

Farm Labor Laws-- What You Need to Know

2018 Illinois Specialty Crops, Agri-Tourism and Organic Conference

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I. DEFINITIONS AND EMPLOYMENT CLASSIFICATIONS

A. Definition of Employer

1. Broadly Defined

The broad legal interpretation of “employer” means that more than one person in a farm operation can qualify as an “employer.” See *Fegley v. Higgins*, 19 F.3d 1126, 1131 (6th Cir. 1994) (holding that members of a general partnership may be liable under the Fair Labor Standards Act (“FLSA”), stating “[w]e have noted that more than one ‘employer’ can be simultaneously responsible for FLSA obligations. The court determines as a matter of law whether a party is an employer using an ‘economic reality’ test.”).

2. Co-Employers

If a number of family members run a farm together, those people might be fellow employers; thus, legal requirements for employees would not apply to these co-employers. Immediate family of the co-employers would not be considered employees either.

3. Look at Day-to-Day Operations

In order to determine whether people are running a business together, courts tend to look at the day-to-day operations of the farm: (1) proof of a shared financial stake in the business (*e.g.*, a farmer and members of his family contributing money for seeds, equipment, or rent, and all share the profits); (2) authority to make decisions about the business, including supervising, hiring and firing workers; and (3) shared responsibility for the daily operation of the farm business.

B. Definition of Employee

1. Generally

Federal and state workplace laws apply to all people classified as employees. Although the host farmer may not think of the intern as an “employee,” in most cases an intern will be considered an employee under applicable laws.

2. FLSA Definition

FLSA broadly 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); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 325-26 (1992) (holding that the broad definition of “employ” in FLSA gives the Act wide coverage).

3. **Migrant and Seasonal Agricultural Worker Protection Act** **("MSAWPA") Definitions**

a) "Agricultural Worker" Definition

An agricultural worker is 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). H-2A temporary foreign workers (that is, nonimmigrant aliens authorized to work in agricultural employment in the United States for a specified time period, normally less than one year) are excluded from the definition of “migrant” workers.

b) "Seasonal Agricultural Worker"

Seasonal agricultural worker means “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) [w]hen employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or (2) [w]hen 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) (emphasis added).

c) Application to Farm Interns

Interns are likely to be classified as migrant or seasonal agricultural workers. Interns most often do temporary agricultural work for a summer or a semester, and their duties generally include some form of field work. For that reason they are likely to be classified as “seasonal” workers.

To be considered a “migrant” worker under the MSAWPA, the intern also has to be **absent overnight from his or her permanent place of residence**. If an intern stays away from his or her home in private housing provided only during the internship period and there are few other inexpensive housing options nearby, thus making it a practical necessity for workers to live in the employer-provided housing, the intern is likely to be considered a “migrant” agricultural worker under the MSAWPA. See Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1511-1512 (11th Cir. 1993) (holding that workers were protected by the MSAWPA where: (1) housing was provided to workers and not provided to the general public; (2) termination of employment allowed eviction; and (3) there were few other inexpensive housing options available nearby).

C. Definition of Independent Contractor

Essentially, workers that do not fit into the definition of employees are considered independent contractors.

II. "UNPAID" LABOR

A. Internships

1. Classification Issue

Typical farm interns will NOT usually fall into the volunteer, trainee, or independent contractor categories. While a farmer and an intern may agree between themselves that an intern is a volunteer, trainee, or independent contractor, that agreement is not legally controlling. See Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 740 (1981) (affirming that an employee cannot waive federal Fair Labor Standards Act benefits). To determine the appropriate legal classification, the courts and agencies that enforce these laws will look to the reality of the work arrangement rather than the title or label used for the worker.

2. Farm Interns Generally Not Classified as "Trainees"

a) Trainees are distinguished from employees by a six-factor test

All six of the following factors must be present in order for an individual working for a "for-profit" private sector employer to be classified as a trainee and therefore exempt from federal minimum wage and overtime laws:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainee;
3. The trainees do not displace regular employees and work under close observation;
4. The employer who provides the training derives no immediate advantage from the activities of the trainees, and, on occasion, the employer's operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period; and
6. The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.

U.S. Department of Labor, Wage & Hour Division, Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act (April 2010), available at <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> (last visited November 6, 2017).

b) Application of “trainee” definition to farm interns

Because farm interns displace regular employees and their work is to the benefit of the farmer, farmers should generally assume that any interns working on their farm are unlikely to be classified as trainees—even if they are completing the internship for credit at an educational institution.

3. Farm Interns Generally Cannot Be Classified as Independent Contractors

a) Factors Used to Determine Whether Worker is a “Volunteer” or “Employee”

Factors used by the courts to determine whether a worker is a volunteer or an employee typically include:

1. Receipt of any benefits (including food and lodging) from those for whom the services are performed;
2. Whether the activity is a less than full-time occupation;
3. Whether the services are of the kind typically associated with volunteer work, such as work assisting the sick, elderly, indigent, infirm, handicapped, or disadvantaged youth; and
4. The length of time the individual is dependent on the employer.

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

b) Application of Volunteer Factors to Farm Interns

Under the above factors, the typical farm intern is unlikely to be classified as a volunteer. The food and lodging that an intern regularly receives from the farmer shows a degree of economic dependence that would weigh against the intern being considered a volunteer. The fact that interns generally work full time for several weeks or months also makes it unlikely that they would be considered volunteers.

Shorter work stints are less likely to indicate economic dependence on the farmer. Therefore, an intern who works at the farm periodically for short periods of time (for example, one day per week) is more likely to be categorized as a volunteer under the law because the internship does not resemble a full-time occupation, nor is the intern dependent on the farmer for an extended

period of time. Interns who work intermittently and also provide their own room and board and receive no monetary payment from the farmer are also more likely to be categorized as volunteers, even if they provide services to the farm over a longer period of time (for example, one day a week for several months).

c) Factors use to Determine Whether a Worker is an "Independent Contractor" or an "Employee"

Put simply, workers who have control over the manner and means by which their work is accomplished are considered to be independent contractors -- key word, "**control.**" In considering whether someone is an independent contractor, the courts analyze a number of factors, including, but not limited to the following:

1. skill required;
2. source of the instrumentalities and tools necessary for the work;
3. location of the work; duration of the relationship between the parties;
4. whether the hiring party has the right to assign additional projects to the hired party;
5. the extent of the hired party's discretion over when and how long to work; and
6. method of payment.

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

d) Application of Independent Contractor Factors to Farm Interns

Farm interns are not likely to be classified as independent contractors. Interns generally learn from the experienced host farmer a range of skills and knowledge that the intern lacks, and then use the farmer-taught skills and knowledge to complete their farm tasks. Interns generally do not come to the farm with sufficient skill to complete their tasks independently. Interns will also use the farmer's tools, will often live on the farmer's land, and will be subject to direction by the farmer as to the tasks to be performed. Therefore, they are very likely to be classified as employees.

4. Minimum Wage Requirements for Interns

If interns are classified as employees, then farmers must comply with minimum wage and overtime requirements unless an exemption applies.

B. Apprenticeships

1. Administration of Formal Apprenticeship Programs

Formal apprenticeship programs are governed by the National Apprenticeship Act ("NAA") and must meet the parameters established under the Act which are designed to protect the welfare of the apprentice. The NAA and its promulgating regulations are administered by the Department of Labor's Office of Apprenticeship or a state apprenticeship agency approved by the federal Secretary of Labor.

A Registered Apprenticeship program is sponsored by an individual business or an employer association and may be partnered with a labor organization through a collective bargaining agreement. Upon finishing the training program, an apprentice earns a "Completion of Registered Apprenticeship" certificate, an industry issued, nationally recognized credential that validates proficiency in an apprenticeable occupation.

2. Registered Apprenticeships are only Available in certain Occupations

Farm-related occupations for which apprenticeship is available include: Agricultural Service Worker; Farm Equipment Mechanic I; Farm Equipment Mechanic II; Farm Worker, General I; Farmer, General.

C. Volunteer Farm Labor

1. How do volunteers get involved, why are they on farms, what is their significance overall, and which legal issues are implicated?

a) Overview

Many small (and some medium-sized) farms, especially those participating in the emerging local food system, are incorporating some aspect of volunteer labor into their businesses. These volunteer opportunities take a wide variety of shapes and forms, and this section outlines some of the most popular arrangements.

Although the FLSA defines "employ" as to suffer or permit to work, a definition which would encompass any compensated or uncompensated volunteer arrangement, Walling v. Portland Terminal Co., 330 U.S. 148 (1947) confined the definition to exclude those who, "**without promise or expectation of compensation, but solely for his personal purpose or pleasure**, worked in activities carried on by other persons either for their pleasure or profit." (Emphasis

Added). The case opened the door for volunteers to perform labor for a business without implicating the minimum wage requirements of the FLSA.

FLSA regulations define 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 (emphasis added). This definition would exclude volunteering for a **for-profit business and volunteering in return for compensation.** However, this definition regulates the application of the FLSA to employees of state and local governments. In the context of volunteers who receive in-kind compensation, but do not work for their own educational objectives, and work for a for-profit business, development of a volunteer exception to the FLSA is minimal.

b) Formal Worker Shares

A “worker share” is a type of volunteer unique to a Community Supported Agriculture (“CSA”) farm. CSA farms are those that sell a “share” of the farm’s production in advance of the growing season. Rather than paying for his or her share in cash, a worker share performs labor for the farm, generally from 4-6 hours per week for 20 to 30 weeks. Worker shares are an important source of labor on many CSA farms, and the arrangements are often formalized through application and selection processes.

c) WWOOFers and Other Travel-Based Volunteers

The nonprofit organization World Wide Opportunities on Organic Farms, originating out of the United Kingdom, acts as a conduit for international and domestic volunteers to work on farms in the states and in other countries. After registration with WWOOF, a potential volunteer is permitted to search the database of farms willing to accept volunteer workers. After making contact, farmer and potential volunteer (the “WWOOFer”) negotiate a private agreement, to exchange labor for temporary housing and food.

d) Informal Worker Shares

The worker share concept has expanded to include less formal arrangements where compensation is understood, but not necessarily specified in the same detail as a formal worker share program. For example, farmers’ market vendors may utilize volunteers who work in exchange for leftover produce. In the CSA context, customers may provide space and assistance distributing produce on their property in exchange for a share. These worker shares do not go through an application and selection process, instead they are chosen based on the resources they can provide to the farmer.

e) Casual Volunteers

With expanding interest in food production, many farms are taking advantage of this opportunity by providing all manners of volunteer opportunities on their farms. Four groups are one example: schools and churches may arrange to visit a farm and assist with a large task. Another emerging concept is the “crop mob:” a large group of volunteers that descend on a farm to accomplish a project. Generally, these individuals receive something in return for their labor such as a meal, access to fields for gleanings, or farm products. The unstated relationship between labor and compensation makes these arrangements especially difficult to characterize.

f) What Issues Are Involved with Compensated Farm Volunteers?

Volunteer programs raise many legal issues for farms. This outline addresses four of the most apparent concerns. Additional concerns may apply to specific volunteer programs and are unaddressed here.

1. Minimum wage
2. Workers compensation
3. Insuring against volunteer injury
4. Taxation and in-kind compensation

2. Volunteer or Employee Determination

a) Is the volunteer working in expectation of compensation?

Courts will explore whether the purported volunteer receives compensation in exchange for the labor, along with the individual’s motivation for accepting the sub-minimum wage compensation. Compensation may be provided as cash or in-kind services. 29 U.S.C. § 203(m). For example, providing food and shelter to otherwise homeless individuals in exchange for their labor is compensation. See Tony and Susan Alamo Foundation v. Sec’y of Labor, 471 U.S. 290, 291 (1985).

Courts may also consider how closely the arrangement **resembles a traditional employment relationship**. When volunteers receive more compensation for better performance or the equivalent of commission (Tony and Susan Alamo Foundation v. Sec’y of Labor, 471 U.S. 290, 291 (1985)), or work a **traditional 8-hour day**, report in for shifts, and use the same tracking system for hours worked as regular employees (Archie v. Grand Central Partnership, Inc., 997 F.Supp. 504, 535 (S.D.N.Y. 1998)) the court is more likely to find the business owes minimum wage.

b) Is the volunteer displacing employees?

Employees are displaced where a volunteer fills a role that is part of the regular, necessary complement of workers. See Donovan v. American Airlines, Inc., 686 F.2d 267 (5t Cir. 1982); Archie v. Grand Central Partnership, Inc., 997 F.Supp. 504, 535 (S.D.N.Y. 1998). Displacement may also take the form of a **reduction in hours for current employees**. U.S. Department of Labor, Wage and Hour Division, Opinion Letter, FLSA2002-9. Also, if volunteers are doing the same work as otherwise regularly employed persons, the business could continue to provide the same level of service or production without the engagement of volunteers or the court may find an employee has been displaced. See Donovan v. American Airlines, Inc., 686 F.2d 267, 272 (5t Cir. 1982). see also Solis v. Laurelbrook Sanitarium and School, Inc., 642 F.3d 518, 530-531 (6t Cir. 2011).

c) Does the volunteer grant the business a competitive advantage?

Courts have shown some willingness to carve out an exception where the **use of volunteer labor does not grant a competitive advantage**, even though the volunteer may displace an employee. Where a service position was created to accommodate conscientious objectors within a nonprofit organization, the court declined to find that the volunteer was an employee. Penn Community Services, Inc. v. Isaacson, 450 F.2d 1306 (4t Cir. 1971). In a second situation where the entire operation would cease to exist without the volunteer opportunities filled by students and where employees served out of religious conviction, the court found the business did not operate in a regular marketplace. Solis v. Laurelbrook Sanitarium and School, Inc., 642 F.3d 518, 520, 531 (6t Cir. 2011).

d) Is the farm exempted from federal minimum wage anyways?

Federal law does except small farms from providing minimum wage where the farm utilizes fewer than 500 man-days of labor in any calendar quarter of the previous year. 29 U.S.C. § 213(a)(6), 29 C.F.R. Part 780 Subpart D. If volunteers are actually employees, then they contribute to the man-day calculation. Since the man-day threshold is sooner exceeded where the operation uses more workers for shorter work periods, a farm with a significant volunteer labor force may exceed the threshold even without full-time employees. Also, the small farm exception is limited to agricultural labor. 29 U.S.C. § 203(f), 29 C.F.R. Part 780, Subpart B. Diversified and direct to consumer farms that utilize volunteer labor may also unwittingly assign non-agricultural labor to volunteers, eliminating small farm exemption from federal minimum wage for the entire workweek in which the labor was performed. See 29 C.F.R. § 780.11.

III. HIRING PRACTICES

A. Best Practices

Here are a few best practices to keep in mind:

1. Outline responsibilities in job descriptions to make sure people are fully informed;
2. Revisit and update responsibilities as needed;
3. Make sure the job description includes any physical requirements (driving, lifting, pulling, etc.) and title this section “physical requirements”

Employers should be clear if any physical requirements are needed for the job. Do not make statements like “we need a young man for this job” because a gender and age preference are not legal. Instead, specify “you need to lift 50 lbs over your head 8 hours a day 5 days a week.”

B. Interviewing

Employers should take the time to interview thoroughly. Here are some tips:

1. Go through the job description and craft standard questions to ask every applicant;
2. The follow ups may/should be different, but you need a standard set of questions based on the job-related information;
3. Although small talk is good, but be careful because you cannot ask about family or make a comment about a wedding ring or ask where a spouse works. Once you have this information, you might subject yourself to a potential discrimination lawsuit if the person is not hired. Do not solicit any personal information.

C. Rejection

Here are some things to consider for the rejection letter:

1. Do not skip this step even though it takes time to send a letter because it builds good will;
2. Do not be specific for the reasons for not hiring him or her; and,
3. Say, instead, “thank you for your interest, unfortunately at this time you haven’t been selected, but we appreciate your interest and wish you the best”.

D. Giving an Offer to An Employee

It might be helpful for farmers to have an attorney draft and/or review your offer letter. Some things to include:

1. Start date;
2. Pay, in the increment in which it is calculated (i.e. hourly vs. salary);
3. Job title;
4. Working hours, subject to change and fluctuation;
5. Direct supervisor; and,
6. At-will employment language.

IV. LABOR LAWS

A. Minimum Wage & Overtime

1. The current federal minimum wage rates under the FLSA are:

Adults: \$7.25 per hour. 29 U.S.C. § 206(a)(1)(C).

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. 29 U.S.C. § 206(g). An employer may not intentionally displace other employees in order to hire employees under the age of 20.

Full-Time Students (DOL Certificate Required): Full-time students may be paid 85 percent of the federal minimum wage if certain requirements are met, primarily ensuring that the student-worker is not displacing a worker who would be paid minimum wage. 29 U.S.C. § 214(b)(2); 29 C.F.R. §§ 520.200-520.508. As noted above, because farm interns do hands-on work that would otherwise be performed by regular employees, the student-learner exception is unlikely to be a good fit for farm interns—even if they are completing the internship for credit at an educational institution.

2. Federal overtime rules:

Unless an exemption applies, federal law requires employers to pay overtime to employees who work more than 40 hours within a workweek. 29 U.S.C. § 207(a)(1).

3. Farmers must apply most protective standard:

Where federal and state employment laws both apply, the employer must comply with the law that provides the worker with the greater protection or benefit. Thus, if both the federal and state minimum wage and overtime standards apply to your operation, the standard that is more beneficial to the farm worker would apply.

B. Child Labor

1. Overview

Both federal and state laws regulate the work that children under 18 years of age can perform. 29 U.S.C. § 212 (federal Fair Labor Standards Act); 29 C.F.R. Part 570 (federal regulations implementing the Fair Labor Standards Act). In many cases, however, the laws regulating agricultural child labor are more relaxed, allowing children to do more farm work.

2. Children working on a farm owned or operated by their parents

Perhaps the most important child labor rule for farm families is that all children of any age (including step, adopted, or foster children) may do any job on a farm owned or operated by their parent(s) (or guardian). Put another way, if you own or operate a farm, any child of yours can do any job on your farm (including jobs identified as hazardous by the Secretary of Labor. 29 U.S.C. § 213(c)(2); see also 29 C.F.R. § 570.123(c).

3. Child labor restrictions that apply to children working on farms owned or operated by adults who are not those children's parents:

Note that farm owners or operators must follow the rules described below for all related children who are not their own children (like nieces, nephews, younger cousins, or younger siblings).

a) General child labor rules for 16 and 17-year-olds working in agriculture

(1) Work Hour Restrictions:

Federal law allows 16-year-old and 17-year-old high school students to work during school hours. 29 C.F.R. § 570.2(b).

(2) Type of Job:

Federal law allows 16- and 17-year-old children to perform any type of farm job during appropriate work hours. 29 C.F.R. § 570.2(b).

b) *General child labor rules for 14- and 15- year olds working in agriculture*

(1) Work Hour Restrictions:

14-year-olds and 15-year-olds performing farm work on farms not owned or operated by their parents may not work during school hours on school days. See 29 C.F.R. § 570.2(b). Note that there are certain exemptions under this rule for minor children who have been excused from compulsory school attendance by the state or other jurisdiction on religious grounds once they have reached at least 14 and/or attained a certain grade level, and they are employed in compliance with all the requirements of State school attendance law. 29 C.F.R. 570.122-23.

(2) Type of Job:

On farms not owned or operated by their parents, 14- and 15-year-olds may perform any farm job except those jobs listed as particularly hazardous by the U.S. Secretary of Labor. 29 C.F.R. § 570.2(b).

c) *General child labor rules for 12- and 13- year olds working in agriculture*

(1) Restricted to working on farms that employ their parents, or with written parental consent:

12- and 13-year-old children may only work on farms not owned or operated by their parents if either of the following is true: (1) the farm the child will work on also employs the child's parent(s), or (2) the child's parents have given written consent. 29 C.F.R. § 570.2(b).

(2) Work hour restrictions (same as 14- and 15-year-old restrictions):

Furthermore, 12- and 13-year-olds performing farm work on farms not owned or operated by their parents may not work during school hours on school days. 29 C.F.R. § 570.2(b).

(3) Type of job (same as 14- and 15-year old restrictions):

On farms not owned or operated by their parents, 12- and 13-year-olds may perform any farm job except those jobs listed as particularly hazardous by the U.S. Secretary of Labor. 29 C.F.R. § 570.2(b).

d) Children 11 years old and younger may not work in agriculture unless on a farm owned or operated by their parent or guardian

Children 11 years of age or younger may not perform farm work unless the farm work is performed on a farm owned or operated by the child's parent or guardian. 29 U.S.C. § 213(c). Therefore, any child relatives age 11 or younger—other than a farmer's own children—may not work on the farm.

e) Child employees 17 and under are required to provide proof of age

Farmers employing minors who are not the farmers' own children must require the child employee to provide proof of age. Farmers must obtain proof of age for children doing both agricultural work (such as on-farm work) and non-agricultural work (such as selling at a farmers' market). Proof of age can be a copy of a birth certificate, driver's license, a Form I-9, or a state age certificate. Farmers employing their own children for agricultural or non-agricultural work do not need to obtain proof of age. 29 CFR 570, Subpart B - Certificates of Age; 29 CFR 570.12.

4. Recordkeeping is required

Every employer of a child 17 years of age or younger must maintain and preserve records containing the following information: child's name in full; child's date of birth; if required, the written consent of a parent or guardian allowing the child to work on the farm; and place where child lives while employed. However, farmers employing their own children for agricultural or non-agricultural work do not need keep any records concerning the employment of their own children. 29 CFR §§ 516.2, 516.33(f).

5. List of agricultural occupations deemed particularly hazardous by the Secretary of Labor

As discussed above, some children are not allowed to do farm tasks that are considered to be particularly hazardous by the U.S. Secretary of Labor. The following is a list of the tasks that the Secretary of Labor has identified as "particularly hazardous":

1. Operating a tractor of over 20 power-take-off (PTO) horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor.
2. Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with operation) any of the following machines: corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, mobile pea viner; feed grinder, crop dryer, forage blower, auger conveyer, or the unloading mechanism of a nongravity-type self-unloading wagon or trailer; or power post hole diggers, power post driver, or non-walking type rotary.
3. Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with operation) any of the following machines: trencher or earthmoving equipment; forklift; potato combine; or power-driven circular, band, or chain saw.
4. Working on a farm in a yard, pen, or stall occupied by a: bull, boar, or stud horse maintained for breeding purposes; a sow with suckling pigs, or a cow with a newborn calf (with umbilical cord present).
5. Felling, bucking, skidding, loading, or unloading timber with butt diameter of more than six inches.
6. Working from a ladder or scaffold (painting, repairing, or building structures, pruning trees, picking fruit, etc.) at a height of over 20 feet.
7. Driving a bus, truck, or automobile when transporting passengers or riding on a tractor as a passenger or helper.
8. Working inside: a fruit, forage, or grain storage designed to retain an oxygen deficient or toxic atmosphere; an upright silo within two weeks after silage has been added or when a top unloading device is in operating position; a manure pit; or a horizontal silo while operating a tractor for packing purposes.
9. Handling or applying toxic agricultural chemicals (including cleaning or decontaminating equipment, disposal or return of empty containers, or serving as a flagman for aircraft applying such chemicals). Such toxic chemicals are identified by the word "poison," or "warning," or are identified by a "skull and crossbones" on the label.
10. Handling or using a blasting agent, including but not limited to, dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord; or
11. Transporting, transferring, or applying anhydrous ammonia. See 29 C.F.R. § 570.71; see also 29 C.F.R. § 570.7.

C. Farm Family Exemptions

1. FLSA minimum wage and overtime exemptions

a) Overview

There are three federal FLSA exemptions most likely to apply to small-scale farming operations using farm intern labor. These include:

1. 500 Man-Day Minimum Wage and Overtime Exemption: an exemption from both minimum wage and overtime requirements for smaller-scale farming operations with a limited number of employees (for example, approximately seven employees working five days a week). 29 C.F.R. § 780.305.
2. Hand Harvest Laborer Minimum Wage and Overtime Exemption: an exemption from federal minimum wage and overtime requirements for temporary farm workers who harvest by hand soil-grown crops—such as fruits and vegetables—if they are paid on a piece-rate basis.
3. Agricultural Overtime Exemption: a broad federal exemption excluding agricultural workers from receiving federal overtime pay, regardless of farm size.

b) 500 man-day exemption

Farm employers that used 500 or fewer man-days of agricultural labor during each calendar quarter of the preceding year are exempt from both federal minimum wage and overtime requirements. 29 U.S.C. § 213(a)(6),(g). To prove that a farmer qualifies for the exemption, the farmer must have records showing the number of hours worked by each employee during the preceding year. If an agricultural operation exceeds 500 man-days during any of the preceding year's calendar quarters, the farmer must pay each employee the federal minimum wage in the current year. 29 C.F.R. § 780.306.

1. A “man-day” is any day on which any employee performs one hour or more of agricultural work. 29 U.S.C. § 203(u); 29 C.F.R. § 780.301(a).
2. If a farmer owns and operates more than one farm, it is the total number of man-days used on all farms and not on each individual farm that determines whether the farmer meets the 500 man-day test. 29 C.F.R. § 780.304(b).
3. Work performed by the farmer or the farmer's immediate family does not count for

purposes of calculating the number of man-days worked. 29 U.S.C. § 203(e)(3); 29 C.F.R. § 780.301.

- This holds true regardless of the form of business organization (for example, sole proprietorship, partnership, or corporation).
 - “Immediate family” is defined to include a farmer’s legal spouse, parents (biological, step, adopted, foster), and children (biological, step, adopted, foster). 29 C.F.R. § 780.308.
4. Work performed by hand harvest laborers (defined below) is not counted toward the 500 man-day total. 29 U.S.C. § 203(e)(3),(u); 29 C.F.R. § 780.301.
5. The 500 Man-Day Exemption only applies to employees who do agricultural work. 29 U.S.C. § 213(a)(6).
- This determination is made week-by-week.
 - Thus, if any work performed by a worker falls outside of the FLSA definition of agricultural labor, the 500 Man-Day Exemption does not apply for that employee for the workweek in which the non-agricultural work was done. 29 C.F.R. § 780.11.
6. Whether or not work is considered “agriculture” depends on the task performed. Work must fit into the definition of primary or secondary agriculture to be considered agricultural work for purposes of the FLSA. 29 U.S.C. § 203(f); 29 C.F.R. § 780.105.
- Primary agriculture is defined as “farming in all its branches,” which encompasses “the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . [and] the raising of livestock.” 29 U.S.C. § 203(f); 29 C.F.R. § 780.105.
 - Secondary agriculture includes any practices, whether or not themselves farming practices, which are “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); 29 C.F.R. § 780.105; Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 762-763 (1949); Holly Farms Corp. v. NLRB, 517 U.S. 392, 397-398 (1996).
7. Processing, packaging, or delivery of another farmer’s crops generally do not fall within the definition of agriculture. 29 C.F.R. §§ 780.137, 780.141.

c) Federal overtime exemption for agriculture workers

The FLSA’s overtime provisions do not apply to “any employee employed in agriculture.” 29 U.S.C. § 213(b)(12). This means that if interns are doing work that falls within

the FLSA definition of agriculture (discussed above), a farmer-employer does not have to pay them federal overtime.

d) Hand harvest laborer exemption

Local hand harvest laborers who: (1) commute daily from their permanent residence, (2) are paid on a piece-rate basis in traditionally piece-rated occupations, and (3) were engaged in agriculture less than 13 weeks during the preceding calendar year, do not have to be paid the federal minimum wage or overtime. 29 U.S.C. § 213(a)(6)(C).

1. The hand harvest laborer exemption applies to local workers who work on a farm on a temporary basis to harvest soil grown crops by hand. The exemption is not intended to apply to a full-time farm worker who earns a livelihood at farming. 29 C.F.R. § 780.310.
2. The term “hand harvest laborer” means a farm worker who harvests crops by hand or with hand tools. It does not apply to workers who use electrically powered tools.
3. The term only applies to workers who harvest soil-grown crops. Among other things, these crops include grains, fruits, and vegetables. “Hand-harvesting” does not include any work involving animals.
4. Performance by the hand harvester of any non-harvesting operation in the same workweek makes the exemption inapplicable. 29 C.F.R. § 780.312.
5. Because farm interns typically live on the farm and have a broad range of duties in addition to harvesting crops, the hand harvest laborer exemption is unlikely to apply to them.

2. Other Exemptions

The following are descriptions of the family-related individual exemptions under relevant federal and state labor and employment laws. All of the family exemptions for individual workers depend on the worker’s family relationship to a farm employer.

a) FLSA Minimum Wage and Overtime

Under the FLSA, a farm employer’s “immediate family” members are exempt. Under the FLSA, “immediate family” includes only the following: legal spouse, children (biological, adopted, step, foster), and parents (biological, step, adopted, foster). Immediate family does NOT include brothers, sisters, aunts, uncles, grandparents, grandchildren, nieces, nephews, cousins, in-laws, or any other extended family members. These family members are NOT exempt from the FLSA.

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b) *Federal OSHA Laws*

Under federal OSHA laws, which set the federal workplace safety and health standards, the farm employer's "immediate family" members are exempt. However, the OSHA laws do not define "immediate family."

c) *Federal Social Security and Medicare*

The rules for withholding and paying Social Security and Medicare taxes exempt farmers' children who are under 18 years old.

d) *Federal Income Tax Withholding*

The rules for withholding federal income taxes from an employee's paycheck exempt farmers' children who are under 18 years old.

e) *Federal Unemployment Taxes*

There is no exemption for family members under the federal unemployment tax law ("FUTA"). Farmers must pay federal unemployment tax for all family member employees unless the federal unemployment requirements are inapplicable to the entire farm operation.

D. Family Medical Leave Act

1. When Does the FMLA Apply?

FMLA applies when an eligible employee, who works for an eligible employer, experiences an eligible event which entitles them to 12 weeks of unpaid leave per 12 month period, with the right to be restored to their former position or an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. 29 C.F.R. §825-214.

2. Who is an Eligible Employer?

An eligible employer, who must abide by the regulations of FMLA, is one who employs at least 50 employees.

- This includes full-time employees, part-time employees.
- This also includes temporary and seasonal employees.
- Finally, this also includes those employees who are currently on a leave of absence (including FMLA leave) and are not currently working.

Those employees must be employed at least 20 weeks of the year, but those weeks need not be consecutive. 29 C.F.R. §825.104, 29 C.F.R. §825.105.

This includes both **joint** employers and **integrated** employers.

3. Who is an Eligible Employee?

Even if an employer falls under the scope of FMLA, not all employees who work for that employer may qualify for FMLA protection.

In order to be eligible, an employee must:

1. Have worked for at least 12 months; and work at least 1250 hours in the previous 12 months; both as of the date that the leave starts.
2. The employer must employ at least 50 people within 75 miles of the location that the employee in question works at. This distance is measured by highway miles; not direct miles.
3. 29 C.F.R. §825.110 provides explicit detail on these qualifications, including details about payroll, military service, etc.
4. Note: the burden is on the employer to provide a record of the employee's hours worked. In the absence of employer records, the presumption is that the employee has worked the 1,250 hours required under the law. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR part 541), the employer has the burden of showing that the employee has not worked the requisite hours.

29 C.F.R. §825.110(c)(3).

4. What is an Eligible Event?

An eligible event includes:

1. The birth of a child;
2. The placement of a child for adoption;
3. The need to provide for the care of a _____ who has a serious health condition.

Spouse--This does not include domestic partners at this time.

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Parent --This does not include in-laws.

Son/daughter -This does include adult disabled children.

A service member who is the spouse, parent, son/daughter, or next of kin of the employee, where:

- The service member has a serious injury or illness; or
- “Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty” 29 C.F.R. §825.112(a)(5)

The employee’s own *serious health condition* that prohibits the employee from performing at least one of the essential functions of the job.

What is a serious health condition?

- The DOL provides an expansive definition of a serious health condition; defining it as “a period of incapacity brought about by a condition including”:
- Pregnancy/prenatal
- Chronic/serious health condition → asthma, diabetes, epilepsy, migraines;
- Permanent/terminal illness → Alzheimers, stroke, terminal disease
- Treatments for recovery → surgery, chemotherapy, dialysis.
- (Not common health problems)
- Treatment for substance abuse may be taken under FMLA leave.

5. FMLA Leave

An eligible employee who suffers from an eligible condition is entitled to 12 weeks of leave during any 12-month period. With regards to service members, the employee is entitled to 26 weeks of leave to care for the service member. An eligible employee is entitled to 26 workweeks of leave to care for a covered service member with a serious injury or illness during a “single 12-month period.” 29 C.F.R. §825.127(c)

The employer can determine how to calculate leave; but that method of calculation must be the same for all employees. 29 C.F.R. §825.200. An employer is permitted to choose any one of the following methods for determining the “12-month period” in which the 12 weeks of leave entitlement described in paragraph (a) of this section occurs:

- The calendar year;
- 12-month “leave year,” such as a fiscal year, a year required by State law, or a year starting on an employee's “anniversary” date. The 12-month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or,
- A “rolling” 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

6. FMLA Return to Work

As a general rule, an employee shall/must be restored to an equivalent position with equivalent benefits, pay, and terms (this is a higher standard than “comparable”). The conditions under which employee benefits must be continued, and responsibility for repayment of those benefits if an employee does not ultimately return to the position is complicated and best addressed by an employment lawyer.

E. Worker's Compensation

1. Overview

Workman’s compensation is a compromise: In return for the certainty of receiving automatic benefits for work-related injuries, a covered employee accepts the limited remedy of receiving only the benefits provided under the workman’s comp law; he or she cannot sue the employer for negligence to recover traditional court-awarded damages.

2. Implications for Volunteer/Unpaid Farm Labor

State workers’ compensation statutes may exempt agricultural operations, volunteers, or small businesses, each of which may be available to a farm utilizing volunteer workers. Even farms that do choose workers’ compensation may have difficulty with the payroll audit considering the non-traditional compensation structure.

3. Illinois Law

Illinois requires that all employers obtain workers’ compensation insurance. See 820 ILCS 305, 820 ILCS 310. This provides automatic benefits and medical coverage to employees who are injured while working “in the course and scope of employment,” including benefits for treatment of the injury, temporary or healing period benefits, and permanent disability benefits.

However, a farm may be exempt from the program if it has less than 400 working days of agricultural labor per quarter, excluding family members. See 820 ILCS 305/3(19).

Farms have some work that is not traditional farming activity so these activities would not be exempt.

V. ADDITIONAL RESOURCES

Amanda Heyman and Jennifer Jambor-Delgado, “Farmers’ Guide to Farm Employees,” Farmers’ Legal Action Group (August 2012) available at <http://www.flaginc.org/wp-content/uploads/2013/03/MILEguide.pdf> (last visited August 18, 2013).

Cari Rincker, Rachel Armstrong, Kimberly Clarke, Edward Cox, Karen Eichman, Maggy Gregory, Jennifer Jambor-Delgado, and Arthur N. Read, “Overview of Employment and Labor Law for Farms and Ranches” American Bar Association Continuing Legal Education Webinar available for purchase at <http://apps.americanbar.org/cle/programs/t13oe11.html> (last visited May 19, 2013).

National Association of Professional Background Screeners:
<http://www.napbs.com/i4a/pages/index.cfm?pageid=1>

Jennifer Jambor-Delgado and Amanda Heyman, “Farmers’ Guide to Farm Internships” Farmers’ Legal Action Group, Incorporated (February 2013) available at <http://www.flaginc.org/wp-content/uploads/2013/04/Farm-Intern-Guide-FINAL-w-covers.pdf> (last visited August 18, 2013).

Summary of Consumer Rights Under the Fair Credit Reporting Act:
<http://www.consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0096-fair-credit-reporting-act.pdf>

Elaws, Employment Law Guide

Environmental Protection Agency, “Worker Protection Standard for Agriculture Pesticides”

Karen E. Eichman, “Farm Labor Contractors: Who, What & Why?”, MUSHROOM NEWS (Vol. 60, No. 6) at 4-10 (June 2012).

Gregorio Billikopf, “Labor Management in Agriculture: Cultivating Personnel Productivity (2003)

Migrant and Seasonal Agricultural Worker Protection Act, 29 USC 1801 et seq.

North Carolina Department of Labor, “A Guide to Farm Safety and Health”

Rachel Armstrong, “Commodity Wage Memo” (October 10, 2012)

Sample Disclosure Statement for Fair Credit Reporting Act

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University of Missouri Extension, “Agriculture and the Occupational Safety and Health Act”

U.S. Department of Labor, “Agreement Between OSHA and ESA for Migrant and Seasonal Farmworker Housing Inspections”

U.S. Department of Labor, “Certification of Health Care Provider for Employee’s Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor, “Certification of Health Care Provider for Family Member’s Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor, “Child Labor Requirements in Agricultural Occupations Under the Fair Labor Standards Act” (June 2007)

U.S. Department of Labor, “Designation Notice (Family and Medical Leave Act)”

U.S. Department of Labor, “ETA Programs for Migrant and Seasonal Farmworkers”

U.S. Department of Labor, “Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)”

U.S. Department of Labor, “Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA)”

U.S. Department of Labor, “Fact Sheet #28D: Employer Notification Requirement under the Family and Medical Leave Act”

U.S. Department of Labor, “Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act”

U.S. Department of Labor, “Fact Sheet #28G: Certification of a Serious Health Condition under the Family and Medical Leave Act”

U.S. Department of Labor, “Fact Sheet #35: Joint Employment and Independent Contractors Under the Migrant and Seasonal Agricultural Worker Protection Act”

U.S. Department of Labor, “Fact Sheet #40: Federal Youth Employment Laws in Farm Jobs”

U.S. Department of Labor, “Fact Sheet #44: Visits to Employers”

U.S. Department of Labor, “Fact Sheet #49: The Migrant and Seasonal Agricultural Worker Protection Act”

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U.S. Department of Labor, “Fact Sheet #50: Transportation under the Migrant and Seasonal Agricultural Worker Protection Act”

U.S. Department of Labor, “Fact Sheet #51: Field Sanitation Standards under the Occupational Safety and Health Act”

U.S. Department of Labor, “Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act”

U.S. Department of Labor, FMLA Poster “Employee Rights and Responsibilities Under the Family and Medical Leave Act”

U.S. Department of Labor, Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act)

U.S. Department of Labor, “Migrant and Seasonal Farmworkers Monitor Advocate System”

U.S. Department of Labor, “Occupational Safety and Health Administration” on Agricultural Operations and Standards

U.S. Department of Labor, OSHA Factsheet on Farm Safety

U.S. Department of Labor, “The Migrant and Seasonal Agricultural Worker Protection Act”

U.S. Department of Labor, Wage and Hour Division, Migrant and Seasonal Agricultural Protection Act, Doctor’s Certificate

U.S. Department of Labor, Wage and Hour Division, Migrant and Seasonal Agricultural Protection Act, Farm Labor Contractor Certificate of Registration

U.S. Department of Labor, Wage and Hour Division, Migrant and Seasonal Agricultural Protection Act, Housing Occupancy Certificate

U.S. Department of Labor, Wage and Hour Division, Migrant and Seasonal Agricultural Protection Act, Housing Terms and Conditions

U.S. Department of Labor, Wage and Hour Division, Migrant and Seasonal Agricultural Protection Act, Notice

U.S. Department of Labor, Wage and Hour Division, Migrant and Seasonal Agricultural Protection Act, Transportation Subject to Department of Labor Safety Standards

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U.S. Department of Labor, Wage and Hour Division, Migrant and Seasonal Agricultural Protection Act, Wage Statement

U.S. Department of Labor, Wage and Hour Division, Migrant and Seasonal Agricultural Worker Protection Act, Worker Information- Terms and Conditions of Employment

U.S. Department of Labor, Wage and Hour Division, Migrant and Seasonal Agricultural Protection Act, Vehicle Mechanical Inspection Report for Transportation Subject to Department of Transportation Requirements

U.S. Government Printing Office, 29 CFR Part 500

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Cari's passion for agriculture issues is deeply rooted. She grew up on a seedstock Simmental cattle operation in Shelbyville, Illinois where she spent significant time working on her family's farm. Cari went on to receive her Associate in Agriculture Science from Lake Land College and Bachelors of Science from Texas A & M University, where she had a successful career livestock judging at the collegiate level. Afterwards, Cari went back home to the University of Illinois to complete her Masters of Science in Ruminant Nutrition. Due to her passion for agriculture law and policy, Cari decided to complete her *Juris Doctor* from Pace University, School of Law, in White Plains, New York. At Pace, Cari completed certificates in both Environmental Law and International Law.

Cari continues to have her boots planted firmly in agriculture –she enjoys judging livestock shows around the country. She recently purchased a small horse farm near Champaign, Illinois and is growing her own farming operation with cattle, goats and chickens. Cari is the Past-Chair of the American Bar Association's General Practice, Solo & Small Firm Division's Agriculture Law Committee and is the Past-President and Founding Member of New York Agri-Women. Cari is a recognized leader in the agriculture industry and the recipient of the Outstanding Early Career Award from Texas A & M University's College of Agriculture and Life Sciences, the Distinguished Alumni Award from Lake Land College, the Vision Award from American Agri-Women, and the "Excellence in Agriculture Law Award" in 2014 from the American Agriculture Law Association in its Private Practice Division.

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