

EMPLOYMENT AND LABOR ON THE FARM

A Law for Food Lecture
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THE SAME LAWS MAY APPLY TO APPRENTICES/ INTERNS AS EMPLOYEES

- The basic standard to define an employee states, broadly, that: *An employee follows the usual path of an employee and, for economic purposes, is dependent on the business served.*

PRIMARY LAWS AND REGULATIONS AFFECTING VT FARM LABOR

- IMMIGRATION REFORM AND CONTROL ACT (“IRCA”)
- FAIR LABOR STANDARDS ACT (“FLSA”)
- MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (“MSAWPA”)
- VERMONT OCCUPATIONAL SAFETY AND HEALTH ACT (“VOSHA”)
- WORKERS’ COMPENSATION
- PAYROLL TAXES
- VERMONT UNEMPLOYMENT INSURANCE
- VERMONT FAMILY/ PARENTAL MEDICAL LEAVE ACT (“FMLA”)

IMMIGRATION REFORM AND CONTROL ACT (“IRCA”)

- applies to all employers and imposes penalties upon employers who knowingly hire or knowingly continue to employ individuals not authorized to work in the U.S;

FAIR LABOR STANDARDS ACT (“FLSA”)

- Federal and/ or Vermont Department of Labor, protects workers from exploitation and guarantees minimum wage, overtime pay, and sets recordkeeping requirements and child labor protections;
 - Vermont exempts agricultural labor from the \$8.15 minimum wage and overtime requirements
 - Federal exempts from overtime pay; and, minimum wage, which is set at \$7.25, applies once agricultural labor exceeds 500 man-days.

SPECIAL STATUS OF INTERNS

- Not covered by FLSA, if, in fact, intern
1. The training is similar to what would take place at a vocational school,
 2. The training is for the benefit of the student/ apprentice/ intern/ etc.,
 3. Trainees do not displace regular employees,
 4. Business derives no immediate advantage from the job description, or terms dictating the internship,
 5. Trainees are not necessarily entitled to a job at the end of the term, and
 6. Business and trainees clearly understand the terms and conditions of the underlying agreement, for example that the trainees are not entitled to wages for the time spent in training.

INDEPENDENT CONTRACTORS

- Also not covered by FLSA;
- nor by Workers Compensation, unless they are “statutory employees;”
- Payroll tax requirements to withhold or provide matching contributions for Social Security

WHAT IS AN INDEPENDENT CONTRACTOR

- Several working definitions, one of which is the
- 7-part “totality of the circumstances” test:
 1. Not an integral part of the business – for farms, consider agricultural vs. non-agricultural labor,
 2. Not a permanent, or long-term, relationship,
 3. Not dependent on the business’s facilities and equipment,
 4. Not closely directed by the business,
 5. Not shielded from liability and loss,
 6. Not dependent on business for initiative, judgment, or foresight, and
 7. Not part of the same business organization and operation as business

MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (“MSAWPA”)

- governs disclosure requirements and employee housing, may apply if:
 - Apprentice does not return to their permanent residence at night, and
 - Apprentice works 500 or more Man-days, a day in which an employee performs at least one hour’s worth of “agricultural labor,” in any calendar quarter of the previous year.

MAN-DAYS AND AGRICULTURAL LABOR

FLSA and MSAWPA share the 500 Man-day exemption; also, they share the definition of agricultural labor, which can generally be read to inform additional statutory workplace requirements and exemptions. Agricultural labor is defined by primary and secondary agricultural activities. In short,

- Primary: farming in all of its branches, from cultivation and tillage, to dairying and raising livestock or bees.
- Secondary: incident to or in conjunction with farming operation, performed by a farmer on a farm. Note, this does not include certain agritourism activities or tabling a farmers market.

VERMONT OCCUPATIONAL SAFETY AND HEALTH ACT (“VOSHA”)

- establishes a general duty to furnish employment safe from recognizable hazards. *Exempt from inspection but not from the general duty are agricultural operations with ten or fewer employees in the previous 12 months.* A complaint triggers inspection
Basic requirements include:

- Housing standards,
- Sanitation standards, for example potable drinking water, clean hand-washing facilities and toilet,
- Protective measures for particular on the farm safety concerns.

WORKERS' COMPENSATION

- administered by Vermont Department of Labor, covers workplace injuries and represents the exclusive remedy of covered employees. *An exemption for agricultural employer exists for those whose annual aggregate payroll is less than \$10,000.*
- Employee versus Contractor for purposes of Workers Comp. coverage:
 - who controls the work being performed?
 - is the work being performed normally carried out by an employee of business?
 - are the worker's work activities integral to the employer's regular business?

PAYROLL TAXES

- Federal and state, including, on the federal end, income tax withholding, Social Security, Medicare.
 - The threshold for application of payroll taxes on agricultural employers is *\$150 or more in annual cash wages to a single employee, or who pay \$2,500 or more* in annual cash wages.
- Also included are federal-state unemployment tax, and, possibly, self-employment tax.

VERMONT UNEMPLOYMENT INSURANCE

- applies generally to agricultural employers who employ *10 or more individuals in each of 20 calendar weeks* of the preceding or current year, or *who paid cash wages of \$20,000 or more annually* to agricultural employees.

"ABC Test"

- Determining contractors for purposes of unemployment insurance exemption: ensures broad unemployment insurance coverage. A contractor if,
- free from control or direction over the performance of such services
- service is either outside the usual course of the business for which such service is performed or that such service is performed outside of place of business of the enterprise
- individual is customarily engaged in an independently established trade, occupation, profession or business.

VERMONT FAMILY/ PARENTAL MEDICAL LEAVE ACT (“FMLA”)

- applies when *15/ 10 or more are employed one year at an average of 30 hours per week.*

HIRING/ FIRING EMPLOYEES

- VERMONT IS AN AT-WILL STATE. THIS MEANS:
Without a contract, termination may be with or without cause, at any time; unless an exception applies.
- **Exceptions to the general rule:**
- Contrary to Public Policy, such as termination on basis of age or other discrimination, or retaliatory;

HIRING/ FIRING EMPLOYEES

- Employer policies may modify the default at-will rule,
- promising for cause termination;
- setting a disciplinary procedure and implying job security;
- by including boiler plate provisions denying contractual arrangement of modifications notwithstanding. And, these exceptions must be:
- Argument in favor of exception must be clear and compelling.

WORK AUTHORIZATION OF EMPLOYEES

- **Form I-9**

- Employee fills out on date of hire;
- Employer completes within 3 days of hire;
- Employer must retain copies of supporting documents for all I-9s
- I-9 kept in separate file from personnel file
- I-9 kept on file 3 years following date of hire, or one year following termination
- Paperwork errors start out at \$100 to \$1,000 fine.

WORK AUTHORIZATION OF EMPLOYEES

- H₂A VISAS
- Work authorization for non-US citizens performing agricultural work on temporary basis
- Jointly administered by Departments of Labor (“DOL”) and Justice (“DOJ”)
- Applicable to employers seeking agricultural laborers on temporary/ seasonal basis

H2A VISAS

- **Workers must be:**
- Foreign, non-immigrant, Not intending to stay, Temporary/ Seasonal agricultural labor
- **Employer application**
- First, to DOL, within 45 days of estimated date of need:
- Need based on insufficient willing, able and qualified workers in the region
- No adverse effect on wages
- Employer places general circulated ad and pays Adverse Effect Wage Rate (“AEWR”)
- Then, expedited DOJ review

HIRING/ FIRING INDEPENDENT CONTRACTORS

- **At Contract Initiation:** Forms W-9, 1099 MISC, and 1096, rather than I-9 and W-4 required at time of hire of an employee
- **Advantages to Independent Contractor classification:**
- Easier to cancel or fail to renew a contract than fire an employee
- No effect on unemployment premiums
- Not covered by FLSA standards or certain provisions of OSHA and VOSHA

ICs AND THE *IRS 20-FACTOR TEST*

1. Instruction
2. Training
3. Integration
4. Services Rendered
5. Hiring Assistants
6. Continuing Relationship
7. Set Hours of Work
8. Full-time Work
9. Work Performed On-premises
10. Order or Sequence Set
11. Reports
12. Payment
13. Expenses
14. Tools and Materials
15. Investment
16. Profit or Loss
17. Works for More than One Party
18. Offers Services to Public
19. Right to Fire
20. Right to Quit

ICs AND THE IRC SECTION 530 EXEMPTION

- Exempts Employers from:
 - FICA, FUTA, Federal Income Tax Withholding, and
 - Penalties and Interest for failure to withhold;
- Tests to Qualify for the Exemptions:
 - Reasonableness Test Prior IRS Audit, Judicial Opinion, Industry Practice, or other Reasonable Basis
 - Consistency Test
Reporting and Substantive Consistency

PENALTIES FOR IC MISCLASSIFICATION

- Payroll taxes retroactively assessed
- Retroactive Social Security and Income Withholding: Employer 100% liable for employee and employer matching share
- Civil and criminal penalties may be assessed against the employer

YOUTH EMPLOYMENT AND VERMONT LAW

- **Vermont FLSA**, controlling statute, provides protections in addition to those provided by Federal FLSA
- **Minimum wage and overtime rules apply** in Vermont regardless of age.
- **Youth, must be at least 16** when:
 - Work hours are school hours (14 to 16, may work outside school hours)
 - Involves activities deemed “particularly hazardous”
- **Youth, 12 to 13** may work outside school hours:
 - First, obtain parental consent in writing; or,
 - They work with a parent already working on the farm
- **Youth, under 12** may be employed:
 - By parents on their farm, or
 - With parental consent on “small farm” exempt from minimum wage rule (500 man-day rule)
 - Youth family members are not employees
- **Child Labor Law Violations**, fines up to \$10,000/ offense and 6 months in jail

FEDERAL AND VERMONT FLSA: MINIMUM WAGE, OVERTIME, AND CHILD LABOR REQUIREMENTS

- **Vermont Minimum Wage:** \$8.15; although “agricultural” employers exempt; “agricultural” work also exempt from overtime requirements
- **Federal Minimum Wage:** \$7.25; exemption for “agricultural” work up to 500 Man-days.
- **Work falling outside “agricultural”** paid Vermont’s minimum wage.
- **Payment within 7 days** of end of pay period and may be weekly, bi-weekly, or semi-monthly
- **Record-keeping Requirements:** employers must keep records of all hours worked and the wages paid to employees

SPECIAL FEDERAL EXEMPTIONS FOR AGRICULTURAL WORK:

- Family members,
- 500 Man-days of agricultural labor during calendar quarter of preceding calendar year,
- Local, temporary workers performing hand-harvesting on piece-rate basis, and
- Maple syrup production exempt from overtime pay

FINAL THOUGHTS

- If legally impossible to designate labor as different from employee, keep below the exemptions.
- Businesses/ their owners need to be honest and forthright with the apprentices. Also, be creative about the arrangements, perhaps they are better suited by a lease or legal structure giving the trainee some interest.

For more information

- Law for Food:
 - www.lawforfood.com
- UVM New Farmer Project:
 - www.uvm.edu/newfarmer