employment liability is not an advancement of workers' interests.

Another area where the jurisdiction of the NLRA continues to expand relates to the coverage of student athletes as employees possessing the right to unionize and engage in collective bargaining over the terms and conditions of their participation in varsity athletics.

On May 18, 2023, Abruzzo issued a complaint against the University of Southern California, the Pac-12 Conference and the National Collegiate Athletic Association alleging that the failure to describe athletes as employees violated the NLRA.

It is likely that the general counsel joined the conference and NCAA as parties and potential joint employers in the matter so as to bring more NCAA schools — many of which are public institutions not subject to federal labor law coverage — within her potential enforcement jurisdiction. This case is still pending before an administrative law judge.

The USC case followed the issuance of a memo on student athletics by Abruzzo on Sept. 29, 2021.[3] In that memo, the general counsel clearly stated her intent to bring college athletes within the coverage of the NLRA and explicitly stated her belief that a college or university's use of the term "student-athlete" in and of itself violates the law because of its tendency to lead athletes to believe that they have no rights under the NLRA.

Regardless of how the USC case plays out, it is crystal clear that the next two years will see an unprecedented expansion of the NLRA into college athletics.

This sort of expansion of the coverage of the NLRA may have an impact on the cohesion of the labor movement overall. It is not a stretch to say that the interests of a USC football player may vary from those of a coal miner in West Virginia or an autoworker in Detroit.

Continual expansion of labor law beyond the working class creates the potential for a splintering of the labor movement such that it could weaken rather than strengthen support for unions and worker rights in the U.S.

Another area where the NLRB appears poised to expand the jurisdiction of the NLRA is the coverage of religious educational institutions. For many decades, the NLRB decided whether a religious educational institution has a "substantial religious character" — and thus fell outside the NLRA's jurisdiction — on a case-by-case basis.

In recent years, the NLRB, shifting with the politics of the White House, has gone back and forth on the appropriate test to make this determination. However, in a case involving Saint Leo University, Abruzzo has again set forth her intent to expand the coverage of the law in this area.[4]

In a brief filed with the NLRB in that case, the general counsel argued that all marketing materials of a religious institution must be examined to determine if in all cases the institution has held itself as providing a religious educational environment.

It is not an exaggeration to suggest that under the exacting standard proposed by Abruzzo, many, if not all religious institutions, will fall within the coverage of the NLRA.

It is not clear that encouraging religious institutions to emphasize their religious character in every public statement in order to be exempted from the coverage of the NLRA will provide prospective students with the information needed to make an informed decision about attending a particular institution.

Yet another potential area of expansion of the coverage of the NLRA relates to independent contractors. On June 13, 2023, the NLRB issued a decision changing the test by which claims of independent contractor status will be evaluated.

Typically, the NLRA covers only employees rather than independent contractors. Thus, any change in the test for making such a determination directly affects whether the NLRA's jurisdiction expands to provide many more workers with unionization and collective bargaining rights.

In the new decision, Atlanta Opera Inc.,[5] the NLRB downplayed the consideration of entrepreneurial opportunity as the hallmark of an independent contractor relationship. Instead, under the new test, entrepreneurial opportunity will only be one of several factors considered in determining the appropriate classification. Those factors include:

1. The extent of control the employer can exercise over the work;

2. Whether the worker is engaged in a distinct occupation or business;

3. Whether this kind of work is usually done under the direction/supervision of the employer or by a specialist without supervision;

4. The skill required in the work;

5. Whether the employer or worker supplies the instrumentalities, tools and place of work;

6. The length of time the worker is employed;

7. The method of payment — whether by time or by the job;

8. Whether the work is part of the regular business of the employer;

9. Whether the parties believe they are creating an independent contractor relationship;

10. Whether the employer is or is not in business; and

11. Whether the evidence tends to show that the worker is, in fact, rendering services as an independent business.

There is no question that this test likely will draw more individuals under the coverage of the NLRA. In particular, it is very likely that many gig-based workers will now be classified as employees, as opposed to independent contractors.

The NLRB's attempt to sweep many more independent contractors under the coverage of the NLRA has the potential to limit entrepreneurial opportunities for workers who may enjoy and value the flexibility of gig engagements more than they do having the right to unionize.

In sum, expanding the coverage of the NLRA is not a slam dunk to improve the working conditions of affected workers. Only time will tell the impact of this expansion.

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[1] 29 U.S.C. § 151 et seq.

[2] For the NLRB's description of the change in the law, see https://www.nlrb.gov/sites/default/files/attachments/pages/node-9558/joint-employer-fact-sheet-2023.pdf.

[3] See NLRB Memorandum GC 21-08 (September 29, 2021).

[4] Saint Leo Univ., Inc., 12-CA-275612 (2023).

[5] 372 N.L.R.B. No. 95 (2023).