



FARM COMMONS

# Classifying Workers in Vermont—Are they Employees, Interns, Volunteers, or Independent Contractors?

**By: Erin Hannum and Rachel Armstrong**

[www.farmcommons.org](http://www.farmcommons.org)

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## Getting Started

### **Classification: Facts, not titles, matter**

Farmers often ask: What’s really the difference between an employee and an intern or volunteer under the law? And, what is an independent contractor? How do I know what type of worker I have, legally speaking?

The first thing to know is job titles don’t matter; calling someone an independent contractor doesn’t make them one, necessarily. The substance of the worker’s tasks are what matters: How are tasks assigned? What does the worker expect in return? Who controls the worker’s time? These and many other questions determine the legal classification of the position. There are four main classifications of workers: (1) a volunteer, (2) an independent contractor, (3) a non-employee intern, and (4) an employee.

The legal classification of farm workers has many implications—whether the farmer must pay minimum wage, carry workers’ compensation, withhold and pay taxes, and so on. Oftentimes, what farmers call interns, volunteers, independent contractors, and so on are in fact “employees” in the eyes of the law. Misclassification is common in many industries, including farming. If a worker is in fact an employee and the farmer doesn’t properly classify them as such, the farmer risks having to pay back wages, taxes, and even penalties.

The good news is that farmers can be proactive. By learning the factors that the law takes into consideration, farmers can craft their worker arrangements to both suit their needs and fulfill their legal obligations. It’s helpful to keep in mind that employment law shares the farmer’s goal of treating their workers well.

Employment law ultimately serves to protect workers—all workers—to ensure fairness, and prevent coercion and exploitation in the workplace. To facilitate this goal, the law will assume that anyone doing work for the farm business is an employee. The farmer may classify a worker as something else if, and only if, the specific criteria for another classification are met.

### **Using this guide**

This guide helps farmers better understand the legal definitions and criteria for classifying their workers. The first step is to walk through the summary flowchart that follows. The flowchart will lead the farmer to an initial determination of which of the four categories their worker(s) fall into. Note that if you have more than one person working on the farm, you may need to walk through

“The legal classification of farm workers has many implications—whether the farmer must pay minimum wage, carry workers’ compensation, withhold and pay taxes, and so on.”

the flowchart for each worker as the classification could be different. The sections that follow provide detailed explanations and criteria for each of the classifications.

The various categories and criteria may feel overly nuanced or abstract at first. To help ground this all in reality, we'll be following the stories of Amanda and Ralph throughout the guide.



**Farmer Amanda is a beginning farmer. She has a small CSA and is looking into labor issues, including whether she can rely on some of her CSA members to do some of the farm work and help out with packing and such. She's ultimately looking to grow and expand her business, and hopefully start selling at farmers' markets and even restaurants to diversify and better improve profits.**



**Farmer Ralph is also a beginning farmer. He sells his products mostly at farmers' markets and to local upscale restaurants. He's a retired math professor, and doesn't depend at all on the farm's income for his livelihood. It's really just a hobby. Ralph's main priority is to teach new farmers the ropes and pass on his legacy in this way. He loves teaching and really wants to help and train young farmers so they can go out and start their own farm businesses.**

Other resources are referred to throughout that provide more detail on specific legal issues. In particular, this guide is part of a series of guides by Farm Commons on Vermont employment law:

*Hiring a Farm Employee in Vermont: Tax and Paperwork Checklist*

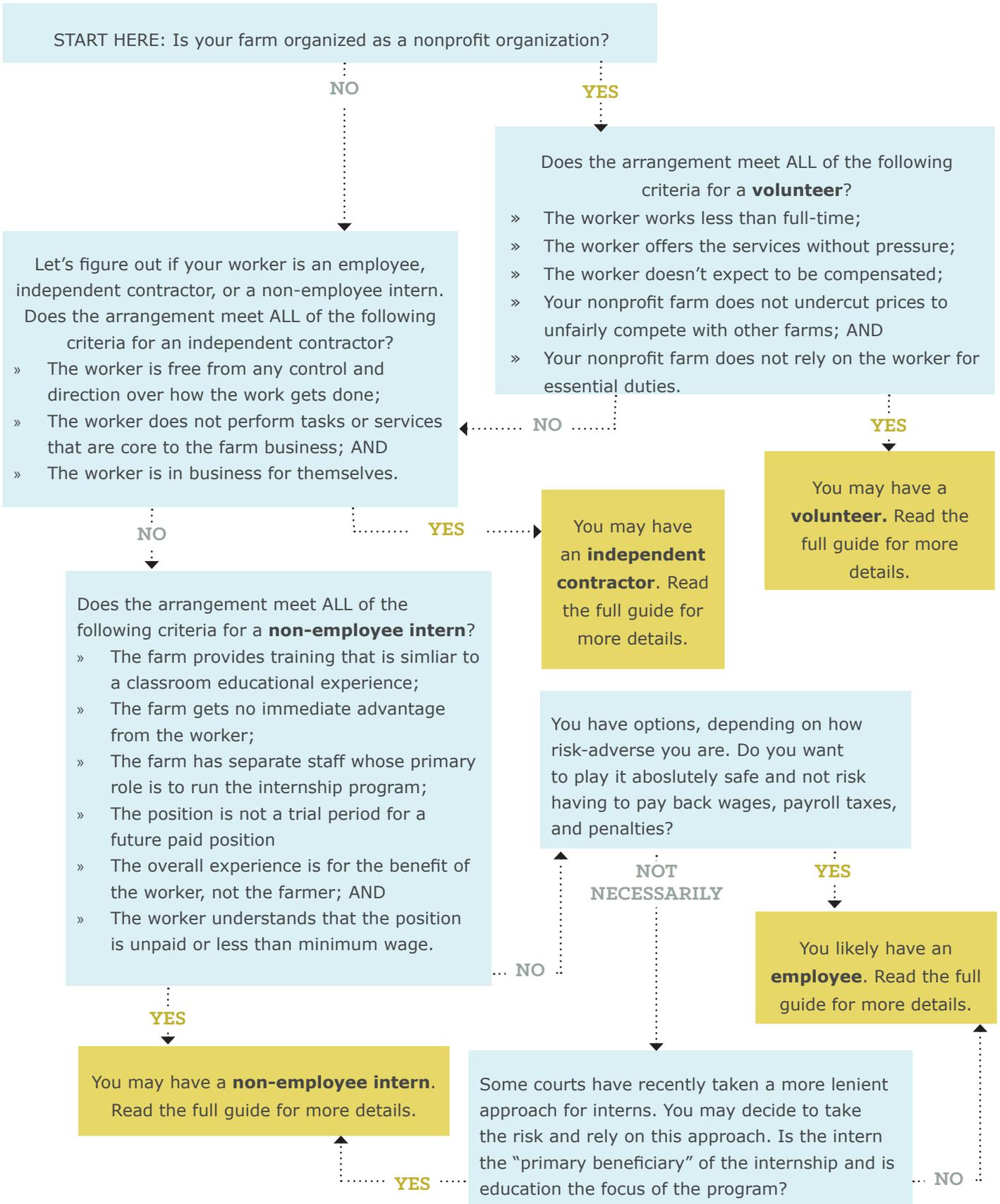
*Classifying Workers on Vermont Farms—Employees vs. Interns, Volunteers, and Independent Contractors*

*Managing Risks of Farm Interns and Volunteers in Vermont*

Be sure to check out these and other relevant legal resources for sustainable farmers, which are all available for free on Farm Commons' website—

[www.farmcommons.org](http://www.farmcommons.org).

## Flowchart: How Do I Classify My Workers?



## Details: What Do the Classifications Mean?

### Volunteers

#### Legal definition

What is a volunteer? The law defines a volunteer as someone who performs service for charitable or humanitarian reasons for a nonprofit or public agency without expecting compensation.

#### Does your farm meet the six criteria for a volunteer?

Folks are often willing to work on sustainable farms for “free.” Some want job training, others simply appreciate the opportunity to be out in nature and see where their food comes from. Is this okay? Yes, so long as the farm meets certain criteria. Both the US Department of Labor Wage and Hour Division (US DOL) and the Vermont of Labor (VT DOL) consider the following six factors when determining whether someone is a true volunteer.

#### 1. The farm must be operating as a nonprofit organization

The harsh reality is that there’s no such thing as a “volunteer” for a for-profit business. Vermont law defines an employee as someone who an employer directs or permits to work for her so the employer can retain a profit. Likewise, a for-profit operation is traditionally motivated by profits. Someone who does work at a for-profit farm is generally helping the farm meet that end. The fact that the worker isn’t paid is not relevant—the farm is being helped and the farm owner is permitting the work. That means the worker is an employee (unless they are an intern or independent contractor). The federal definition of a volunteer is someone who is motivated by charitable or humanitarian reasons *for a public agency* with no expectation of receiving compensation for her services. So, volunteering for a for-profit business just doesn’t work under the dominant legal paradigm.

The reasoning behind this is again about preventing exploitation and coercion of workers. As the theory goes, the business owner is effectively making money off the employee, so the employee deserves a cut in it. Otherwise the economic and power dynamic is just not equitable.

With that said, there is one scenario when a for-profit farm can have a “true volunteer.” This would be the case if someone is motivated solely by play and leisure and the farm benefits in no way from their efforts. For example, let’s say a mother and her young child come to Amanda’s farm to pick raspberries simply for the joy of it. They take home all the proceeds of their efforts—baskets of raspberries they picked themselves. Even if they get carried away and *accidentally* pick a couple extra baskets, the farm only benefits indirectly. This would be a “true volunteer.”

Aside from this one-off scenario, the farm can only have non-employee volunteers if it is organized and run as a nonprofit. Like a volunteer, the nonprofit is by definition motivated by charitable and humanitarian reasons.

### 2. The worker works less than full-time

This factor protects the workers from coercion and exploitation. If a volunteer works full time for a nonprofit farm, they may become dependent on the farm for their livelihood. Let’s say the nonprofit farm has “volunteers” that work full time and the farm provides them room, board, and essentially all they need for their livelihood. This puts these workers in a potentially exploitative situation. The workers may feel pressured to do everything the farmer says to protect their living arrangement, even if unfair working conditions prevail. This is precisely the type of arrangement that employment laws protect. Nonprofit farms should be careful not to create such a dependency relationship. The best way to do this is to have the volunteers work only part time. This provides them opportunities to create a livelihood outside of the farm.

### 3. The worker offers the services freely, without pressure or coercion

The volunteer needs to have some level of autonomy. As the name depicts, a volunteer must “voluntarily” agree to the tasks at hand. While the farmer can provide instruction and direction, the farmer cannot force a volunteer to do arduous or repulsive tasks such as shovel horse manure for hours on end—unless, of course, the volunteer freely volunteers to do it!

In addition, the non-profit farm cannot force a regular employee to perform volunteer services for free. Forcing an employee to volunteer is by no means volunteering! With that said, the farm can have a one-off event, such as a weekend fundraiser, and open up volunteer opportunities to regular employees. However, the farmer cannot require employees to participate or make it in any way a condition of continued employment.

#### 4. The worker doesn't expect to be compensated

This gets to the heart of the legal definition of a volunteer—someone who does not expect compensation for the services offered. If the worker expects compensation in return, they are not a volunteer. This brings up a couple key points.

First, farmers who provide some compensation to volunteers—whether in the form of cash or in-kind payments—should tread cautiously. By paying volunteers some compensations, the farmer risks making it look more like an employee arrangement. The “volunteer” begins to expect this compensation. Farmers in Vermont who are required to pay at least the minimum wage to their employees should strongly consider ratcheting up any compensation provided to volunteers to at least the minimum wage amount. Otherwise, they may be better off risking it and paying their volunteers no compensation, as it will look less like an employment arrangement. In Vermont, farms with 500 or more man-days must pay at least the federal minimum wage. A man-day is any day on which a person does at least one hour of work. Farms assigning non-agricultural labor tasks to workers must pay at least the higher Vermont minimum wage.

In addition, as mentioned earlier, a non-profit farm cannot suddenly require a regular employee to do the work they regularly do for free. For example, let's say the farm is running low on cash. The farmer can't ask the employee to work for free for a couple weeks to get the farm through a tough time. The law sees this as unfair to the employee who expects compensation for their work. The farm will need to figure out another way to make payroll.

#### 5. Your nonprofit farm does not undercut prices to unfairly compete with other farms

In addition to protecting the workers, the law is also interested in protecting overall fairness in the marketplace. Nonprofit farms gain a bit of an advantage over for-profit farms given they don't have to pay their volunteers. They can, in turn, undercut their prices. This runs counter to how the free market system is supposed to work, so the law does not allow this! If a nonprofit farm is using its volunteer base to get an upper hand at the market, the law may step in and say that the volunteers must be treated and paid as employees. What can the nonprofit farm do to prevent this? First, the nonprofit farm should be sure that the tasks assigned to volunteers are typical of volunteer tasks. Basically, they should be more tangential than essential to the farm's core operations. While the

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For more details on the state and federal minimum wage requirements in Vermont, including an explanation of the federal 500 man day agricultural labor exemption to minimum wage, see pages 5-10 of [Hiring a Farm Employee in Vermont: Tax and Paperwork Checklist](#).

volunteer base can offer a significant help to the nonprofit farm, the volunteers should not be running or even playing a critical role in the operation. In addition, the farm should be sure to charge the going market rate for its products.

#### 6. Your nonprofit farm does not rely on the worker for essential duties

This factor goes hand-in-hand with the previous factor. The volunteer's work should be informal. This means that if the volunteer doesn't show up, the farm's regular operations won't be significantly affected. In other words, the volunteers should not be fulfilling essential duties of the organization that would otherwise be done by paid employees. One way the law gauges this factor is to see if regular employees are being displaced by volunteers. If they are, it's looking more like an employee. To be on the safe side, the nonprofit farm should continually ask itself whether volunteers are displacing their employees. In addition, if the volunteer is being told to come in at a specific time for a specific duration on a specific day, the law will most likely see this as an employee. Farmers should extend flexibility and forgiveness to volunteers and not become overly dependent on them.

#### Now What?



Farms that do meet the volunteer criteria

**“This is terrific! I already looked into setting my farm up as a nonprofit with my mission to train the next generation of sustainable farmers! What now?”**

Farmers like Farmer Ralph who have a non-profit farm and feel they meet these criteria should review *Managing Risks of Interns and Volunteers in Vermont* for more information on the legal aspects of hosting volunteers.



Farms that don't meet the volunteer criteria

**“Okay, clearly I cannot have unpaid volunteers as I am operating my farm as a for-profit. So what does this mean?”**

Farmers like Amanda will most likely need to treat their workers as employees. First, however, they can review the criteria in the next two sections for independent contractors and interns to see if they might qualify.

## Independent contractors

### Legal Definition:

What is an independent contractor? The law defines an independent contractor as someone who performs a specific service for another while having **control** over precisely how the work is done.

### Does your farm meet the six criteria for an independent contractor?

Farmers may be asking, what are the benefits of classifying workers as independent contractors? The main benefit in Vermont is that the farm is not required to pay minimum wage, carry workers' compensation, or pay payroll taxes for independent contractors—whereas the farm may have to for employees (depending on available exemptions). When farm budgets are tight, the flexibility that independent contractors allow can seem attractive. However, if the farm misclassifies a worker as an independent contractor, it potentially faces penalties and fines at both the state and federal level.

The Vermont Department of Labor (VT DOL) uses the ABC test to determine whether a worker is an independent contractor versus an employee. The ABC is not an acronym, but rather signifies a three-part test. All three criteria must be met for the worker to be considered an independent contractor. Vermont's ABC test is more stringent than the test used by the US Department of Labor (US DOL). Farmers must be particularly cautious that they are following Vermont's legal criteria for independent contractors if they choose to have independent contractors.

Before getting into the details of the legal criteria, it's helpful to start with a "perfect" example of an independent contractor—a plumber. The plumber comes to your house, brings her own tools, and her skills and expertise to determine what needs to be done to reach your goal of fixing your pipes. She doesn't take orders from you. Also, she likely has other clients, and has business skills to build her plumbing business. You hire her for a specific project, and while you may call her back when things break, you don't have a permanent or ongoing relationship. This is a true independent contractor. With this in mind, let's turn to the criteria.

### **A: The worker is free from any control and direction over how the work gets done**

Under this criteria, the worker is an individual contractor if she completes the work with no direction, supervision, or set hours. The worker is more likely an independent contractor if the farmer provides little to no instruction for how the task gets done and simply cares about the end result. That's because the law assumes that independent contractors are already skilled at the services they provide. They know best how to do the work. If the farmer trains or instructs the worker on the specifics for how to pull weeds or how to transplant tomatoes, it's likely an employee. In addition, the independent contractor typically sets their own schedule. So if the farmer is telling her workers exactly when to arrive and how long they must work out in the field, they're likely employees. However, the farmer can set a deadline or a time when the project needs to be completed. Independent contractors can choose to hire and pay assistants if that's what it takes to get the job done on time. If any assistants are hired, these folks must be supervised by the independent contractor and not the farmer.

Also, independent contractors are typically paid for the services they provide. They often bid out the project and their pay is typically not based on an hourly, weekly, or monthly rate.

### **B: The worker does not perform tasks or services that are core to the farm business**

Independent contractors must conduct tangential tasks and not the core or day-to-day tasks of the farm operation. One way the VDOL measures this is to assess whether the worker performs tasks that other employees perform. For example, core tasks like harvesting crops on a daily basis would not be appropriate for an independent contractor. These tasks are essential and get to the core of the farm operation; they are typically completed by employees. However, a farmer may hire an independent contractor to install or fix the irrigation system or build an equipment shed, as these are more one-off projects.

In addition, if the worker performs the service at her own facility it often looks more like an independent contractor. For example, the farm may decide to outsource its accounting to an independent contractor who does the work from her own office.

### **C: The worker must be in business for herself**

An independent contractor is generally someone who demonstrates business

skill and initiative. Like the plumber, she's building her client base to run an independent business. The independent contractor typically has her own specialized tools and equipment rather than using the farm's tools and equipment. She may also have her own employees, which she manages. The independent contractor will also have her own unemployment insurance account with VDOL.

In addition, an independent contractor typically has a number of clients and doesn't work solely for one farm. Independent contractors conduct their own advertising to promote their services. After all, they're operating a business and to be successful they need a broad client base. If the worker primarily works for the farm, or is essentially "full time," it's most likely an employee and not an independent contractor.

### Now what?



Farms that do meet the independent contractor criteria

**My neighbor Alex has a hay baler and I was thinking about hiring him to bale some hay for me this season. I am sure I can meet the above criteria.**

**What next?**

Independent contractors are not covered by employment laws such as workers' compensation, minimum wage, and others.



Farms that do not meet the independent contractor criteria

**"We now realize that our day-to-day workers clearly don't meet the criteria for independent contractors. What do we do now?"**

So you don't meet these criteria? This means you don't have an independent contractor. You likely need to go back to the default classification of employee. First, there's one more option: interns. Read the following section to confirm your status there. Or, assume you have an employee and skip to the last section.

**Interns**

**Legal definition:**

What is an intern? Unfortunately, the law does not provide a precise definition of an intern; however, the legal criteria for an intern emphasizes the **educational** dimension of the arrangement. In addition, the intern should be the sole beneficiary, or at least the primary beneficiary, of the internship program.



**Does your farm meet the legal test for a non-employee intern?**

**“I love having college students working on my farm over the summer. And I provide them extensive training. What about having interns instead of employees?”**



**“What if I decide not to form a nonprofit and therefore can’t have volunteers. Can I run my educational farm as a for-profit with interns instead of employees?”**

These are tough questions, as the law surrounding non-employee interns is rather complex. Like Amanda and Ralph, farmers are attracted to offering “intern” positions because they want to offer a lot of education. However, farmers are often under the impression that because education is such a strong component, the intern is different than a regular employee. This is a misimpression. Simply providing education to a worker does not mean the worker is not an employee. Even if the farmer calls the worker an “intern,” the law will treat the worker as an employee unless they meet the legal test for interns. The legal intern test is quite robust.

With that said, the law surrounding non-employee interns is in a bit of flux. Up until the past few years, the US Department of Labor (US DOL) was the authoritative voice throughout the country on interns. They have established a set of six factors that must be met for a worker to be a non-employee intern. However, interns in various industries have recently been filing lawsuits against their employers throughout the country. In these cases, the interns have argued that they are employees and have a right to wages and all the other benefits and privileges of employees. As a result, federal courts in certain parts of the country

have weighed in. One court in particular—the Second Circuit Court of Appeals—has said that the US DOL’s criteria is too robust. Instead, this court created its own set of criteria, which has since been adopted by a few other federal courts around the country. The good news for Vermont farmers is that the Second Circuit Court of Appeals governs federal law in Vermont (along with New York and Connecticut). Therefore, Vermont farmers can feel relatively confident in following the court’s more lenient approach. However, until and unless the U.S. Supreme Court weighs in and provides clarity once and for all, there’s still a level of uncertainty.

Uncertainty in the law can be confusing and frustrating, as it carries risks. What are the risks here? If the farmer treats their workers as non-employee interns and the law determines otherwise, the farmer risks having to pay back wages (i.e., if the state and federal agricultural labor exemptions to minimum wage do not apply), back taxes, penalties, and lawsuits.

With this in mind, farmers basically have two options. Vermont farmers who are risk adverse and want to play it absolutely safe should follow the US DOL’s strict approach. Farmers who are less risk adverse can choose to take the more lenient approach established by the federal courts. We’ll briefly cover each of these approaches now.

For more details on these criteria and the state of the law on interns, see Farm Commons’ resource *Managing Risks of Interns and Volunteers in Vermont*.

**US DOL’s strict approach:** *All* of these six factors must be met in order for the worker to be considered an intern and not an employee.

1. The farm provides training that is similar to a classroom educational experience
2. The farm gets no immediate advantage from the worker
3. The farm has separate staff whose primary role is to run the internship program
4. The position is not a trial period for a future paid position
5. The overall experience is for the benefit of the worker, not the farmer
6. The worker understands that the position is unpaid or less than minimum wage

**Some federal courts’ lenient approach:** Some federal courts have adopted an approach that differs from the DOL’s strict approach in four significant ways.

1. Not all of the US DOL’s factors need to be met
2. The intern, not the farmer, must be the “primary beneficiary” of the internship program
3. The farm can benefit from the arrangement, so long as the intern is the “primary beneficiary”
4. Education must be the focus of the internship experience

**Now what?**

Farms that do meet the DOL’s strict criteria for interns OR are willing to take the risk and follow the more lenient approach taken by some federal courts



**“This is great! I’m nearly certain I meet all of the DOL’s six criteria. I’m already working in partnership with a college and I’m certain I’ll be able to arrange academic credit for my interns. My mission is to help young aspiring farmers and I’m willing to dedicate my time and energy toward providing training to interns so they can start their own farms.”**

The law surrounding interns is uncertain, and involves a level of risk. Farmers should read *Managing Risks of Interns and Volunteers in Vermont* for more information on working with interns and to learn ways to minimize risk.



Farms that do not meet the legal criteria for interns

**“I don’t think I meet these criteria. I know I can’t risk the harm of an enforcement action. What do I do now?”**

Farmers uncertain if they meet the non-employee intern criteria should read *Managing Risks of Interns and Volunteers in Vermont* for more information. If these criteria are not met, the farm’s interns are legally classified as employees.

## Employees

### Legal Definition

**What is an employee?** Vermont law defines an employee as someone who an employer directs or permits to work for her so the employer can retain a profit.

### Employee is the default category

Bottom line, if someone performs work for a for-profit business the assumption is that he or she is an employee. That is, unless that person can be classified as an independent contractor or a non-employee intern. Again, for-profit businesses generally cannot have volunteers, so that is not an option.

### Now what?

What must farmers do when they have employees? They must follow all applicable state and federal employment laws. For a detailed overview of these requirements, see *Hiring a Farm Employee in Vermont: Tax and Paperwork Checklist*.

## Remaining Questions?

Farmer Amanda still has some questions, which are common to many farmers.



**What about the websites and programs that help me find travelers and vacationers who work on my farm in exchange for housing and food?**

Everything in this guide applies to worker networking services. The above are your options: independent contractors, interns, employees, or volunteers. There's nothing else. No matter how the farmer finds the worker, they will fit into one of the above categories. Again, farmers should work under the assumption that everyone who performs work for a farm is an employee. The worker can only be classified as something else if the worker meets the criteria for a volunteer, intern, or independent contractor.



**What about work trade and in-kind payment arrangements (i.e., room and board)? Do those affect their classification?**

Work trade and in-kind arrangements do not affect the classification as described in this guide. Farmers can certainly pay their employees in room and board to meet any minimum wage requirements; however, that is a separate issue. For more details on in-kind arrangements, see the Farm Commons resource: *Managing Risks of Interns and Volunteers in Vermont*.



**What if my workers don't care how they are classified?**

It does not matter. By law, someone cannot waive their right to protections provided under employment laws. Unlike other areas of law, employment law is simply nonnegotiable. This is because of the overarching policy reasons behind employment laws, including the prevention of coercion and oppression in the workplace.



**What if I still don't know which classification my workers fall into?**

Farmers who still have questions or are left with uncertainty as to the proper legal classification of their workers can seek further assistance from the following:

- **Vermont Department of Labor:** <http://labor.vermont.gov/contact-us/>
- **United States Department of Labor:** <https://www.dol.gov/general/contact>
- **Internal Revenue Service:** <https://www.irs.com/articles/contact-the-irs>
- **An attorney familiar with agricultural employment laws in Vermont**

## Conclusion

Employment law can seem overwhelming and complex. A key takeaway is that when in doubt, play it safe. If you treat your workers like they are employees, you are going a long way to minimize your liability risks.

Again, for further guidance, be sure to check out other related materials on employment law in Vermont provided by Farm Commons:

*[Hiring a Farm Employee in Vermont: Tax and Paperwork Checklist](#)*

*[Managing Risks of Farm Interns and Volunteers in Vermont](#)*

The following are some additional recommended resources on employment law for Vermont farmers:

*[Vermont Farm Worker Wage, Hour and Housing Fact Sheet](#)*

Provided by the VT Agency of Agriculture Food and Markets

*[FAQ: Labor Regulations for Farmers](#)*

Provided by the Northeast Organic Farming Association of Vermont

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