Like many types of regulation in agriculture, the regulation of farm labor is all about the exemptions. Some state and federal labor regulations apply to all farms regardless of size. Vermont’s Fair Employment Act, which prohibits certain kinds of discrimination, the federal Immigration Reform and Control Act, which imposes penalties for knowingly hiring unauthorized workers, as well as farm size, the way in which a particular regulatory scheme defines agriculture is also important to whether or not you must comply. The chart below provides an overview of the major state and federal rules and regulations in ascending order of farm or payroll size. With one notable exception, if your farm is exempt, you needn’t concern yourself with those rules. The notable exception is Workers' Compensation. Employers enrolled in Workers’ Compensation have immunity from employee lawsuits for job-related injury and disability. Even if you are exempt from having to provide Workers' Compensation, you may want to cover your employees anyway.

<table>
<thead>
<tr>
<th>Employer Type</th>
<th>Must Comply with</th>
</tr>
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<tbody>
<tr>
<td><strong>All Agricultural Employers</strong></td>
<td><strong>The Vermont Fair Employment Act</strong>, which prohibits discrimination on the basis of race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth, age, or against a qualified individual with a disability. The VFEA also mandates equal pay for equal work and prohibits sexual harassment in the work place.</td>
</tr>
<tr>
<td><strong>All Agricultural Employers</strong></td>
<td><strong>The federal Immigration Reform and Control Act</strong>, which forbids employers from knowingly hiring or continuing to employ individuals who are not authorized to work in the United States. IRCA also requires employers to verify the citizenship or work authorization of all new hires on an Employment Eligibility Form I-9.</td>
</tr>
<tr>
<td><strong>All Agricultural Employers</strong></td>
<td><strong>The rules regarding child labor</strong> under the Vermont and Federal Fair Labor Standards Act.</td>
</tr>
<tr>
<td><strong>Agricultural Employers who pay cash wages of at least $150 to an individual or a total of $2,500 in annual cash wages</strong></td>
<td><strong>The IRS rules on withholding</strong> social security, Medicare, and federal income taxes and must pay an employer’s share of FICA.</td>
</tr>
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</table>
# Farm Labor Regulation

<table>
<thead>
<tr>
<th>Employer Type</th>
<th>Must Comply with</th>
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<tbody>
<tr>
<td>Agricultural Employers with 4 or more employees</td>
<td>The anti-discrimination provisions of the Immigration Reform and Control Act that prohibit employers from discriminating on the basis of national origin in hiring, firing, and recruiting workers.</td>
</tr>
<tr>
<td>Agricultural Employers with an aggregate payroll of $10,000 in a calendar year</td>
<td>Vermont's Workers' Compensation law, although employers with an aggregate payroll of less than $10,000 may still voluntarily opt for coverage.</td>
</tr>
<tr>
<td>Agricultural Employers who use more than 500 man days of agricultural labor (approximately 7 full time employees) in any calendar quarter during the preceding calendar year</td>
<td>The minimum wage requirements of the Vermont and federal Fair Labor Standards Act.</td>
</tr>
<tr>
<td>Agricultural Employers with 10 or more employees for an average of at least 30 hours per week during a year</td>
<td>Parental leave requirements under the Vermont Family and Medical Leave Act that require up to 12 weeks of unpaid leave for employees that have been employed for a period of one year for an average of 30 hours per week.</td>
</tr>
<tr>
<td>Agricultural Employers with 15 or more employees for an average of at least 30 hours per week during a year</td>
<td>Family leave requirements under the Vermont Family and Medical Leave Act that require up to 12 weeks of unpaid leave for employees that have been employed for a period of one year for an average of 30 hours per week.</td>
</tr>
<tr>
<td>Agricultural Employers who have paid cash wages of $20,000 to individuals employed in agricultural labor, OR who employ 10 or more individuals in each of 20 calendar weeks in either the current or preceding calendar year</td>
<td>Vermont’s Unemployment Insurance (see <a href="http://www.det.state.vt.us/sections/uiwages/">http://www.det.state.vt.us/sections/uiwages/</a>).</td>
</tr>
<tr>
<td>Agricultural Employers who employed more than 10 individuals at any one time in the previous 12 months</td>
<td>Vermont Occupational Safety and Health Administration rules on Field Sanitation Standards that require potable water, toilets, and hand-washing facilities for field laborers, and comply with OSHA standards for roll-over protective structures, slow-moving vehicles, equipment guards, storage and handling of anhydrous ammonia, logging operations, and several other areas of safety concern on farms.</td>
</tr>
</tbody>
</table>
Employees vs. Independent Contractors

Employees are entitled to certain protections under state and federal law—Workers’ Compensation and Unemployment Insurance coverage, for example. Employers are responsible for withholding federal and state income taxes and must also pay a share of the employee’s social security taxes. Independent contractors, however, can be treated differently than employees. They generally carry their own insurance, pay a self-employment tax as a contribution to social security, and work somewhat independently under a contract to provide their services.

The standard used most often—under the FLSA and by the IRS—defines an employee as someone who, as a “matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves.” The U.S. Department of Labor looks to a Supreme Court case that held that there is no single rule or test for determining when an individual is an independent contractor or an employee. The Court said that you had to look at the totality of the situation and identified some factors that they considered to be significant:

1) The extent to which the services rendered are an integral part of the principal’s business. If the business is farming, and the individual is engaged in primary agricultural activities (tilling, cultivating, caring for livestock, harvesting, dairying, and so on), the individual is likely to be an employee rather than an independent contractor. If the business is farming and the individual is providing non-agricultural services, he or she is more likely to be an independent contractor.

2) The permanency of the relationship. If the individual has been providing services for many years, he or she is more likely to be an employee.

3) The amount of the alleged contractor’s investment in facilities and equipment. The greater the investment, the more likely it is that the individual is an independent contractor.

4) The nature and degree of control by the principal. If the proprietor closely directs the work, the individual is more likely to be an employee.

5) The alleged contractor’s opportunities for profit and loss. If the individual bears some financial risk in the enterprise, he or she is more likely to be an independent contractor.

6) The amount of initiative, judgment, or foresight required and whether they are in open market competition with others. If the individual does not have to show initiative, judgment, or foresight to successfully perform the job, the more likely he or she is to be an employee.

7) The degree of independent business organization and operation. The greater the independence, the more likely the person is to be an independent contractor.

There are certain factors that are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.
The Immigration Reform and Control Act (IRCA), passed in 1986, imposes penalties upon employers who knowingly hire or knowingly continue to employ individuals who are not authorized to work in the United States. IRCA requires employers to verify the citizenship or work authorization of all new hires. This verification must take place only after the employee is hired. Once hired, the employee and employer must complete an Employment Eligibility Form I-9. An I-9 form is not necessary for independent contractors.

In Section I of the I-9 Form, employees must indicate whether they are citizens, nationals, lawful permanent residents, or work-eligible aliens. The employer completes Section II, although the employee must provide the employer with specific documentation for it. The list of documents is intended to first ensure that the individual is work-authorized and second, to verify the identity of the individual. Some documents accomplish both goals. An expired or unexpired U.S. passport, for example, establishes both work authorization and identity. An unrestricted social security card – work authorization – along with a driver’s license – identity – is also acceptable. The various documents that are deemed acceptable are listed on the back of the I-9 Form.

The employee must submit originals of these documents. Photocopies are not acceptable. The employer need only review the documents for the appearance of authenticity. If the documents appear to be authentic, the employer must accept them. If the documents do not appear to be authentic (for example, if a document appears to be altered), the employer may ask for a substitute document. If the employee is unable to present a suitable substitute document, the employer is supposed to terminate the employee or risk penalties for knowingly continuing to employ an individual not authorized to work in the United States.

Employers must retain the I-9 Form for whichever date comes later—three years after the date of hire or one year after the termination of employment. Some resident alien cards issued by the INS have expiration dates. In some cases, even though the card has expired, the underlying status and the work authorization that goes with it has NOT expired. INS operates an employer’s hotline that can help you navigate these kinds of issues. The number is: 1-800-357-2099.

Anti-discrimination Provisions of IRCA

During the IRCA debate in Congress, many immigration advocates expressed concern that penalizing employers for hiring unauthorized workers would increase workplace discrimination. They feared that many employers would simply not hire workers who looked or sounded foreign to avoid IRCA sanctions. As a result of these concerns, Congress included provisions in IRCA which prohibit employers from discriminating on the basis of national origin in hiring, firing, and recruiting workers. These provisions are administered by the Office of Special Council for Immigration Related Unfair Employment Practices of the U.S. Department of Justice.

The anti-discrimination provisions apply to any employer with four or more employees.

The most common way to run afoul of the anti-discrimination provisions is to decide not to hire someone solely because they look or sound “foreign.” You can also violate the law if you demand additional documentation when the documents submitted by the employee appear to be authentic. For example, employers who will only accept a green card and no other document listed on the I-9 form are violating the anti-discrimination provisions. In addition, employers may not ask job applicants where they were born or whether they are authorized to work in the United States during the interview process. Verification of work authorization status is to take place after hiring, during completion of the I-9 Form.
Agricultural employers who pay cash wages of at least $150 to an individual employee in the course of a year must withhold for that employee. Employers who pay a total of $2,500 in annual cash wages to all their employees must also withhold social security, Medicare, and federal income taxes. Employees must also pay a share of an employee’s social security (6.2%) and Medicare (1.45%) taxes. You can find a wealth of information on your responsibility to withhold federal income tax and pay social security and Medicare taxes for your employees in the “Agricultural Employer’s Tax Guide,” published by the IRS. You can find it on the web at: http://www.irs.gov/pub/irs-pdf/p51.pdf. This publication also includes information on the advanced earned income credit, the federal unemployment tax act, recordkeeping responsibilities, and wage reporting forms.

### Agriculture under the Fair Labor Standards Act

The federal Fair Labor Standards Act (FLSA) governs minimum wages, overtime pay, and rules prohibiting oppressive child labor. The state of Vermont has also adopted legislation governing minimum wages, overtime pay, and child labor. Both the FLSA and the State of Vermont exempt certain agricultural activities from the minimum wage, overtime, and child labor rules.

While Vermont has adopted many of the federal rules and definitions, there are some differences. Whichever rule sets the higher standard or provides a higher level of worker protection is the rule that applies. Vermont, for example, has set $7.25 as a minimum hourly wage beginning January 1, 2006 and is one of just thirteen states that sets a rate higher than the $5.15 federal minimum wage.

Beginning in 2007 the Vermont minimum wage will increase by either 5 percent or by the percentage increase in the Consumer Price Index, whichever is smaller. The FLSA uses a two-pronged definition of agriculture that includes both primary agricultural activities as well as those activities that are secondary or incidental to carrying out the farming operation. The primary definition includes “farming in all of its branches” – cultivation and tillage, dairying, growing and harvesting horticultural crops, raising livestock, bees, fur-bearing animals, and poultry. Anyone performing these activities is engaged in agriculture regardless of whether he or she is employed by a farmer or on a farm.

Agriculture—and thus the exemption—also includes activities that are secondary to the farming operation. Those activities must be performed by a farmer on a farm “as an incident to or in conjunction with such farming operations” to be considered “agriculture.” For example, employees who build a silo or a terrace, or those who dig a stock well, are exempt when those activities are performed in conjunction with a farming operation. Logging activities, for example, are also exempt when they are part of a farming operation. But when these employees work for an employer engaged exclusively in forestry or lumbering, they are not considered agricultural employees.

These secondary activities must be subordinate to the farming operation. If they amount to a separate business, they lose the agricultural exemption. Building grain storage facilities to store grain produced by other farmers or on other farms, for example, would not be exempt. Likewise, the operation of a gravel pit for selling gravel off the farm is probably not exempt. But when an employee removes gravel for on-farm use, that activity is in-
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Incidental to and part of the farming operation.

Exempt activities on a dairy farm would include separating cream, bottling milk and cream, and making butter or cheese when the farmer or employee of the farmer uses milk produced by that farmer on that farm. But if the milk was produced on another farm, these activities are not exempt.

Similarly, employees engaged in cleaning, grading, preserving, packing, and processing fruits and vegetables on a produce farm are exempt employees unless they are processing fruits or vegetables produced by another farmer or on another farm.

Secondary activities also include “delivery to storage or to market or to carriers for transportation to market” when performed by a farmer or his employee as an incident to his own farming operations.

Minimum Wage and Overtime Pay Exemption

Both Vermont and federal FLSA exempt agriculture from the overtime pay requirements. Vermont, in fact, excludes any individual employed in agriculture from both the overtime and the minimum wage requirements. Remember, however, that the law that provides the greatest protections for workers will always apply. In this case it is the more limited federal exemption from the minimum wage that will apply to agricultural workers in Vermont. For those agricultural employees that fall outside the federal exemption, the applicable minimum wage rate is the more generous one set by Vermont’s rules – $7.25 an hour.

The federal Fair Labor Standards Act exempts several kinds of agricultural employees from the minimum wage. They include:

1. Any employee who is a parent, spouse, child, step-child, or other member of the farmer’s immediate family.

2. Any employee working for an employer who did not use more than 500 man days of agricultural labor during any calendar quarter during the preceding calendar year. For the purposes of this exemption, a man day is defined as any day in which an employee performs any agricultural labor for not less than 1 hour. 500 man days in any calendar quarter is “approximately the equivalent of seven employees employed full time in a calendar quarter.” Employers who own several farms or other enterprises must count all employees engaged in agricultural activities toward the 500 man-day limit. The test only applies to the preceding year.

3. There is also an exemption from the minimum wage and overtime pay requirements for local, temporary workers who perform hand-harvesting on a piece-rate basis. For more on this exemption, see the DOL interpretive bulletin at 29 CFR §780.319. This is one of several specialized exemptions for labor-intensive and seasonal farming activities.

4. There is also a special exemption from the overtime pay provisions for employees engaged in maple syrup production. See 13(b)(15) of FLSA and $780.816.

Interns under the Fair Labor Standards Act

A farm internship can provide valuable on-farm experience for a farm-seeker. Farm experience is essential to successful credit applications and other opportunities available to farm-seekers. Most farm internships, however, involve long hours and little or no pay. The Wage and Hour Division of the Department of Labor has developed a six-part test to determine when an intern is an “employee” under the Act. If an intern is an “employee,” an employer must count them in determining whether they use more than 500 man days of agricultural labor. If the employer falls outside the agricultural or other exemption, the employee/intern is entitled to the minimum wage and other protections afforded under the FLSA. The six-part test is as follows:

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 trainees or students.
3. The trainees or students do not displace regular employees, but work under their close supervision.

4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his/her operations may actually be impeded.

5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.

6. The employer and the trainees or students understand that the trainees or student are not entitled to wages for the time spent in training.

In applying this test, some courts have required that all six factors be met. Other courts have looked to the totality of the circumstances and found the trainee was not an employee even where one of the factors was missing. In most farm internship situations, the employer derives an immediate benefit from the efforts of the intern and therefore most farm interns are arguably covered under the FLSA. The law, however, does not appear to be universally enforced. Unpaid internships have become a widespread and accepted rite of passage for many professions in our economy, including law, agriculture, and media.

Volunteers are exempt from the minimum wage and overtime pay requirements of the FLSA. An individual 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, is outside the sweep of the Act.”

In a case where neighboring farmers exchange their own work under an arrangement where the work of one farmer is repaid by the labor of the other farmer and there is no monetary compensation for these services paid or contemplated, the Department of Labor would not assert that either farmer is an employee of the other.8

### Child Labor Regulations

Vermont issued comprehensive child labor regulations in 2003.9 These rules adopt many of the standards and restrictions of the federal FLSA. They also provide some additional protections for Vermont minors employed in Agriculture.

#### Employing Minor Non-Family Members

Youth employed on Vermont farms must be at least 16 years of age when:

- The work hours are during school hours for the school district in which the child lives, or
- The work involves certain farm activities deemed by the Secretary of Labor to be particularly hazardous. (See “Prohibited Activities by Young Farm Workers,” page 99.)
- Youth at least 14 to 16 years of age may work outside of school hours.

Youth 12 to 13 years of age may work outside of school hours only:  
- with the written consent of their parent, or
- if they are working with a parent who is also employed on the farm.

Youth under 12 may:

- be employed by their parents on their parents’ farm, or
- be employed with parental consent on a “small farm” defined as exempt from the minimum wage provisions. (The 500 man-day rule.)
Unless employed by a parent on a farm owned or operated by such parent, the following activities are deemed particularly hazardous for children below the age of 16 and are prohibited:

- Operating a tractor of over 20 PTO horsepower or connecting or disconnecting an implement or any of its parts to or from such a tractor.
- Operating or assisting to operate, including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation, any of the following machines:
  (i) Trencher or earthmoving equipment;
  (ii) Fork lift;
  (iii) Potato combine; or
  (iv) Power-driven circular, band, or chain saw.
- Working on a farm in a yard, pen, or stall occupied by a:
  (i) Bull, boar, or stud horse maintained for breeding purposes; or
  (ii) Sow with suckling pigs or cow with newborn calf with umbilical cord present.
- Felling, bucking, skidding, loading, or unloading timber with a butt diameter of more than 6 inches.
- Working from a ladder or scaffold and painting, repairing, or building structures, pruning trees, picking fruit, and so on at a height of over 20 feet.
- Driving a bus, truck, or automobile when it is transporting passengers or riding on a tractor as a passenger or helper.
- Working inside:
  (i) A fruit, forage, or grain storage designed to retain an oxygen-deficient or toxic atmosphere;
  (ii) An upright silo within 2 weeks after silage has been added or when a top unloading device is in operating position;
  (iii) A manure pit; or
  (iv) A horizontal silo while operating a tractor for packing purposes.
- Handling, including cleaning or decontaminating equipment; applying, disposing, or returning empty containers; or serving as a flagman for aircraft applying agricultural chemicals classified under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135 et seq.) as Category I of toxicity, identified by the word “poison” and the “skull and crossbones” on the label, or Category II of toxicity, identified by the word “warning” on the label;
- Handling or using a blasting agent, including but not limited to: dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord; or
- Transporting, transferring, or applying anhydrous ammonia.

There are some exemptions from the rules on hazardous agricultural activities for student learners, vocational and technical school students, and for youth that have completed training courses provided by Extension. For more information, contact the Vermont Department of Labor.
Employing Family Members

Children younger than 16 years of age may work for their parents on a farm owned or operated by their parents at any time – inside or outside of school hours. This does not relieve the parent of compliance with truancy laws, however. Children working for their parents on their farm may also engage in those agricultural activities deemed particularly hazardous. (See side bar, “Prohibited Activities by Young Farm Workers,” page 99.) Minimum wage and overtime pay rules apply in Vermont regardless of the age of the employee. If the farm is not exempt from the minimum wage, you must pay youth the minimum wage. Violations of child labor laws can lead to fines of up to $10,000 per offense and up to six months in jail.

Foreign Workers and the H-2A Visa Program

As this section is being written, the U.S. Congress is debating immigration reform. Some of the proposals currently under discussion include a provision for a new “guest worker” program that would allow agricultural employers, including dairy farmers, to employ foreign workers for up to three years. Some of those proposals include an avenue for these guest workers to eventually become either lawful permanent residents or citizens. It’s not clear whether any of these proposals will pass either the Senate or the conference committee review. As of April, 2006, the only agricultural guest-worker program available is offered under the H-2A Visa program.

According to the 2004 Yearbook of Immigration complied and published by the Department of Homeland Security, there were a total of 22,141 H-2A visas granted nationally in 2004. Of the total, 17,218 of the guest workers were from Mexico.

The H2A visa program allows agricultural employers to legally hire “non-immigrant” workers to perform temporary or seasonal farm work when there is a shortage of U.S. workers who are “able, willing, qualified and available to work.” Guest-worker programs have a long and not very admirable history. H-2A is the successor to the bracero program that brought Mexican workers to labor on U.S. farms from 1942 through 1964. The bracero program was criticized for widespread abuses by employers and farm labor contractors. Substandard housing, discrimination, unsafe and substandard working conditions, and under or non-payment of wages were common complaints. The bracero program was allowed to expire in 1964, after Edward R. Murrow hosted “Harvest of Shame,” an embarrassing CBS news documentary about the life of migrant workers.

The H-2A program, which was closed to Mexican workers until the bracero program expired, was authorized under the Immigration and Naturalization Act of 1952, and further amended by the Immigration Reform and Control Act of 1986. It is jointly administered by the Department of Labor and the Department of Justice. An employer first makes application for it to the Department of Labor. It’s possible to make this application be made on-line at www.h2a.doleta.gov. The application must be filed no less than 45 days before the employer estimates that workers are needed. The regulations provide for an expedited review of the application by the Department of Justice. Early applications are encouraged, however.

Aliens in the United States illegally or who are here legally but are unauthorized to work are not eligible for this program. Only “non-immigrants” are eligible. “Non-immigrants” are workers who reside in another country, have no intention of staying in the United States, and intend to return to their country of origin once the temporary or seasonal work is completed. “Temporary” means less than one year, although extensions are possible in certain extreme situations. H-2A workers may only perform agricultural work, which is broadly de-
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fined to include even the processing of farm products if more than one half of the commodity being processed was produced by the farm operator.

To get an H-2A Visa, the employer petitioner must obtain a determination from the Department of Labor that:

- There are insufficient workers in the region who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services needed, and

- The employment of a foreign worker will not adversely affect the wages and working conditions of similarly employed workers in the United States.

The H-2A regulations require employers seeking H-2A workers to first actively recruit U.S. workers by placing ads in general circulation publications and other outlets. And in order to ensure that the hiring of foreign workers does not depress U.S. wages, the program requires H-2A employers to offer a minimum wage rate known as the “adverse effect wage rate” (AEWR). This rate is determined by the Department of Labor and is tied to the annual average hourly wage rate for similar work in the region. The general agricultural labor AEWR rate in Vermont for 2006, for example, was $9.16 an hour. Specific rates are also set for specific types of agricultural work. The 2006 AEWR for harvesting vegetables in Vermont was $9.00 an hour. The AEWR rates can be found online at: [http://workforcesecurity.doleta.gov/foreign/adverse.asp](http://workforcesecurity.doleta.gov/foreign/adverse.asp).

The employment benefits afforded to H-2A workers are strictly regulated by the Department of Labor. H-2A employers are required to provide insurance for the guest workers with coverage for workplace injury and disease at levels equal to Vermont’s Workers’ Compensation coverage. H-2A employers are also required to provide housing for guest workers as well as meals or convenient cooking facilities and in some cases, transportation to the workplace. Charges, if any, for meals are limited by the Department of Labor. Housing standards are tied to OSHA standards if housing is provided by the employer or to standards established under the State’s landlord-tenant law if the housing is rental housing. The employer must guarantee payment to the H-2A worker for at least three-quarters of the period specified in the job offer. H-2A workers, however, are excluded from coverage under the Migrant and Seasonal Agricultural Worker Protection Act. An employer’s handbook on the H-2A program is available online at: [http://www.nhes.state.nh.us/alien/h2a-app.pdf](http://www.nhes.state.nh.us/alien/h2a-app.pdf).

The H-2A program does not provide any opportunity to the guest worker to become a legal resident alien or a U.S. Citizen. The H-2A Visa is tied to the employer and once it expires, guest workers are expected to return to their country of origin.

Estimates of the number of undocumented aliens residing in the United States range from 7 to 12 million. A study by the Pew Hispanic Center suggests that there may be as many as 5.5 million unauthorized workers in the United States. The Pew Center also estimates the number of unauthorized agricultural workers at 1.2 million. The Department of Labor conducts a periodic survey of agricultural workers and in 2001, 53 percent of the agricultural workers surveyed were not legally authorized to work in the United States.
The Vermont Fair Employment Practices Act

Vermont’s Fair Employment Practices Act is patterned after Title VII of the federal Civil Rights Act. The standards and burdens of proof are identical to those applied under the Title VII of the U.S. Civil Rights Act. Vermont courts, however, will consider the interpretations of employment discrimination laws in other states under other state laws as well as federal case law when interpreting Vermont’s law.18

Under FEPA, unless there is a bona fide occupational qualification that requires a person of a particular race, color, religion, national origin, sex, sexual orientation, ancestry, place of birth, age, or physical or mental condition, it is unlawful for ANY employer to discriminate against any individual on the basis of race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth, or age or against a qualified individual with a disability.

A “qualified individual with a disability” refers to an individual with a disability who is nevertheless capable of performing the essential functions of the job or jobs for which the individual is being considered with reasonable accommodation to the disability. For example, a housekeeping worker in a Stowe tourist resort was fired because she had no upper teeth – a disability which the Vermont Supreme Court found did not affect her capacity to perform her job and therefore, found her firing was based on illegal discrimination.19 See the section below for further information.

Discriminating on the basis of pregnancy is considered discrimination on the basis of sex. In other words, pregnancy should be treated like any other temporary disability.

It is illegal to discriminate on the basis of a person having a positive test result from an HIV-related blood test. It is also illegal to request or require an applicant or prospective employee to have an HIV-related blood test as a condition of employment.

Burden of showing a bona fide occupational qualification – that the job requires a particular sex or nationality, for example – is on the employer. Such qualifications are rarely upheld.

It is also illegal to indicate a preference, limitation, specification, or discrimination based upon race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age or against a qualified individual with a disability in an advertisement for employees.20 You can, however, indicate that the job requires heavy lifting, work with large livestock, or other essential tasks.

Vermonters with Disabilities

The federal Americans with Disabilities Act prohibits discrimination against individuals with disabilities in employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. The employment-related provisions of the federal legislation only apply to employers with 15 or more employees on each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

Vermont law regarding employment discrimination against disabled but otherwise qualified employees is based on the federal legislation and federal case law and regulations are used as guidelines for interpreting the meaning of the laws. Unlike the federal law, however, the Vermont law applies to any employer of one or more employees.22

The law in Vermont seeks to protect disabled individuals with physical or mental impairments that substantially limit one or more major life activities. Our attitudes about certain disabilities also play a role in defining what is and is not “substantially limiting.” Vermont law seeks to protect individuals who are regarded by their employer as having such impairment.23

The definition of disability is broad. It can include physiological disorders or conditions, cosmetic disfigurement, anatomical loss, as well as mental or psychological disorders. It does not, however, include alcoholism or drug addiction.

The law prohibits employment discrimination against disabled individuals who are otherwise capable of performing the essential functions of the
job with reasonable accommodation. These two factors are linked; if an individual is unable to perform the job but could do so with reasonable accommodation, the law requires accommodation.

Reasonable accommodation may involve changes and modifications that can be made in the structure of a job or in the manner in which a job is performed unless it would impose an undue hardship on the employer, given:

- the size of the employer’s operation, the number of employees, the number and type of facilities, the size of the budget, and
- the cost of the accommodation.

For example, where reasonable, the law imposes an obligation to make facilities used by all employees, such as hallways, restrooms, and cafeterias, accessible and usable. Depending on the capacity of the employer to make accommodations, it may also require job restructuring, part-time or modified work schedules, and the acquisition or modification of equipment or devices.\(^{24}\)

### Equal Pay for Equal Work

Vermont’s FEPA also prohibits any employer from discriminating between employees on the basis of sex by paying wages to employees of one sex at a rate less than the rate paid to employees of the other sex for equal work that requires equal skill, effort, and responsibility that is performed under similar working conditions.\(^ {25}\)

### Sexual Harassment

Sexual harassment is a form of sex discrimination and it is a violation of both the Vermont FEPA and the Federal Civil Right Act. In Vermont, sexual harassment can entail direct and specific harassment involving unwanted sexual advances or inappropriate and offensive touching or more generally, a workplace that becomes a hostile work environment.\(^ {26}\) Courts are more likely to find a “hostile work environment” when women are subjected to lewd and sexually suggestive remarks; displays in common areas of sexually oriented materials that tend to denigrate women; vulgar and derogatory remarks about the employee’s appearance; and when women are judged differently and more harshly than male colleagues.

### Serious Consequences

Violating the FEPA can be very expensive. It can result in civil penalties, getting stuck with the costs of the State’s investigation, restitution of lost wages and benefits, punitive damages, and payment of the employee’s attorney’s fees.\(^ {27}\)
The federal Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act regulates worker safety standards to reduce pesticide poisoning and injury among agricultural workers. Any paid employee on a farm who handles pesticides or who cultivates or harvests plants on farms is covered by the worker protection standards. The standards are designed to reduce worker exposure to pesticides by imposing workplace practices and responses to accidental poisonings and emergencies. The standards impose certain duties as follows.

- **Application.** Employers must ensure that the handlers use the pesticide in a manner consistent with the label and without exposing other workers. Workers must have access to the labels.

- **Protective Equipment.** The regulations require employers to provide personal protective equipment for handlers.

- **Restricted entry.** Employers must ensure that all workers are excluded from the area for the period specified on the pesticide label.

- **Notification.** Employers must provide notice to employees of areas that have been treated.

- **Decontamination.** Employers must ensure an ample supply of soap, water, and washing equipment in case of emergency contamination.

- **Training.** Employers must provide training for all handlers of pesticides.


### Vermont Occupational Safety and Health

Vermont has adopted the federal Occupational Safety and Health Act. Its provisions are enforced by the Department of Labor and Industry, Vermont Occupational Safety and Health Administration or “VOSHA.” The federal Occupational Safety and Health Act imposes upon all employers a “general duty” to furnish to each employee a place of employment which is free from recognizable hazards that cause or are likely to cause death or serious physical harm to employees. If you comply with OSHA’s standards for agricultural operations, you will be deemed in compliance with the general duty clause for the condition covered by the standard.

Most agricultural operations, however are exempt from VOSHA rules. Congress has for many years annually attached a “rider” to the OSHA appropriations bill prohibiting the expenditure of any funds to enforce any OSHA standard against a farming operation that employs ten or fewer employees. Family members are not considered farm employees.

If you employ 11 or more hand laborers doing field work, OSHA requires that you provide potable drinking water, handwashing facilities, and toilets to laborers in the field. Toilets – one for each 20 employees – and handwashing facilities are required when the employees are working for more than three hours per day. The facilities should be within a quarter mile walk. Hand labor includes using hand tools for cultivation, weeding, planting, and harvesting of fruits and vegetables, seedlings, and other field crops.

OSHA has also provided standards for roll-over protective structures, slow moving vehicles, equipment guards, and the storage and handling of anhydrous ammonia, logging operations, and several other areas of safety concern on farms.
Agriculture is NOT exempted from either the federal or Vermont family or medical leave legislation. The federal Family and Medical Leave Act, however, applies only to employers with 50 or more employees in 20 or more workweeks in the current or preceding calendar year who are engaged in commerce or in any industry affecting commerce. The Vermont Parental and Family Leave Act, however, applies to much smaller employers. Vermont employers with 10 or more employees for an average of at least 30 hours per week during a year must comply with the laws regarding parental leave, and those who employ 15 or more individuals for an average of at least 30 hours per week must comply with the Vermont Family Leave Act.55

Parental Leave

Parental leave is warranted for the birth of the employee’s child or the initial placement of a child 16 years of age or younger with the employee for the purpose of adoption.

Family Leave

Family leave is warranted for cases of: a serious illness of the employee or a serious illness of the employee’s child, step-child, or ward who lives with the employee; foster child, parent, spouse, or parent of the employee’s spouse. Serious illness means an accident, disease, or physical or mental condition that poses imminent danger of death, requires inpatient care in a hospital, or requires continuing in-home care under the direction of a physician.

Only employees that have been employed continuously by the same employer for a period of one year and for an average of at least 30 hours per week are eligible for parental or family leave, and they are entitled to the following.

During any 12 month period, an employee may take unpaid leave for a period not to exceed 12 weeks. The employer must continue employment benefits for the duration of the leave at the level and under the conditions that coverage would have been provided if the employee had continued working as usual for the duration of the leave.36 During the leave, the employee may take accrued sick leave or vacation leave or any other accrued paid leave as long as it does not exceed six weeks.

Upon returning to work, employees must be offered the same or a comparable job at the same level of compensation, benefits, seniority, or any other term or condition of employment that existed on the day that leave began.37 However, there are two exceptions, as follows:

If, during the leave, the job would have been terminated or the employee laid off for reasons unrelated to the leave or the reason for the leave, or

If the employee performed unique services and hiring a permanent replacement during the leave was the only alternative available to the employer to prevent substantial and grievous economic injury to the employer’s operation.
Workers’ Compensation is a state-sponsored insurance program that compensates covered workers suffering death, injury, and/or disability in the course of their employment. The program is administered by the Vermont Department of Labor and Industry, and you can find information at [http://www.state.vt.us/labind/wcindex.htm](http://www.state.vt.us/labind/wcindex.htm). Most employers are required to purchase Workers’ Compensation coverage. In Vermont, it is offered by private insurers.

Worker’s Compensation is a covered employee’s exclusive remedy for workplace injuries. If an employer has covered the employee, the employee can look only to the benefits and compensation offered through Workers’ Compensation and may not sue in a private civil suit the employer or the employer’s estate for injuries sustained on the job. This liability shield is the *quid pro quo* for employers. If employers provide insurance, the worker’s remedy is limited to Workers’ Compensation coverage and the employer’s liability from a civil suit is limited.

The consequences for failing to cover an employee are serious. The law allows an employee who suffers a personal injury while working for an employer who is legally required to provide Workers’ insurance but fails to do so, the right

### Independent Contractors and Workers’ Compensation

Under Vermont law, certain kinds of independent contractors are still considered to be employees for the purposes of Workers’ Compensation and must be covered. The law seeks to make it more difficult for employers to skirt Workers’ Compensation coverage by hiring independent contractors to carry out some of the basic or central aspects of their business. If the contractor is performing services that are closely related to the employers business they will likely be considered “statutory employees” and the law will impose a duty of coverage. For example, a Vermont wood products manufacturer who hired an independent contractor to haul its lumber and load it on railroad cars was found to be a “statutory employer” of those providing the hauling because hauling and loading the lumber was an integral part of its business. The statute provides a list of factors that must be present to exclude those providing services under contract and their employees from coverage. These workers may be excluded from coverage when the individual:

- performs work that is distinct and separate from that of the employer;
- controls the means and manner of the work performed;
- holds him or herself out as a business;
- holds him or herself out for work for the general public and does not perform work exclusively for one employer;
- is not treated as an employee for purposes of income or employment taxation with regard to the work performed; and/or
- services are performed by a written agreement or contract that explicitly states that the individual is not considered to be an employee for purposes of workers compensation, has no employees, and is not a subcontractor. The contract must also include information regarding the individual’s right to purchase Workers’ Compensation and the individual’s election not to do so.

Whenever work is provided by an independent contractor, the agreement should also specify that the contractor has covered their employees under workers compensation. Proof of that coverage should also be provided.
to bring a civil suit for full damages. The law also shifts the burden of proof to the employer in such a suit. The employer will have the burden of proving that the injury did not result from the employer’s negligence. The employer’s defenses are also limited, and the statute provides that for employees who prevail in the suit, the employer will be liable for costs and fees of suit, including attorney’s fees.  

Vermont exempts agricultural workers for an employer whose aggregate payroll is less than $10,000 per year from carrying Workers’ Compensation insurance. “Wages” include the market value of board, lodging, fuel, and other non-monetary benefits received from the employer. “Workers” include interns and apprentices. Employers may exclude from coverage members of the employer’s family who dwell in the employer’s house. Sole proprietors and partner owners may also be excluded from coverage although they may elect to be covered. Agricultural employers may also elect to cover employees otherwise excluded to take advantage of the liability shield from private suits by employees.

Workers’ Compensation provides compensation for lost wages as well as vocational rehabilitation for injured workers. Workers with only a partial disability may be expected to seek work that suits their abilities when cleared to do so by a physician. Workers may also return to work with certain physician-prescribed restrictions.

Employers who regularly employ at least ten employees working more than 15 hours per week have an obligation to rehire workers who recover their ability to safely perform the duties of their old job. The employer need not make special accommodations if the employee is not able to perform the duties of their old job. The worker must fully recover within two years of the onset of the disability and must keep the employer informed of his continuing interest in the job. The worker is entitled to the first available position and upon reinstatement is to regain the seniority and any unused annual, personal, or sick leave.

Employers who discharge or refuse to employ someone because they have asserted a claim under Workers’ Compensation open themselves to civil penalties for unlawful discrimination.
Vermont is an “employment-at-will” state. Unless an employee has an employment contract that provides otherwise, he or she may be discharged at any time — with or without cause. There is, however, a public policy exception to the employment at will doctrine. Vermont Courts will allow a discharge at will “unless there is a clear and compelling public policy against the reason advanced for the discharge.”

Whether a discharge offends public policy is a matter of “community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare” and whether an employer’s action is “cruel or shocking to the average [person’s] conception of justice.”

The Vermont Supreme Court has held that an at-will firing solely on the basis of the age of the employee is contrary to public policy. The court has also suggested that firing an employee for refusing to violate a clear and compelling professional code of conduct adopted to protect the public might also be contrary to public policy.

Certain kinds of retaliatory firings that punish a worker for exercising rights afforded to all employees are also unlawful. A retaliatory firing for filing a claim of unlawful discrimination under the Vermont Fair Employment Practices Act is specifically prohibited by statute. A retaliatory firing of an employee for filing a Worker’s Compensation claim is also specifically prohibited by statute.

Other Exceptions to the At-Will Doctrine

An employer’s written policies and practices may also modify the employment-at-will doctrine. When an employee manual implies that an employee will only be fired for cause, Vermont Courts have required cause. If the manual includes a procedure to be followed prior to a termination, Vermont Courts are likely to hold the employer to that procedure. Whenever an employee manual implies there is job security and seeks to garner employee loyalty in exchange for job security, a Vermont Court will enforce the language of the manual. Vermont Courts have done so even where the manual was prefaced with bold language stating that the manual did not constitute an employment contract and that employees were employed at will and could be terminated at any time and for any reason. Boiler plate language denying that the manual is an employment contract will not effectively negate policies and procedures that clearly indicate otherwise.
Worker Housing

You must provide written notice, served by a law officer, to the former employee. The language you must use to give notice is provided in the statute – 9 V.S.A. §4469(c).

- Within 10 days of the service of notice and summons, the court will hold a hearing to allow the employer to establish that the failure of the employee to leave is causing actual hardship to the employer because of unavailability of farm housing for a replacement employee.

- If the employer establishes actual hardship, the court will issue a writ of possession.

If the employee has counterclaims against the employer, such as a claim of wrongful termination, the right to pursue that claim will be preserved. A counterclaim will not delay removal of the former employer. The employee will still be allowed to seek whatever relief might be available under the law.

The State of Vermont provides a special, expedited eviction process for agricultural workers who fail to vacate housing provided by an employer at the termination of their employment. The employer must earn at least one-half of their gross income from farming and the housing must be provided to the employee without any expectation of payment other than utilities. The housing must at least be “controlled” by the employer and it may be located on or off the farm.

The farm employee housing statute gives employers the right to terminate the tenancy at the termination of employment but requires the employer to follow certain procedures as follows:

- You must provide written notice, served by a law officer, to the former employee. The notice must be served together with a summons and complaint seeking a writ of possession to remove the farm employee. The language you must use to give notice is provided in the statute – 9 V.S.A. §4469(c).
Case Study: Labor Management at North Williston Cattle Company

By Deb Heleba

North Williston Cattle Company is owned and operated by the Whitcomb family. Located in Chittenden County, the 300-cow dairy farm employs family members as well as full- and part-time employees. Mary and her husband, Onan, supervise the dairy end of the business, and Onan's brother, Lorenzo, oversees the crops and field work.

In addition to family labor, two full-time employees work year-round in the dairy and there are two to three part-time milkers. Lorenzo also hires a number of seasonal employees to help with the field work.

The farm sees very little turn-over in labor. In 15 years, they've had to fire only one employee. Mary attributes their employee retention to their careful recruitment and selection process, communication practices, and their positive attitudes about farming and farm labor – these all help make the farm a rewarding and fun place to work. When someone does leave, it tends to be a life-change decision, that is, they are graduating from college, making a career change, and/or moving away from the area rather than making a decision based on job satisfaction.

The employee mix is diverse in terms of age, gender, background, and full-versus part-time status. Employees range from 18 to 72 years old; some have never farmed before, while others have farmed their entire lives. For example, one of their 61-year-old man who works in the dairy full-time. He operated his own dairy farm for 40 plus years but when he was ready to slow down, he still wanted to work with animals. Another employee is a UVM pre-vet student who is interested in gaining large animal experience. She works as a part-time milker. Another part-time employee also works full-time for IBM. He had fond childhood memories of his family's farm and because he has a flexible work schedule at IBM with three days on and two days off, he is able to work at North Williston Cattle Company for two weekends a month in exchange for housing. This allows the other employees, including Mary and Onan, to take off for up to two weekends a month.

Employee Recruitment

When looking for a full-time employee, Mary starts the process by writing an advertisement that begins with the letter “A.” Most classified sections run their ads in alphabetic order and Mary says she wants to make sure that their ad is the first that people see. The ad might start out as “Animal lover...” or “A farm job...” or even, “Agriculture...” Typically, they will choose to place their ad in a local paper such as the Burlington Free Press rather than an agricultural publication. By doing this, they draw a wide variety of candidates. Likewise, they place the ad in the regular classified section as opposed to the farm section unless there are no other listings there. Mary says she wants the farm to be the only one listing a help-wanted ad and will sometimes wait to post their ad so they can achieve this.

The advertisement includes the farm name and location so that candidates will know who they're calling. The person returning the call reads the job description to potential applicants and discusses hours and housing options. However, they do not discuss salary because this is negotiated, depending on background. If the caller still wants to pursue the position, Mary schedules an interview.

Mary estimates that of 150 inquiries about one job opening, they know that there are about 120 people they won't consider.
want to pursue. However, they don’t
discourage anyone from an initial visit
to the farm. Even so, Mary says that
about half of the candidates don’t show
up for their visit and interview.

For the first face-to-face meeting,
Mary gives the candidate a half-hour
tour of the farm. At this time, applicants
receive a job application, which
includes solicitation of two references:
one from an employer, one from a
landlord. It includes the question,
"why do you want to work on this
farm?" The application also includes
a skills checklist where the applicant
can check his or her level of ability
and interest in learning for each farm
skill – carpentry, artificial insemination,
mechanics, electrical work, health
care – as follows: a) know a lot; b) don’t know and have no interest in
learning; and c) don’t know but have
an interest in learning. If the person
is hired, Mary said that the answers to
the checklist can help them tweak the
job responsibilities to fit the employee’s
strengths and interests.

Following the initial visit and
completion of the application form, the
candidate is invited back to the farm
to spend a morning or evening milking
with the family and other employees.
Then each of the final candidates has
an interview with Mary, Onan, and
Lorenzo before being hired.

Once the Whitcombs choose to hire
an applicant, they ask them to complete
a tenant agreement for the on-site
housing but do not ask for an employee
contract. The tenant agreement
includes a stipulation that if employment
is terminated, the employee and his or
her family will be expected to vacate the
premises within one week. Every adult
who will be living in the house signs the
tenant agreement.

Mary keeps a file of all applicants who
seemed particularly appropriate. She
calls these applicants to let them know
that they’ve filled the position but will
keep their application on file. Mary also
keeps a separate file of all applicants
who were particularly inappropriate so
that she will have a record of folks who
have raised “red flags” in the past.
This is a costly process. Mary
estimates that it costs $200 for the
advertisement alone, plus countless
hours returning phone calls, scheduling
tours, interviewing candidates, and
following-up with rejected applicants.
However, she said it is definitely worth
the effort to spend the time and money
to hire the right employee, versus
dealing with the hassles of managing
and/or terminating an employee hired
on impulse. “Thankfully,” she says, “we
don’t have to go through this process
very often.”

Employee Benefits
For full-time employees, North Williston
Cattle Company provides salary, on-
site housing, health insurance, a half
of a beef per year, garden space, and
utilities – electricity, garbage removal,
and water. Employees also receive one
week of paid vacation and four days
of emergency leave, but no paid sick
days. If they work on the farm for at
least 3 years, the farm will pay health
insurance for their spouse or domestic
partner and after 5 years, the farm
will provide a co-payment for a family
insurance plan.

For part-time employees, the starting
wage is $8.50 per hour. After six
months, part-timers get paid $9/hour
plus one tank of gas per week.

The farm carries worker’s
compensation on all employees. In
addition to these tangible benefits,
the Whitcombs believe that making
the farm an enjoyable place to work
is important. To that end, they try
to build camaraderie among the
employees. Mary says, “We want to
build community on this farm. We’re
committed to know these people like
our own family—I know where their
children go to school, what sports they
play, where their parents work.”

Each summer, the Whitcombs host a
picnic for their employees and families.
In the past, they also hosted a holiday
dinner at a local restaurant every year.

The “Red Book”
Several years ago, Mary created the
“red book.” This is a three-ring binder of
protocols for all the day-to-day activities
on the farm. Mary said, “I had a terrible
fear that if something happened to my
husband and brother-in-law, I wouldn’t
continued on page 112
Case Study: Labor Management at North Williston Cattle Company (continued from page 111)

know what to do if 'X' broke, and the farm would go under." The binder seeks to answer a wide range questions about the farm – how to treat mastitis, where the water lines to the well run, who services what – plumbers, welder, electrician, and so on. It lists all supplies and equipment used on the farm, where they are purchased, and how to fix or replace them. It includes an emergency section that covers the "what ifs"—what to do if there's a flood in the parlor, what if the milk truck is late, what if the farm loses power – how to hook up the generator and the phone number for Green Mountain Power. The book even covers what to do if the media comes to the farm. It says, "Everyone has a happy face, clean boots, and clean jackets." Everyone knows where to stand – by the farm sign – if pictures or footage are taken, and knows to stay with the reporter to ensure that only the best views of the farm are shot.

When employees start working on the farm, they are introduced to the Red Book. After they are trained, if they have questions about a procedure, they are encouraged to consult the Red Book first – if their question is not addressed there, Mary will help them and their question is added to the binder for the next time someone has that question.

In addition to the Red Book, Mary posts listings of tasks that need to be attended to every day, those that need attention each week, and tasks that can be done whenever there's some extra time. She said, "Our employees are motivated and want to keep busy." The lists serve as reminders of what needs to be done and what employees can do on their own, without being asked.

Termination
Mary said they have only had to fire one person in 25 years. In hindsight, she said she should not have veered from her normal recruitment and hiring procedures, but the employee was very charismatic and convinced the Whitcombs to hire her without first checking references. The Whitcombs' approach to troublesome employee behavior is to first give the employee a verbal warning. This is followed by two written warnings; each time, the employee meets with Mary, Onan, and Lorenzo to review the written warning, which includes a description of the problem, the proposed solution, and avenues for improvement. They ask the employee to sign the written warning to acknowledge that he or she understands the grievance. In the case of the employee whom they fired, there was no improvement after the verbal and written warnings, so the Whitcombs gave a two-week termination notice. Mary said that having written documentation was extremely helpful because this employee tried to collect unemployment benefits, citing wrongful termination. Without this documentation, the Whitcombs would have had to pay unemployment payments, but with it, they could show cause for the termination.

Attitude about Employees
Mary said, "Our employees are what make the farm work. They are our biggest resource." She says that at many farmer meetings, she hears farmers disparaging their labor, "we will never do that," she said. "When there is nothing good said about agriculture, it perpetuates. I encourage everyone to work on a farm. It's a wonderful work experience." Mary tells other farmers to look at the local market for workers and be flexible and open to the options.