

HUSCH BLACKWELL

# “Ag Gag” Laws: Stopping Trespass by Deception in the Name of Animal Rights

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# Overview

Since the 1990's, legislatures have grappled with how to safeguard the animal production industry against smear campaigns by individuals or animal rights extremist organizations who gain access to private property through deception.

After all, trespass is a crime, in one form or another, in every state. It follows that when access to property is gained through deception or fraud, criminal penalties should apply—even if the deception is in the name of animal rights. It has become commonplace for animal rights organizations to conduct undercover investigations of animal agriculture facilities to uncover incidents of animal abuse. These “investigators” frequently gain access by applying for employment without disclosing their true motives—and in some instances blatantly lying about their affiliations when asked. The “investigators” wear hidden cameras, oftentimes in violation of posted notices forbidding recording on the property. Often times misleading, carefully edited videos, are sent to the media, causing irreparable reputational and economic damage. In an economic climate where labor shortages are at critical levels, the harm to the producers can often lead to closure of businesses if left unaddressed. Potentially more concerning are certain irreparable bio-security harms that can occur if unwanted individuals enter farms with ill-guided intentions. Why is this so important? Trespass by deception could lead to intentional adulteration of food or—even worse—food terrorism in a country that already has experienced food insecurity in the last several years.

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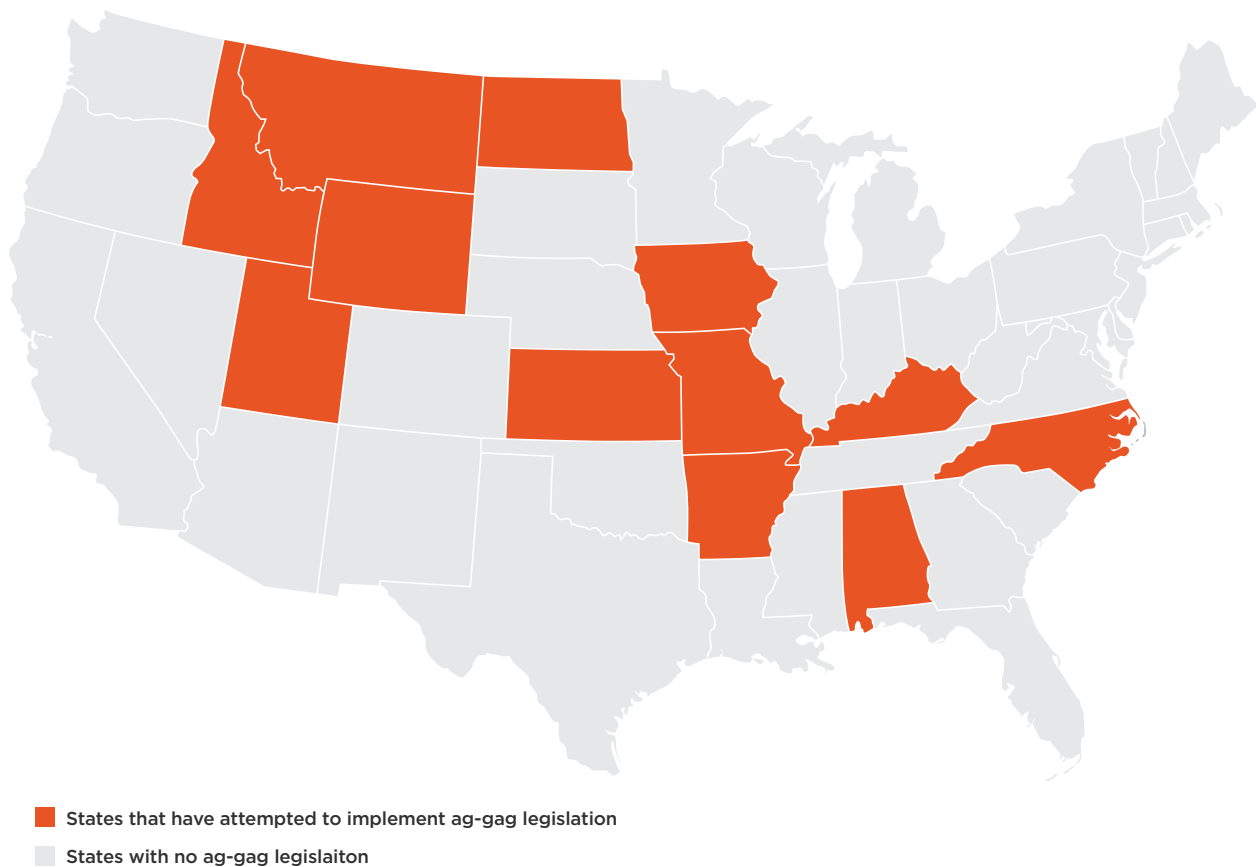
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# State Law Attempts to Safeguard Food Systems Industry

As many are already aware, several states have attempted to provide the animal production industry protections against this conduct by enacting so called “Ag Gag” laws. These laws vary in substance, but generally prohibit and criminalize gaining access to an agricultural production facility by false pretenses. Animal rights groups are deterred from conducting undercover investigations to avoid criminal prosecution. A recent wave of litigation is challenging these laws as unconstitutional, claiming the laws violate the First Amendment’s guarantee of free speech.

## STATUS OF AG-GAG STATE LEGISLATION



On January 8, 2024, in a win for the industry, the Eighth Circuit upheld Iowa’s “Ag Gag” law ([Iowa Code § 717A.3B](#)) as constitutional, recognizing, “[t]he statute filters out trespassers who are relatively innocuous, and focuses the criminal law on conduct that inflicts greater harm on victims and society.” *Animal Legal Def. Fund v. Reynolds*, No. 22-1830, 2024 WL 74899 (8th Cir. Jan. 8, 2024). In 2021 the Eighth Circuit found a prior version of Iowa’s “Ag Gag” law ([Iowa Code § 717A.3A](#)) to be partially unconstitutional, but upheld as constitutional the “Access Provision” of that law, which prohibited using intentionally false statements to trespass on to private property. The Iowa legislature later amended its “Ag Gag” law ([Iowa Code § 717A.3B](#)), which was the subject of the Eighth Circuit’s January 8, 2024 opinion. The court held § 717A.3B was neither a content-based nor viewpoint-based restriction on speech, “but rather a permissible restriction on intentionally false speech undertaken to accomplish a legally cognizable harm.” *Animal Legal Def. Fund v. Reynolds*, No. 22-1830, 2024 WL 74899 (8th Cir. Jan. 8, 2024). In another victory for the industry on January 8, 2024, the Eighth Circuit also upheld Iowa’s Trespass-Surveillance statute ([Iowa Code § 727.8A](#)) as constitutional. This statute created a new crime to video

or audio record on trespassed property. The court found the statute does not violate the First Amendment, finding that Iowa has a significant interest in protecting private property and § 727.8A is sufficiently narrowly tailored to achieve this aim. *Animal Legal Def. Fund v. Reynolds*, No. 22-3464, 2024 WL 74907 (8th Cir. Jan. 8, 2024).

It appears that the Eighth’s Circuit decisions have not gone unnoticed by state legislatures, with Iowa’s Senate recently reviving a bill which would criminalize remotely piloted aircraft with surveillance equipment over a homestead or a secure farmstead, and Kentucky’s Senate approving a similar bill. Even Kansas, which saw its previous legislation struck down as unconstitutional by the Tenth Circuit, has recently moved to revive its law by removing problematic language.

As animal welfare legislation is evolving and animal welfare litigation is on the rise, the attorneys at Husch Blackwell continue to monitor the status of “Ag Gag” legislation for our trade partners within the Animal Health and Production industry. The below chart provides the current status of “Ag Gag” legislation.

| STATE    | CITATION                                    | DETAILS   | CURRENT STATUS  |
|----------|---|---|---|
| Alabama  | <a href="#">Ala. Code 1975 § 13A-11-153</a> | Illegal to “obtain access” to a facility “by false pretenses.”<br>Illegal to obtain or possess records or data by deception or theft. | Active, not currently being challenged.   |
| Arkansas | <a href="#">Ark. Code § 16-118-113</a>      | Civil penalties for accesses non-public/commercial property and recording images or sound that damage the owner.                      | Active, not currently being challenged.<br><br>Challenge filed in the United States District Court for the Eastern District of Arkansas dismissed on March 31, 2023, for failure to state a claim upon which relief could be granted. See <i>Animal Legal Defense Fund et al v. Vaught et al</i> , 4:19-CV-00442. |

| STATE | CITATION   | DETAILS   | CURRENT STATUS  |
|-------|--|---|---|
| Idaho | <a href="#">Idaho §18-7042</a>   | Illegal to enter a facility or obtain employment under misrepresentation. Illegal to obtain records or record audio or video without express consent.   | <p>Partially upheld/partially deemed unconstitutional.</p> <p><b>Upheld:</b><br/>The Ninth Circuit upheld Idaho’s criminalization of misrepresentations to obtain records and secure employment in § 18-7042(1)(b)–(c).</p> <p><b>Struck:</b><br/>The court struck the criminalization of misrepresentations to enter a production facility and the ban on audio and video recordings of a production facility’s operations as protected speech under the First Amendment.</p> <p><i>See <a href="#">Animal Legal Def. Fund v. Wasden</a> 878 F.3d 1184, (9th Cir. 2018).</i></p>   |
| Iowa  | <a href="#">Iowa Code § 717A.3A:</a><br>Agricultural production facility fraud | <p>Illegal to “obtain access” to a facility “by false pretenses.”</p> <p>Illegal to obtain employment based on false representations while intending to commit an act not authorized by the employer.</p> | <p>Partially upheld/partially deemed unconstitutional.</p> <p>The Eighth Circuit upheld § 717A.3A(1)(a), the “Access Provision,” and struck down § 717A.3A(1)(b), the “Employment Provision.”</p> <p><b>Upheld:</b><br/>The Access Provision that made it illegal to obtain access to a facility by false pretenses.</p> <p><b>Struck:</b><br/>The Employment Provision of the statute that made it illegal to obtain employment based on false representations, finding the provision as too broad to satisfy the First Amendment.</p> <p><i>See <a href="#">Animal Legal Defense Fund v. Reynolds</a>, 8 F.4th 781 (8th Cir. 2021).</i></p> |

| STATE | CITATION  | DETAILS   | CURRENT STATUS   |
|-------|---|---|--|
| Iowa  | Iowa Code § 717A.3B: Agricultural production facility fraud               | Illegal to enter a facility or gain employment under “false pretenses” while intending to harm the owner or its operations.   | Upheld as constitutional.<br><br>On March 14, 2022, the United States District Court for the Southern District of Iowa granted summary judgment for the Animal Legal Defense Fund, striking down § 717A.3B as unconstitutional. <i>See Animal Legal Def. Fund v. Reynolds</i> , No. 4:19-CV-00124-SMR-HCA, 2022 WL 777231 (S.D. Iowa Mar. 14, 2022).<br><br>On January 8, 2024, the Eighth Circuit Court of Appeal reversed the District Court, finding § 717A.3B constitutional. <i>See Animal Legal Def. Fund v. Reynolds</i> , No. 22-1830, 2024 WL 74899 (8th Cir. Jan. 8, 2024).          |
| Iowa  | Iowa Code § 716.7A: Food operation trespass                               | Illegal to enter or remain on the property of a food operation without consent. Establishes “food operation trespass.”  | Active, not currently being challenged.  |
| Iowa  | Iowa Code § 727.8A: Cameras or electronic surveillance devices — trespass | The law creates a new crime for a person who (i) “commit[s] a trespass as defined in section 716.7” and (ii) “knowingly places or uses a camera or electronic surveillance device that transmits or records images or data while the device is on the trespassed property.” | Upheld as constitutional.<br><br>On September 26, 2022, the United States District Court for the Southern District of Iowa granted summary judgment for the Animal Legal Defense Fund striking down § 727.8A as unconstitutional. <i>See Animal Legal Defense Fund et al v. Reynolds et al.</i> , 421CV00231SMRHCA, 2022 WL 4998999 (S.D. Iowa Sept. 26, 2022)<br><br>On January 8, 2024, the Eighth Circuit Court of Appeal reversed the District Court, finding § 727.8A constitutional. <i>See Animal Legal Def. Fund v. Reynolds</i> , No. 22-3464, 2024 WL 74907 (8th Cir. Jan. 8, 2024). |

| STATE    | CITATION                                  | DETAILS   | CURRENT STATUS  |
|----------|---|---|---|
| Iowa     | Iowa Code § 715D                          | Proposed law creates a new crime for a person who uses, for an extended period of time, a remotely piloted aircraft with surveillance equipment over a homestead or a secure farmstead. | Passed Iowa House and Senate. The Bill was signed by the Governor into law on May 3, 2024.  |
| Kansas   | <a href="#">Kan. Stat. Ann. § 47-1827</a> | Illegal to enter a facility without consent of owner and with intent to damage the enterprise of the facility “to take pictures by photograph, video camera or by any other means.”     | <p>Unconstitutional.</p> <p>The Tenth Circuit overturned three parts of the “Ag-Gag” law in <a href="#">Animal Legal Def. Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021)</a>.</p> <p>On April 25, 2022, the United States Supreme Court <a href="#">denied</a> a request to review the decision of the Tenth Circuit.</p> <p>On March 20, 2024, the Kansas House of Representatives passed HB 2816, which aimed to correct the unconstitutional deficiencies which led to the law’s overturning in the Tenth Circuit decision. While the new legislation would still make it illegal to enter or remain in the covered facilities without permission or to knowingly make false statements on an employment application to gain access to those places, it removes the “effective consent” language which the Tenth Circuit found problematic. The Bill is pending in the Kansas Senate Committee on Agriculture and Natural Resources.</p> |
| Kentucky | KRS § 511.100                             | Illegal to record video or audio using an unmanned aircraft and take photos on or above an animal agriculture facility without the formal written consent from the owner.               | After being vetoed by the Kentucky Governor, the Kentucky Senate over-rode the Governor’s veto on April 12, 2024.   |
| Missouri | <a href="#">Missouri § 578.405</a>        | Criminalizes obtaining access to an animal facility by false pretenses for the purposes of performing acts not authorized by the facility.  | Active, not currently being challenged.   |

| STATE          | CITATION                                | DETAILS   | CURRENT STATUS  |
|----------------|---|---|---|
| Missouri       | <a href="#">Missouri § 261.099</a>      | Illegal to “inspect” animal facilities; prohibits testimony on conditions or events on the grounds in criminal prosecutions.  | Active, not currently being challenged.   |
| Montana        | <a href="#">MCA § 81-30-103</a>         | Illegal to enter a facility without consent of owner and with intent to damage the enterprise of the facility “to take pictures by photograph, video camera, or any other means with the intent to commit criminal defamation.” | Active, not currently being challenged.   |
| North Carolina | <a href="#">N.C. Gen. Stat. § 99A-2</a> | Illegal to access non-public property and exceed one’s authority, including an employee knowingly placing a camera or recording device on the property.   | <p>Partially upheld/partially deemed unconstitutional.</p> <p>In 2020, the United States District Court for the Middle District of North Carolina held § 99A-2 (the North Carolina “Property Protection Act”) is unconstitutional. On appeal, the United States Court of Appeals for the Fourth Circuit scaled back the lower court’s finding that the Act is unconstitutional holding the act is not unconstitutional in its entirety and in all applications. Rather, the Fourth Circuit found the Act is unconstitutional as a violation of the First Amendment only to the extent it punishes newsgathering activities. See <i>People for the Ethical Treatment of Animals, Inc. v. Stein</i>, 466 F. Supp. 3d 547 (M.D.N.C. 2020), <i>aff’d in part, rev’d in part sub nom. People for the Ethical Treatment of Animals, Inc. v. N. Carolina Farm Bureau Fed’n, Inc.</i>, 60 F.4th 815 (4th Cir. 2023).</p> <p>On October 16, 2023, the United States Supreme Court denied a request to review the decision of the Fourth Circuit.</p> |
| North Dakota   | <a href="#">ND §12.1-21.1-02</a>        | Illegal to enter an animal facility and “use or attempt to use a camera, video recorder, or other video or audio recording equipment.”  | Active, not currently being challenged.   |



| STATE   | CITATION  | DETAILS   | CURRENT STATUS  |
|---------|---|---|---|
| Utah    | <a href="#">Utah Code § 76-6-112</a>  | Illegal to record images or sounds of an “agricultural operation” without the owner’s consent; illegal to gain employment with intent to do so. | Unconstitutional.<br>The United States District Court for the District of Utah held § 76-6-112 is unconstitutional. See <i>Animal Legal Def. Fund v. Herbert</i> , 263 F. Supp. 3d 1193 (D. Utah 2017).<br>The decision was not appealed.                               |
| Wyoming | <a href="#">Wyo. Code § 6-3-414</a> (criminal); <a href="#">Wyo. Code § 40-27-101</a> (civil) | Illegal to cross private lands and collect data (e.g., photographs or samples) to give to federal or state regulators.                          | Unconstitutional.<br>The United States District Court for the District of Wyoming held both the criminal and civil statutes were unconstitutional. See <i>W. Watersheds Project v. Michael</i> , 353 F. Supp. 3d 1176 (D. Wyo. 2018).<br>The decision was not appealed. |

Husch Blackwell will continue to monitor any pending or new legislation or constitutional challenges to the Ag Gag Laws. For those in the animal production industry now, employing full labor and employment, as well as third-party vendor confidentiality protections are essential to ensure any labor shortages or business harm are not self-inflicted through the unwanted sharing of information behind the farm doors. For assistance regarding these issues and more concerning the animal health and production industry, please contact a Husch Blackwell attorney of your choice.