

Outline on Various Local Food Law Issues

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I. OVERVIEW

A. Generally

A myriad of legal issues affect farms that participate in the local food movement. Attorneys counseling these farmers therefore must have working knowledge in a number of areas of the law. The purpose of this outline is to help attorneys spot potential legal issues affecting the local food movement.¹

B. What is Direct Farm Marketing

Put simply, direct farm marketing refers to a method of marketing when a farmer sells his/her farm-raised food product directly to the consumer, instead of to the wholesaler or retailer. Popular types of direct farm marketing include: (1) farmers’ markets, (2) roadside stands, (3) on-farm stands, and (4) Community Supported Agriculture (“CSA”).

There are numerous advantages to direct farm marketing. Perhaps the most obvious advantage is that by eliminating the “middleman” the farmer can keep a higher percentage of the proceeds. Direct farm marketing also gives consumers a way to buy fresh local farm products directly from the producer and keep more dollars in the local economy. It also facilitates

¹ What makes “agriculture law” and “food law” difficult to define is that, unlike other areas of law that are “subject-based” (e.g., criminal law, property law, environmental law, tort law), food and agriculture law is “industry-based.” See SUSAN A. SCHNEIDER, *WHAT IS AGRICULTURE LAW?*, AGRIC. LAW UPDATE (AM. AGRIC. LAW ASS’N, BROWNSVILLE, ORE.), JAN. 2009, <http://nationalaglawcenter.org/wp-content/uploads/assets/aala/1-09.pdf>.

consumer education about the food they eat and where it is raised and encourages relationships between the farmer and consumer.

On the flip side, along with greater profits, the farmer selling directly to the consumer has greater risk. Farmers participating in direct farm marketing therefore should use appropriate risk management tools and be increasingly aware of food and agriculture law affecting their operation.

C. Trends in Direct Farm Marketing

The U.S. Department of Agriculture (“**USDA**”) Economic Research Service (“**ERS**”) published a report in 2015 using data from a 2012 agriculture resource management survey to investigate how farmers were selling locally produced food to consumers. The report, “Trends in U.S. Local and Regional Food Systems” (“**ERS Report**”), was also based on statistics from the 2012 Census of Agriculture and provides a nice empirical overview of trends in the local food movement and direct farm marketing, available at <http://www.ers.usda.gov/media/1763057/ap068.pdf> (January 2015) (last visited September 26, 2015); see also Congressional Research Service, “The Role of Local Food Systems in U.S. Farm Policy” (March 2013) available at <https://www.fas.org/sgp/crs/misc/R42155.pdf> (last visited September 26, 2015).

Importantly, there is no legal definition of “local” or “local food.” What is “local” to one consumer is not “local” to another. And, despite what many believe, “local” food is not limited to food bought at farmers’ markets. Farmers’ markets are the public face of the local food movement; however, they represent only one type of local food marketing channel. The ERS Report looked at an array of direct-to-consumer and intermediated marketing channels (e.g., farm-to-restaurant, farm-to-school/university, farm-to-grocery store).

Much can be gathered by looking at the historical context of direct farm marketing. Between 1978 and 2007, only 5.5% of farms sold food directly to the consumer, representing only 0.3% of the total farm sales. There was a peak in 1982, likely due to the 1976 Farmer-to-Consumer Direct Marketing Act, which finally provided technical assistance to agriculture producers via extension education. There was a 58% increase in the number of farms selling directly to consumers between 1992 and 2007.

In 2012, there were approximately 115,304 farms that participated solely in direct farm marketing, representing approximately \$1.152 billion in sales. Interestingly, 85% of these sales came from “small” farms (grossing less than \$75,000 a year), while 10% came from “medium-sized” farmers (grossing \$75,000 to \$349,999 a year). Only 5% of the direct farm marketing sales came from “large” farms (grossing \$350,000 per year). These statistics demonstrate a few important points. First, by and large, it is the “small” farm that is participating in direct farm

marketing. From a business perspective, these “small” farms (using ERS’s definition) are grossing \$75,000 or less a year and likely have allocated very little for legal fees.

Additionally, according to the 2007 Census of Agriculture, 80% of the farm-to-consumer sales in this study were via farmers’ markets and roadside stands. When looking at the 2007 data, very few farms participated in CSAs: 1.1% of “small” farms, 2.5% of “medium” farms, and 1.4% of “large” farms. The 2012 Census did not have updated numbers concerning CSAs.

The ERS Report indicated that approximately 22,615 farms sold only through “intermediated marketing channels,” such as farm-to-restaurant (a/k/a “farm-to-table”), farm-to-grocery store and farm-to-institution (e.g., school or government entity). This small number of farms (compared to 115,304 that sold directly to the consumer) had \$3.349 billion in sales – over three times the gross sales from the direct-to-consumer sales noted above. Additionally, 25,756 farms sold through both direct-to-consumer channels and intermediate marketing channels. This number of farms had \$1.162 billion in sales. Often, food and agriculture attorneys neglect the prominence and profitability of the intermediated farm outlet industries such as farm-to-restaurant, farm-to-grocery store, or farm-to-school. In fact, 60% of “local food” passed via intermediated channels – a statistic that cannot be overlooked. Of note, approximately 35% of the farms in the 2012 agricultural resource management survey that only sold via intermediated channels were “large” farms generating \$350,000 plus in gross sales. On average, these “large” farms had \$352,375 in gross sales from their intermediated sales.

In sharp contrast, approximately 75% of “small” farms sold direct-to-consumer only, while approximately 10% sold only to intermediated channels. The relatively low percentage of “small” farms selling only to intermediated channels also highlights that “small” farms likely do not have the volume required for intermediated channels; however, it also indicates an opportunity for groups of small farms to work together and fill the demand from intermediated channels. This coordination can be beneficial for the small farm because sales to intermediated channels require less labor.

D. Overview of Legal Issues

There are numerous issues that affect direct farm marketing, primarily at the state and local level. Attorneys counseling these farms should think about the following “big picture” legal issues:

1. Contract Law

The agriculture industry is notoriously conservative and has developed a “handshake” culture; however, local food lawyers should emphasize the importance of putting in writing

transactions that are over \$500 due to the Statute of Frauds.² This is especially important for farmers selling to an intermediated channel (e.g., farm-to-restaurant, farm-to-school).

2. What Can and Cannot Be Sold via Direct Farm Marketing

The law varies from state to state on what can or cannot be sold via direct farm marketing. In New York, as well as Tennessee, for example, farms are generally permitted to sell the following (with limited exceptions): *unprocessed* fruits and vegetables, eggs (if clean and refrigerated at 41°F), grains, legumes, honey and maple syrup. Highly perishable products, such as meat and dairy, can be sold in New York and Tennessee so long as (1) the products are processed at an approved food processing facility, (2) prepackaged and properly labeled, and (3) kept at required cold temperatures to prevent spoilage or contamination.³ Like many states, New York also proscribes the sale of certain products via direct farm marketing unless certain conditions are satisfied. The same is true for Tennessee. For example, home-canned or jarred fruits and vegetables, pickled products, sauces, relishes and other low-acid foods cannot be sold directly to the consumer unless they are manufactured under an approved processing method at an inspected facility.⁴ Local food lawyers should be familiar with what can or cannot be sold via direct farm marketing in the states in which their clients sell their products.

3. Processing and Sanitation Requirements

Each state will have different rules on processing and sanitation for food sold via direct farm marketing. In New York, for example, farmers selling food products via roadside stands, on-farm outlets and farmers' markets "may not use packaging, cutting, slicing or portioning of fruits and vegetables, meat, dairy products or ready-to-eat food" unless certain sanitary conditions are met for "retail food stores."⁵ Additionally, in Tennessee, any farmer selling meat products must post a copy of the Meat Sales Permit where they are selling their products, as well as requiring different types of meats to be stored separately to avoid cross contamination.⁶ Additionally, unprocessed peas and nuts are exempt from inspection, but if they are shelled and pre-packaged, they must be subjected to an inspection by Tennessee Department of Agriculture before being sold.⁷

² See UCC § 2-201.

³ See *Sanitary Regulations for Direct Marketing*, N.Y. State Dept. of Agric. & Markets, <http://www.agriculture.ny.gov/FS/industry/sanitary.html> (last visited Mar. 30, 2014).

⁴ See *Sanitary Regulations for Direct Marketing*, *supra* note 21. See *TENNESSEE CODE ANNOTATED*, § 53-1-208

⁵ See *Sanitary Regulations for Direct Marketing*, *supra* note 21; N.Y. STATE DEPT. OF AGRIC. & MARKETS, RULES AND REGULATIONS RELATING TO RETAIL FOOD STORES. CIRCULAR 962 (Mar. 2004), <http://www.agriculture.ny.gov/FS/pdfs/circs/962.pdf> (last visited September 26, 2015).

⁶ See *TENNESSEE CODE ANNOTATED*, § 53-8-207.

⁷ See *TENNESSEE CODE ANNOTATED*, § 53-1-208.

4. Direct Meat Marketing

Amenable⁸ livestock (e.g., cattle, sheep, goats) and amenable poultry (e.g., chickens, turkey, ducks, geese, ostrich) are subject to the Federal Meat Inspection Act (“**FMIA**”), which requires these animals to be harvested in a USDA slaughter facility (with limited exceptions, such as “custom exempt slaughterhouses”). However, nonamenable (i.e., non-answerable) animals such as game animals and birds are not subject to FMIA. There are specialized state facilities that conduct butchering and processing for nonamenable animals. In New York, such facilities are required to obtain a certain license (known as an Article 5-A license) and are held to higher standards (in certain ways) than conventional custom exempt plans. All red meat in New York is considered to be “amenable” to FMIA even if the red meat is only sold via intrastate commerce; however, some states allow for red meat to be harvested in state-specific slaughter facilities if the meat is only sold via intrastate commerce.

In Tennessee, slaughtering and processing activities are solely monitored by the federal inspection system, which is administered by the Food Safety and Inspection Service (“**FSIS**”).⁹ The FSIS provides inspection of all raw meat and poultry sold in interstate commerce and monitors meat and poultry products after they leave federally inspected plants. To obtain federal inspection in Tennessee, an establishment must apply for a “grant of inspection” to become an “official establishment” for meat, poultry, or both, which includes a description of the types of activities performed in the facility (e.g. slaughtering, boning, fabricating, curing, formulating).¹⁰

II. FARMER’S MARKETS

A farmers’ market is where farmers sell food products they create, raise or purchase directly to the consumer. It usually operates at a temporary location (often on public property) on a periodic basis (e.g., one to two times a week), for a certain period of time (e.g., three to five hours), during the local growing season (usually five to six months), and is usually operated by a not-for-profit organization.¹¹

Farmers’ markets usually have “Market Rules” (a/k/a “Statement of Rules”) that are distributed and agreed to by the farmer-vendor. This set of rules is the contract between the not-

⁸ Amenable is defined as “answerable or accountable to a higher authority.” See MARTHA GOODSSELL, TATIANA STANTON, AND JIM MCLAUGHLIN, “GUIDE TO DIRECT MARKETING LIVESTOCK AND POULTRY,” <http://smallfarms.cornell.edu/resources/>, at 7.

⁹ See THE UNIVERSITY OF TENNESSEE, A REVIEW OF USDA-INSPECTED LIVESTOCK SLAUGHTERING FACILITIES IN TENNESSEE (2007); <https://extension.tennessee.edu/publications/documents/pb1727.pdf>

¹⁰ See Id.

¹¹ See NEIL D. HAMILTON, THE LEGAL GUIDE FOR DIRECT FARM MARKETING (1999); Neil D. Hamilton, Nat’l Agric. Law Ctr., *Farmers’ Markets Rules, Regulations and Opportunities* (June 2002), http://nationalaglawcenter.org/wp-content/uploads/assets/articles/hamilton_farmersmarkets.pdf.

for-profit organization or other entity managing the farmers’ market and the vendor. It discusses the key terms of the agreement, such as the application process, rent or other fees, requirements for the approval of vendors and food products, requirements for transfers or changes in ownership, provisions regarding food sampling and farm visits and inspections, necessary permits, insurance requirements and market operational procedure. Local food lawyers can be hired by the farmers’ market itself to draft the Market Rules or by vendors to review the rules.

Here is a list of common provisions and terms used in Market Rules:¹²

<u>Provision or Term</u>	<u>General Description</u>
Application Process, Fees and Rent	These provisions provide for the timing of the application, process for vendor selection and notification of approval. This clause likely identifies any fees associated with the application itself and any fees associated with security of vendor space including payment method and timing. The number of stalls that a particular vendor can reserve may be limited. Depending on the market, flat fees and/or commissions may be utilized (percentages may vary depending on type of vendor and/or product sold). The market may also require rent on a weekly, monthly or seasonal basis.
Approval of Vendors and Products	This provision will identify who can sell products at the farmers’ markets (e.g., farmer, non-farmer, peddler) and what type of products may be sold at the markets (e.g., produce, crafts, processed foods).
Carrying Crafts	“Carrying Crafts” are typically non-food items made by vendors (e.g., yarn, quilts); if allowed, said crafts usually have to be selected and approved by the Market Manager.
Carrying Rules	This clause may allow vendors to sell products raised by other farmers.
Categories of Products	Rules for items such as raw produce, baked goods, nursery plants, eggs, cheeses, meat and processed foods, including but not limited to rules relating to inspections, sanitary conditions and handling are discussed in this provision.
Changes in Ownership and Vendors’ Rights	This clause will address issues pertaining to the transfer and other changes of business ownership, as well as seniority for market spaces.

¹² CARI B. RINCKER & PAT B. DILLON, FIELD MANUAL: LEGAL GUIDE FOR NEW YORK FARMERS AND FOOD ENTREPRENEURS 324–27 (2013). See also the sources cited *supra* note 25.

Enforcement Process	These provisions establish procedures for rule enforcement (usually by the Market Manager), including reporting violations or grievances, notice, penalties, suspension or removal and appeals.
Farm Visit (or “Farm Inspection”)	In some cases, the Market Manager will visit the vendor’s farm to make a determination whether the food product was “farm-raised.” This prerequisite is more typical in farmers’ markets that have producer-only standards. The farmer typically must agree to comply with specific inspection procedures which are likely provided for under a document separate from the Market Rules. There may also be a small inspection fee that is required.
Food Safety, Sanitation and Sampling	These provisions will set forth specific rules from the farmers’ market pertaining to sanitation, handling and storing different types of food products.
Hold Harmless and Indemnification Clause	Typically, the vendor agrees to financially protect the farmers’ market and its organizers from any liability.
Length of Market	Usually, the Market Rules will specify the start and end date for the farmers’ market (typically a five- to six-month span).
Location	The same Sponsor may be running several farmers’ markets in different locations in a particular community; thus, it may choose to use the same Market Rules for all of its markets. In these cases, the Market Rules may enumerate specific rules for different locations.
Market Manager	The Market Manager is the person designated to run the market on a day-to-day basis. This person usually enforces the Market Rules.
Market Operation/ Operational Procedures	This provision will memorialize detailed guidelines and procedures for setup, cleanup, selling times, notification for non-attendance/tardiness, parking, vehicles, samples, sanitation, signage, hawking, smoking/alcohol/drugs, pets (including service animals), display guidelines, shelter requirements from rain and sun, food safety, food handling and food labeling requirements. These operational provisions can be very detailed and technical.
Membership and Market Organization	In these cases, an operational structure is created for the farmers’ market and a separate payment may be required for membership in the sponsoring organization in order to participate as a vendor.

Necessary Documents/Permits	This section will enumerate the various documents and licenses from state department of agriculture. This may include, but is not limited to, proof of insurance, tax permits, health certificates, state department of agriculture licenses, farm plan, farm information sheet (describing the size, type and scope of the operation), load lists for products raised, USDA National Organic Program (NOP) certification, business organizational documents (e.g., Articles of Organization or Incorporation, Certificate of Assumed Name) and federal tax identification number.
Peddlers	Vendors who buy products at wholesale for reselling at the market.
Producers-Only	A farmers' market that only sells items raised by the farmers who sell them (i.e., no peddlers or reselling of other farm produce).
Proof of Insurance	A form a vendor obtains from the insurance carrier (1) as proof of insurance, (2) as a summary of type of coverage obtained, and (3) proof that the farmers' market is a covered party under the insurance policy. Some farmers' markets will require that the vendor has a certain amount of coverage (e.g., \$1 million).
Product List	List of food (and non-food) products that the farmer plans to sell at the farmers' market. This list is typically used by the market to help allocate ample space and limit vendors from unapproved products.
Prepared Food	In some farmers' markets, ready-to-eat food (e.g., take-away meals and snacks) may be sold.
Processed Food	Certain processed foods may be sold at some farmers' markets (e.g., jams, jellies, wine, salsa, canned goods, cider, vinegar, maple syrup, and baked goods), subject to the sanitary guidelines.
Sponsor or Organizer (and its Logo Use)	The Market Rules should note the person or entity legally responsible for creating and operating the farmers' market. This clause generally sets out the philosophy and purpose of the farmers' market. Furthermore, some Market Rules lay out procedures for using the sponsor or farmers' markets logo on advertising materials.

Vendor (and Criteria for Selecting Vendors)	A vendor is a farmer or other person designated by the management as having the right to participate in the market. Most Market Rules also state criteria for selecting vendors such as any priorities or preferences (e.g., geographic distance), and the basis for any priority or preference. In some cases, “Categories of Vendors” are described for both seasonal and daily vendors.
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In addition to the foregoing clauses, there may be other provisions pertaining to product labeling requirements, posting farm names, using legal scales, accepting nutrition checks such as Supplemental Nutrition Assistance Program (“**SNAP**”) and the Women, Infants and Children Program (“**WIC**”), pricing guidelines (e.g., prohibition of price-cutting top quality produce), display guidelines, gleaning excess food, tax collection and income reporting, as well as other various prohibitions (e.g., firearms) and miscellaneous legal terms (e.g., Alternative Dispute Resolution clause, award for attorneys’ fees and court costs to prevailing party, limitation in damages, forum section clause for the local county Supreme Court). If the Market Rules are silent on a particular issue, the Market Manager will typically determine how to best handle the situation.

There are many questions that a farmer should consider before participating in a farmers’ market. A farmer may wish to consider some of the following issues before agreeing to participate in a farmers’ market:¹³

- (1) Who sponsors the farmers’ market?
- (2) How long has the farmers’ market been established?
- (3) What is the expected crowd for the farmers’ market (quantity of people and geographic reach)?
- (4) What is the application fee and/or procedures?
- (5) Do vendors pay seasonal, monthly or weekly flat fees or a percentage of gross sales?
- (6) Who owns or rents the land on which the farmers’ market is located?
- (7) Who is responsible in case of slip-and-fall accidents or injuries to shoppers?
- (8) Which areas of the farmers’ market get the most traffic?

¹³ See RINCKER & DILLON, *supra* note 26, at 329–31.

- (9) Who has the authority to decide which farm sets up in which location? Is there an additional fee for preference?
- (10) Is the market a “producer only” market or does the market allow for wholesale peddlers or sale of food raised by other farmers?
- (11) Can vendors provide free samples to consumers?
- (12) What is the penalty (if any) for violating a market rule?
- (13) What is the penalty, if any, for missing a market day?
- (14) If a vendor is forced to leave the market or is unable to continue participating, is any portion of the fee or rent refundable?
- (15) What are the dispute resolution procedures, if any? In other words, what are the procedures if there is an alleged violation of the Market Rules? For example, is there a committee of vendors and customers who decides whether there is a violation? Are there procedures for nonbinding mediation or binding arbitration?
- (16) Does the market have all the necessary local business permits and licenses? Can the vendor ask for copies of the permits and licenses?
- (17) Is the farmers’ market approved to participate in the WIC Farmers’ Market Nutrition Program (“FMNP”)?
- (18) What food products may be sold at the farmers’ market (e.g., meat, poultry, eggs, homemade processed foods)?
- (19) Does the farmers’ market itself carry its own insurance in case of accidents?
- (20) What type of insurance does the farmers’ market expect vendors to have (e.g., \$1 million face value of commercial insurance) and what proof of insurance must be provided to the market?
- (21) Do the Market Rules require the farmer to actually attend the market or can vendors send employees or independent contractors to do the selling?
- (22) Does the farmers’ market require the farmer or vendor to submit a plan before the market season begins, listing what produce will be sold and in what approximate volume?

- (23) Can the market officials visit a vendor's farm to inspect the operation and its records?
- (24) Are there special food labeling requirements other than what is already required under state and federal law (if applicable)?
- (25) How quickly are Electronic Benefit Transfer (“**EBT**”) payments received?
- (26) What does the farmers' market do to help promote both the farmers' market and its vendors? For example, will the vendors be listed on its website?

III. COMMUNITY SUPPORTED AGRICULTURE

A. Overview

CSAs are a relatively new form of direct to consumer sales that have increased popularity, especially around urban areas. In this program, subscribers pay up front for his or her “share” of the farm's produce. The subscriber picks up the fruit and vegetables at a certain location during specific periods of time; alternatively, some CSA's offer delivery to the subscribers home or work location for an upcharge.

B. CSA Agreements

Although not widely used, farms are encouraged to have a simple CSA Agreement signed by the subscribers. Not only does it help secure payment terms, but the CSA Agreement should mitigate potential liability in the case of a food safety issue arising from the mishandling or misuse of the food product.

The CSA Agreement should specify how long the “growing season” will last (e.g., 22 weeks), the type of share (e.g., egg share, vegetable share, fruit share, meat share), products that will be available throughout the growing season (e.g., peaches, apples, cherries, pumpkins, kale, kohlrabi, radishes, mustard greens, Swiss chard, basil), and whether the subscribers will receive a guaranteed minimum amount of food for that share (e.g., pounds of meat per week, dozen eggs per week).

The following are a few additional issues that should be discussed in the CSA Agreement:

1. Price/Payment Methods

Not only does a farm need to decide on the price per share, but it needs to determine whether: (1) it will have a sliding scale or reduced price based on limited family income, (2) it

will accept a payment plan on a monthly or weekly basis, (3) it will accept payment via credit card, PayPal, or Google Checkout, (4) it will offer “half shares,” (5) it will charge a fee to deliver to the home directly, (6) it will charge a penalty for late payments, and (7) it will accept EBT (which requires certification). To offset reduced prices for subscribers of limited means, some CSAs request an additional donation for subscribers that can afford to do so. An explanation of this voluntary request may be memorialized in the CSA Agreement.

2. How a Share is Defined

What quantity of food product should the subscriber reasonably expect? Is it measured by box, basket, bag, etc., or by a percentage of the harvest?

3. Subscriber’s Risk with Harvest

The CSA Agreement should note that the subscriber bears the risk of a partial or total crop failure due to drought, flood, insects or other conditions that may reasonably impact production. Although the CSA Agreement should state that the farmer will use reasonable efforts to generate a successful harvest, the actual quantity will vary according to the myriad factors that affect a harvest. The CSA Agreement should state that the subscriber is sharing these risks.

4. Subscriber’s Benefit from Successful Harvest

On the flip side, the agreement should state that the subscriber will also reap the benefits of a better-than-expected harvest season. From a practical standpoint, some subscribers may not want additional food in this situation. To prevent waste, the CSA Agreement may address procedures for handling a surplus, including an option to donate the food to a local food bank or share with the farm workers and their families.

5. Delivery or Drop-Off Location

There may be zoning or permit issues depending on where a farm wishes to drop off its food products. Storage and refrigeration of any egg, meat or processed food products may also be a concern at these drop-off locations. If a farm wishes to deliver the product directly to the subscriber, the specific delivery procedures should be memorialized in the CSA Agreement as well as procedures for canceling delivery for a week.

6. Forfeited Products

To prevent a dispute, the CSA Agreement should note that the food products will be forfeited if they are not picked up during the allotted time without alternative arrangements being made. Some CSA Agreements note that forfeited products may be sold or donated (e.g. homeless shelters, food pantries, after-school programs, elder care facilities). In some CSAs,

subscribers may contact other participants to pick up their products that week. The CSA Agreement should disclose whether names and email addresses may be shared with the other subscribers.

7. **Bags/Boxes**

The CSA Agreement should note whether subscribers must return boxes or bags each week for pickup or bring their own bags. Alternatively, the CSA Agreement could note that bags will be provided.

8. **Communication**

There should be a method of communicating with the subscribers in case of an emergency or inclement weather. This mode of communication should be noted in the CSA Agreement (e.g., email). Furthermore, many CSAs have newsletters for their subscribers noting farm news and events, recipes, information about the week's produce selection and posts from the farm blog to help subscribers feel more informed and connected to the farm and the CSA. Subscription to these newsletters can take place directly in the CSA Agreement or the farm's website. Any email newsletter should allow subscribers an option to "opt out" of the email.

9. **Fresh/Frozen Meat**

If applicable, the CSA Agreement should note whether the meat product will be fresh or frozen and what cuts of meat will be available. Any special processing guidelines, such as Kosher or Halal, should be noted.

10. **Volunteer Requirements**

Some CSAs require subscribers to volunteer a certain number of hours during the harvest season on the farm ("work shares" or "half work shares") or at the CSA pickup (e.g., work the sign-in table for one week). The details of these requirements should be noted in the CSA Agreement, keeping in mind "in kind" compensation and minimum wage requirements under the Fair Labor Standards Act ("**FLSA**").

In hopes of building a sense of community, some CSA Agreements use the word "partner." When possible, a farm should avoid using the words "partner" or "partnership" in its CSA Agreement and in conversations with the subscribers. In fact, the CSA Agreement should clearly note that it is not a partnership. A partnership is a specific kind of legal entity in which the partners go into business together and split profits – partners are jointly and severally liable for each other's actions. Therefore, it is important to be clear that a CSA is not a partnership. Along these lines, the words "member" and "shareholder" should be avoided when possible to avoid implying that the consumer has some type of ownership in the farm. The word "subscriber" most accurately describes the relationship.

All of that being said, there has been virtually no litigation involving CSAs; however, due to their exponential growth, it is anticipated that legal disputes will arise in the future. It is always prudent to build a written record of a farm's compliance with the CSA Agreement. Records should be kept regarding production, delivery of products, the quality of the delivery and food safety controls (including storage, transportation and refrigeration), among other things.

IV. COTTAGE FOOD OPERATIONS

Attorneys counseling the local food movement should not overlook the increasingly popular cottage food industry. "Cottage food operations" (or home-based food processing) is one of the fastest-growing trends in the local food movement. Cottage food operations provide community residents with locally produced food and increases the money in the local economy. It also creates cost-effective outlets for agriculture producers with excess fruits and vegetables.

The majority of states have cottage food operation laws, exempting certain home processors from certain regulations. Importantly, cottage food laws only apply to home-processed food sold intrastate; if food is sold interstate, more stringent federal regulations will apply, making compliance more difficult for a small-scale home processor. If food entrepreneurs do not fit under the cottage food exemption for home-processed food, then they may need to apply for commercial kitchen licenses in their state (an "Article 20-C License" in New York).

In Tennessee, producers are allowed to sell baked goods, candies, jams and jellies, and other non-potentially hazardous foods. Generally, any food that does not need to be refrigerated is considered non-potentially hazardous.¹⁴ Currently, pickles, sauces, applesauce, salsas, fermented food and other preserves are prohibited from being processed in a private home and then sold to consumers.

Harvard Food Law and Policy Clinic published an excellent comparative analysis of cottage food laws throughout the country.¹⁵ Most states have a cottage food operation law at a certain level; however, there is very little uniformity among the states. The following jurisdictions currently do not have a cottage food operation law: Connecticut, District of Columbia, Hawaii, Idaho, Kansas, New Jersey, North Dakota, Oklahoma and West Virginia.¹⁶

It is important for local food lawyers to familiarize themselves with the cottage food operation law in their state. Attorneys should be cognizant of the following potential issues:

¹⁴ See *TENNESSEE ANNOTATED CODE* § 53-8-117.

¹⁵ ALLI CONDRA, HARVARD LAW SCHOOL FOOD LAW & POLICY CLINIC, COTTAGE FOOD LAWS IN THE UNITED STATES (Aug. 2013), http://blogs.law.harvard.edu/foodpolicyinitiative/files/2013/08/FINAL_Cottage-Food-Laws-Report_2013.pdf.

¹⁶ See CONDRA, *supra* note 31, at 5.

- A restriction of home-based food processing activities to a narrow category of processors (e.g., on-farm sales only¹⁷);
- A list of allowed cottage food products (e.g., specific foods,¹⁸ foods that are “not potentially hazardous,”¹⁹ foods that meet a certain pH level,²⁰ foods made from certain ingredients²¹);
- Description of prohibited cottage food products²² or food processing techniques (e.g., no pressure cooker);
- Limitation on where the food products can be sold (e.g., farmers’ markets, county fairs, roadside stands, on-farm stands, CSA subscriptions, churches,²³ restaurants²⁴);
- Whether internet sales are allowed or prohibited;
- License, permit or registration requirements²⁵;
- Inspection of the home-based processing facility; and
- Restrictions on sales.²⁶

Furthermore, most states with cottage food operation laws also have sanitation and food labeling requirements. Only three states do not have labeling requirements for home-processed

¹⁷ See, e.g., 3 DEL. ADMIN. CODE §§ 101-1.0–101-16.3; KY. REV. STAT. §§ 217.136–217.137; N.H. REV. STAT. § 143-A:12; R.I. GEN. LAWS § 21-27-6.1.

¹⁸ See, e.g., CAL. HEALTH & SAFETY CODE § 114365.5; N.Y. State Dept. of Agric. & Markets, Home Processors, FSI-898d (Feb. 2013), <http://www.agriculture.ny.gov/FS/consumer/processor.html>.

¹⁹ See ARK. CODE § 20-57-201(1)(B)(iv).

²⁰ Wisconsin’s “pickle bill” exemption from food processing licensing requirements only applies to the processing of fruits and vegetables that meet a certain pH value, such as pickled fruits and vegetables, sauerkraut, salsas, chutneys, jams, jellies and applesauce. See WIS. STAT. § 97.29(2)(b)(2).

²¹ Vermont’s cottage food law only applies to baked goods, breads, cakes, pies or other food products made from flour. See VT. STAT. tit. 18, § 4451.

²² For example, in New York, food products that require refrigeration as potentially hazardous. See N.Y. State Dept. of Agric. & Markets, Home Processors, FSI-898d (Feb. 2013), <http://www.agriculture.ny.gov/FS/consumer/processor.html>.

²³ Tennessee’s cottage food law states that products “may be sold at that person’s personal residence, a community or social event, including church bazaars and festivals, flea markets, or at farmers’ markets located in this state.” TENN. CODE § 53-8-117(b).

²⁴ California has two levels of cottage food operations: (1) Class A operations (direct to consumer only) and (2) Class B operations (may also sell to restaurants and other retail food establishments). See CAL. HEALTH & SAFETY CODE § 113758(a).

²⁵ Alaska requires cottage food operators to obtain a business license. See ALASKA ADMIN. CODE tit. 18, § 31.012(a)(4).

Colorado requires a certificate in safe food handling and processing. See COLO. REV. STAT. § 25-4-1614(1)(c). Washington requires a food and beverage service worker’s permit. See WASH. REV. CODE § 69.22.030(2). Utah requires a food handler’s permit. See *Utah Code* § 4-5-9.5(4)(a).

²⁶ Approximately 50% of the states that allow cottage food operations have a limitation on gross sales per year. Typically the limit is between \$5,000 and \$50,000: See, e.g., LA. REV. STAT. § 4:9(B); MINN. STAT. § 28A.15(10)(a); WIS. STAT. § 97.29(2)(b)(2)(c); TEX. HEALTH & SAFETY CODE § 437.001(2-b). Some states’ statutes allow for a gradual increase in sales caps. See MICH. COMP. LAWS § 289.4102(5); CAL. HEALTH & SAFETY CODE § 113758(a). Some states place limits on each eligible food item. For example, Colorado has a \$5,000 limit for each item sold. See COLO. REV. STAT. § 25-4-1614(2)(e).

foods: Louisiana, Montana and Vermont.²⁷ To illustrate, New York requires the following information on the label:

- name and address of the home processor;
- common or usual name of the food;
- if the food is fabricated from two or more ingredients, the common or usual name of each ingredient in their order of predominance (except that spices, flavorings and colorings may be designated as spices, flavorings and colorings without naming each component; and spices and flavorings may be designated together as flavorings); and
- the net weight, standard measure or numerical count.²⁸

Tennessee requires that the date product was made be included on the label as well as the above stated information. Tennessee also recommends that an up-to-date list of where food was distributed, including quantities distributed, be kept in case of incident.²⁹

Attorneys counseling home-based food processors should also consider whether the home-based business conflicts with their clients' residential leases or local zoning codes. Furthermore, commercial activities, such as cottage food operations, will not be covered under rental insurance or homeowner's insurance.

V. ON-FARM POULTRY SLAUGHTER

The general rule is that all poultry must be slaughtered at a USDA-inspected facility under FMIA and the Poultry Produce Inspection Act (“**PPIA**”). However, the statute provides a “1,000 Bird Limit Exemption” for a farm (not farmer) that sells less than 1,000 chickens or 250 turkeys (4 chickens = 1 turkey). Additional requirements include: (1) the birds must have been raised on the farm, (2) the farm does not engage in the buying or selling of poultry products other than what is raised on the farm, (3) slaughter is conducted under sanitary standards, practices and procedures that are sound and clean, (4) the farm keeps required records, and (5) the poultry does not move into interstate commerce. The poultry slaughter subject to this exception must be done on-farm and may involve the use of a Mobile Poultry Processing Unit (“**MPPU**”). Some states, like New York, *recommend* that poultry slaughtered on the farm be sold direct to the consumer.

In Tennessee, a facility that wants to do on-farm poultry slaughter within the USDA exemption, must get a letter of approval from the local health department. The local health department will need information regarding method of disposing waste, where water comes from, and the method by which the waste water is treated. Once this letter is obtained, the facility must let USDA know that it is functioning under this exemption. The USDA does not

²⁷ See CONDRA, *supra* note 32, at 16.

²⁸ See RINCKER & DILLON, *supra* note 27, at 334.

²⁹ See TENNESSEE DEPARTMENT OF AGRICULTURE REGULATORY SERVICES DIVISION, CHAPTER 80-4-11.

perform an inspection once notified, but the facility is subject to “spot inspections” if there is reason to do so. After informing the USDA, the facility will still need to acquire a state retail license in order to sell the poultry on the farm, at farmer’s markets or in a retail store.³⁰ There are also specific food labeling requirements for on-farm poultry slaughter that local food lawyers should review with their clients.

VI. VOLUNTEER FARM LABOR³¹

Most farms, agri-businesses and food companies employ labor of one sort or another. Hiring outside labor opens the operation to regulation from state and federal agencies that administer *labor laws*. It is important for lawyers involved in the agriculture industry to have a solid grasp of employment law.

A. Classification of Workers

1. Employee vs. Independent Contractor

The distinction between *employee* and *independent contractor* is crucial in just about every area of law that affects the labor hired to work on farm operation (or elsewhere). Even unpaid labor such as interns, apprentices, and community volunteers may be classified as employees (and they usually are). As a general rule, employees receive more benefits or protection from these laws than do independent contractors. Employers who classify workers as independent contractors do not have to withhold federal and state income taxes for employees, nor do the employers have to pay Social Security taxes, carry workman’s compensation insurance, or pay unemployment taxes for these workers.

It shouldn’t be too surprising, then, that in most of these situations, the people hired to work on a farm are first assumed to be employees. If a farm owner wants to prove that their labor is not entitled to various labor law advantages (all of which generally require either more money or more work, or both, from the employer), it is usually their burden to prove that the person hired was an independent contractor.

In general, the question of “employee vs. independent contractor” is one of control over the details of the work:

- If the operator controls how, when and where the other party works, it looks a lot like an employer-employee relationship.

³⁰ See 2010 TENNESSEE CODE, TITLE 53 – FOOD, DRUGS AND COSMETICS, CHAPTER 7 – MEAT INSPECTION AND REGULATIONS, PART 2 – TENNESSEE MEAT AND POULTRY INSPECTION ACT

³¹ Am. Bar Ass’n (ABA) Continuing Legal Education (CLE) Online Course, Rachel Armstrong, Kimberly Clarke, Edward Cox, Karen Eichman, Maggy Gregory, Jennifer Jambor-Delgado, Art Read and Cari Rincker, OVERVIEW OF EMPLOYMENT AND LABOR LAW FOR FARMS AND RANCHES (Feb. 20, 2013) (available for purchase at <http://apps.americanbar.org/abastore/index.cfm?section=CLE> [product code CET13OELOLC]).

- If the person hired sets his or her own hours, provides his or her own equipment, and does similar work for other operators, it begins to look more like an independent contractor relationship.

It is important to realize, too, that the “labels” placed on a relationship between farmer and workers do not control their legal classification.

2. Who is an “Employee?”

When looking at any person who is working the farm – a paid worker, intern, apprentice or volunteer laborer – it is important to understand when state and federal laws will classify a person as an “employee.” Broadly, the Fair Labor Standards Act (“**FLSA**”) defines an employee as “any individual employed by an employer.” 29 U.S.C. § 203(e)(1). The term “employ” under the FLSA means to “suffer or permit to work.” 29 U.S.C. § 203(g). Federal tax laws use common law rules to determine whether a person is an “employee.” See 26 U.S.C. § 3121(d)(2). For example, the IRS has historically looked at whether the principal has the right to direct and control the worker who provides services. See Internal Revenue Service, Publication 51 (Circular A), Agricultural Employer’s Tax Guide (2010).

Alternatively, the Migrant and Seasonal Agriculture Worker Protection Act (“**MSAWPA**” or “**MSPA**”) defines an “agricultural worker” as an “individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.” 29 C.F.R. § 500.20(p). Furthermore, a “seasonal agriculture worker” is defined as “an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence:

- (1) When employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or
- (2) When employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.” 29 C.F.R. § 500.20(r).

3. When is an Intern an Employee?

Interns are oftentimes classified as migrant or seasonal agricultural workers. To explain, interns usually do temporary agricultural work (e.g., summer or a semester). An intern’s duties on a farm usually include field work. For these reasons, a farm intern would likely be considered a “seasonal” worker. To be considered a “migrant” worker under the MSPA, the intern also has to be absent overnight from his or her permanent place of residence (i.e., away from his or her home). If an intern opts to stay in employer-provided housing during the internship because there are few

inexpensive housing options available, that intern is likely considered a “migrant agricultural worker.”

Although some farms and food entrepreneurs may have a contractual agreement stating that the intern is not an employee and instead referring to him or her as a “volunteer,” “trainee” or “independent contractor,” courts have repeatedly set aside these agreements when this person should be classified as an employee. In other words, courts have held that an employee cannot waive his or her rights in a contract to FLSA benefits and will instead look at the reality of the work arrangement.

In order for a “trainee” or “intern” to be exempt from federal minimum wage requirements in the “for-profit” private sector of farms, agri-businesses and food companies, the following six factor test must be satisfied:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If all six of the above factors are met (i.e., not just a few of the factors but all six of them) an employment relationship does not exist under the FLSA and the farm or food employer does not need to pay the intern minimum wage. See U.S. Department of Labor, Wage & Hour Division, Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act (April 2010).

From a practical standpoint, farms and agri/food businesses with an internship program should understand that it is unlikely that the intern will be classified as a “trainee” even if he or she is obtaining credit from an educational institution. Farms and food entrepreneurs with an unpaid internship program should carefully tailor their program to meet this test.

4. Who is an Independent Contractor?

Put simply, a worker must retain control over the manner and means to accomplish a project to be considered an independent contractor. Courts look at a myriad of factors when deciding if someone is an independent contractor:

- skill required;

- source of tools necessary for the work;
- location of the work;
- duration of the relationship between the parties;
- whether the hiring party has the right to assign additional projects to the hired party;
- the extent of the hired party's discretion over when and how long to work; and
- method of payment.

See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-752 (1989) and Ernster v. Luxco, Inc., 596 F.3d 1000, 1003-1004 (8th Cir. 2010).

It is unlikely that a farm or agri-business intern will be classified as an independent contractor under FLSA. The nature of the internship itself rests on the fact that the intern is there to learn from the host farmer or food entrepreneur so that he or she may use the skills and knowledge gained from the internship on their own. Typically, an intern does not come to the farm or agri-business with the skills necessary to complete his or her tasks independently and will be subject to the direction and supervision from his or her host. The intern will use the farmer's tools or the agri-businesses office space.

5. Who is a Volunteer?

In determining whether someone is a volunteer or an employee, courts look at the following factors:

- Whether the worker received any benefits including “in kind” compensation (e.g., food and lodging);
- Whether the activity is usually considered a full-time occupation;
- Whether the services are of a nature typically associated with volunteer work (i.e., helping the sick, elderly, indigent, handicapped or underserved communities); and,
- Length of time the individual is dependent on the food/agricultural employer.

See Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290, 301, 303 (1985).

It is unlikely that an intern on a farm or in an agri-business would be considered a volunteer. If the intern is receiving “in kind” compensation including food or housing, then this shows the court that the intern has an economic dependence on the employer. Additionally, working for for-profit farms or agri-businesses is not typically associated with volunteer work. Interns usually work full-time for several weeks or months at a time; however, if the intern only worked one day per week and provided his or her own housing then this person is less likely to look like he/she is working in a full-time occupation to the courts. Ultimately, courts will look at the totality of the circumstances when making this determination.

6. Who is an Apprentice?

Apprenticeships are offered at several farms throughout Tennessee. Although apprenticeships seem to be a nice way to give workers a deepened educational experience, they should be offered with cautious awareness of their regulation.

It is important to understand that formal apprenticeship programs are regulated by the National Apprenticeship Act (“NAA”). Certain parameters must be met in order for there to be a registered apprenticeship. For example, applicants are required to go through a formal training program and obtain a completion certificate.

Apprenticeships are available for the following:

- Agriculture Service Worker,
- Farm Equipment Mechanic I and II,
- Farm Worker, General, and
- Farmer, General.

As a caveat, apprenticeship programs are challenging for farmers because they require a classroom education component which can be challenging to properly administer.

B. Potential Labor Issues with CSA “Worker Shares” or Other Types of Volunteer Farm Labor

Many CSA farms are using “worker shares” or “half worker shares.” Instead of paying for his or her share, a subscriber may volunteer between 4 to 6 hours a week for 20 to 30 weeks. A “half worker share” allows for smaller volunteer commitment for a reduced fee. CSA worker share programs oftentimes go through a formal application process. Additionally, some CSAs offer free shares in exchange for use of their space for the “drop off” points.

Although CSAs are most widely recognized for volunteer farm labor, some farms are enrolled in the World Wide Opportunities on Organic Farms (“WWOOF”) matching volunteers (“WWOOFers”) from around the globe that wish to work on a farm for temporary housing and food. Furthermore, many farms accept casual volunteers from their community (e.g., church, schools, non-for-profit organizations, “crop mobs”) in exchange for food.

As noted above, FLSA defines “employ” as “to suffer to permit to work” – which would include almost any volunteer farm labor arrangement. However, this definition has been narrowed to exclude those who work without a promise or expectation of compensation but only for his or her personal pleasure. See Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

Importantly, the FLSA defines a “volunteer” as “an individual who performs service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered” 29 C.F.R. § 553.101. Although not clear-cut, it appears that this definition does not include working for for-profit private entities, like farms or food businesses, or volunteering in exchange of “in kind” compensation (e.g., a share in a CSA).

The court generally uses the following questions when deciding whether a volunteer is an employee:

- Is the volunteer working in expectation of compensation (including “in kind” compensation)?
- Is the volunteer displacing paid employees?
- Does the volunteer give the business any kind of competitive advantage?

In most cases, CSA worker share programs and other farm labor programs where the volunteers are being paid “in kind” compensation are utilizing employees under FLSA. That said, the 500-Man Day exception, as discussed below, will apply to many small scale farms. If volunteers are considered employees then this will contribute to the 500-Man Day calculation.

For example, a CSA share worth \$800 is compensation under the FLSA in the amount of \$800. However, that farm must keep an accounting of the “volunteer” labor hours to make sure that \$800 surpasses the minimum wage requirement. This requires farms to keep accurate records of “in kind” compensation.

If a farm using volunteer farm labor wishes to be exempt from this requirement, it must carefully craft the program with the assistance of an attorney.

C. Minimum Wage and Overtime

Once it has been determined that a farm or agri-business worker is an “employee,” then the minimum wage and overtime requirements under FLSA applies. The current federal requirements are as follows:

- Adults: \$8.25 per hour in New York (New York will incrementally raise to \$9.00 in 2015); \$7.25 in Tennessee.
- Youth Age 20 and Under: A federal minimum youth wage of \$4.25 per hour applies to workers who are under the age of 20 for the first 90 consecutive days of their employment. A farm or food business may not intentionally displace other employees in order to hire employees under the age of 20. See 29 U.S.C. § 206(g).

- Full-Time Students (a Department of Labor Certificate is required): Full-time students may be paid 85 percent of the federal minimum wage if certain requirements are met (e.g., ensuring that the student-worker is not displacing a worker who would be paid minimum wage, not performing work performed by regular employees). See 29 U.S.C. § 214(b)(2); 29 C.F.R. §§ 520.200-520.508.

Payroll can be paid at different rates (biweekly or weekly), but the issue of overtime pay comes into play if the employee goes over 40 hours in a 7-day calendar week, regardless if it is in one pay period or two. Employees must be paid time-and-one-half their regular hourly rates of pay for hours worked in excess of 40 per week. There are exceptions to this overtime requirement, some noted below.

Farm owners can encounter serious legal problems by failing to keep and maintain records of the names and permanent addresses of temporary agricultural employees, dates of birth of minors under age 19, or hours worked by employees. As costs rise for labor, more and more operations, even small ones, farmers need to resist any and all temptation to skirt around the requirements of the IRS and federal wage laws. Farmers and lawyers have to keep a constant eye on these laws because some of them can change dramatically from year to year. The penalties for non-compliance are far worse than the burden of compliance. The bottom line on this is to advise farm owners to hire a bookkeeper and/or seek legal advice to keep themselves informed about the current state of these regulations.

D. Exemptions to the Minimum Wage and Overtime Requirements

1. 500 Man-Day Minimum Wage and Overtime Exemption

This exemption applies to smaller-scale farming operations with a limited number of employees. To explain, this exemption applies to farm employers that used 500 or fewer man-days of agricultural labor during each calendar quarter of the preceding year. 29 U.S.C. § 213(a)(6)(g). See 29 C.F.R. § 780.305 (noting that 500 man-days generally equals seven full-time employees). Please note that this exemption only applies to agricultural work (including farming, livestock production, and ancillary tasks such as transportation to market or manning a table at a farmstand) See 29 C.F.R. § 780.11; 29 U.S.C. § 203(f); 29 C.F.R. § 780.105. Processing, packaging or delivery of another farmer’s crops or livestock do not fall under this exemption. See 29 C.F.R. §§ 780.137, 780.141.

A “man-day” is any day on which any employee performs one hour or more of agricultural work for a specific farmer – not per farm. 29 U.S.C. § 203(u); 29 C.F.R. § 780.301(a); 29 C.F.R. § 780.304(b). Work performed by the farmer or his/her immediate family does not count as a “man day.” 29 U.S.C. § 203(e)(3); 29 C.F.R. § 780.301.

In order to qualify for this exemption, the farmer must have *accurate time records* illustrating the number of hours worked by each employee during the prior calendar year. See 29 C.F.R. § 780.306.

2. Hand Harvest Laborer Minimum Wage and Overtime Exemption

This exemption applies to local hand harvest laborers and includes those who: (1) commute daily from their permanent residence, (2) are paid on a piece-rate basis in traditionally piece-rated occupations, and (3) are engaged in agriculture less than 13 weeks during the preceding calendar year. 29 U.S.C. § 213(a)(6)(C). This exemption does not apply to full-time workers who earn a livelihood from working on the farm. See 29 C.F.R. § 780.310.

3. Agricultural Overtime Exemption

This is a broad overtime exemption for agricultural workers from receiving federal overtime pay applicable to farms of any size for employment in agriculture production. See 29 U.S.C. § 213(b)(12). It is important to understand that this exemption only applies to agriculture workers – there is a separate exemption for workers engaged in the transportation of fruits or vegetables in intrastate commerce. This exemption would not apply to a bookkeeper or someone who works at a farmer’s roadside stand.

E. Farm Family Employment

1. Who is the Employer?

More than one person in a farm operation can qualify as an “employer.” In a farm family, it can sometimes be challenging to distinguish who is the “employer” and who is the “employee.” More than one person in a farm can qualify as an employer – or a business entity, such as a general partnership or limited liability company may be considered the employer. If a number of family members run a farm together, those people might collectively be the employer.

Courts will generally look at how a business is running to determine who the employers and employees are. For example, courts look at (1) financial stake in the business, (2) how profits are shared, (3) decision-making authority (including supervision of workers, hiring/firing workers), and (4) responsibility in the day-to-day activities in a family farm or agri-business.

Ownership in the farm operation does not mean that the farmer-employer must own the real property that is being used for agriculture production. Courts look at the totality of the circumstances to determine financial stake. For example, is the land being rented? Who owns the livestock or farm equipment? Without a doubt, courts will consider the farming operation’s organizational documents (e.g., Operating Agreement if it is a limited liability company, Partnership Agreement) and tax documents (e.g., a Schedule F on the tax return).

2. Family Employee Exemptions

After identifying the employer in a farming operation, the next step is to identify family employees. There are several exemptions that apply to family under federal and state labor laws. Some include the following:

- Minimum Wage Exemption: A farm employer's "immediate family" (spouse, children, and parents) are exempt from the FLSA's minimum wage requirement. Note that "immediate family" does not include brothers, sisters, aunts, uncles, grandparents, grandchildren, nieces, nephews, cousins, in-laws, etc.
- Occupational Safety and Health Act ("OSHA") Exemption: A farm employer's "immediate family" are exempt from OSHA, discussed more below.
- Social Security and Medicare Exemption: This exemption applies to a farmer-employer's children who are under 18 years old.
- Federal Income Tax Withholding: Farmer-employers need not withhold federal income tax from children who are under 18 years of age.

Generally speaking, farm employers are **not exempt** from their requirement to pay federal unemployment tax for all family member employees.

F. Children and Agricultural Employment

1. Hiring A Farm Owner's Children

Under federal law, children under the age of eighteen (18) can perform on-farm labor. See 29 U.S.C. § 212 and 29 C.F.R. Part 570. If operating a farm, any child of the farmer owner can do any job on the farm. See 29 U.S.C. § 213(c)(2) and 29 C.F.R. § 570.123(c).

2. Work Hours and Duties

Under federal law, minor children who work in non-agricultural employment cannot be under fourteen (14) years of age, and are subject to the following basic rules, many of which turn on the age of the child laborer:

- Children aged sixteen (16) years or older can perform non-hazardous duties, with unlimited hours; and

- Children aged fourteen (14) and fifteen (15) years cannot perform hazardous duties, work in manufacturing jobs, or work in mining, and they cannot work during school hours on school days (with limited exceptions). See 29 C.F.R. § 570.2(b).
- Children aged twelve (12) to thirteen (13) years may only work on farms not owned or operated by their parents if (1) the farm that the child will work on also employs the child's parents, or (2) the child's parents have given express written consent. See 29 C.F.R. § 570.2(b). They also cannot work during school hours on school days.
- Children aged eleven (11) years or younger may not work on a farm unless the farm is owned and/or operated by the child's parents. See 29 U.S.C. § 213(c).

Children in *agricultural employment* may work:

- Up to 14 hours a week (in two-hour blocks) when school is in session; or
- Up to 20 hours a week (in maximum of four-hour blocks) when school is out.

In addition, children over the age of 14 may de-tassel, from June through August, with no restriction on hours. No matter how eager the child, it is important that farmers do not ignore the work hour limitations for minor workers. Both employers and parents who allow a child to work in violation of the child labor laws may be punished by fines, or jail time, or both.

Teen-aged employees may drive a car or truck on farm property, operate garden-type tractors, clear brush by hand, hand-plant seeds or plants, weed, hoe and water plants, care for poultry and horses, pick produce, and help with milking operations. As a general rule, minor children (under the age of 18) cannot be employed to work in any of these agriculture-related industries or tasks:

- Logging,
- Power-driven woodworking machines,
- Power-driven metal punch machines,
- Slaughter,
- Meat packing or rendering plants,
- Circular saws,
- Band saws,
- Wrecking and demolition;
- Roofing,
- Excavating, or
- Operating forklifts, backhoes, or cranes.

3. Hazardous Work

Essentially, only children *over the age 16 may do hazardous work* in the agriculture industry. Hazardous work would include:

- Operating tractors over 20 horsepower (“PTO”);
- Combining;
- Mowing;
- Corn or cotton-picking;
- Trencher or earthmoving equipment operation;
- Being in stall with a bull, boar, stud horse, or a sow or cow with newborn offspring;
- Working from a ladder or scaffold at a height of over 20 feet;
- Felling, bucking, skidding, loading or unloading timber;
- Driving a bus, truck or automobile;
- Handling or applying toxic agriculture chemicals;
- Handling or using a blasting agent; and
- Transporting, transferring or applying anhydrous ammonia.

If the child is *under age 16*, he or she *cannot* work:

- Felling, bucking, stacking or loading timber;
- Working from a ladder or scaffold; or
- Transporting or applying NH₃ or handling Category I toxic ag chemicals. See 29 CFR 570.71(a)(1-11).

The U.S. Department of Labor is active in seeking to restrict this list further, and you should consult with your attorney or the Department of Labor to find out the current Ag Hazardous Occupation Orders to ensure your operation can safely employ your youth employee.

4. Record Keeping

If there are minor farm employees, employers must ensure they have his or her full name, address, date of birth, and proof of age. Proof of age can be a copy of a birth certificate, driver’s license, or a Form I-9.

VII. AGROTOURISM

Agrotourism, or agri-tourism, farm tourism, agricultural tourism, or agritainment, combines an agricultural business with activities to attract people to visit the farm or ranch. The National Agricultural Law Center lists four factors to determine whether a business can be considered agrotourism:

- (1) Combines the essential elements of the tourism and agriculture industries;

- (2) Attracts members of the public to visit agricultural operations;
- (3) Is designed to increase farm income; and
- (4) Provides recreation, entertainment, and/or educational experiences to visitors.

Examples of agrotourism are farms that invite people to pick food such as apples or pumpkins, a corn maze, feeding animals, cut-your-own Christmas tree farms, winery tours and tastings, agricultural museums, and a Bed and Breakfast located on a farm or ranch.

A. Possible Legal Issues to Consider

1. Landowner/Operator Liability

Any time a landowner opens his or her land to the public, he or she faces certain risks if the visitor is injured on the property. The type of duty owed to a person on a land depends on the status of that person. Someone visiting a farm or ranch for agrotourism purposes will be defined as an *invitee*. An invitee *enters the land with the permission of the owner* and the *owner derives an economic benefit* from the invitee. A landowner has a duty to warn invitees of potential dangers that the owner is aware of or should be aware of and must keep the premises reasonably safe. This standard applies to both the public and employees who may be working agrotourism events.

2. Agrotourism Statutes

Over half of the states, including Tennessee,³² in the United States have enacted Agrotourism statutes that create affirmative defenses against people who are injured on the premises for those operating an agrotourism business. These statutes protect against “inherent risks” that are associated with being on the farm and participating in farm related activities. These statutes do not provide protection to landowners in cases of negligence or gross negligence.

Many agrotourism statutes, including Tennessee’s statute, require that a sign be posted and maintained that contains a specifically worded warning about liability for death or injury on the property that occurs as part of an agrotourism activity.

3. Animal Welfare Act

Animals used solely for agricultural purposes are exempt from the Animal Welfare Act (“AWA”). However, animals used for agrotourism purposes, such as petting zoos, roadside zoos, trained animal shows, and educational displays must be treated within the guidelines of the AWA.

³² See *TENNESSEE CODE ANNOTATED*, § 43-39-101

4. Other Considerations

Those operating agrotourism businesses may have to consider issues of zoning restrictions, building codes, compliance with the American Disabilities Act (“ADA”), taxation, and business permits as well as the issues stated above. There may also be issues of food safety and health issues if food or liquor is being served on the premises.

VIII. MISCELLANEOUS DIRECT FARM MARKETING ISSUES

Other areas of the law with which practitioners must be acquainted include (1) liability and liability insurance, (2) the National Organic Program (“NOP”), (3) the Food Safety Modernization Act (“FSMA” pronounced “Fiz-ma”), (4) land use and zoning law (including its treatment of urban and suburban agriculture), (5) right-to-farm laws, (6) farm leases³³ (7) food labeling requirements,³⁴(8) renewable energy law,³⁵ (9) environmental law, (10) farm animal welfare law³⁶, and (11) intellectual property law (e.g., trademarks).³⁷

³³ CARI B. RINCKER, “OVERVIEW OF FARM LEASES,” Lawline (July 16, 2015), [available at http://www.lawline.com/cle/course/overview-of-farm-leases](http://www.lawline.com/cle/course/overview-of-farm-leases) (last visited July 23, 2015).

³⁴ ABA CLE Online Course, Cari B. Rincker, Stan Benda, Jason Foscolo, Alan Fowler, Erin Hawley, Leon Letter, Lindsey Peebles, Amy Salberg and Jean Terranova, COUNSELING FARMERS, FOOD ENTREPRENEURS, AND RESTAURANTS ON FOOD LABELING LAWS (May 30, 2013) (available for purchase at <http://apps.americanbar.org/abastore/index.cfm?section=CLE> [product code CET13CFFOLC]).

³⁵ ABA CLE Presentation, Cari B. Rincker, Kevin Erickson, Shannon Ferrell, Jennifer Martin and Kathryn Brack Morrow, RENEWABLE ENERGY LAW FOR THE AGRICULTURE INDUSTRY (Oct. 10, 2013) (available for purchase at <http://apps.americanbar.org/abastore/index.cfm?section=CLE> [product code CET13RELCDR]).

³⁶ *See generally* Cari B. Rincker, LAWLINE PRESENTATION, PART 1: COUNSELING THE LOCAL FOOD MOVEMENT (Oct. 24, 2013) (available at <http://www.slideshare.net/rinckerlaw/lawline-counseling-the-local-food-movement-part-1>); Cari B. Rincker, LAWLINE PRESENTATION, PART 2: COUNSELING THE LOCAL FOOD MOVEMENT (Nov. 18, 2013) (available at <http://www.slideshare.net/rinckerlaw/lawline-counseling-the-local-food-movement-part-ii>). *See also* ABA CLE Online Course, Cari B. Rincker, Dr. Stan Benda, Derrick Braaten, Jason Foscolo, Neil Hamilton, Erin Hawley, Leon Letter, Jesse Richardson, Jr., Rich Schell and Patricia Salkin, COUNSELING THE LOCAL FOOD MOVEMENT,” (May 10, 2012).

³⁷ *See generally* Cari B. Rincker, PROTECTING THE FOOD OR AGRI-BUSINESS: MANAGING CONTRACTS, TRADEMARKS AND NON-DISCLOSURE AGREEMENTS, (September 24, 2015) [available at http://www.lawline.com/cle/course/protecting-the-food-or-agri-business-managing-contracts-trademarks-and-non-disclosure-agreements](http://www.lawline.com/cle/course/protecting-the-food-or-agri-business-managing-contracts-trademarks-and-non-disclosure-agreements) (last visited September 26, 2015).

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