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An Agricultural Law Research Publication

Handbook of Laws and Regulations Affecting Arkansas Farm Employers and Employees

by

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and
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INTRODUCTION

The number of laws and regulations which affect agricultural employers and employees continues to increase at both the state and federal levels. This expansion of the body of law applicable to the employment relationship is, for the most part, due to laws enacted and promulgated for the benefit of farm employees. For this reason the farm employee should be aware of the basic provisions of these laws and regulations. Employers, likewise, will find useful a ready source of information on at least the basic provisions of these laws and regulations. It is to this end that this handbook is dedicated.

This handbook is intended to provide a convenient reference to the major provisions of the state and federal laws and regulations which affect farm employers and employees. It reflects state and federal laws as of June 15, 1993 as they apply to farm workers but not necessarily to workers considered non-agricultural. This handbook is not intended to provide answers to the more technical aspects of the laws summarized or legal interpretations of questions of law. Its purpose is simply to remind employers and employees of the fundamental provisions of the laws which govern their relationship.

This handbook is intended as an educational tool and does not and should not substitute for specific technical advice from responsible state and federal agencies, knowledgeable grower associations, or legal experts in the agricultural labor law field. It is not a substitute for the advice of legal counsel regarding specific situations.

THE EMPLOYER-EMPLOYEE RELATIONSHIP

The farm operator who hires employees does so by creating one of three possible legal employment relationships: a principal-agent relationship, a master-servant relationship or an employer-independent contractor relationship. Each brings with it rights and duties on the part of both the employer and the employee. Some of the rights and duties are recognized by the courts as arising because of the nature of the relationship; others are rights and duties derived from statutory programs at the federal or state levels.

While the primary focus of this handbook is on the laws and regulations found in these statutory provisions, the employer and employee must keep in mind that important aspects of their relationship are governed by common law rules created by the courts over the years in order to resolve questions that have arisen in situations where no statutory guidance has been available.

I. Rights and Duties of the Employer and Employee:

A. Principal-Agent

The most important aspect of the principal-agent relationship is that the principal (employer) may be liable for contracts made by the agent (employee) on behalf of the employer if made within the scope of the agent's authority. This is because the nature of the principal-agent relationship is that the agent is authorized to represent the principal in business dealings with third parties. The authority can, of course, be clearly stated in the employment agreement but it may also be implied in some cases. That is, if the nature of the duties is such that a third party could reasonably assume that the agent was acting with authority, the principal can be bound by the agent's acts. Thus, employees who are typically in positions involving decision-making may be considered agents even if the employment agreement does not specifically spell out their authority. A farm manager or an attorney fits the usual definition of agents. Note that the agency may be general, as in the case of the farm manager, or it may be "special," as in the case of the attorney who is authorized to act with regard to a particular transaction.

B. Master-Servant

Some employees have little or no authority to act on behalf of the employer. At common law, such employees were called "servants" and the employer was designated as "master." The master retains control over all decision-making and the servant is given little management discretion. While it is not usually assumed that such employees may act as agents, and thus bind the employer contractually, it is possible for the employer to be responsible for the actions of the employee under the doctrine of *respondeat superior* ("let the master respond"). If the employee commits a wrongful act while acting within the scope of employment the responsibility is also that of the employer. Usually, this occurs in the context of negligent conduct which causes injury or damage to a third party who then sues both the employer and the employee. An employer is generally not responsible for intentional acts of an employee unless they are closely related to the employment.

Independent Contractors

The third category of employees is that of independent contractors. "Custom operators" in agriculture serve as the best example. The independent contractor agrees to do a specific task, using his or her own methods and without being under the control of the employer, except as to the result of the work. The prime test is whether the employee has retained control over the method of doing the job. Ordinarily, the independent contractor also supplies his or her own tools and equipment.

The independent contractor is usually not authorized to act as an agent of the employer and has no power to bind the employer by the employee's contractual acts. Similarly, the employer is not usually liable for the wrongful acts of the independent contractor. There are two general exceptions to this rule: when the employer was negligent in hiring the contractor (for example, knowing of inexperience or previous bad actions) or negligence in giving the independent contractor faulty plans or specifications for the work. Also, the employer can be held liable for damages or injuries caused by the independent contractor if the work itself is inherently dangerous. For example, landowners have often been held liable for damage caused by aerial application of pesticides, although the damage resulted from the negligent actions of an aerial applicator (usually an independent contractor) because the spraying itself can be inherently dangerous to neighboring property if not conducted correctly and free of negligence.

II. Employee Tort Actions Against the Employer:

In addition to legislation protecting their rights and on-the-job safety, employees are also protected by a substantial number of common law tort actions that can be filed against employers. A tort is a legal wrong committed by one person against another person and/or their property. The following is a sampling of the more common tort actions filed by employees about which employers need to be cognizant.

A. Negligent Hiring and Retention of Employees

All employers, including agricultural employers, must use reasonable care in selecting new employees. Employers have a duty to protect current employees, and third parties, from employees whose actions cause a risk of harm to others. A negligent hiring and retention case can arise from hiring an employee who is unfit for his or her duties. Fitness, of course, varies with the job at issue. For example, if an agricultural employer uses heavy equipment in his or her farming activities the employer would need to hire employees capable of handling such equipment. If an employee was then injured by the negligent actions of an inexperienced co-worker, the employer could be liable to the injured employee under the negligent hiring and retention doctrine.

Negligent hiring and retention cases can also arise where an employee intentionally abuses other employees or third parties. The abusive employee is also an "unfit" employee. A good example of such an employee is one who sexually harasses other employees. Not only is sexual harassment a federal statutory violation, it also can be a separate independent tort action. In one case, an employer was sued by employees for the negligent hiring and retention of a co-worker

who made sexually suggestive remarks to other workers. The offended employees had repeatedly complained to the company's general manager who, despite having authority to hire and discharge employees, refused to discharge or discipline the abusive employee.

To establish the employer's liability in a negligent hiring case, the complainant must prove that (1) the employee who caused the injury was unfit for his or her employment; (2) the employer's hiring (or retention) of the unfit employee was the proximate cause of the injury; and (3) the employer knew, or should have known, of the employee's unfitness.

Because an employer rarely has direct knowledge of an employee's unfitness, many of these cases hinge on the extent of the employer's pre-hiring background check of the unfit employee. Did the employer do what a reasonably prudent person would have done in investigating the unfit employee's prior work history, including checking references? If the employer had conducted a more thorough background investigation, would the employer have discovered the employee's unfitness?

Given the substantial compensatory and punitive damage awards possible in negligent hiring (and retention) cases, all employers can expect a future increase in these actions. To reduce exposure to this type of action, an employer should verify that a job applicant possesses the necessary licenses and certificates required by the job. An agricultural employer should also check with the applicant's former employers as to job performance and relationships with other employees. If possible, state and federal authorities should be contacted as to the applicant's criminal record. Unfortunately, many states will not permit police departments to provide employers with certain criminal records of prospective employees.

B. Defamation

Any communication may be defamatory if it is false and tends to injure the employee. Defamation can take two forms: slander, which is defamation through speech, and libel, which is defamation by the written word. "Defamation actions are gaining popularity in a variety of employment-related contexts. Current employees may allege defamation in connection with performance evaluations, workplace investigations, drug testing, or, most recently, AIDS-testing. Former employees may allege defamation related to their terminations or to post-employment references."

Often, work place defamation is *per se* defamation in that the libel or slander directly affects the aggrieved employee's job or profession. *Per se* defamatory communication is presumed to be injurious and the defamed employee is not required to prove special or actual damages in order to recover. Examples of *per se* defamation include remarks denigrating an employee's business abilities, allegations of criminal conduct, and statements indicating that an employee has a venereal disease.

There are a number of defenses available to an employer accused of defamation. Truth is an absolute defense to the employee's defamation action. "Qualified privilege" may also be raised

as a defense. The "qualified privilege" defense is available if the employer possessed a good faith belief that the statement was true, served a legitimate business purpose, and was published to an appropriate individual who had a legitimate business purpose in receiving the information. Qualified privilege, however, is not a defense if (1) the communications are made to individuals who have no legitimate business reason for knowing the information, and (2) when the employer acts with malice—a reckless disregard for the truth and an intent to injure the employee.

C. Invasion of Privacy

An invasion of privacy can occur (1) by appropriating one's name or likeness; (2) through an unreasonable intrusion upon another's solitude or seclusion; (3) through publicity or disclosure that unreasonably and publicly places a person in a false light; and, (4) through the unreasonable publication or disclosure of private facts about another. Although an employer could commit any one of the four described invasions, most cases involving employers arise out of a public disclosure of private facts concerning an employee.

If an employer publicly discloses private facts about an employee, without the disclosure serving any legitimate business purpose, the employer may be subject to an invasion of privacy lawsuit. The truthfulness of the revealed facts is not a defense to the employee's cause of action. The invasion of privacy cause of action stems from the fundamental doctrine that each person has a right to be left alone.

A common source of privacy litigation is the public disclosure of information contained in personnel files. Such files contain confidential information (e.g., medical history) and other sensitive information from sources such as completed application forms. The disclosure of such information to other employees could result in an invasion of privacy claim, unless the other employees had a legitimate reason to have that information.

Many states have enacted statutes specifically limiting an employer's right to invade an employee's privacy. State statutes not only prohibit the unreasonable disclosure of an employee's personnel and work records, but also limit drug and alcohol testing, AIDS testing and polygraph testing. Defenses available to an employer accused of invading an employee's privacy include justifiable business reason, disclosure because of a need to know, employee consent or waiver, qualified privilege, information was not made public, information was not private, disclosure was required by law and employee suffered no damages or harm.

D. Infliction of Emotional Distress

The infliction of emotional distress theory of recovery is extremely broad and is often referred to as the "catch-all" tort theory in employer-employee relations. The tort arises out of conduct that is outrageous and intolerable in a civilized society. Infliction of emotional distress cases tend to overlap with other independent tort actions. Examples of conduct which can give rise to this cause of action include invasions of privacy, verbal or physical harassment, false performance appraisals, and exposure to toxic substances.

An infliction of emotional distress case can arise where an employee is hypersensitive, provided the employer knows of the employee's hypersensitivity. For example, if an employer forced an employee who was claustrophobic to work in a closed or narrow space, and the employer knew of the employee's condition, the employer would be vulnerable to an infliction of emotional distress claim.

E. Assault and Battery, and Related Quasi-Criminal Conduct

Assault and battery are intentional torts. Assault is the threat to inflict injury to another person, while battery is the act of inflicting the injury. Like the intentional infliction of mental distress, assault and battery cases arise in conjunction with other torts, such as sexual harassment. A fertile source of assault and battery cases is false imprisonment claims. False imprisonment cases often occur when an employee is detained in relation to an investigation of work place theft. In a false imprisonment case it must be shown that the imprisonment resulted from actual force, or by an express or implied threat of force. Polygraph testing, drug testing and exposure to toxic substances have also resulted in assault and battery cases.

F. Wrongful Termination of Employment

Just as an employer must be careful in hiring an employee, an employer must also be careful in terminating employment. In the absence of an express contract of employment, most employer-employee relationships traditionally have been regarded as "at will". The hallmark of an employment at-will was, until recent years, the fact that either the employer or employee could terminate the employment relationship at any time and without justification. The employee served entirely at the employer's pleasure, yet was equally free to "walk away." Today, however, employers do not have unfettered discretion to fire employees. Instead, state law often permits a fired employee to recover damages from his former employer unless the employer can show good cause for the dismissal.

To understand what circumstances may give rise to liability for wrongful termination, an employer must consider (1) what "good cause" for dismissal means, and (2) the potential claims an aggrieved employee may advance against his former boss in a wrongful termination suit. In all jurisdictions, an employer may dismiss an employee if the conduct or performance of the employee provides the employer with "good cause" to terminate. As the Texas Court of Appeals noted in *Lone Star Steel Co. v. Wahl* 636 S.W.2d 217 (Texas 1982), "good cause is essentially an employer's only defense in a breach of contract action when the employee has been employed for a definite period of time." "Good cause" has been interpreted to mean, among other things: any conduct which constitutes a material breach of the employment contract, performance that does not measure up to that expected of the reasonably prudent person, or the employer's good faith belief that the employee's continued employment is not in the employer's best interest.

However, it is not enough for an employer to merely claim that good cause for termination existed; he must also be able to rebut the employee's claim of wrongful termination. Although the burden of proving that the dismissal was wrongful is upon the employee, the employer must be prepared to go forward with evidence of "good cause" for termination once the employee has set forth a *prima facie* case of wrongful termination. Therefore, to effectively avoid liability for wrongful termination, an employer should establish formal procedures for employee performance

review and disciplinary action. Detailed evaluations of each employee's performance, as well as records of any disciplinary measures and the reasons for implementing such measures, must be kept in the employer's regular course of business. Whenever appropriate, such records should be signed by both the employer and the employee to demonstrate that the employee had notice of the information contained in the reports.

Three theories of recovery generally are available to the aggrieved employee:

- (1) Breach of an express or implied contract not to terminate except for good cause;
- (2) Breach of an implied promise of good faith and fair dealing; and/or
- (3) Wrongful discharge as a tortious act.

Here the discussion addresses only those common law "exceptions" to the employment-at-will doctrine that have emerged in recent years. Causes of action may also be based upon violations of various federal or state statutes. For example, under the federal Employment Retirement Income Security Act (ERISA) a cause of action is created for employees who can show that they were discharged for the purpose of preventing payment of pension or disability benefits.

1. Express Contract to Terminate for Cause Only

A former employee who asserts that he was fired in breach of an express or implied promise not to be dismissed except for good cause does not necessarily claim that his employment was governed by a formal, written contract of employment. Instead, he or she will probably base such a contract claim on an alleged promise (whether written or oral, express or implied) inadvertently made by the employer.

2. Implied Covenant of Good Faith and Fair Dealing

Any employment relationship is, among other things, a contract. In addition to the express promises contained in contracts, courts interpret most contracts as containing an implied covenant of good faith and fair dealing. The covenant of good faith and fair dealing generally mean that the parties to the contract promise to do nothing which will have the effect of destroying or injuring the right of the other party to receive the benefits of the contract. Although these terms may not be part of the bargain struck between the parties, courts often hold each party bound by such implied covenants as if the covenants were express terms of the contract.

3. Wrongful Discharge as a Tortious Act

Some states have recognized a cause of action for wrongful discharge which has nothing to do with agreements between employees and employers. Those states which have recognized a "public policy exception" to the employment-at-will doctrine permit a wrongfully discharged employ to recover in tort if he or she can show the termination of employment to be repugnant to established public policy.

The public policy exception is also triggered when the employee is discharged for exercising a vested or statutory right, since the firing works to undermine the recognized rights of the employee or objective of the legislature. Such claims frequently arise when an employee is allegedly discharged in retaliation for filing a workers' compensation claim.

To help avoid liability for wrongful discharge, the agricultural employer should keep in mind the following:

- (1) Guard against making inadvertent representations of permanent or secure employment, either through oral statements or written policies in employee manuals, memoranda, etc.;
- (2) Understand what constitutes "good cause" for discharge when making a decision to dismiss an employee;
- (3) Maintain complete and accurate employee files.

4. The Arkansas Approach

The Arkansas courts have been willing to find a limited exception to the employment-at-will concept where employees have been discharged in violation of a clear public policy. For example, where an employee is fired for reporting suspicions of employer misconduct or after filing a Workers' Compensation claim, the courts have found such discharge to be a breach of contract. The Arkansas courts do not find such conduct to be tortious.

Where employee handbooks or manuals are provided detailing rights of employees, the Arkansas courts are willing to enforce specific provisions related to dismissal but are not willing to imply a "for cause" requirement where no express clause to that effect exists. Even where a list of causes for discharge is included, the courts, unlike those in many states, do not imply that this limits the basis for discharge to those listed.

EMPLOYER'S RESPONSIBILITY FOREMPLOYEE INJURIES - COMMON LAW

In the absence of Workers' Compensation coverage (to be discussed in the next section) if an employee can show that he or she has been injured on the job by some act of negligence on the part of the employer, the injured employee would have a right to recover for the injury. The employer has an obligation to provide a safe place of employment and safe and suitable tools, equipment, and machinery. However, the employer is not strictly liable for all on-the-job injuries; some negligence must still be shown. The standard of care will be whether the employer exercised that degree of care that should have been exercised by an ordinary, reasonable and prudent person in the same or similar circumstances. This is the traditional test for the tort of negligence. The focus is on discovering who is at "fault."

The concept of fault is also important in employee injury cases because the defenses frequently raised by employers are those of *assumption of risk* and of *contributory negligence*. Either if these doctrines, if successfully asserted, will mean the employee cannot recover from the employer for injuries.

Assumption of risk is based on the idea that an employee knowing of a danger to which he is exposed in his employment, agrees to assume all responsibility for injuries resulting from his continuation with the task if the risks are those usually and ordinarily associated with that type of job. The agreement may be express or implied. The employee must freely and voluntarily continue in the dangerous employment.

Where the risk involves defective machinery, the usual approach is that in order to assert the defense of assumption of risk, the employer must show that not only did the employee know of the defect but that he or she also knew and appreciated the danger that it would pose.

Contributory negligence is similar in that the argument is that the employee's own conduct caused or substantially contributed to the injury. The standard for measuring the negligence of the employee is the familiar "ordinary, reasonable and prudent person" test. If the employee acted with such negligence as to have caused his or her own injury, the employer may assert the defense of contributory negligence.

Because the common law defenses often protect the employer but leave the employee with no suitable remedy for compensation, the states turned to statutory solutions to offer protection to the employee for on-the-job injuries. This protection is most often provided in the form of Workers' Compensation statutes.

WORKERS' COMPENSATION-STATE

Workers' Compensation statutes were enacted to provide workers with some protection in dangerous jobs. The concept has broadened to cover most types of employment. Workers' Compensation, as a form of mandatory insurance, gives the employee a guarantee of compensation for work-related injuries without regard to fault. The amount of compensation is determined by a fixed formula fixed by state statute. In return for the guaranteed compensation, the employee forfeits the right to assert common law claims against the employer for the injury. Funding for the system is provided by insurance premiums paid by the employer.

A. Compulsory Workers' Compensation

In analyzing insurance needs, a farmer must first determine whether state law makes workers' compensation insurance coverage compulsory. At least a dozen states require workers' compensation coverage be provided for agricultural workers in the same manner as their non-agricultural counterparts.

In those states, if you fail to purchase compulsory workers' compensation insurance, you lose certain common-law defenses in any lawsuit filed by an injured employee. For example:

- *Contributory Negligence*. This defense looks at the employee's own carelessness. If the injury is more the fault of the employee than the employer, the employee's recovery is either denied, or reduced.
- *Assumption of Risk*. This defense applies if the employee was aware of the work dangers and chose to be exposed to the dangers. In this situation, he or she may not be entitled to compensation.

But remember, both of these defenses may be lost if compulsory insurance is not obtained.

Second, the employer loses the benefit of any other liability insurance he or she might have. Liability policies commonly state that there is no coverage under the policy for injured employees when state law requires them to be covered under workers' compensation insurance.

B. The Agricultural Exemption

A majority of states exempt some farm laborers from state workers' compensation statutes. Some such as Arkansas exclude all agricultural workers. Others exclude only the workers of farmers who employ less than a certain number of employees, have an annual payroll less than a certain amount, or whose employees work less than a specified number of hours each year.

In interpreting the state exemption for agricultural workers, some courts have found concentrated poultry or hog operations to be commercial activities outside the "agricultural" exemption. In those cases, workers' compensation insurance was found to be compulsory.

Similarly, if an employee regularly shifts from strictly farm work to an assignment of some non-farm work, even if an agricultural exemption exists, the worker must be covered by workers' compensation insurance. An employer who has an employee constantly operating or repairing non-farm machinery, or repairing other non-farm equipment or buildings, may find the agricultural exemption inapplicable if the worker gets injured.

Even those states that exclude agricultural workers from compensation coverage, however, usually give the employer the right to bring their agricultural workers under the state's workers' compensation act. Any agricultural employer who has the opportunity to elect to bring his workers under a state workers' compensation statute should seriously consider doing so, because of the financial security it provides the employer, as well as the benefits it provides the employee.

C. The Case for Workers' Compensation

While state law may make workers' compensation insurance coverage *optional* for agricultural employers, it does not give the employer immunity from lawsuits filed by injured employees. The employer is still obligated to compensate an injured employee if the employee's injuries result from the employer's negligence or failure to fulfill a duty owed the employee.

Employers must provide employees with a reasonably safe workplace and safe tools. Employers must issue rules and warnings so that work can be done in safety, and they must ensure their co-workers are reasonably competent. If the employer breaches any of those duties, and the employee is injured, then the employer is financially responsible.

Workers' compensation insurance offers both advantages and disadvantages to the employer and the employee. For the employer, in most situations, it provides the exclusive remedy to claims filed by an employee. For example, the worker who is entitled to compensation under a state workers' compensation act cannot sue the employer under state product liability laws, wrongful death statutes or federal statutes such as the Occupational Safety and Health Act (OSHA).

However, even workers' compensation will not preclude an action by an employee who is intentionally injured by the employer. Similarly, a few states allow an employee to sue an employer outside of the workers' compensation remedy if the employee has been placed in a position where harm is almost certain to occur, regardless of the employer's intent.

For the employee, workers' compensation insurance guarantees the employee compensation and medical care, even if the employee was at fault. The employer cannot raise the employee's own negligence or fault as a defense. An insured worker is entitled to compensation for any personal injury caused by an accident or disease arising out of an in the course of employment, so long as the injury is caused by, or related to, the employment.

However, employees will find that they may not be fully compensated for their injuries. Workers' compensation does not provide compensation for impotency, pain and suffering, psychological damage or disfigurement. Instead, the worker is paid according to a schedule of

benefits. For each injury, depending on whether the injury is permanent or temporary, the employee will be paid for a certain number of weeks, at a fixed percentage of the worker's average weekly wage, up to a maximum amount.

D. Finding the Right Coverage

If an employer chooses to provide workers' compensation insurance for employees, the employer must also decide what insurance is best. There are basically three ways of securing workers' compensation insurance under state Workers' Compensation Acts.

- Many states permit what is known as self-insurance which is simply a program whereby the employer regularly sets aside sufficient assets to cover potential liability claims. The states that do permit self-insurance have specific regulations for setting up such programs. For many employers, self-insurance isn't a viable option because of the amount of assets that must be set aside to take care of potential claims.

- In some states it is possible to obtain workers' compensation at competitive rates through a state fund. Information about these funds can be obtained through an insurance agent or the state's Workers' Compensation Commission.

- For most employers, state law (as well as economics) requires purchase of workers' compensation coverage through a private insurance company. Insurance company rates for workers' compensation vary greatly. Check for reputation, reliability and financial stability.

There are several services that rate insurance companies. A. M. Best is probably the most well-known. Under its ranking system, the most reliable insurance companies receive an A+ rating. Standard & Poors, as well as Duffy & Phelps, give AAA ratings to the best insurance companies, while Moody's Service identifies the better companies with an Aaa rating. All are helpful in selecting a reliable insurance company.

As far as the actual cost of workers' compensation insurance, it will vary greatly with the type of operation, number of employees and size of payroll. The more employees, the greater the payroll, and the more dangerous the operation, the higher the premiums. An operation's safety record is also a factor.

E. Occupational Diseases

Traditionally, employers have had to concern themselves with traumatic injuries to employees, such as fractures, lacerations and amputations caused by accidents with machines. The safety measures adopted by employers, as well as the insurance protection obtained on behalf of employees, such as workers' compensation, were all directed towards such injuries. However, employers must also now deal with, and prepare for, the ever growing list of occupational diseases. OSHA is now targeting occupational diseases.

1. Occupational Diseases Defined

Occupational illness is not a new phenomenon. The link between substances in the work place environment and illness was first established two centuries ago. At that time it was discovered that a link existed between cancer of the scrotum in chimney sweeps and creosote, a combustion by-product found in chimneys. Since then additional links, such as that between coal mining and black lung disease, have been found.

An occupational disease is defined as any disability arising out of exposure to hazardous or harmful conditions of employment, provided the disease is peculiar to the employment. In other words, there is a greater incidence of the disease occurring in workers in a particular employment, as compared to other occupations, or in everyday life separate from employment. Some states now specifically define occupational disease in workers' compensation statutes and the following Arkansas definition is typical:

"Occupational disease," as used in this chapter, unless the context otherwise requires, means any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee, or naturally follows or unavoidably results from an injury as that term is defined in this chapter. However, a causal connection between the occupation or employment and the occupational disease must be established by clear and convincing evidence.

Occupational illnesses and diseases were initially not covered under Workers' Compensation Acts because of the notion that illnesses and diseases could not be considered to be unexpected (e.g., accidental), since they were recognized and accepted as an inherent hazard of continuing exposure to conditions of the particular employment. This idea, of course, has now been soundly rejected. Courts and legislatures also had the notion that occupational disease should be treated differently from occupational injury because hyper susceptible employees should be beyond the coverage of Workers' Compensation statutes. Obviously, this idea is now in revision, as most cases now hold that an individual weakness is immaterial, so long as the particular condition of employment in fact caused the disability beyond that normally prevailing. In addition, even a disease which is normally non-occupational can become occupational if the work facilitates or aggravates its transmission.

Many courts have defined disease in its broadest dictionary meaning of any "serious derangement of health" or "disordered state of any organism or organ." As a result, courts have defined at one time or another all of the following as diseases: back strain, herniated disk, flat feet, deterioration of a toe joint, bursitis, rheumatoid arthritis, sciatic neuritis, gradual paralysis of arm and diaphragm from aggravation of thoracic outlet syndrome, tenosynovitis, varicosity, phlebitis, bronchitis, pneumonia, effeminacy and impotency, psychosis, stroke, and enlarged heart.

As far as agriculture is concerned, a number of ailments are now recognized as being natural to the industry. The following are a few of the more common problem areas:

a. Unusual Chemicals, Dust, Poisons or Germs

If a worker's employment is attended with unusual germs, poisons, chemicals, fumes, dust,

spores, or similar conditions, the courts have had a little difficulty in deciding that any ailment arising out of such activity is peculiar to the employment and is not one of the ordinary diseases of life. All that need be shown is a natural link between the employment conditions and the injury in fact. For example, in one Arkansas case salmonella infection from poultry was found to be an occupational disease.

b. Familiar Elements Present to an Unusual Degree

In order for an employee to recover under an occupational disease claim, it is not necessary that the employee be exposed to unusual chemicals, fumes or the like. In some instances, the disease may be compensable even though the elements to which the employee has been exposed are common. The liability arises out of the fact that the employee has been exposed to these common elements to an unusual degree. Although exposure to change in temperature is common to all life and employment, exposure to excessive changes in temperature have been found to be compensable.

c. Stress

Over 30 states now recognize stress as a compensatory illness. In the last ten years the number of mental stress claims has gone from virtually zero to more than 10% of all occupational disease claims.

d. Cumulative Traumatic Disorders

Cumulative traumatic disorders are illnesses of the musculoskeletal and nervous system that involve damage to tendons, tendon sheaths and related bones, muscles and nerves of the hands, wrists, elbows, arms, back or legs. They are conditions that result from repetitive motion or exposure rather than a single traumatic event.

Cumulative traumatic disorders are a major and ongoing problem in the meat industry, especially in packing and slaughterhouses. While meat industry cases have focused primarily on processors, these disorders can occur in any segment of the meat industry where repetitive work tasks are involved.

e. Infectious Diseases

Employees who constantly work with animals and come into physical contact with them during handling operations may contract an infectious disease from the animals. For example, brucellosis is a disease that can be transmitted from animals to humans. The primary carrying agents of brucellosis are cattle and swine. Brucellosis in employees has been the subject of a number of workers' compensation cases. Some courts have refused to recognize an employee's brucellosis as an occupational disease, because of its infrequency among workers who handle cattle or swine.

Those courts, while they concede the connection between brucellosis in humans and the handling of infected cattle and hogs, do not believe that the disease occurs with enough regularity in people to be the usual and expected result of such work.

Other courts, however, have not been reluctant to declare brucellosis in employees to be an occupational disease. For such courts, it is enough that the disease of brucellosis in humans is an incident of handling and working with cattle and swine, regardless of the frequency of the occurrence.

Furthermore, some of the courts, that have not recognized brucellosis as an occupational disease, have still allowed employees to collect workers' compensation benefits on the basis that the employee sustained an accidental injury while on the job. These cases usually involve workers who received cuts or scrapes while on the job and then became infected. Some courts have simply decided that brucellosis may be an occupational disease or an accidental injury. The final determination simply depends on the facts of the case. Regardless, brucellosis in an employee is still compensable.

f. Occupational Loss of Hearing

Courts have also been receptive to finding that hearing loss due to long term exposure constitutes an occupational disease and thus is a compensable claim. While most of these cases have arisen in industrial operations they certainly are by no means confined to operations in which extensive machinery is used. It simply need be proven that the hearing loss results from acoustic trauma suffered over a period of time.

2. Unique Problems of Occupational Diseases

Occupational diseases present employers and their insurance carriers with some unique difficulties. One critical problem is that of latency. Unlike traumatic injuries, an occupational disease may not manifest itself until many years after the exposure to the particular hazard. And, when a particular occupational disease does manifest itself, there may be a flood of such cases.

OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA) - FEDERAL

A. Overview

The Occupational Safety and Health Act of 1970 (OSHA) 29 U.S.C. § 651 *et seq.* (1970 & Supp. 1992) assures safe and healthful working conditions for employees. OSHA applies to private employers engaged in business affecting commerce. The broad judicial interpretation of commerce subjects virtually every employer to OSHA requirements. OSHA requires employers to provide places of employment free of recognized hazards causing, or are likely to cause, death or serious physical harm to employees.

The United States Department of Labor constantly promulgates safety and health standards with which employers must comply. OSHA defines "occupational safety and health standards" as: "[a] standard which requires condition, or the adoption or use of one or more practices, means, methods, operations or processes reasonably necessary or appropriate to provide safe or healthful employment or places of employment."

Some key aspects of OSHA already applicable to employers in general, include informing employees of safety regulations, adequate supervision of employee's activities, exercising due care in hiring co-workers, supply and maintenance of necessary equipment and warning employees of hazards inherent in the work place.

OSHA does not give an employee a private cause of action against an employer for violations. Enforcement is the responsibility of the Department of Labor. OSHA violations, however, can be used as evidence in an independent tort action filed by an employee for on-the-job injuries suffered as a result of the negligent or intentional conduct of an employer.

OSHA regulators have become much more aggressive in recent years in citing employers for violations, especially where employees have been exposed to health hazards. Millions of dollars in fines have been assessed against employers for such actions as having excessive carbon dioxide levels in buildings, failing to provide employees with respiratory protection and failing to provide workers with written procedures to follow in case of chemical leaks. Criminal actions have also been brought against employers when OSHA violations have resulted in employee deaths. In one case, a company's executives were successfully prosecuted because of the deaths of employees recklessly exposed to toxic chemicals.

B. Who must comply

All agricultural employers of one or more workers engaged in a business that affects interstate commerce must comply with OSHA regulations except:

1. Farm operators who employ only their own farm family members.

2. Farm operations employing 10 or fewer employees during the previous 12 months and do not maintain a migrant labor camp.

C. Employers of 11 or more workers must

1. Inform employees of safety regulations and display OSHA posters in a conspicuous place or places where notices to employees are customarily posted.
2. Report within 48 hours any accident which is fatal to one or more employees or which results in hospitalization of five or more employees by telephone or in writing (telegram) to the nearest OSHA Area office.
3. Maintain up-to-date (within 6 working days) records of all occupational injuries and illnesses.
4. Post an annual summary on February 1 of the prior year's occupational injuries and illnesses on OSHA form No. 200 in a conspicuous place or places where notices to employees are customarily posted. Such notice must remain posted for 30 days.
5. Retain all records of occupational injuries and illnesses for five years following the end of the year to which they relate.
6. Insure the ready availability of medical persons for advice and consultation on matters of work place health.
7. In the absence of an infirmary, clinic or hospital in near proximity to the work place which is used for treatment of all injured employees, a person or persons shall be adequately trained to render first aid. OSHA has established "Guidelines for Basic First Aid Training" which detail the training elements which should be covered. First aid supplies approved by the consulting physician shall be readily available.
8. Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.
9. Provide employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious harm to employees.

10. Comply with the specific standards which apply to agriculture:

- Anhydrous ammonia
- Temporary labor camps
- Pulpwood logging
- Slow-moving vehicle emblem, signs and tags
- Roll-over protective structure (ROPS)
- Safety for agricultural equipment, guarding of farm field equipment, farmstead equipment, and cotton gins
- Field Sanitation
- Hazard Communication (Right to Know)

11. At the time of initial assignment and at least annually thereafter, instruct every employee in the safe operation and servicing of tractors and equipment operated by the employee, in the handling of hazardous materials and in employee requirements within the field sanitation standard.

D. Employee Requirements

Each employee must comply with an safety and health regulations which are applicable to his own actions and conduct. He must obey all rules, regulations and safety procedures required by his employer to comply with the law, including participation in safety training and certifying that he has received such training. The employee is not subject to fines for noncompliance as is his employer, however, repeated failure to observe recommended safety procedures or use provided safety equipment is grounds for dismissal when properly documented.

E. Inspections

- There are four categories of OSHA inspections. They are:
 - (a) Imminent Danger
 - (b) Fatality/Catastrophic Investigations
 - (c) Complaints/Referrals
 - (d) Programmed.

The first three categories are considered unprogrammed inspections conducted in response to specific evidence of hazardous conditions at a workplace. Programmed inspections can be health and/or safety inspections and are normally comprehensive in scope.

Ordinarily OSHA Compliance Safety and Health Officers (CSHO) will be admitted to the workplace upon request. Should an employer deny a CSHO admittance, a search warrant must be obtained by OSHA to gain admittance. Following a programmed inspection any recommended corrective action for identified hazards must be accomplished by an agreed upon correction due date. When the correction method is verified, an Exemption Certificate may be obtained which exempts the business establishment from programmed OSHA enforcement inspections for a period of one year. However, unprogrammed inspections may still be conducted as indicated above.

FEDERAL SANITATION STANDARD – FEDERAL

A. Overview

The purpose of this standard is to ensure that employees engaged in hand-labor operations in the field are provided without cost hand washing facilities, potable drinking water and toilet facilities. Employees are to be notified as to the location of the sanitation facilities and water and are to be allowed reasonable opportunities during the workday to use them.

B. Who must comply

Employers who currently employ, or have employed during the past twelve months, at any one time, eleven or more employees engaged in hand-labor operations in the field, must provide toilets, hand washing facilities and drinking water to such employees at no cost to the employee. .

C. Exemptions

- Employers who currently employ 10 or less employees in hand-labor field operations and who have not employed during the past twelve months, at any one time, eleven or more employees engaged in hand-labor field operations.
- Toilet and handwashing facilities are not required for employees who perform field work for a period of three (3) hours or less during the day, including transportation time to and from the field.
- Activities such as logging operations, the care and feeding of livestock, or hand labor operations in permanent structures (e.g., canning facilities or packing houses) are not included in hand labor operations.

D. Definitions

- "Handwashing facility" means a facility providing either a basin, container, or outlet with an adequate supply of potable water, soap and single-use towels.
- "Potable Water" means water that meets the standards for drinking purposes of the state or local authority having jurisdiction or water that meets the quality standards prescribed by the U.S. Environmental Protection Agency's National Interim Primary Drinking Water Regulations, published in 40 CFR Part 141.

- "Toilet facility" means a fixed or portable facility designed for the purpose of adequate collection and containment of the products of both defecation and urination which is supplied with toilet paper adequate to employee needs. Toilet facility includes biological, chemical, flush and combustion toilets and sanitary privies.

E. Employers must

- (1) Provide toilets and handwashing facilities as follows:
 - One toilet facility and one handwashing facility for each twenty (20) employees or fraction thereof.
 - Toilet facilities shall be adequately ventilated, screened, having self-closing doors that can be closed and latched from the inside and constructed to insure privacy.
 - Toilet and handwashing facilities shall be accessible to employees and in close proximity to each other. Facilities shall be located within a one-quarter mile walk of each hand laborer's place of work in the field.
 - Where, because of terrain problems, it is not feasible to locate facilities within the one-quarter mile distance, the facilities shall be located at the closest vehicular access to the field.
- (2) Provide potable drinking water which is readily accessible to all employees as follows:
 - The water shall be suitably cool and in sufficient amounts, taking into account the air temperature, humidity and the nature of the work performed, to meet the needs of all employees.
 - The water shall be dispensed in single-use drinking cups or by fountains. The use of common drinking cups or dippers is prohibited.
- (3) Maintain potable drinking water, toilets and handwashing facilities in accordance with appropriate public health sanitation practices as follows:
 - Drinking water containers shall be constructed of materials that maintain water quality, shall be refilled daily or more often as necessary, shall be kept covered and shall be regularly cleaned.

- Toilet facilities shall be operational and maintained in a clean and sanitary condition.
 - Handwashing facilities shall be refilled with potable water as necessary to ensure an adequate supply and shall be maintained in a clean and sanitary condition.
 - Disposal of waste from facilities shall not cause unsanitary conditions.
- (4) The employer shall notify each employee of the location of drinking water and sanitation facilities and provide employees with reasonable opportunities during the work day to use them.
- (5) It is the employers responsibility to inform each employee of the importance of each of the following good hygiene practices to minimize exposure to the hazards in the field of heat, communicable diseases, retention of urine, and agricultural residues:
- Use the water and facilities provided for drinking, handwashing, and elimination.
 - Drink water frequently and especially on hot days.
 - Wash hands both before and after using the toilet.
 - Urinate as frequently as necessary.
 - Wash hands before eating and smoking.

FIELD WORKER PROTECTION STANDARD FOR PESTICIDE APPLICATIONS- FEDERAL

A. Overview

The Environmental Protection Agency (EPA) has promulgated a number of standards relating to pesticide application that apply to employees working with or around pesticides. The field worker protection standard is designed to reduce the risk of illness or injury resulting from workers' and handlers' occupational exposure to pesticides. This standard requires protective clothing for workers and prohibits the presence of unprotected workers in fields being treated. In addition, immediately following application of certain pesticides, re-entry into treated fields is restricted for specific time periods, usually 12-72 hours. These intervals are generally specified in the pesticide labeling.

Any entry into a treated area, even for a permitted short term activity, must be postponed for at least the first four hours following the end of application. No hand labor activity may be performed and, if re-entry occurs for permitted short term activities during this restricted-entry interval, the worker must use personal protective equipment (as specified on the product label).

This standard also requires notification to workers (either oral or by posting or both depending, again, on product labeling) of any pesticide application on the farm. Any warning signs used must meet specified standards (including both English and Spanish warnings).

Workers must be provided information about pesticides previously applied if within the last 30 days. Also included are worker training requirements for workers performing early-entry activities and for workers who enter any area where pesticides have been applied in the last 30 days.

The standard includes details for protection of both workers and handlers and the responsibilities of the employer. The standard for workers includes a new focus on entry restrictions and standards for personal protective equipment. NOTE: The Worker Protection Standard requirements discussed here are those applying to workers on farms and forests. Similar requirements apply to pesticide use in nurseries and in greenhouses. In some cases the requirements are more restrictive because of the need for ventilation.

B. Duties of Employer

Among the duties of the employer who hires or contracts for workers to perform activities related to the production of agricultural plants, is that of assuring that any restricted pesticide is used in a manner consistent with its labeling. In fact, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) makes it unlawful for *any person* to use a registered pesticide in a manner inconsistent with its labeling.

The employer is to provide to supervisors information and directions sufficient to assure that workers and handlers receive the protection of the standard and to require supervisors to assure compliance with the standard.

C. Entry Restrictions for Workers

During application of any pesticide the agricultural employer shall not allow any person other than appropriately trained and equipped handlers to enter or remain in treated areas. Entry into a treated area is not allowed before expiration of the restricted-entry interval (REI) specified on the pesticide labeling. This REI varies depending on the pesticide but is generally 12-72 hours.

Entry into a treated area before expiration of the REI may be permitted in four special circumstances.

- (1) Entry for activities with no contact with anything treated with the pesticide (including but not limited to soil, air, water or surfaces of plants)
- (2) Short-term activities are permitted if the following requirements are met:
 - (a) No hand labor is performed
 - (b) No entry for at least four hours after the end of application and not until any inhalation exposure level listed in the labeling has been reached or any ventilation criteria met
 - (c) No worker's time in a treated area exceeds 1 hour in a 24 hour period
 - (d) Proper personal protective equipment, as specified on the labeling, is provided to the worker.
- (3) Entry to mitigate a substantial economic loss arising from an "agricultural emergency" when no alternative practices would prevent or mitigate the loss. This exception requires a governmental agency declaration of the existence of circumstances that could cause an agricultural emergency.
- (4) Entry pursuant to an approved exception application granted only in unusual circumstances following a public notice, public comment and public notice procedure.

D. Notice to Workers of Applications

The employer must notify workers of any applications of pesticides either by oral notification or posting of signs, or both if required by the pesticide labeling. Notice is not required if the worker will not enter, work in, remain in or pass through on foot in the treated area or within 1/4 mile of the treated area.

- (1) If notice is required by posting signs, specific criteria for the signs must be met including a background color that contrasts with red with the words "DANGER" and "PELIGRO" plus "PESTICIDES" and "PESTICIDAS" and "KEEP OUT" and "NO ENTRE."
- (2) The sign must be posted to be visible from all usual points of entry to the treated areas and must be posted no sooner than 24 hours before the scheduled application and remain throughout the REI.

E. Application and Safety Information

When workers are on an agricultural establishment and, within the last 30 days, a pesticide has been applied on the establishment or a restricted-entry interval has been in effect, the agricultural employer shall display specific information about the pesticide.

The information shall include:

- (1) The location and description of the treated area,
- (2) The product name, EPA registration number, and active ingredient(s) of the pesticide,
- (3) The time and date the pesticide is to be applied,
- (4) The restricted-entry interval for the pesticide.

A safety poster must be displayed that conveys at a minimum basic pesticide safety concepts such as:

- Avoid getting on your skin or into your body any pesticides that may be on plants and soil, in irrigation water, or drifting from nearby applications.
- Wash before eating, drinking, using chewing gum or tobacco, or using the toilet.
- Wear work clothing that protects the body from pesticide residues (long-sleeved shirts, long pants, shoes and socks, and a hat or scarf).
- Wash/shower with soap and water, shampoo hair, and put on clean clothes after work.
- Wash work clothes separately from other clothes before wearing them again.
- Wash immediately in the nearest clean water if pesticides are spilled or sprayed on the body. As soon as possible, shower, shampoo, and change into clean clothes.
- Follow directions about keeping out of treated or restricted areas.

The name, address, and telephone number of the nearest emergency medical care facility must be on the safety poster or displayed close to the safety poster.

The agricultural employer must inform workers promptly of any change to the information on emergency medical care facilities.

The information is to be displayed in a central location on the farm or in the nursery or greenhouse where it can be readily seen and read by workers.

The information must be displayed in a location in or near the forest in a place where it

can be readily seen and read by workers and where workers are likely to congregate or pass by, such as at a decontamination site or an equipment storage site.

The compliance date for these provisions is April 15, 1994.

F. Safety Training

Before a worker enters a treated area on the agricultural establishment during a restricted-entry interval to perform permitted early-entry activities and contacts anything that has been treated with the pesticide to which the restricted-entry interval applies, including, but not limited to, soil, water or surfaces of plants, the agricultural employer must assure that the worker has been trained.

The training is to be done before the 6th day that a worker enters any areas on the agricultural establishment where, within the last 30 days a pesticide to which this subpart applies has been applied or a restricted-entry interval for such pesticide has been in effect.

Until October 20, 1997, the training may be done before the 16th day that a worker enters any areas on the agricultural establishment where, within the last 30 days a pesticide to which this subpart applies has been applied or a restricted-entry interval for such pesticide has been in effect. After October 20, 1997, this exception no longer applies.

A worker who is a currently certified as an applicator of restricted-use pesticides who satisfies the training requirements chapter or who satisfies the handler training requirements need not be trained.

General pesticide safety information shall be presented to workers either orally from written materials or audio-visually. The information must be presented in a manner that the workers can understand (such as through a translator) using nontechnical terms. The presenter also shall respond to workers' questions.

The person who conducts the training shall meet at least one of the following criteria:

- i. Be currently certified as an applicator of restricted-use pesticides; or
- ii. Be currently designated as a trainer of certified applicators or pesticide handlers by a State, Federal, or Tribal agency having jurisdiction; or
- iii. Have completed a pesticide safety train-the-trainer program approved by a State, Federal, or Tribal agency having jurisdiction; or
- iv. Satisfy other required training requirements.

Any person who issues an EPA-approved Worker Protection Standard worker training certificate must assure that the worker who receives the training certificate has been trained in a number of specific areas. The compliance date for this section is April 15, 1994.

G. Decontamination

If any worker on an agricultural establishment performs any activity in an area where,

within the last 30 days, a pesticide has been applied or a restricted-entry interval has been in effect and contacts anything that has been treated with the pesticide, including, but not limited to, soil, water, or surfaces of plants, the agricultural employer shall provide, in accordance with this section, a decontamination site for washing off pesticide residues.

The agricultural employer shall provide workers with enough water for routine washing and emergency eyeflushing. At all times when the water is available to workers, the employer shall assure that it is of a quality and temperature that will not cause illness or injury when it contacts the skin or eyes or if it is swallowed.

The agricultural employer shall provide soap and single-use towels at each decontamination site in quantities sufficient to meet workers' needs.

To provide for emergency eyeflushing, the agricultural employer shall assure that at least 1 pint of water is immediately available to each worker who is performing early-entry activities and for which the pesticide labeling requires protective eyewear. The eyeflush water shall be carried by the early-entry worker, or shall be on the vehicle the early-entry worker is using, or shall be otherwise immediately accessible.

The decontamination site shall be reasonably accessible to and not more than 1/4 miles from where workers are working.

For worker activities performed more than 1/4 mile from the nearest place of vehicular access:

- (i) The soap, single-use towels, and water may be at the nearest place of vehicular access.
- (ii) The agricultural employer may permit workers to use clean water from springs, streams, lakes, or other sources for decontamination at the remote work site, if such water is more accessible than the water at the decontamination site located at the nearest place of vehicular access.

The decontamination site shall not be in an area being treated with pesticides.

H. Standard for Pesticide Handlers

A pesticide handler is a person employed by an agricultural enterprise who is:

- mixing, loading, transferring, or applying pesticides
- disposing of pesticides or pesticide containers
- handling opened containers of pesticides
- acting as a flagger
- cleaning, adjusting, handling or repairing the parts of mixing, loading, or application equipment that may contain pesticide residues
- assisting with the application of pesticides
- entering a greenhouse or other enclosed area after the application for various duties
- entering treated area outdoors after application of any soil fumigant to adjust or

- remove soil coverings such as tarpaulins
- performing tasks as a crop advisor during applications or during an REI

Requirements regarding specific information about applications, pesticide safety training, knowledge of labeling, safe operation of equipment, posted pesticide safety information, use of personal protecting equipment and decontamination, are similar to those for workers discussed above. The exemptions are the same.

Handler employers must assure that no pesticide is applied so as to contact any worker or other person other than an appropriately trained and equipped handler. Usual monitoring or voice communication at least every 2 hours is required for handlers handling highly toxic pesticides.

I. Exceptions and Exemptions

For both workers and handlers certain exemptions from the protection standard apply. The standard does not apply when any pesticide is applied or handled for use on an agricultural establishment in the following circumstances:

- (1) For mosquito abatement, Mediterranean fruit fly eradication, or similar wide-area public pest control programs sponsored by governmental entities.
- (2) On livestock or other animals, or in or about animal premises.
- (3) On plants grown for other than commercial or research purposes, which may include plants in habitations, home fruit and vegetable gardens, and home greenhouses.
- (4) On plants that are in ornamental gardens, parks, and public or private lawns and grounds and that are intended only for aesthetic purposes or climatic modification.
- (5) In a manner not directly related to the production of agricultural plants, including, but not limited to, structural pest control, control of vegetation, along rights-of-way and in other noncrop areas, and pasture and rangeland use.
- (6) For control of vertebrate pests.
- (7) As attractants or repellents in traps.
- (8) On the harvested portions of agricultural plants or on harvested timber.
- (9) For research uses of unregistered pesticides.

Owners of agricultural establishments need not assure that the protections are provided to themselves or to members of their immediate family who are performing tasks related to the production of agricultural plan including handling tasks, on their own agricultural establishments. However, they must provide any protections required to other handlers and other persons who are not members of their immediate family, and are encouraged to provide the protections to themselves and members of their families.

OSHA HAZARD COMMUNICATION STANDARD•FEDERAL

A. Overview

The purpose of the hazard communication standard is to ensure that the potential hazards of chemicals are evaluated and information concerning the hazards is transmitted to employers and employees, which include container labeling and other forms of warning, material safety data sheets and employee training. The objective is the development and maintenance of a written hazard communication program for the workplace.

B. Who must comply

Any employer who manufactures, imports, distributes, stores or uses chemicals in the workplace which are determined to be hazardous, must inform their employees of such hazards by means of:

1. A written Hazard Communication Program
2. Labels and other forms of warning,
3. Material Safety Data Sheets (MSDS), and
4. Information and training.

C. Hazard Communication Program

1. Employers must develop and implement a written Hazard Communication Program for their workplace which specifies how the requirements for labeling and other forms of warning, material safety data sheets (MSDS), and employee information and training will be met, and must also include the following:
 - A list of the hazardous chemicals present in the workplace using the identity referenced in the MSDS.
 - The methods the employer will use to inform employees of the hazards of non-routine tasks.
 - The methods the employer will use to inform contractor employers of the hazards their employees may be exposed to in the workplace.
2. The employer shall make the written Hazard Communication Program available, upon request, to employees, their representatives, and officials of the U.S. Department of Labor, OSHA and the U.S. Department of Health and Human Services.

D. Labels and Other Forms of Warning

1. Chemical manufacturers, importers and distributors shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged, or marked with the following information:
 - Identity of the hazardous chemical(s).
 - Appropriate hazard warnings.
 - Name and address of the chemical manufacturer, importer or other responsible party.
2. The employer is not required to label portable containers into which hazardous chemicals are transferred from labeled containers, intended for the immediate use of the employee who performs the transfer.
3. Employers are not required to label pesticides which are subject to the labeling requirements of the Federal Insecticide Fungicide, and Rodenticide Act.

E. Material Safety Data Sheets

1. A Material Safety Data Sheet (MSDS) is a document, written in English, containing standardized information about the properties and the hazards of toxic substances. Manufacturers and importers of toxic chemicals are required to prepare, update, and furnish MSDSs' to their distributors and employers.
2. If an MSDS is not furnished with a shipment that has been labeled as hazardous chemicals, the purchaser (employer) shall obtain an MSDS from the chemical manufacturer, importer or distributor.
3. Employers shall have on file an MSDS for each hazardous substance in the workplace and shall insure that they are readily accessible during each work shift to employees when they are in the work area(s).
4. MSDS's shall also be readily available, upon request, to official representatives of the U.S. Department of Labor (OSHA), and the U.S. Department of Health and Human Services.

F. Employee Information and Training

Employers shall provide employees with information and training on hazardous chemicals in the work area at the time of their initial assignment and whenever a new hazard is introduced into their work area.

1. Information

Employees shall be informed of the:

- Information and training requirements of the law,
- Any operations in their work area where hazardous chemicals are present, and
- The location and availability of the written Hazard Communication Program, including the required list(s) of hazardous chemicals and required MSDSs'.

2. Training

Employee training shall include at least:

- Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area.
- The physical and health hazards of the chemicals in the work area.
- The measures employees shall take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used.
- The details of the Hazard Communication Program developed by the employer, including an explanation of the labeling system and the MSDS, and how employees can obtain and use the appropriate hazard information.

IMMIGRATION REFORM AND CONTROL ACT – FEDERAL

A. Overview

The major focus of the 1986 Immigration Reform and Control Act was to impose sanctions on employers who hire illegal aliens and to require that employers verify worker identity and worker authorization to work.

B. Who must comply

All employers (agricultural and non-agricultural) are prohibited from knowingly employing aliens not legally entitled to work in the U.S. The definition of “knowingly hiring” has been greatly expanded. Using a “constructive knowledge” standard the regulation now states:

“Knowing” is defined as including not only actual knowledge, but also constructive knowledge – knowledge which may fairly be inferred through notice of certain facts and certain circumstances which would lead a person, through the exercise of reasonable care, to know about certain conditions.

C. Employers must

1. Have employees and prospective employees fill-out their part of the Form I-9 when they start to work.
2. Inspect the employee’s documents establishing the employee’s identity and eligibility to work, noting the employee’s document ID number and expiration date.
3. Properly complete the employer’s part of the Form I-9. This must be completed within three business days, or at the time of hire if the employment is for less than three days.
4. Retain the Form I-9 for at least three years or one year after the employee leaves, whichever is longer.
5. Present the Form I-9 for inspection when requested by an INS, DOL, or OSC officer. The inspection officers are required to give at least three days advance notice before inspection.

A Form 1-9 is not required for:

- Persons employed for domestic work in a private home on an intermittent or sporadic basis.
- Persons who provide labor who are employed by a contractor providing contract services (e.g., employee leasing).
- Persons who are independent contractors.
- Persons referred by the state employment agency, if the agency has elected to provide a certification of employment eligibility. However, the employer must retain the certification the same as a Form 1-9 and present it for inspection if requested.
- Persons employed who have completed an 1-9 form with a private 1-9 agency of which the employer is a member. Some grower organizations have set-up 1-9 offices to serve as an agent for their members in completing and retaining 1-9 forms. Generally the worker is then issued a picture LD. card which he presents to the member employer when hired. It should be noted that the employer is still responsible for compliance and may be liable for violations of the law.

D. Acceptable Documents

The IRCA requires that a prospective employee establish (1) his or her identity and (2) his or her *employment eligibility*. Some acceptable documents establish both identity and employment eligibility. As a result, only one document need be furnished from List A. If an individual does not provide a document from List A, he or she must provide one document that establishes identity (List B) *and* one document that establishes employment eligibility (List C).

If an employee is unable to provide the required document or documents within three days, he or she must at least provide (within three days) a receipt showing that he or she has applied for the document. The document itself must be provided within 90 days of the hire.

LIST A

Documents That Establish Identity and Employment Eligibility

- United States Passport (expired and unexpired)
- Certificate of United States Citizenship. (INS Form N-560 or N-561)

- Certificate of Naturalization. (INS Form N-550 or N-570)
- Unexpired foreign passport which:
 - Contains an unexpired stamp which reads "Processed for 1-551. Temporary Evidence of Lawful Admission for Permanent Residence. Valid until _Employment authorized;"

OR

Has attached thereto a Form 1-94 bearing the same name as the passport and contains an employment authorization stamp, so long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form 1-94.

- Alien Registration Receipt Card (INS Form 1-151) or Resident Alien Card (INS Form 1-551), provided that it contains a photograph of the bearer.
- Unexpired Temporary Resident Card (INS Form 1-688)
- Unexpired Employment Authorization Card (INS Form 1-688A)
- Unexpired reentry permit (INS Form 1-327)
- Unexpired Refugee Travel document (INS Form 1-571)
- Unexpired INS employment authorization document with a photograph (INS Form 1-688B)

List B

Documents That Establish Identity

For individuals 16 years of age or older:

- State-issued driver's license or state-issued identification card containing a photograph. If the driver's license or identification card does not contain a photograph, identifying information should be included, such as name, date of birth, sex, height, color of eyes, and address.
- School identification card with a photograph
- Voter's registration card
- United States Military card or draft record

- Identification card issued by federal, state or local government agencies.
- Military dependent's identification card
- Native American tribal documents
- United States Coast Guard Merchant Mariner Card
- Driver's license issued by a Canadian government authority.

For individuals under age 16 who are unable to produce one of the documents listed above:

- School record or report card
- Clinic doctor or hospital record
- Daycare or nursery school record

List C

Documents That Establish Employment Eligibility

- Social Security number card, Other than one which has printed on its face "not valid for employment purposes."
- An original or certified copy of a birth certificate issued by a state, county, or municipal authority bearing an official seal
- Unexpired INS employment authorization
- Certification of Birth issued by the Department of State. (Form FS-545)
- Certification of Birth Abroad issued by the Department of State. (Form DS1350)
- United States Citizen Identification Card. (INS Form 1-197)
- Native American tribal document
- Identification Card for use of Resident Citizen in the United States. (INS Form 1-179)

E. Penalties for Prohibited Practices

All employers, including agricultural employers of seasonal agricultural workers, must comply with the IRCA law. Civil money penalties and criminal penalties may be levied against employers for failure to comply with provisions of the law.

1. Civil money penalties:

Civil money penalties may be levied against employers and others who:

- Hire or continue to hire unauthorized aliens.
- Fail to comply with the record-keeping requirements of this act (IRCA).
- Require indemnification from prospective employees.
- Recruit unauthorized seasonal agricultural workers outside the U.S.

2. Criminal penalties:

Criminal and/or civil money penalties may be levied against employers and others who:

- Regularly, repeatedly or intentionally engage in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens.
- Engage in fraud or false statements or otherwise misuse visas, immigration permits and identity documents.

F. Discrimination

Employers of four or more employees may not discriminate against any person (other than an unauthorized alien) in hiring, discharge, or recruiting or referring for a fee because of national origin or citizenship status. Because Title VII of the Civil Rights Act of 1964 is in effect for employers of fifteen or more employees, discrimination complaints involving *national origin* will be reported as follows: 1-3 employees -not covered, 4-14 employees -to the Office of Special Counsel, Department of Justice, 15 or more employees -to the Equal Employment Opportunity Commission. Discrimination complaints involving *citizenship status* against employers of four or more will be filed with the Department of Justice.

G. Recruiters and Referrers for a Fee

Recruiters or referrers for a fee should complete a Form 1-9 for any person they refer to an employer and who is hired by that employer. The Form 1-9 should be completed within three business days of the hire.

The recruiters or referrers may designate agents to complete the verification process on their behalf, but they are still responsible for obtaining and filing a copy of the Form 1-9, and are still responsible and liable for compliance with the law. Recruiters and referrers must retain the Form 1-9 for three years after the date the referred individual was hired by the employer.

H. Independent Contractors

Employers can be held liable for the actions of an "Independent Contractor" if an unauthorized alien is hired and the user of the Independent Contractor has actual knowledge of the lack of work authorization. Independent Contractor has been redefined as follows: "The term independent contractor includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results."

Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity:

- Supplies the tools or materials,
- Makes services available to the general public,
- Works for a number of clients at the same time,
- Has an opportunity for profit or loss as a result of labor or services provided,
- Invests in the facilities for work,
- Directs the order or sequence in which the work is to be done,
- Determines the hours during which the work is to be done.

I. Other Provisions

In addition to the employer verification procedures outlined above, the IRCA includes a number of other provisions, such as the general legalization of eligible aliens residing in this country since January 1, 1982, the Special Agricultural Worker (SAW) program which provides legal status to illegal aliens who have been working in perishable Agriculture, revision of the H-2A temporary agricultural worker program, and the Replenishment Agricultural Worker (RAW) program to replace perishable agricultural workers who do not qualify for legalization or who leave agricultural for other jobs.

While these are important programs and agricultural employers are encouraged to assist agricultural workers in becoming legalized, they do not affect the fundamental employer/employee relationships covered in this handbook.

MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) - FEDERAL

A. Overview

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) of 1983 amended the Farm Labor Contractor Registration Act. The purpose of the legislation is to regulate those who recruit, solicit, hire, employ, furnish or transport any person who meets the definition of a "migrant" or "seasonal" worker. Anyone engaged in farm labor contracting activity must register and obtain a certificate of registration.

B. Agricultural Employers

Agricultural employers and agricultural associations need not register as farm labor contractors, but, unless they are otherwise exempt, must comply with the provisions of the act if they recruit, solicit, hire, employ, furnish, or transport migrant and/or seasonal agricultural workers, or house migrant agricultural workers.

An agricultural employer is defined as any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes or transports any migrant or seasonal agricultural worker.

A migrant agricultural worker is defined as an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

A seasonal agricultural worker is defined as an individual who is employed in agricultural employment of a seasonal or other temporary nature, and is not required to be absent overnight from his permanent place of residence.

C. Exemptions from the Act

Several groups are exempt from the provisions of the MSPA. Persons not subject to the provisions of the act include:

- Family Business -Any individual who engages in a farm labor contracting activity on behalf of a farm or other agricultural operation which is owned or operated exclusively by such individual or an immediate family member.
- Small Business -The same rules apply to this exemption as used in determining the minimum wage exemptions, i.e., currently the limit for exemption is 500 man-days of agricultural labor used during any calendar

quarter of the preceding calendar year. [See Fair Labor Standards Act (Minimum Wage) Federal]. The man-days of agricultural labor rendered in a joint employment relationship are counted toward the man-days of such labor of each employer for purposes of the man-day test.

- Common Carrier -Any common carrier which would be a farm labor contractor solely because the carrier is transporting migrant and seasonal agricultural workers.
- Labor Organizations-Any labor organization as defined In the Labor Management Relations Act or as defined by state law.
- Non-Profit Charitable Organizations -Any nonprofit charitable organization or public or private nonprofit educational institution.
- Local, Short-Term Contractors -Any person who engages in any farm labor contracting activities solely within a twenty-five mile intrastate radius of such person's permanent place of residence and not for more than thirteen weeks per year. This exemption is void if the person uses the U.S. mail, telephone, or advertising to recruit, solicit, hire or furnish workers from more than twenty-five miles or across a state line. When the limit of weeks is exceeded in a calendar year the person immediately loses the exemption and is subject to the provisions of the act in the next calendar year.
- Employees of Exempt Employers-Any employee of an exempt employer when performing farm labor contracting activities exclusively for such person. This rule does not apply to anyone utilizing a "family business" or "small business" exemption.
- Other exemptions-Other exemptions include some custom combine operations, custom poultry operations, seed production operations, and shade grown tobacco.

D. Conditions of Employment

- At the time of recruitment of any *migrant* agricultural worker, a farm labor contractor, agricultural employer or agricultural association must disclose the following information in a language understood by the workers. The use of Form WH 516 is optional.
 1. Place of employment;
 2. Wage rates (including piece rates) to be paid;

3. Crops and kinds of work;
 4. Period of employment;
 5. Transportation, housing and any other benefits provided and their cost to the worker;
 6. Workers compensation and unemployment insurance;
 7. Whether a strike or work stoppage is in progress;
 8. Any commission (kickback) arrangement between the employer and any local merchant selling to employees.
- The employer of any migrant or seasonal agricultural worker shall provide at the place of employment, *upon request of the worker*, a written statement of the conditions of employment (Form WH 516).
 - At the place of employment of migrant and seasonal agricultural workers, by a labor contractor, agricultural employer or agricultural association, post in a conspicuous place a poster (Form WH 1376) outlining the workers' rights and protections. In joint employment situations each employer is equally responsible for displaying this poster and for providing written statements of employment conditions if requested by the worker.
 - Each farm labor contractor, agricultural employer and agricultural association, which owns or operates housing facilities for migrant farm workers, shall post the housing permit, and in addition shall post in a conspicuous place in such housing, for the entire period of occupancy, or provide a written statement to the worker at the time of recruitment, information on the terms and conditions of occupancy (for details of this statement, see Housing Safety and Health).
 - At the time of recruitment of *seasonal* agricultural workers, farm labor contractors, agricultural employers and agricultural associations shall disclose in writing, *upon request* the conditions of employment listed under migrant workers (WH 516).
 - At the time and place of recruitment of *seasonal* workers through a day-haul operation in canning, packing, ginning, or seed conditioning, farm labor contractors, agricultural employers and agricultural associations shall disclose in writing the conditions of employment listed under migrant workers (WH 516).

- All required disclosures under the act shall be in English, or Spanish, or another language common to the migrant and seasonal agricultural worker. The Department of Labor will make forms available in English, Spanish, Haitian Creole or other languages as necessary.

E. Wages and Payroll

- Each labor contractor, agricultural employer and agricultural association must:
 1. Keep the following payroll records for migrant and seasonal agricultural workers:
 - (a) Name
 - (b) Permanent address
 - (c) Social Security number
 - (d) Basis on which wages are paid
 - (e) Number of piecework units earned if paid on piecework basis
 - (f) Number of hours worked
 - (g) Total pay period earnings
 - (h) Sums withheld and purpose of each withholding
 - (i) Net pay
 2. Preserve payroll records for three years.
- A labor contractor must furnish the person who contracts for his services with a copy of all payroll records. The person who receives such records must maintain them for three years.
- Farm labor contractors, agricultural employers and agricultural associations must provide each migrant and seasonal agricultural worker with an itemized written statement of the payroll information shown above at the time of payment. Pay periods cannot be less often than every two weeks or semimonthly. The employee payroll statement (Form WH-501) must also include:
 1. Employer's name
 2. Employer's address
 3. Employer's IRS identification number

- In a joint employment situation, both parties are equally responsible for payroll records.
- Wages owed migrant and seasonal workers must be paid when due.

F. Motor Vehicle Safety

- Each farm labor contractor, agricultural employer and agricultural association which uses or causes to be used any vehicle to transport migrant and seasonal agricultural workers must:
 1. Ensure that such vehicle conforms to safety standards prescribed by the Department of Labor or the Department of Transportation (see Motor Carrier Safety Law Federal)
 2. Ensure that each driver of any such vehicle has a currently valid motor vehicle operator's permit or license as provided by state law. (See Driver Qualifications under Motor Carrier Safety Law - Federal)
- The term "cause to be used" does not include carpooling arrangements made by the workers using one of their own vehicles. Carpooling does not include transportation arrangements made by a labor contractor or at the direction of an agricultural employer, hence such arrangements are subject to the provisions of the MSPA.
- All transportation of migrant and seasonal agricultural workers both on and off the road are covered, except for those activities listed as exempt in this section.
- If the vehicle is an automobile or station wagon used or caused to be used by any farm labor contractor, agricultural employer or agricultural association to transport migrant and seasonal agricultural workers, it must meet the Department of Labor safety standards. In addition, all other vehicles used for transportation of 75 miles or less (excluding day-haul operation) must meet the following Department of Labor standards:
 1. External Lights: Head lights, tan lights, stop lights, back-up lights, turn signals and hazard warning lights shall be operable.
 2. Brakes: Every vehicle shall be equipped with operable brakes for stopping and holding on an incline. Brake systems shall be free of leaks.
 3. Tires: Tires shall have at least 2/32 inch tread depth and have no cracks/defects in the sidewall.
 4. Steering: The steering wheel and associated mechanism shall be maintained so as to safely and accurately turn the vehicle.

5. Horn: Vehicles shall have an operable air or electric horn.
 6. Mirrors: Mirrors shall provide the driver full vision of the sides and rear of the vehicle.
 7. Windshields/Windshield Wipers: All windshields and windows shall have no cracks which obscure vision and no opaque obstructions. Vehicles shall be equipped with windshield wipers that are operational to allow the operator full frontal vision in all weather conditions.
 8. Fuel System: Fuel lines and the fuel tank shall be free of leaks and be fitted with a cap to securely cover the filling opening.
 9. Exhaust System: An exhaust system will be provided and maintained to discharge carbon monoxide away from the passenger compartment and be free of leaks beneath the passenger compartment.
 10. Ventilation: Windows will be operational to allow fresh air to the occupants of the vehicle.
 11. Safe Loading: Vehicles' will not be driven when loaded beyond the manufacturer's gross vehicle weight rating.
 12. Seats: A seat will be provided for each occupant or rider in, or on, any vehicle, except that transportation which is primarily on private farm roads will be excused from this requirement provided the distance traveled does not exceed ten (10) miles, and so long as the trip begins and ends on the farm of the employer.
 13. Handles and Latches: Door handles and latches shall be provided and maintained to allow exiting capability for vehicle occupants.
- Any vehicle, other than a passenger automobile or station wagon used in a day-haul operation or used for trips of more than 75 miles will be subject to safety standards prescribed by the Department of Transportation (see Motor Carrier Safety Law-Federal).
 - Passenger automobiles station wagons and other vehicles used to transport migrant and seasonal agriculture workers for distance of less than 75 miles and not involved in a day-haul operation will be subject to the Department of Labor standards shown above.
 - A pick-up truck, when transporting passengers only in the cab, shall be treated as a station wagon.

G. Exclusions Vehicle Safety Standards

- Vehicle safety standards and insurance requirements do not apply to the transportation of migrant and seasonal agricultural workers on a tractor, combine, harvester, picker or similar vehicle while engaged in on-farm agricultural work.
- Vehicle safety standards and insurance requirements do not apply to individual migrant or seasonal agricultural workers when the only other occupant of that individual’s vehicle consists of his immediate family.
- Vehicle safety standards and insurance requirements do not apply to carpooling arrangements made by the workers themselves, using one of the workers' own vehicles and not directed by the employer.

H. Vehicle Insurance

- A farm labor contractor, agricultural employer or agricultural association shall not transport any migrant or seasonal agricultural worker in any vehicle owned, operated, controlled or cause to be operated unless he has an insurance policy or liability bond in effect against liability for damage to persons or property. Vehicle insurance requirements do not apply to vehicles used in a carpooling arrangement made by the workers using one of the worker's own vehicles and not involving the employer or done at his direction.
- Except in those instances where a liability bond is in effect or where workers compensation insurance is applicable, a farm labor contractor, agricultural employer or agricultural association is required to have vehicle liability insurance in at least the amounts shown below:

INSURANCE REQUIRED FOR PASSENGER EQUIPMENT

| | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|-------------------------|
| (1) Breach of an express or implied contract not to terminate except for good cause; | | |
| (2) Breach of an implied promise of good faith and fair dealing; and/or | | |
| (3) Wrongful discharge as a tortious act. | | |
| Limit for bodily injuries to or death of one (1) person | 15 or less passengers | More than 15 passengers |
| Limit for bodily injuries to or death of one (1) person | \$100,000 | \$100,000 |
| Limit for bodily injuries to or death of all persons injured or killed in any one (1) accident subject to a maximum of \$100,000 for bodily injuries to or death of one (1) person | \$1,500,000* | \$5,000,000* |

- In those instances where the employer of migrant or seasonal agricultural workers is satisfying the insurance requirements by covering his workers with state workers compensation insurance, the MSP A regulations also require that he provide insurance of at least \$50,000 for loss or damage to property of others.
- Agricultural employers and agricultural associations are required to provide evidence of liability insurance coverage only upon request by the Department of Labor. Farm labor contractors, however, must provide evidence of insurance when applying for authorization to transport migrant or seasonal agricultural workers and the policy must include a clause which provides for cancellation only after 30 days notice to the Department of Labor, Wage and Hour Division.
- Persons who will be transporting migrant and seasonal agricultural workers may provide financial responsibility in lieu of insurance by providing a liability bond of at least \$500,000 for damages to persons and property.

I. Housing Safety and Health

- Housing requirements apply only to migrant agricultural workers.
- Each person who owns or controls a facility or real property which is used as housing for any migrant agricultural worker must ensure that the facility or real property complies with all substantive Federal and State safety and health standards applicable to such housing. The joint employment (responsibility) concept applies when more than one person is involved in providing housing for migrant agricultural workers (see Farm Labor Camps Federal).
- Housing must be certified by state or local health authorities or other appropriate agency that the housing meets applicable safety and health standards. A copy of the certificate of occupancy must be posted at the housing site and the certification must be retained for three years.
- Each farm labor contractor, agricultural employer and agricultural association which provides housing for any migrant agricultural worker must post in a conspicuous place at the housing site, for the entire period of occupancy, or present a written statement to the worker at the time of recruitment, the following information on the terms and conditions of occupancy (WH-521):
 1. Name and address of the employer(s) providing the housing
 2. Name and address of person in charge of the housing
 3. Mailing address and phone number where housing occupants can be reached
 4. Who may live in the housing
 5. The charge-(rent) to be made for the housing
 6. Meals to be provided and the cost to workers
 7. Charges for utilities
 8. Any other charges or conditions of occupancy
- Exemptions Housing Standards: MSPA housing standards do not apply to any person who, in the ordinary course of business, regularly provides housing to the general public and who provides housing to any migrant agricultural worker on the same or comparable terms and conditions.

J. Registration of Farm Labor Contractors

- A farm labor contractor is defined as any person other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who for any money or other valuable considerations paid or promised to be paid performs any farm labor contracting activities (recruiting, soliciting, hiring, employing, furnishing or transporting any migrant or seasonal agricultural worker).

K. Who must register

- Any person who desires to engage in any farm labor contracting activities, and is not exempt, is required first to obtain a Certificate of Registration authorizing each such activity and specifically including transporting and housing agricultural workers.
- Any employee of a currently registered farm labor contractor who performs farm labor contractor activities on behalf of such contractor must obtain a Farm Labor Contractor Employee Certificate of Registration authorizing each such activity and specifically including transporting and housing agricultural workers.

L. Hiring Farm Labor Contractors

In utilizing the services of a registered Farm Labor contractor, agricultural producers should verify the following prior to engaging such labor contractor:

1. That the labor contractor holds a valid certificate of registration as a farm labor contractor at the time he/she is engaged. A copy of an application is not sufficient.
2. That the labor contractor holds a valid certification to perform the services for which he is engaged, i.e., transporting, housing, etc.
3. That each vehicle to be used to transport workers is certified and that the insurance on such vehicle is current.
4. That each driver of a properly certified vehicle used to transport farm workers is properly registered as a farm labor contractor employee authorized to transport farm workers, possess a Commercial Driver's License with a passenger transport endorsement, and have a satisfactory doctors certificate (Form 415) which is less than 3 years old.

H. Farm Labor Contractors Must

- Apply for and receive a Certificate of Registration annually from the Department of Labor.
- The application must include:
 1. A sworn declaration stating the:
 - (a) Applicant's permanent place of residence
 - (b) Activities for which certification is sought
 - (c) Mailing address for official documents
 2. A statement:
 - (a) Identifying each vehicle to be used to transport migrant and seasonal agricultural workers
 - (b) Indicating whether the vehicle is owned or controlled by the applicant
 - (c) Providing documentation that the applicant is in compliance with the motor vehicle safety requirements for each vehicle.
 - (d) Providing documentation that each vehicle is in compliance with the insurance requirements.
 - (e) Evidence that drivers of vehicles have a satisfactory doctor's certificate (Form 415) which is less than three years old and possess a valid and appropriate operators license as provided by state law.
 3. A statement:
 - (a) Identifying each facility or real property to be used to house migrant workers.
 - (b) Indicating whether the facility or real property is or will be owned or controlled by the applicant.
 - (c) Providing documentation that the housing is in compliance with the housing safety and health regulations.

4. A set of fingerprints of the applicant.
5. A sworn declaration consenting to a court designation of the Secretary of Labor, if applicant is not present, to accept summonses in any action against the applicant.

N. Duration of Certificate

- Registration dates coincide with the birth date of the farm labor contractor.
- Certificates issued to employees of farm labor contractors shall expire on the same date that the farm labor contractor's certificate expires.
- A certificate may be temporarily extended by filing an application at least thirty days prior to its expiration. Under these circumstances the farm labor contractor can continue to operate until the renewal application has been determined by the Department of Labor.
- Certificates may be issued or renewed for periods generally from twelve to twenty-four months.
- Only those farm labor contractors and their employees who have not been cited during the last five years under either FLCRA or MSPA are eligible for an extended renewal certificate.

O. Suspension, Revocation and Refusal to Issue or Renew

The Department of Labor may suspend, revoke, refuse to issue or renew a Certificate of Registration for a farm labor contractor or farm labor contractor employee if the applicant or holder:

- Knowingly made any misrepresentations on the application.
- It is not the real party in interest and the real party has been refused insurance or renewal or has had a certificate suspended or revoked.
- Failed to comply with the law or regulations.
- Failed to pay any court judgments.
- Failed to comply with any final order issued by the Department of Labor.
- Has been convicted within the last five years of:
 1. Any crime relating to gambling, alcoholic beverages or in connection with farm labor contracting activities.

2. Any felony involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, narcotics, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, prostitution, peonage, or smuggling or harboring illegal aliens.

P. Joint Employment

The joint employment concept contained in the Fair Labor Standards Act is embodied in the MSP A, and as such the grower is jointly responsible for the actions of the labor contractor. The term joint employment means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. The factors considered significant by the courts in determining joint employment and to be used to determine joint employment under the provisions of the MSP A include, but are not limited to the following:

- The nature and degree of control of the workers.
- The degree of supervision, direct or indirect, of the work.
- The power to determine the pay rates or the methods of payment of the workers.
- The rights, directly or indirectly, to hire, fire, or modify the employment conditions of the workers.
- Preparation of payroll and the payment of wages.

Q. Discrimination

It is a violation of the act for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause:

- Filed a complaint with the Department of Labor.
- Instituted or cause to be instituted any proceeding under the act.
- Testified or about to testify in any proceedings.
- Exercised or asserted on behalf of himself or others any rights or protection under the act.

Migrant and seasonal agricultural workers who believe they have been discriminated against may, no later than 180 days after such violation occurs, file a complaint with the Department of Labor.

FARM LABOR CAMPS – FEDERAL

A. Overview

There are currently two federal laws which apply to migrant farm labor camps. The older is the housing standards law administered by the U.S. Department of Labor, Employment and Training Administration (ETA) (20 CFR part 654). The second federal law dealing with migrant farm labor housing was passed in 1970 and is administered by the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) (29 CFR part 1910.142).

B. Who must comply

Employers who house one or more migrant farm workers must comply with either the ETA or OSHA standards depending upon when the housing was constructed. Farm Labor housing built to the earlier, less restrictive ETA standards may be operated under these standards until the housing undergoes major modifications. Migrant farm labor housing constructed after April 3, 1980 must comply with OSHA standards.

The Migrant and Seasonal Agricultural Worker Protection Act of 1983 provides that all migrant farm worker housing must comply with either ETA or OSHA standards, depending upon when built or significantly modified, and may be subject to inspections by ETA or OSHA regardless of whether the housing is a “condition of employment.” In addition, employers housing migrant agricultural workers must comply with applicable State housing safety and health standards.

C. Inspections

OSHA inspections of migrant agricultural worker housing is on a post-occupancy basis. There is no licensing procedure under OSHA regulations. Inspections are usually made in response to employee’s complaints, following a report of a fatality or injury, or on a random basis. With the passage of MSPA in April 1983, whether the housing is provided as a “condition of employment” appears to be a moot point and OSHA can inspect any migrant agricultural worker housing.

The three U.S. Department of Labor Agencies responsible for housing standards enforcement have agreed on a plan for coordinating their inspections of migrant labor housing facilities. Under the agreement ETA (Employment and Training Administration) through state employment service agencies, will continue to conduct pre-occupancy inspections of facilities on farms which it supplies with workers. ESA (Employment Standards Administration) will inspect facilities owned or operated by crew leaders which have not already been inspected by ETA. OSHA (Occupational Safety and Health

Administration) will inspect those camps not covered by the other two agencies. OSHA will continue to inspect camps on a post-occupancy basis where injuries, deaths or complaints occur. The standards used (ETA or OSHA) by any of these agencies will depend on when the housing was constructed or whether it has been substantially modified. The U.S. Employment Service has promulgated lengthy rules to guide its personnel in determining what constitutes major modification in determining when "old" housing becomes "new" housing and comes under OSHA standards.

D. Employers must

Meet minimum federal, state, and local housing standards. ETA and OSHA standards specify requirements for:

1. Housing site.
2. Shelter and housing.
3. Water supply.
4. Toilet facilities.
5. Sewage disposal.
6. Laundry, handwashing and bathing facilities.
7. Electrical lighting.
8. Refuse and garbage disposal.
9. Cooking and eating facilities.
10. Screening, insect and rodent control.
11. Fire, safety and first aid facilities.
12. Reporting of communicable diseases.

MOTOR CARRIER SAFETY LAW -FEDERAL

A. Overview

The federal Motor Carrier Safety Regulations provide detailed safety and licensing regulations for motor vehicles and drivers of motor vehicles. There are two parts of the regulations which are relevant to agriculture. The first deals with drivers of farm trucks and the second deals with vehicles and drivers which transport migrant farm workers.

The Commercial Motor Vehicle Safety Act of 1986 requires each state to meet the same minimum standards for commercial driver licensing. The standards require commercial motor vehicle drivers to obtain a Commercial Driver's License (COL).

B. Drivers of Farm Trucks

1. Waiver:

The licensing provisions of the Commercial Motor Vehicle Safety Act of 1986 (49 CFR, Subtitle B, Chapter III) are waived for operators of a farm vehicle which is:

1. Controlled and operated by a farmer,
2. Used to transport either agricultural products, farm machinery, farm supplies or both to and from a farm,
3. Not transporting placarded hazardous materials,
4. Not used in the operation of a common or contract motor carrier, and
5. Used within 150 miles of the person's farm.

NOTE: This waiver does not apply to drivers of vehicles designed to transport passengers.

2. General requirements:

A driver of a farm vehicle must meet the physical requirements and comply with all other provisions of the Federal Motor Carrier Safety Regulations. For example, a person cannot drive a farm vehicle if he/she has lost a foot, a leg, a hand or an arm unless he/she has been granted a waiver. A person cannot have any impairment of a hand or finger which interferes with prehension or power grasping, or an arm, foot or leg which interferes with the ability to perform normal tasks associated with operating a motor vehicle. A driver of a farm vehicle cannot have diabetes, cardiovascular disease, respiratory dysfunction, high blood pressure, arthritis or rheumatism or epilepsy likely to interfere with the ability to control or drive a motor vehicle safely.

The driver of a farm vehicle must have visual acuity of at least 20/40 with corrective lenses and not be color blind. Hearing must not be significantly diminished and the person cannot be addicted to habit forming drugs or alcohol.

C. Transportation of Migrant Farm Workers

The transportation of migrant and seasonal farm workers is governed by the Federal Motor Carrier Safety Regulations and regulations adopted by the U.S. Department of Labor (DOL) in implementing the Migrant and Seasonal Agricultural Worker Protection Act of 1983. The DOL adopted, virtually intact, the Federal Motor Carrier Safety Regulation dealing with the transportation of migrant and seasonal agricultural workers. In addition the DOL adopted its own vehicle standards for automobiles and station wagons used to transport migrant and seasonal agricultural workers and all other vehicles used to transport migrant and seasonal agricultural workers for trips of 75 miles or less (excluding day-haul operations). (see Migrant and Seasonal Agricultural Worker Protection Act (MSPA) -Federal.)

The regulations contain provisions setting forth the qualifications of drivers or operators, the driving of motor vehicles, parts, accessories necessary for safe operation, hours of service by drivers, maximum driving time and inspection and maintenance of motor vehicles.

1. Operator qualifications:

The regulations on the qualifications of drivers provide that no person shall drive any motor vehicle carrying migrant farm workers unless he/she meets the following minimum qualifications:

1. Be 21 years of age or older.
2. Have no mental, nervous, organic or functional diseases likely to interfere with safe driving.
3. Have no loss of foot, leg, hand, or arm.
4. Have no loss of fingers, impairment of the use of foot, leg, hand or arm likely to interfere with safe driving.
5. Have visual acuity of at least 20/40 corrected.
6. Have hearing of not less than 10120 in one ear.
7. Not be addicted to the use of narcotics or habit forming drugs, or the excess use of alcoholic beverages or liquors.

8. Have a physical examination by a licensed doctor of medicine or osteopathy at least every 36 months and carry a certificate of physical examination at all times.
9. Read and speak English.
10. Possess a valid driving permit applicable to the type of vehicle being driven, i.e., a Commercial Driver's License with a passenger transport endorsement.

2. Operator regulations:

Regulations governing the driving of motor vehicles carrying migrant farm workers include:

1. Driving rules to be obeyed
2. Driving while ill or fatigued
3. Alcoholic beverages
4. Schedules to conform to speed limit
5. Equipment and emergency devices
6. Safe loading
 - (a) Distribution and securing of load
 - (b) Doors, tarpaulins, tailgates and other equipment
 - (c) Interference with driver
 - (d) Property on motor vehicle
 - (e) Maximum passengers on motor vehicles
7. Rest and meal stops
8. Kinds of motor vehicles in which workers may be transported
9. Lighting devices and reflectors
10. Limitation on distance of travel
11. Ignition of fuel precautions
12. Carrying reserve fuel

13. Driving by unauthorized persons
14. Protection of passengers from weather
15. Unattended vehicle precautions
16. Railroad grade crossings

3. Vehicle specifications:

The regulations also specify certain parts and accessory requirements for vehicles used to transport migrant farm workers as follows:

1. Lighting devices
2. Brakes
3. Coupling devices: fifth wheel mounting and locking
4. Tires
5. Passenger compartment
 - (a) Floors
 - (b) Sides
 - (c) Nails, screws, splinters
 - (d) Seats
 - (e) Protection from weather
 - (f) Exit
 - (g) Gate and doors
 - (h) Ladders and steps
 - (i) Hand holds
 - (j) Emergency exits
 - (k) Communication with driver
6. Protection from cold, prohibited heaters:
 - (a) Exhaust heaters
 - (b) Open flame heaters
 - (c) Heaters permitting fuel leakage
 - (d) Heaters permitting air contamination
 - (3) Heaters not securely fastened

FAIR LABOR STANDARDS ACT (MINIMUM WAGE) - FEDERAL

A. Overview

The Fair Labor Standards Act (FLSA) 29 U.S.C. § 201 *et seq.*; *see also* 29 C.F.R. Part 780, was enacted by Congress in 1938 as a means of economic recovery from the Depression. The FLSA requires employers to provide employees a minimum wage, equal pay and a minimum work week.

1. Minimum Wage

The FLSA establishes a minimum wage for employees engaged in commerce or the production of goods for commerce, or for employees employed in a business engaged in commerce, or in the production of goods for commerce in any work week. Commerce is defined as trade, commerce, transportation, transmission or communication among the several states, or between any state and any place outside thereof. The courts have adopted an extremely broad view of the FLSA and have held that it applies as to employees whose activities merely "affect" commerce, either directly or indirectly.

Currently, employers are required to pay employees a minimum wage of \$4.25 per hour. Although the minimum wage is stated on an hourly basis, employees can also be paid on salary commissions, piecework, biweekly, or under any other arrangement so long as the wages equal or exceed the minimum wage. To determine whether the minimum wage is being paid, the hours worked per week is the standard of measurement. For example, a worker being paid \$225.00 per week would meet the minimum wage requirement ($\$225.00/40 \text{ hours} = \5.65 per hour). If, however, the same worker were being asked to work 60 hours a week for \$225.00 then the FLSA would be violated by the employer ($\$225.00/60 \text{ hours} = \3.75 per hour).

In some instances, employers can pay employees less than the statutory minimum wage. Certain workers, such as apprentices, messengers and full-time students can be paid lower rates if they are employed according to special certificates issued by the Department of Labor.

2. Equal Pay Act

In 1963 the FLSA was amended by the Equal Pay Act (EPA). The EPA makes it unlawful for an employer to discriminate on the basis of sex as to wage rates. Male and female employees must be paid the same wage rate if they perform jobs requiring equal skill, effort and responsibility and if the jobs are performed under similar working conditions. As a general rule, the EPA applies to the same workers protected by the FLSA. The EPA, however, also protects certain workers exempted from the FLSA including bona fide executives, administrative professionals or outside sales persons.

While the EPA prohibits wage differentials based solely on sex, the Act does not prohibit differences in wages based on factors other than sex. Factors which have withstood judicial scrutiny include seniority systems, merit and incentive programs, training programs and shift differentials.

The department of labor no longer enforces the EPA. Since July 1, 1979 the administration and enforcement of the EPA has been the responsibility of the Equal Employment Opportunity Commission (EEOC).

3. Minimum Work Week

The FLSA also requires employers to limit the employee's work week to no more than 40 hours per week, unless overtime is paid. Workers who are required to work more than 40 hours per week must be compensated for each hour worked in excess of 40 hours in a work week at a rate of not less than one and one-half times their "regular rate of pay."

"Work week" is defined by the regulations of the wage and hour department as "a fixed and regularly recurring period of 168 hours-seven consecutive 24-hour periods." "Hours worked" includes time spent by an employee on his or her principal duties and incidental activities. "Regular rate" is simply the employee's hourly rate.

B. Who Must Comply

Any farmer who uses more than 500 man-days of labor during any calendar quarter of the preceding calendar year (the equivalent of about seven full-time employees working five days a week).

If the employer did not employ more than 500 man-days of agricultural labor in any quarter of the preceding calendar year, his agricultural employees are exempt from the minimum wage provisions of the act for the entire following calendar year. Conversely, if the employer used more than 500 man-days of farm labor in any calendar quarter of a year, coverage extends to the entire following calendar year even if the employer does not use 500 man-days of labor in any quarter of the second year.

Employees are excluded from the minimum wage and overtime requirements of the law as well as the 500 man-day test if such employee is the parent, spouse, child, or other member of his/her employer's immediate family.

The following employees are also exempt from the minimum wage and overtime requirements of the law, but their man-days of work must be counted toward the 500 man-day test.

1. Employees who are paid on a piece-rate basis, A"ID were employed in agriculture as hand harvest laborers fewer than 13 weeks in the previous year, Al\ID commute to work daily (non-migrants).
2. An employee in agriculture whose employer did not, during any calendar quarter of the preceding calendar year, use more than 500 man-days of agricultural labor.
3. Any agricultural employee sixteen years old or younger employed as a:
 - Hand harvest laborer,

- Paid on a piece-rate basis in an operation which is customarily and generally recognized as paid for on a piece rate basis in the region,
 - Employed on the same farm as his/her parent or person standing in place of his/her parents, and
 - Is paid at the same piece rate as employees over sixteen on the same farm.
4. Employees principally engaged in the range production of livestock who must be available at all hours to care for such livestock. (The judicial application of this exemption does not turn on the characteristics of the land use for grazing, but on conditions under which the employees perform their duties. The exemption is applicable only if the method of operation is such that the computation of hours worked caring for the stock would be "extremely difficult.")

C. Employers must, if covered

- Pay at least the minimum wage to all employees. (Under current law the minimum wage is \$4.25 per hour.)

D. Record Keeping

The FLSA requires employers to keep certain records concerning covered employees. Although the Department of Labor (DOL) does not mandate the form of the records to be kept, the DOL does set forth the information to be preserved. It is no defense to an alleged wage and hour law violation that the employer's records are insufficient. In fact, the failure to keep accurate records creates a presumption in favor of the employee that a violation did occur. The following information must be kept by an employer as to each employee:

- Employee's name in full including any identifying name or symbol used in place of the name on any other records;
- Home address (with Zip Code);
- Date of birth if employee is less than nineteen (19) years of age;
- Employee's sex, and the occupation in which employed;
- Time of day and day of the week on which the employee's work week begins;
- Regular hourly rate of pay and the basis on which wages are paid;
- Hours worked each workday and total hours worked each work week;
- Total daily or weekly straight-time earnings or wages;
- Total weekly premium pay for overtime hours worked;
- Total additions to or deductions from wages paid each pay period;
- Total wages paid each pay period; and
- Date of payment and the pay period covered by payment.

Records on employees must normally be kept for a minimum period of three years. Records which should be kept include time cards, earning cards, or any other records which contain daily beginnings and ending times when those amounts determine employee wages; and records reflecting wage deductions and additions.

- Have on file a statement from each exempt piece rate employee showing the number of weeks employed in agriculture during the preceding year.
- Have on file the date of birth and the parent's name for each exempt minor paid on a piece rate basis.
- Maintain a file showing the full name, present and permanent address and date of birth of any minor under 18 who works when school is in session or works in a hazardous occupation.
- Display the official poster "Notice to Employees" where employees can see it. This poster contains basic information on minimum wages.

E. Overtime

Employees employed in "agriculture" as defined by the Fair Labor Standards Act are exempt from overtime. In general, under the primary definition of agriculture, if the employee is engaged in cultivating the soil or growing or harvesting crops, or raising livestock, bees, fur-bearing animals, or poultry, he/she is engaged in agriculture and exempt from overtime. Under the secondary definition of agriculture any practice performed, other than those listed under the primary definition, such as office work, shipping, warehousing, transporting, sales, etc., are exempt only if performed by employees of the farmer with respect to products grown by their employer or if performed on a farm as an incident to and in conjunction with products grown on the particular farm on which they are working.

Performance in a week of any work which is not exempt under the primary or secondary definition will cause the employee to be subject to overtime for that week.

Because some employees of agricultural employers handle or otherwise work on products not grown by their employer, or do work not within the definition of agriculture as outlined above, the employer should seek professional legal counselor advice from the local U.S. Department of Labor, Wage and Hour office concerning specifics of the overtime exemption.

F. Employers may

Deduct the cost of certain items from the wages of farmworkers. However, care should be exercised because the deduction of certain items can not reduce wages below the minimum wage.

Deductions which *may* lawfully reduce the wage level below the current minimum wage, are:

1. Taxes required by law--Social Security, Medicare and withholding tax.
2. "Third Party" deductions authorized by the employee-union dues, Savings Bonds, Merchant Accounts, Insurance Premiums, Church and Charitable Organizations -so long as the employer receives no profit or benefit directly or indirectly.
3. Salary advances exclusive of interest charges. Receipts for cash advances must be obtained and retained.

4. Housing and meals, provided it does not exceed the lesser of actual costs or fair rental value and meets a number of specified conditions dealing with profit and rate of return on investment (See 29 CFR Part 531). Housing facilities must be maintained for the benefit of employees, occupancy must not be mandatory, and costs cannot include depreciation when the facilities have been fully depreciated. Recent rulings by DOL indicate that some migrant housing may have "no fair rental value." If you provide and charge farmworkers for housing which can only be used by migrant workers and thus has "no fair rental value," this rental charge *cannot* reduce their wages below the current minimum wage of \$4.25 per hour.

Deductions which *may not* lawfully reduce the wage level below the current minimum wage, are:

1. Transportation advances. Where agricultural employers provide daily transportation to assure a sufficient number of workers, this policy applies.

However, when the following three factors are all present, agricultural employers may deduct from workers' wages the lesser of reasonable costs or fair value of such transportation regardless of whether such deductions will decrease workers' wages below the minimum wage:

- The workers must know the location of their worksite,
- Alternative transportation sources (i.e., personal automobile or carpool arrangements) must be readily available, and
- The workers are not required to use the employer's transportation.

2. Charges for contractors' (crew leader) services.
3. Charges for "Tools of the Trade and Other Materials Incidental to Carrying on the Employer's Business."

MINIMUM WAGE-STATE

A. Overview

The Arkansas minimum wage statute provides that every employer shall pay employees at a rate of not less than \$4.00 per hour unless that employee is in one of the exempt categories listed in the law. Also, the rate for full time students is set at no less than 85% of the stated minimum if the student is employed for not more than 20 hours per week during weeks that school is in session or 40 hours during weeks when school is not in session.

The state law does not come into play if the employer is subject to the provisions of the federal minimum wage provisions. In addition, the Arkansas law does not apply to any employer who employs fewer than four employees in a regular employment relationship.

B. Exemptions

Among the categories of employees who are not included in the state coverage are:

- (1) Any bona fide independent contractor (One who contracts to perform certain work away from the premises of his employer, uses his own methods to accomplish the work, and is subject to the control of the employer only as to the result of his work.)
- (2) Any individual employed by an agricultural employer who did not use more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year. ("Man-days" is defined to mean any day during which an employee performs any agricultural labor. Migrants 16 years of age or under are included in computing man-days of agricultural labor.)
- (3) The parents, spouse, child or other member of an agricultural employer's immediate family.
- (4) An individual who:
 - (a) is employed as a hand harvest laborer and is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been paid on a piece-rate basis in the region of employment;
 - (b) commutes daily from his permanent residence to the farm on which he is employed; and,
 - (c) has been employed in agriculture less than 13 weeks during the preceding calendar year.
- (5) A migrant who:
 - (a) is 16 years of age or under and is employed as a hand harvest laborer;

- (b) is paid on a piece-rate basis as above described;
 - (c) is employed on the same farm as his parents; and
 - (d) is paid the same piece-rate as employees over age 16 are paid on the same farm.
- (6) Any employee principally engaged in the range production of livestock.
- (7) Any employee employed in planting or tending trees, cruising, surveying or felling timber or in preparing or transporting logs or other forestry products to the mill, processing plants or railroad or other transportation terminal (if the number of employees in such timber or forestry operation does not exceed 8).

C. Overtime

While the Arkansas law provides for overtime pay calculated at one and one-half times the regular rate of pay for a work week longer than 40 hours, this provision specifically excludes agricultural employees. No provision of the law is to be construed to require compensation of greater than the regular rate for services performed by agricultural employees in excess of 40 hours per week.

CHILD LABOR--FEDERAL

A. Overview

The FLSA also prohibits the use of oppressive child labor. Child labor is oppressive if a minor is employed below the minimum age specified for a particular occupation. Generally, the minimum age for employment is sixteen years of age. However, state labor laws often set other age limits and restrictions on the use of child labor. Both federal and state laws require that children must be eighteen years of age to work at jobs deemed to be "hazardous occupations." The Secretary of Labor makes the determination of what is hazardous and current designations include construction work, demolition activities, mining and handling radioactive substances, among others. State laws often expand the list of hazardous occupations. Given the injury statistics associated with agriculture, it is conceivable that almost any agricultural activity is hazardous. Certainly, as to the handling of chemicals, live animals and heavy machinery, agriculture is a hazardous occupation.

While sixteen years of age is the standard minimum age for non-hazardous occupations, the regulations do authorize the hiring of fourteen and fifteen-year-old children in some circumstances. Children in this age group can be employed if their employment is performed outside of school hours; is performed between the hours of 7:00 AM and 7:00 PM (except during the summer, when they can work until 9:00 PM); they work only three hours per day on school days and eight on non-school days; and work no more than eighteen hours per week when school is in session and no more than forty hours per week when school is not in session. Working must not interfere with a child's schooling, health or well-being.

B. Coverage

Minors age 16 and over in agriculture are not included under the child labor provisions of the Fair Labor Standards Act (FLSA). Farm employers who are not covered under other provisions of FLSA (minimum wages, overtime) for the most part must comply with the law if they employ minors under 16 years old.

16 years old is the minimum age for working in agricultural jobs:

1. declared hazardous by the Secretary of Labor, and
2. during school hours.

14 years old is the minimum age for working in agricultural jobs:

1. **outside** of school hours, and
2. **not** declared hazardous by the Secretary of Labor

Except:

- 12 and 13 year-olds may be employed with written parental consent or on a farm where the minor's parent or person standing in place of the parent is also employed.
- Minors under 12 may be employed with written parental consent on farms whose employees are exempt from federal minimum wage provisions.

It should be noted that minors of any age may be employed by their parents at any time in any occupation on a farm owned or operated by their parent or person standing in place of their parent.

10 and 11 year olds:

Upon application, waivers may be issued by the Department of Labor permitting 10 and 11 year old minors to work in hand harvested, short season crops provided the employer does not use certain restricted pesticides and complies with the minimum reentry times for specified chemicals. (29 CFR Part 575).

C. Hazardous Occupations in Agriculture

The Secretary has declared that certain occupations in agriculture are hazardous. Aside from certain exemptions, no minor under 16 years of age may be employed at any time in these occupations. Briefly these hazardous occupations are:

1. Operating, driving or riding on a tractor with more than 20 PTO horsepower.
2. Operating or assisting to operate a corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, pea viner, feed grinder, crop dryer, forage blower, auger conveyor, self unloading wagon or trailer, power post-hole digger, power post driver, nonwalking type rotary tiller.
3. Operating or assisting to operate a trencher or earth moving equipment, forklift, potato combine, power driven circular, band or chain saw.
4. Working in pen, yard, or stall with a bull, boar, stud horse, sow with pigs or cow with calf.
5. Working around timber with a butt diameter of more than six inches.
6. Working from a ladder or scaffold more than 20 feet high.
7. Driving a bus, truck or automobile when transporting passengers.

8. Working inside a fruit, forage or grain bin or silo under certain specified conditions.
9. Handling or applying anhydrous ammonia or other specified chemicals, including those that bear the legend "Poison" or "Warning" on the label.
10. Handling or using explosives.

D. Exemptions from Hazardous Occupations in Agriculture:

- As previously stated, minors under 16 years old working for their parents on their parents' farm are exempt.
- Student-Learners. Student learners in a bona fide vocational agricultural program may work in the occupations listed in items 1 through 6 of the hazardous occupations order under a written agreement which provides that the student-learner's work is incidental to training, intermittent, for short periods of time, and under close supervision of a qualified person; that safety instructions are given by the school and correlated with on-the-job training; and that a schedule of organized and progressive work processes has been prepared. The written agreement must contain the name of the student-learner, and be signed by the employer and a school authority, each of whom must keep copies of the agreement.
- 4-H Federal Extension Service Training Program. Minors 14 and 15 years old who hold certificates of completion of either the tractor operation or machine operation program may work in the occupations for which they have been trained. Occupations for which these certificates are valid are covered by items 1 and 2 of the hazardous occupations order. Farmers employing minors who have completed this program must keep a copy of the certificates of completion on file with the minor's records. Enrollment in this program is open to minors who are not members of 4-H as well as 4-H members. Information on this program is available from an Extension Agent of the Cooperative Extension Service of a land grant university.
- Vocational Agricultural Training Program. Minors, 14 and 15 years old, who hold certificates of completion of either the tractor operation or machine operation program of the U.S. Office of Education Vocational Agriculture Training Program may work in the occupations for which they have been trained. Occupations for which these certificates are valid are covered by items 1 and 2 of the hazardous occupations order. Farmers employing minors who have completed this program must keep a copy of the certificate of completion on file with the minor's records. Information on the

Vocational Agriculture Training Program is available from vocational agriculture teachers.

E. Employers Must:

- Every employer, except a parent employing his own child on his own farm, who employs any minor under 16 years old must preserve and maintain records containing the following data on each minor employee
 1. Name in full
 2. Place where minor lives and his permanent address
 3. Date of birth
 4. Evidence in writing of any required parental consent

- Keep a minor employee's age or employment certificate on file.
- Observe wage and hour provisions of the FLSA
- Prohibit minors under 16 from performing jobs declared as hazardous.

F. Minor Employees Must:

- Provide their employer with proof of age. Certificates issued under most State laws are acceptable.

CHILD LABOR -STATE

A. Overview

With the exception of the exemptions discussed below, all minors under age 16 come under the provisions of the Arkansas Child Labor Law.

B. Coverage

Minors 16 and 17 years old are permitted to work in most occupations except for certain vendors licensed under the Alcoholic Beverage Law. However, these minors are subject to restrictions on hours of employment as discussed below. These restrictions do not apply if the minor age 16 or 17 if the minor is married or is a parent or if the minor is a graduate of any high school, vocational school, or technical school.

Except for employment during school vacations by parents or guardians in occupations owned and operated by them, and in newspaper delivery work and as a "batboy" or "batgirl" for a professional baseball team when not required to be in school, no minor under 14 years old may be employed at any time.

Employment certificates are required of minors under age 16. Employers must have on file a copy of the employment certificate which must be accessible to the Department of Labor, the Arkansas Department of Education or local school officials. Application for the certificate is to be made on a form provided by the Department of Labor and requires submission of (1) proof of age, (2) description of the work and work schedule, and (3) written consent of the parent or guardian.

Children under the age of 16 are not permitted to be employed or to work in any occupation dangerous to the life and limb, or injurious to the health or morals of the child, or in any salon, resort, or bar where intoxicating liquors are sold or dispensed.

C. Certain Places of Employment

Minors under the age of 16 may not work in certain places of employment including on the stage of a theater or concert hall (unless performing with a parent or guardian), nor in or about or in connection with any processes in which dangerous or poisonous acids or gases or other chemicals are used. (This would include pesticides.) Nor may such a minor be employed in occupations causing dust in injurious quantities, in scaffolding, in heavy work in the building trades, in any mine, tunnel or excavation, quarry or coke oven. Employment in a bowling alley or pool or billiard room is also prohibited.

D. Hazardous Occupations

Minors under age 16 may not work in these occupations which are declared to be hazardous:

- (1) adjusting any belt to any machinery
- (2) sewing or lacing machine belts
- (3) oiling, wiping, or cleaning machinery or assisting therein
- (4) operating or assisting in operating any of the following machines:
 - (a) circular or band saws
 - (b) wood shapers
 - (c) wood jointers
 - (d) planers
 - (e) sandpaper or wood-polishing machinery
 - (f) wood turning or boring machinery
 - (g) picker machines or machines used in picking wool
 - (h) carding machines
 - (i) job or cylinder printing presses operated by power other than foot power
 - (j) boring or drill presses
 - (k) stamping machines used in metal or in paper or leather manufacturing
 - (l) metal or paper cutting machines
 - (m) corner staying machines in paper box factories
 - (n) steam boilers
 - (o) dough brakes or cracker machinery of any description
 - (p) wire or iron straightening or drawing machinery
 - (q) rolling mill machinery
 - (r) washing, grinding, or mixing machinery
 - (s) laundering machinery
- (5) in proximity to any hazardous or unguarded belt, machinery, or gearing
- (6) upon any railroad, whether steam, electric or hydraulic.

The Department of labor may determine that other occupations are sufficiently dangerous to the life or limb or injurious to the health or morals of children and exclude the employment of minors under 16 from employment so determined.

The Department of Labor has listed the following occupations in agriculture as particularly hazardous for the employment of children below the age of 16:

- (1) 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.
- (2) 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) Corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, or mobile pea viner;
 - (ii) Feed grinder, crop dryer, forage blower, auger conveyor, or the unloading mechanism of a nongravity-type self-unloading wagon or trailer; or
 - (iii) Power post-hole digger, power post driver, or nonwalking type rotary tiller.
- (3) 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.
- (4) 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).
- (5) Felling, bucking, skidding, loading, or unloading timber with butt diameter of more than 6 inches.
- (6) Working from a ladder or scaffold (painting, repairing, or building structures, pruning trees, picking fruit, etc.) at a height of over 20 feet.
- (7) Driving a bus, truck, or automobile when transporting passengers, or riding on a tractor as a passenger or helper.
- (8) Working inside:
 - (i) A fruit, forage, or grain storage designed to retain an oxygen deficient or toxic atmosphere;
 - (ii) An upright silo within two 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.

- (9) Handling or applying (including cleaning or decontaminating equipment, disposal or return of 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;
- (10) Handling or using a blasting agent, including but not limited to dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord; or
- (11) Transporting, transferring, or applying anhydrous ammonia.

E. School Hours and Work Hours:

Minors 16 and 17 years old may not work

- More than 54 hours per week.
- More than 6 days in one week.
- More than 10 hours a day.
- Work must be between 6:00 AM and 11:00 PM. The limitation of 11:00 PM does not apply on nights preceding non school days.

Minors under 16 years of age may not work:

- More than 8 hours on any day.
- More than 48 hours per week.
- More than 6 days in one week.
- Work must be between 6:00 AM and 7:00 PM when school is scheduled the next day. May work until 9:00 PM on nights preceding a nonschool day.

SOCIAL SECURITY AND MEDICARE-FEDERAL

A. Overview

The Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3101 *et seq.*, commonly known as Social Security, provides a variety of Social Security benefits, including hospital and medical insurance, disability benefits, survivor benefits and retirement. General revenues and federal insurance premiums fund FICA hospital and medical insurance provisions. All other benefits are funded from payroll taxes collected directly from employees, employers and from self-employed persons covered by Social Security.

An employer is required to correctly record the employee's social security number. To report Social Security taxes, the employer must have an employer identification number (EIN) obtained from the local Internal Revenue Service or Social Security Administration office. The EIN application must be completed by the seventh day after the first payment of wages subject to FICA.

To comply with FICA the employer must deduct the Social Security tax when wages are paid. The current amount of Social Security tax to be deducted from each employee's earnings is 7.65%. Employers are taxed for FICA the same rate as employees. Employers must deposit FICA income tax withholding at scheduled intervals with an authorized financial institution or a federal reserve bank.

B. Who Must Comply

Farm employers must make Social Security and Medicare deductions if they:

- Pay an employee \$150 or more in cash wages during a calendar year, OR
- Pay total wages of \$2,500 or more per year to all employees.

Some types of family employment are not covered by Social Security and Medicare. This exemption is not optional. Noncovered family employment is any work performed by:

1. A child under 18 years of age in the employ of his/her father or mother.
2. A parent in the employ of a son or daughter performing:
 - (a) domestic service in or about the home of the son or daughter
 - (b) work not in the course of the son's or daughter's trade or business,

The family exclusion does not apply when the employer is a corporation or association classified as a corporation or a partnership, unless the family relationship exists between the employee and all the partners.

Special Agricultural Workers (SAWs -- Holders of I-688A and I-688 Cards) under the Immigration Reform and Control Act of 1986 are considered permanent residents for the purpose of Social Security and Medicare and employers must deduct and pay Social Security and Medicare taxes on their wages. The same is not true for H-2A workers who are "nonresident aliens admitted on a temporary basis to perform agricultural services."

C. Employers Must

Social Security Taxes:

- Withhold 6.2 percent of the employee's cash wages (including the initial \$150) and add 6.2 percent as the employer's contribution (during 1993 the tax is limited to the first \$57,600 of annual wages).

Medicare Taxes:

- Withhold 1.45 percent of the employee's cash wages (including the initial \$150) and add 1.45 percent as the employer's contribution (during 1993 the tax is limited to the first \$135,000 of annual wages).
- Employers having an undeposited liability of withheld income taxes and Social Security-Medicare deductions and contributions must deposit such funds in a Federal Reserve Bank or authorized commercial bank as indicated in the following schedule. Deposits must be accompanied by Form 8109 Federal Tax Deposit Coupon.

Summary of Deposit Rules for Social Security and Medicare Taxes and Withheld Income Tax

| DEPOSIT RULE | DEPOSIT DUE |
|------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------|
| 1) If at the end of December your total undeposited taxes for the year are less than \$500: | No deposit is required You may pay the taxes to IRS with Form 941 or you may deposit them by January 31. |
| 2) If at the end of any month except December your total undeposited taxes are less than \$500 | No deposit is required. You may carry the taxes over to the following month. |

3) If at the end of any month your total undeposited taxes are \$500 or more but less than \$3,000:

Within 15 days after end of the month. (No deposit is required if you are required to make a deposit for an eighth-monthly period during the month under Rule 4 below. However, if this occurs in December, deposit any balance due by January 31.)

4) If at the end of any eighth-monthly period (the 3rd, 7th, 11th, 15th, 19th, 22nd, 25th, and last day of each month) your total undeposited taxes are \$3,000 or more but less than \$100,000:

Within 3 banking days after end of that eighth-monthly period.

5) If at the end of any day during an eighth-monthly period you undeposited taxes are \$100,000 or more:

By the end of the next banking day.

- Provide each employee by January 31, with a Form W-2, Wage and Tax Statement, showing the amount of earnings, income tax withheld, and amount of Social Security and Medicare deductions.
- Give each employee from who you withheld zero income tax (other than those who claimed exemption from withholding on Form W-2) a copy of Notice 797, You May Be Eligible for a Refund on Your Federal Income Tax Return because of the Earned Income Credit (EIC), or copy C of Form W-2.
- Attach copies of each employee's Form W-2 to Form W-3. Transmittal of Income and Tax Statements, and send to the Social Security Administration, Data Operations Center, Albuquerque, N.M. 87180, by February 28th of each year.
- Prepare and file Form 943, Employer's Annual Tax Return for Agricultural Employers, with the Internal Revenue Service by January 31st of each year (February 10 if tax was paid in full and on time).
- Maintain payroll records for at least four years for each employee.

These records should include:

1. Employee's name and social security number.
2. Cash payments to the employee for farmwork.
3. Any amount deducted as employee social security tax
4. The number of days the employee did farmwork for cash wages on a time basis.
5. The amount, if any, of income tax withheld.
6. The amount of noncash wages paid (for income tax purposes only).

NOTE: The farm operator may be held liable as joint employer if a labor contractor fails to pay Social Security and Medicare taxes. If a crew leader furnished farm workers, the operator must keep record of the name, permanent address, and employer identification number of crew leader. If the crew leader had no permanent mailing address, his or her present address should be recorded.

D. Self Employed Farmers: (Self Employed Contributions Act-SECA)

Self employed farmers who report a new income of \$400 or more from farming operations must contribute to Social Security and Medicare. The contribution rate in 1993 is 12.4 percent of annual net earnings up to \$57,600 for Social Security and 2.9 percent of annual net earnings up to \$135,000 for Medicare. The taxable limits for both Social Security and Medicare change each year based on an index of average wage levels. If a farmer also earns wages which are subject to Social Security and Medicare deductions, he/she will contribute on his/her self employment income until the combined earnings reach the Social Security limitation of \$57,600 for 1992 and the Medicare limitation of \$135,000 for 1993.

UNEMPLOYMENT COMPENSATION STATE AND FEDERAL

A. Overview

The Federal Unemployment Tax Act (FUTA), 26 U.S.C. § 3301 *et seq.*, requires employers to pay an unemployment tax based on the employer's payroll. The FUTA is administered in conjunction with the unemployment insurance provisions of the Social Security Act. The objective of unemployment insurance is to provide workers with at least a partial income during temporary periods of involuntary unemployment. Unemployment insurance is a state-administered program with federal participation. Currently, the tax rate for federal unemployment insurance is 6.2% of the wages paid by the employer during the calendar year of employment.

B. Who Must Comply

Any employer of farm workers who, either has in the current calendar year or had in the preceding calendar year.

1. a payroll of at least \$20,000 in any calendar quarter, to individuals employed in agricultural labor

OR

2. ten (10) or more employees for some portion of a day in twenty (20) or more weeks during the year, whether or not the weeks were consecutive.

C. Responsible Employer

Depending upon the circumstances, the Farm Operator or the Crew Leader may be the employer.

The FARM OPERATOR is the employer under these circumstances:

1. The individual is an employee of the farm operator under usual common law rules applicable in determining the employer-employee relationship, or
2. The worker is furnished by the crew leader but is not treated as an employee of the crew leader, i.e., the crew leader is acting on behalf of the farm operator rather than as an employer, or
3. The crew leader has entered into a written agreement with the farm operator under which the crew leader is designated as an employee of the farm operator.

The CREW LEADER is the employer under these circumstances:

1. The crew leader holds valid certification of registration under the Migrant and Seasonal Agricultural Worker Protection Act of 1983, or
2. Substantially all crew members operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment provided by the crew leader, and
3. The employee is not an employee of any person under usual common law rules applicable in determining the employer-employee relationship.

D. Definition of "Agricultural Labor"

If the employment is for "agricultural labor" the FUTA coverage is required only if the tests outlined above are met. For purposes of determining whether the work performed is "agricultural labor" the Arkansas statute provides that "agricultural labor" means any service performed:

- (A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;
- (B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of the farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane if the major part of the service is performed on a farm;
- (C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in § 15(g) of the Agricultural Marketing Act, as amended, or in connection with the operation or maintenance of ditches, canals, reservoirs, waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;
- (D)
 - (i) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if the operator produced more than one-half (1/2) of the commodity with respect to which the service is performed;
 - (ii) In the employ of a group of operators of farms, or a cooperative organization of which the operators are members, in the performance

of service described in (i), but only if the operators produced more than one-half (1/2) of the commodity with respect to which the service is performed;

- (iii) The provisions of subdivisions (i) and (ii) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or as used in this section, the term "farm" includes stock, dairy, poultry, fruit, furbearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

E. Farm Related Exempt Employment

- Farm work for an exempt employer (See who must comply).
- Certain students working for credit on a program combining academic instruction with work experience (work-study program).
- Service performed for a son, daughter, or spouse, or by a child under age 21 for his father or mother.
- Work on a fishing vessel under 10 net tons.
- Work performed by temporary H-2A workers.

F. Employers Must

1. Pay unemployment compensation tax on the first \$8,000 of annual payroll earnings for each employee. There are two parts to the tax: federal and state.
 - (a) The effective FEDERAL tax is 0.8 percent of the first \$7,000 of annual payroll of each employee. (The actual federal tax is 6.2 percent less a credit of 5.4 percent if the employer pays the state tax by January 31st of the following year.)
 - (b) The STATE tax will vary depending on the experience rating of the individual farm employer and the timeliness of tax payments. Farm employers without an experience rating will pay 2.9 percent of the first \$8,000 of annual payroll of each employee.

Experience ratings are recalculated annually thereafter. Annual rate notices are mailed to all employers. The current maximum tax rate payable in Arkansas is 6.0 percent. The minimum tax rate is 0.1 percent.

2. Submit tax and wage reports as required. The employer's Quarterly Tax and Wage Report (Form Ucr-6) is due the first day of the first month following the end of the calendar quarter. Penalty and interest charges are due if the Tax and Wage Report is filed after the last day of the first month following the quarter. The Tax and Wage Report form, which is sent to each liable employer at the end of each quarter, provides for listing each employee's name, social security number, number of weeks worked in the calendar quarter, and the gross wages paid.
3. When a former employee submits an unemployment benefit claim, most recent employers will be notified from the local office on Form UCB-4, Notice of Claim Filed. The employer has ten days to furnish the local office information about the job separation which may be disqualifying (see list below). Other employers will also be notified of the claim by the central office on Form UCB-412. The employer has ten days to furnish the central office with information about the separation which may be disqualifying. If the employer fails to reply within the prescribed period concerning a disqualifying separation the claim may be charged against his experience rating and result in a higher tax rate in the future.
4. Display, in a place where all employees can see it, the poster "To Employees" (LES Form BUC-83 in English or LES Form BUC-83S in Spanish).
5. Have records available for inspection at any reasonable hour during the business day and maintain records for a period of five calendar years,

G. Employee Eligibility

In addition to being unemployed, able and available for work, and not subject to any of the disqualifications listed below, a claimant must have the necessary wage credits during the base period. The base period is the first four of the last five completed calendar quarters prior to the quarter in which a claim is filed.

H. Weekly Benefits

The weekly benefit amount to which a claimant is entitled is one-half the average weekly wage but not more than 66 2/3% of the state average weekly wage for insured employment for the calendar year (determined on June 1 each year by the Department of Labor).

I. Employee Claims

Employees do not pay for unemployment insurance. This cost is borne by the employer. Unemployed farm workers, who are eligible, may file for benefits at the local office of the Employment Security Division.

A farm worker may not be eligible for benefits if it is found that he or she:

- Voluntarily quits their job without good cause attributable to their employment.
- Was discharged for misconduct connected with their work.
- Fails to apply for or accept suitable work.
- Is unemployed due to participation in a labor dispute other than a lockout at the premises of employment.
- Fails to disclose required information on a benefit claim or willfully makes a false statement or misrepresentation.
- Refuses to report for work upon recall after a layoff.
- Is receiving or is eligible to receive a retirement income from a base period employer.
- Is receiving or is seeking unemployment benefits under an unemployment compensation law of another state or the United States.
- Is an illegal alien.

INCOME TAX WITHHOLDING FOR FARMWORKERS

A. Overview

The Internal Revenue Code requires all employers to deduct and withhold taxes on wages paid to their employees. 26 C.F.R., Subpart E, sections 31.3401(a)-1 *et seq.* The Internal Revenue Code defines wages as all remuneration, cash, checks, bonds and other value paid for services provided. The deduction must be made in accordance with federal income tables or computational procedures prescribed by the U.S. Department of the Treasury. Farm employers are required to withhold federal income taxes on the cash wages of farm workers.

B. Exemptions

Cash farm wages are not subject to withholding unless the worker is paid \$150 or more per year by one employer, or the employer's labor expenditures for the year equal or exceed \$2,500, except that the \$2,500 rule does not apply if the worker:

- 1) Is employed in hand harvest labor,
- 2) Is paid on a piece rate basis in an operation generally recognized as paying on a piece rate basis,
- 3) Commutes daily to the farm from his permanent residence, and
- 4) Has been employed in agriculture less than 13 weeks during the preceding calendar year.

Remuneration paid in any form other than cash for agricultural labor, i.e. a house, an automobile, food, etc., is not considered wages for withholding purposes.

Special Agricultural Workers (SAWs: Holders of 1-688 and 1-688A cards) under the Immigration Reform and Control Act of 1986 are considered permanent residents for the purpose of Federal Income Tax Withholding and employers must withhold income taxes on their wages. The same is not true for H-2A workers who are "nonresident aliens admitted on a temporary basis to perform agricultural service."

C. Employers Must

- (1) Except for those workers in the exempt status above, obtain a completed Form W-4, "Employee's Withholding Allowance Certificate" for each employee and, withhold income taxes on cash wages paid for agricultural labor. Copies of Form W-4 must be sent to IRS when an employee (1)

claims more than 10 exemptions or, (2) claims exemption from withholding and wages exceed \$200 per week.

- (2) Deposit such withholding taxes in accordance with deposit rules of the IRS (see Social Security and Medicare-Federal Section).
- (3) Prepare and give to each employee a Form W-2, "Wages and Tax Statement," by January 31st for the preceding year's taxes.
- (4) Send copy UN of Form W-2 and a completed Form W-3, "Transmittal of Income and Tax Statements" to IRS by February 28th.

D. Employee Tax Obligations

Farm employees should be aware that every citizen or resident of the U.S., whether an adult or minor, who has \$5,500 or more income must file a return. In the case of married couples filing joint returns, the amount is \$10,000. These figures increase to \$10,650 if one individual is over 65 years of age and to \$11,300 if both are over 65. The taxable income thresholds change from year to year and the current amount should be obtained from I.R.S.

A farm employee is required to file a declaration of estimated tax using Form 1040ES if he/she expects to have a tax liability of \$500 or more from sources not subject to withholding. The tax may be paid in four equal installments.

ADVANCE EARNED INCOME CREDIT--FEDERAL

A. Overview

The earned income credit is a credit against tax for taxpayers who provide more than one-half of the support for a child (a minor child or a full-time student under the age of 24), having its principal place of abode with the taxpayer. The employee may request advance payment from the employer (taken from the income tax withholding, Social Security taxes and Medicare taxes). The payment is added to the employee's pay.

B. Who must comply

All employers including farmers must pay Advance Earned Income Credit if the employee is eligible and requests payment.

C. Exemptions

Employers who pay agricultural workers on a daily basis are not required to pay advance earned income credit.

D. Employer must

- Notify employees not having income tax withheld that they may be eligible for earned income credit (Notice 797 or use Copy C of Form W-2).
- Provide the Form W-5, Earned Income Credit, Advance Payment Certificate, to the employee upon request (available at the nearest IRS office or post office).
- When a Form W-5 is filed,
 1. Compute employee's gross pay (for agricultural employees gross pay is interpreted to mean those wages subject to Social Security and Medicare Taxes).
 2. Compute employee's Social Security, Medicare and Withholding Tax.
 3. Refer to tables in IRS Circular E, Employer's Tax Guide, and compute the Advance Earned Income Credit payment based on employee's gross pay for pay period.

4. Add the Advance Earned Income Credit to the worker's pay for the pay period.
 5. Show the amount of advance EIC payments during year on employee's form W-2.
 6. Retain all records of Advance Earned Income Credit payments for four (4) years. These records should include the following information:
 - (a) Copy of employee's Form W-5.
 - (b) Amount and date of employee's earnings.
 - (c) Dates of each employee's employment.
 - (d) Dates and amount of tax deposits made.
 - (e) Copies of returns filed.
- On the form W-5 the employee must show if he or she is married and whether the spouse has a Form W-5 in effect for the year. If the employee indicates that the spouse has a Form W-5 in effect, the employer will use the table titled "Married with both spouses filing certificate."
 - File the appropriate forms with the Internal Revenue Service, Form 941, Employer's Quarterly Tax Return, for non-farm packinghouses, canners, and processors, or Form 943, Annual Tax Return for Agricultural Employers, for farm employers.
 - File Form W-3, Transmittal of Income and Tax Statements, annually by February 28th, accompanied by a W-2 form for each individual employee to the Social Security Administration (see section on Social Security).

Employers are reimbursed by the Federal government for Advance Earned Income Credit payments as follows:

- The employer deducts the amount of the Advance Earned Income Credit Payment from his total liability for withholding taxes as he periodically remits funds to the Internal Revenue Service.
- If the Federal Income taxes withheld are not sufficient to cover the amount of the Advance Earned Income Credit payments to his employees, the employer may deduct the excess from the employee contribution to Social Security and Medicare.
- If there is still an excess of Advance Earned Income Credit payments, the employer may deduct the excess from the employer's contribution to Social Security and Medicare.
- If for any payroll period the advance EIC payments are more than the withheld income tax and the Social Security and Medicare Taxes (including the employer's share of Social Security and Medicare Tax), the employer may:

1. Reduce each advance EIC payment proportionately; or
2. Elect to make full payment of the advance EIC amount and have these full amounts treated as an advance payment of the employer's tax liability.

E. Employee Eligibility

Employees are eligible to receive Advance Earned Income Credit payments if they are eligible for EIC, and:

- The employee's expected earned income and adjusted gross income each is less than a specified figure which changes annually. (Check with IRS.)
- If married, the employee must file a joint tax return or (if eligible) as head of household.
- The employee must not be able to exclude any income earned abroad, housing expense exclusion or foreign housing expense deduction.
- The employee cannot be a qualifying child of another person who is claiming the EIC.
- The employee generally must have a child living with him/her more than half the year, including time when the child is away at school or on vacation. (The entire year for a foster child.)
- A married child generally must be claimed as a dependent by the employee.
- The child must be under age 19 at the end of the year, a full-time student under age 24, or permanently and totally disabled.
- Files a Form W-5 with his or her employer. The employee is solely responsible for determining his or her eligibility when filing a Form W-5.
- An employee who files a Form W-5 and receives Advance Earned Income Credit payments must file an IRS Form 1040, Income Tax Return, at the end of the year. If he or she is married, it must be a joint tax return.

TARGETED JOBS TAX CREDIT -- FEDERAL

A. Overview

Current law provides a Targeted Jobs Tax Credit for qualified wages paid or incurred by employers for members of targeted groups who begin work after January 1, 1979 and on or before June 30, 1992.

B. Eligibility

Employers may utilize this tax credit if they employ individuals who are classified as being in one of the following targeted groups:

1. Economically disadvantaged summer youth employees who are 16 or 17 years of age on the hiring date and who have not previously worked for the employer;
2. Youth aged 18 through 22 from economically disadvantaged families, (the definition of "Economically Disadvantaged" varies with location);
3. Youth aged 16 through 19 from economically disadvantaged families, who participate in a qualified cooperative education program;
4. Handicapped persons referred to the employers from state vocational rehabilitation or Veterans Administration Programs;
5. Vietnam-era veterans who are economically disadvantaged;
6. Ex-offenders who are economically disadvantaged and hired no later than five years after release from prison or date of conviction, whichever is more recent;
7. Recipients of Aid to Families with Dependent Children (AFDC) who are eligible for AFDC on the hiring date and have received it for 90 days immediately prior to being hired;
8. Recipients of Federal Supplemental Security Income (SSI) for at least 60 days prior to certification.
9. Recipients of state and local general assistance payments for at least 30 days.

C. Certification

Cooperative Education Target Group certifications can only be issued by a qualified school. AU other target group certifications can be processed by the state Employment Security Division. Job seekers may apply directly to ESD or be referred by a prospective employer. If determined eligible, a voucher is issued by ESD. Vouchers are good for 45 days.

The certification form provides the employer with all the evidence needed to claim the tax credit. Employers claim the tax credit by filing IRS Form 5884 with their income tax return.

D. Tax Credit

The tax credit can be taken for the first year of eligible employment only. For most target groups, employers may claim a credit of 40 percent of first year wages up to \$6,000 per employee. Employers are allowed a maximum credit of \$2,400 per employee the first year. For economically disadvantaged summer youth employees, employers may claim a credit of 40 percent of wages up to \$3,000, for a maximum credit of \$1,200. The credit applies only to employees hired into a business or trade. Maids, chauffeurs and other household employees do not qualify for the credit.

In figuring business expenses for computing income tax, the deduction for wage expenses is reduced by the amount of the tax credit.

E. Limitations

- The Targeted-Jobs Tax Credit cannot be taken on wages paid to an employee for any period you are receiving federal funds for on-the-job training. However, the credit may be claimed on certified employees after on-the-job training is completed.
- Firms hiring individuals whose wages qualify for credit must request certification prior to or on the date the individual starts to work, i.e. the letter must be postmarked on or before the date of hire. If the applicant has a voucher as evidence of eligibility determination, the employer has five days to get the voucher in the mail to request certification.
- The employer must retain the employee on his payroll for at least 90 days or 120 hours (14 days or 20 hours for summer youth) to claim the credit for wages paid.
- The tax credit is limited to 90 percent of the employer's federal income tax liability after certain other credits are deducted.
- Any unused tax credit can be carried back three years or forward for fifteen years.

HUMAN RIGHTS – DISCRIMINATION -- FEDERAL

A. Overview

While the courts have interpreted the National Labor Relations Act to prohibit racial discrimination, agriculture is excluded from the provisions of this law. In general, however, human rights in agriculture are dealt with in four basic federal laws and apply to most, but not all farm employers.

B. Title VII: Civil Rights Act of 1964

Congress has passed extensive legislation to prohibit discriminatory employment practices. Title VII of the Civil Rights Act of 1964 has been especially important in protecting the civil rights of employees and job seekers. Title VII removes all "artificial, arbitrary and unnecessary" barriers to employment based on sex, race, color, national origin, or religion. (Title VII covers all employers with 15 or more employees). The courts address Title VII cases under two theories: "disparate impact" and "disparate treatment."

1. Disparate Impact

A disparate impact case is one in which an employer uses practices that appear neutral on the surface, but adversely affect a protected class of persons such as women or minorities. An employer's imposition of minimum height and weight requirements upon prospective employees is a classic example of disparate impact. Even though the requirements apply to both men and women, they tend to exclude a larger percentage of women from doing a job because, on an average, men are taller and heavier than women. An employer's requirement that all employees weigh a minimum of 120 pounds and be at least 5 feet 2 inches tall effectively excludes over 40% of the female population, but less than 10% of the male population, and statistically establishes a *prima facie* case of sexual discrimination.

If an employer imposes job requirements that have a disparate impact, the employer must prove that a business necessity justifies the hiring criteria. For example, if an employer did impose weight and height requirements for prospective employees, he or she would have to prove that the requirements were necessary to do the job. While physical size and strength can be a legitimate criteria if a job requires extensive heavy lifting or involves extremely strenuous physical work, an employer cannot merely assume that women cannot do the job. The United States Supreme Court requires the use of tests that measure strength directly. If an employer needs an employee to do a physically demanding job, such as loading and unloading large livestock, the employer can require applicants to be able to repeatedly lift certain heavy loads. While the employer might be able to find

more men than women capable of lifting the loads, the employer could not legitimately refuse to hire a woman who was physically capable of doing the job.

An employer's claim that his or her discriminatory hiring criteria arise from a business necessity will be closely scrutinized by the courts. As the Supreme Court has noted, when a particular employment practice is shown to have discriminatory effects, it may be justified only if the employer shows it "... to have a demonstrable relationship to successful performance of the job for which it [is used]." Therefore, in order for discriminatory criteria to qualify as a business necessity, the employer must show that:

- 1) the criteria are necessary to the safe and efficient operation of the [employer's] business;
- 2) they effectively carry out the purpose they are supposed to serve; and
- 3) there are no alternative policies or practices which would better or equally well serve the same purpose with less discriminatory impact

2. Disparate Treatment

Disparate treatment cases are obvious acts of discrimination. In disparate treatment cases an employer openly excludes classes of people from employment, such as women or minorities. In disparate treatment cases the complaining parties need only prove that they were qualified for a particular position, applied for it, and were rejected, even though the job continued to be advertised or was still available.

Disparate treatment cases are extremely difficult for employers to defend. In order to successfully defend a disparate treatment case an employer must rely on the "bona fide occupational qualification" (BFOQ) exception found in Title VII. The BFOQ exception permits what otherwise would be illegal discriminatory practices "for religion, sex or national origin, as a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The BFOQ exception is extremely narrow and has not been recognized as a legitimate defense in a number of circumstances. For example, customer preferences are not a legitimate BFOQ. The fact that an employer's customers do not like dealing with a woman, or a minority, or a person with a particular religious preference, is not a legitimate basis for discrimination.

It is very difficult for an employer to refuse to hire any person based on a BFOQ exception. For example, an agricultural employer might believe that certain agricultural activities, such as handling heavy machinery or large animals, are particularly dangerous to women--especially pregnant women. However, the courts have not recognized a BFOQ exception on the basis that a job is dangerous to women. Instead the employer would have to prove that female workers would pose a threat to the safety of others--a highly doubtful proposition. This is especially true given the 1978 passage of the Pregnancy Discrimination Act which states that discrimination "on the basis of sex" includes discrimination on the basis of pregnancy, child birth or related medical conditions. Women cannot be excluded

from dangerous occupations because of possible injuries to unborn children. Under Title VII the woman makes those choices for herself and her unborn child.

3. Pre-employment Practices

Title VII applies to discriminatory employment practices affecting every aspect of employment, including recruitment, hiring, promotion, compensation and termination of employment. Employers, however, are particularly vulnerable to Title VII claims arising out of pre-employment practices. Many employers unknowingly conduct illegal interviews of prospective employees as many of the inquiries contained in employment application forms are unlawful. Some pre-employment inquiries are directly prohibited by law. For example, questions regarding prior arrest records have been found per se unlawful because the questions themselves have been found to disproportionately deter minorities.

Employers are expressly prohibited from disqualifying applicants on the basis of their answers to discriminatory questions. Questions which either directly or indirectly disclose the race, color, religion, sex, or national origin of applicants may constitute evidence of unlawful discrimination. Therefore, employers must be extremely cautious in asking a pre-employment question that (1) identifies the applicant's race, color, religion, sex, or national origin, (2) results in the screening out of persons based upon these characteristics, or (3) which has no direct relationship to the employee's ability to perform the job as expected.

Liability may arise not only from inquiries which directly seek information relating to the above characteristics, but also questions which indirectly screen out members of protected groups. The clearest example of this is illustrated through impermissible lines of inquiry directed toward women.

Out of a desire to reduce the potential for employee absenteeism, many employers are typically concerned about a woman's child-bearing plans and child care needs. Questions relating to these subjects, even if asked of all applicants, indicate that the employer's hiring practices discriminate against women. The discriminatory effect arises from the fact that such questions have a disparate impact upon female applicants. Inquiries which even indirectly express a bias against women are unlawful and will give rise to a cause of action against the employer.

The only means available to an employer for soliciting information which tends to indicate a discriminatory approach to hiring practices is if the employer can demonstrate that such an inquiry is justified by a business necessity.

The employer bears a very heavy burden in establishing a business necessity for discriminatory pre-employment inquiries. Employers are generally required to support an assertion that a person's gender, race, religion, etc. are related to job performance with a technical validation study.

Given the high risks posed to an employer who conducts discriminatory hiring practices, the agricultural employer should keep in mind the following considerations:

- (1) all application and interview procedures should be conducted in accordance with formal, structured, standardized, objective, and job-related guidelines for evaluating the applicant's qualifications;
- (2) current employees who will be involved in the applicant screening and hiring process must be instructed about the use of non-discriminatory lines of inquiry; and
- (3) if there is a valid reason for gathering protected personal information from applicants, such as for purposes of health insurance policy coverage, the employer should wait until after making a decision to hire the applicant.

4. Sexual Harassment

The consequences of sexual harassment or discrimination should be of increasing concern to employers. Employers should establish and widely circulate rigid company policies against such behavior. Procedures to quickly and effectively deal with sexual harassment should be established as soon as possible and should be the basis for across the board employee training.

The Equal Employment Opportunity Commission (EEOC) guidelines define two types of sexual harassment; both of which are illegal:

QUID PRO QUO (something given or received for something else):

Occurs when employee is subjected to unwelcome sexual advances and submission is made the basis for hiring, firing or advancement.

ENVIRONMENTAL:

Occurs when any type of unwelcomed sexual behavior creates a hostile work environment.

Examples of Sexual Harassment:

- Unsolicited and unwelcome flirtations, advances or propositions.
- Display of sexually suggestive objects or pictures.
- Graphic or degrading comments about employee's appearance, dress or anatomy.
- Ill-received dirty jokes and offensive gestures.
- Sexual or intrusive questions about employee's personal life.
- Explicit descriptions of the harasser's own sexual experiences.
- Abuse of familiarities or diminutives such as "honey," "baby," "dear."

- Unnecessary, unwanted physical contact such as touching, hugging, pinching, patting, kissing.
- Whistling, catcalls, leering.
- Exposing genitalia.
- Physical or sexual assault.
- Rape.

C. Equal Pay Act of 1963

The Equal Pay Act of 1963 which amends the Fair Labor Standards Act of 1938 was enacted for the purpose of correcting "Wage differentials based on sex." The act requires equal pay for both sexes for jobs requiring substantially equal skill, effort, and responsibility, and for jobs which have similar working conditions. The job or working condition comparisons usually only apply to one establishment or plant, even if an employer has similar, multiple plants or establishments. Violations of this act are cured by raising the wages of the lower paid employee to that of the higher paid. Criminal penalties may be imposed for willful and flagrant violations.

The Equal Pay Act of 1963 applies to farmworkers and prohibits wage discrimination on the basis of sex to employees who are subject to the minimum wage provisions of the act. Exceptions are permitted when wages are based on: (a) a seniority system, (b) a merit system, (c) a system which measures earnings by quantity or quality of production, or (d) any other factor other than sex.

D. Age Discrimination in Employment Act of 1967

This act prohibits employers with 20 or more workers during at least 20 calendar weeks of the current or preceding year from discriminating against individuals aged 40 or older in matters of hiring, discharging, wages and terms, conditions or privileges of employment because of age.

The law prohibits any statement in advertisements which indicate any preference, limitations, specifications, or discrimination on the basis of age. For example, you are not permitted to use such phrases as "age 25 to 35," "young," "boy," "girl," or others of similar nature. Such phrases as "age 40 to 50," "age over 65," "retired," or "supplement your pension" are also prohibited since they discriminate against others in the 40 or older age group. The phrase "state age" is not, in itself, a violation of the act. However, since it is felt that such a phrase will tend to deter older applicants, its use will be carefully scrutinized to assure that such a request is for a lawful purpose. The same reasoning should be followed when using similar phrases such as "give date of birth" on an employment application. The act does not prohibit specification of a minimum age below 40 in advertisements, i.e. "must be 18 or over."

There are permitted exceptions to the above rules but they should be used with care. An exception is permitted where age is a bona fide occupational qualification (BFOQ) and is reasonably necessary to the normal operation of the particular business. This exception is narrowly construed and the burden of proof in establishing that it applies is the responsibility of the employer.

The act provides that it shall not be unlawful for an employer to take an action otherwise prohibited where the differentiation is based on reasonable factors other than age. No precise definition is made of these other factors and the burden of proof is on the employer.

If the results of a test are used as the basis for differentiation and cannot be related to job performance, it is unlawful. A vital factor in employee testing as it relates to the 40 or older age group is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the increased use of tests in primary and secondary schools in recent years, may have an advantage over older applicants.

A differentiation based on the claim that it is more costly to employ older persons is unlawful except for employee benefit plans.

AMERICANS WITH DISABILITIES ACT (ADA) - FEDERAL

A. Overview

One of the most important pieces of civil rights legislation to be enacted in recent years is the Americans with Disabilities Act (ADA), which was signed by President Bush on July 26, 1990. 42 U.S.C. § 12101 et seq. (1990). The ADA requires employers to make a "reasonable accommodation" to an applicant's or employee's known physical or mental limitations. Employers must modify work environments to make existing facilities readily accessible and usable by disabled employees. The ADA prohibits discrimination against disabled people in the same manner that Title VII prohibits discrimination against other protected groups.

B. Persons Protected

The ADA protects the 43,000,000 Americans with one or more disabilities. Under the ADA disability means:

1. a physical or mental impairment that substantially limits one or more of an individual's major life activities;
2. a record of such impairment; or
3. being regarded as having such an impairment.

The ADA protects not only those with obvious mobility impairments, but also the mentally retarded and those with such hidden disabilities as epilepsy, cancer, heart disease or AIDS. Even those persons with mental disturbances may be protected.

C. Private Employment Discrimination

Private employment discrimination is prohibited under Title I of the ADA. Title I states the following policy goal:

"(a) General rule· No covered entity shall discriminate against a qualified individual with a disability because of the disability of the individual in regard to job application procedures, the hiring, advancement of or discharge...."

Covered entity includes any employer with 25 or more employees. After July 26, 1994, an employer will

"mean any person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year"

D. Qualified Person With a Disability

A qualified person with a disability is defined as:

"An individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position...."

To avoid discriminating against a "qualified person with a disability" an employer must be careful to define the "essential functions" of a position. An employer must be able to explain why any function is listed as essential. It is suggested that an employer itemize and prioritize all duties of a particular position and write the job description in clear, concise and accurate language.

The federal regulations describe "essential function" as:

"Primary job duties that are intrinsic to the employment position the individual holds or desires. The term 'essential function' does not include the marginal or peripheral functions of the position that are incident to the performance of primary job functions."

Factors which can be considered in determining whether a job function is essential include:

- employer judgment;
- time necessary to perform a function;
- work experience of current and past employees in that position;
- limited number of employees available to perform the function;
- consequences of not requiring a certain function;
- the position exists to perform the function.

The above factors are just some that can be taken into consideration. Each case is decided on its own merits.

Once the employer has defined the essential functions of a job, the employer must design hiring and advancement procedures which are non-discriminatory towards the disabled.

However, questions routinely asked on employment applications, and previously not violative of other civil rights legislation, may be prohibited under the ADA. Examples of such questions include the following:

- Have you ever had or been treated for any of the following conditions or diseases (followed by a checklist of various conditions and diseases)?
- Have you been treated for any conditions or diseases in the past three years? Please list.
- Have you ever been hospitalized? If so, for what condition?
- Have you ever been treated by a psychiatrist or psychologist? If so, for what condition?
- Have you ever been treated for any mental condition?
- Is there any health-related reason you may not be able to perform the job for which you are applying?
- Have you had a major illness in the last five years?
- How many days were you absent from work because of illness last year? (Note: an employer may state its attendance requirement and inquire whether the applicant can satisfy that requirement).
- Do you have any physical defects that preclude you from performing certain kinds of work? If so, please describe the defects and specific work limitations.
- Do you have any disabilities or impairments that may affect your performance in the position you seek?
- Are you taking any prescribed drugs? (This inquiry is prohibited because the answer may reveal a disability).
- Have you ever been treated for drug addiction or alcoholism?
- Have you ever filed for workers' compensation insurance?

F. Reasonable Accommodation

To establish a *prima facie* case of discrimination, a "qualified person with a disability" need only show that he or she was discriminated against and that a reasonable accommodation could have been made by the employer to accommodate the complainant's disability. "Reasonable accommodation" includes: (1) making existing facilities readily accessible and usable to disabled persons; (2) restructuring jobs, such as modifying work schedules; (3) modification of equipment or devices or even the acquisition of new equipment or devices; (4) modification of examinations, training materials or policies; (5) hiring qualified readers or interpreters, and (6) similar modifications for disabilities.

G. Undue Hardship

To defend a *prima facie* case of discrimination under ADA, the employer must prove that a reasonable accommodation would be an "undue hardship." Undue hardship is determined on a case by case basis, but the following factors may be taken into consideration:

- the facility's financial resources;
- number of persons employed;
- the overall size of the operations;
- the impact of the expense on the business;
- the type of business, its structure and functions.

I. Prohibitions and Exemptions

Although the protection afforded under the ADA is extremely broad, there are a number of persons and activities that not covered. The following is a list of those persons and activities:

- The ADA specifically excludes from protection homosexuals, bisexuals, compulsive gamblers, kleptomaniacs, transvestites, transsexuals, and pedophiles.
- A person who is a "significant risk to the safety of others" may be denied a job without reasonable accommodation.
- An employer may prohibit the illegal use of drugs and alcohol at the work place. Also, employers can require that employees not be under the influence of alcohol or illegal drugs while at work.

J. Enforcement

Like Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Equal Pay Act of 1963, the ADA is enforced by the Equal Employment Opportunity Commission (EEOC). As a result, employees have a convenient mechanism for pursuing grievances against employers. Many states have their own anti-discrimination statutes and enforcement agencies which function in a manner similar to the EEOC.

CIVIL RIGHTS - STATE

A. Overview

The 1993 Arkansas General Assembly enacted "The Arkansas Civil Rights Act of 1993" which prohibits discrimination because of race, religion, ancestry or national origin, gender or the presence of any sensory, mental, or physical disability. "Civil Rights" includes the right to obtain and hold employment without discrimination.

B. Remedies

An individual injured by employment discrimination by an employer has a civil action in court. The court may issue an order prohibiting the discrimination and may award back pay, interest on back pay, cost of litigation and reasonable attorney fees. Back pay may accrue for up to two years prior to the filing of the action.

An individual injured by intentional discrimination by an employer may be entitled to recover compensatory damages (injury for mental anguish, loss of dignity and other intangible injuries) and punitive damages. The total of compensatory and punitive damages awarded cannot exceed specified amounts depending on the number of employees in each of twenty calendar weeks in the current or preceding calendar year.

| <u>Damages Limit</u> | <u>Number of Employees</u> |
|-----------------------------|-----------------------------------|
| \$15,000.00 | Fewer than 15 |
| \$50,000.00 | 15 - 100 |
| \$100,000.00 | 101 -200 |
| \$200,000.00 | 201 -500 |
| \$300,000.00 | More than 500 |

C. Time Limits

The right to bring the action must be brought within one year after the alleged employment discrimination or within 90 days of receipt of a "Right to Sue" letter or notice of "Determination" from the U.S. Employment Opportunity Commission concerning the unlawful employment practice, whichever is later.

D. Exemptions

The employment discrimination provisions do not apply to employment by a religious corporation, association, society or other religious entity. Nor is it employment discrimination to refuse to accommodate the religious observance or practice of an employee or prospective employee if the employee is able to demonstrate that the accommodation cannot be reasonably made without undue hardship on the conduct of the business.

It is also not construed as discrimination, provided the conduct is based on a bona fide business judgment and not as a pretext for prohibited discrimination, for differences to be established in benefit plans and insurance based on such things as underwriting risks if based on or not inconsistent with state or federal law.

E. Definitions

"Employee" does not include an individual employed by his or her parents, spouse or child or an individual employed under special license in a nonprofit sheltered workshop or rehabilitation facility nor to individuals employed outside the State of Arkansas.

"Disability" does not include compulsive gambling, kleptomania or pyromania; current use of illegal drugs or psychoactive substance use disorders resulting from illegal use of drugs or alcoholism.

RELATED LAWS AND REGULATIONS

A. Employee Polygraph Protection -Federal

Most private employers are prohibited from using lie detector tests either for pre-employment screening or during the course of employment.

Federal, state and local governments are not affected by the law. The act permits polygraph tests, subject to restrictions, of certain prospective employees of security service firms (armored car, alarm, and guard) and of pharmaceutical manufacturers, distributors and dispensers.

Those employees subject to polygraph tests have certain strict rights including the conduct and length of the test, the right of written notice, the right to refuse or discontinue a test and the right not to have test results disclosed to unauthorized persons.

B. Portal-to-portal Act of 1947:

This federal act establishes a uniform interpretation as to what constitutes compensable working time where travel time to and from work is involved or where certain preliminary or postliminary activity can be construed as work. In general, work starts at the work site unless otherwise provided by contract, custom or practice.

C. Right-to-Work:

The Arkansas Constitution guarantees that:

No person shall be denied employment because of membership in or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union; nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union, or because of resignation from a labor union; nor shall any person against his will be compelled to pay dues to any labor organization as a prerequisite to or condition of employment.

- Article 34, Section 1, Arkansas Constitution.

PROTECTING YOURSELF FROM EMPLOYEE CLAIMS

A. Overview

Although an agricultural employer may seem overwhelmed by the statutes protecting employees' rights, and even be fearful of the common law tort doctrines available to employees, there are some protective measures that can be taken to lessen any employer's exposure to employee claims. Protective measures include risk management techniques and adequate insurance coverage.

B. Risk Management

Risk management merely consists of anticipating, recognizing and eliminating problems. A number of risk management measures have already been suggested throughout this chapter. Of course, the most effective risk management is compliance with the law. However, to avoid even inadvertent violations of employees' rights any employer should develop a risk management plan. Key elements of a risk management plan include:

1. The implementation of non-discriminatory hiring practices and guidelines;
2. Careful screening of potential employees, including checking references;
3. Properly training employees, including the use of equipment;
4. Providing regular IS-minute work breaks to lessen fatigue and the possibility of injury;
5. The establishment of safety regulations which are made known to employees and are enforced by management;
6. The formulation of policies that respect employee privacy;
7. The formulation and enforcement of policies that prohibit on-the-job discriminatory conduct, including sexual discrimination and harassment. Copeland, *supra*.
8. The establishment of job descriptions which are communicated to employees;
9. The regular use of job performance appraisals; and
10. Documentation of the reasons necessitating the termination of employment.

More than anything else, the employer must be sensitive to his or her employees' complaints. The employer should make it a practice to thoroughly investigate any danger or difficulty brought to the employer's attention by employees. The employer must also be willing to take prompt remedial action when needed.

C. Insurance Coverage

To at least limit the financial exposure to employee's claims of wrongdoing, an agricultural employer must be adequately insured. Unfortunately, many agricultural employers do not have liability coverage as to their employees.

1. Farmers Comprehensive Personal Liability Policy

Many agricultural employers are relying upon a farmers comprehensive personal liability policy (FCPL) to protect them from all liability claims, including those filed by employees. Certainly, the overwhelming number of farmers rely upon "FCPL policies for such protection.

Although the FCPL policy protects the insured fanner from the claims of third parties injured by the negligent conduct of the fanner's employees, the employees are not always financially protected from the negligent conduct of their employers. Many policies provide that the insurer is not liable for bodily injury to any farm employee, or is not liable unless the employee is specifically designated as covered in the policy.

The courts have included under FCPL coverage those persons who occasionally help out on a farm or only work a few hours for minimum pay. The courts have also permitted farm neighbors to exchange labor without creating an employer-employee relationship. The following examples are useful in understanding what the courts have done.

a. Gratuitous Activity

Austin -St. Paul Mutual Insurance Co. v. Belshan, 297 Minn. 522, 211 N.W.2d 517 (1973), involved an FCPL policy that excluded bodily injury coverage for any farm employee. The insured hired a worker to mow hay on the insured's farm. During a work break, the worker assisted the insured in repairing a piece of broken machinery. While helping with the repairs, a piece of metal struck the worker in the eye. The Minnesota Supreme court held that the employee exclusion did not apply because the worker was no longer mowing hay and was involved in a purely gratuitous activity.

b. Casual Employee

In *Huntington Mutual Insurance Co. v. Walker*, 181 Ind. App. 617, 392 N.E.2d 1182 (1979), the insured fanner's policy excluded coverage for employees injured as a result of the insured's negligence. A tree trimmer working on the insured's farm was injured when the insured moved a tree limb with a tractor. The insurance company pleaded the employee exclusion. The court, however, found the term "employee" to be ambiguous. The court also found the tree trimmer to be a "casual" employee who was not excluded under the policy.

c. Neighborly Exchanges

In *Maurer v. Krueger*, 363 N.W.2d 830 (Minn. 1985), a fanner's hand was crushed between a feed bunk and a tractor bucket when he assisted a neighboring farmer in moving several feed bunks on his neighbor's property. His neighbor's insurance company

contended that the accident was not covered under the neighbor's FCPL policy because the assisting farmer was an employee.

The evidence showed that the two farmers frequently exchanged labor back and forth on their farms. Only if one farmer helped the other more during a given period was there ever an exchange of cash. Also, the parties did not carry each other as employees on any state or federal reports. As a result, the court refused to find an employer-employee relationship and the insurance company was not permitted to raise the employee exclusion as a coverage defense.

d. Occasional Employees

A good example of a court refusing to apply the employee exclusion to an "occasional employee" is *American Reliance Insurance Co. v. Mitchell*. 385 S.E.2d 583 (Va. 1989). The case arose when three neighboring farmers, Owens, Mitchell and Inman, orally agreed to harvest Owens's hay "on shares." As their contribution to the venture, Mitchell and Inman were to provide the equipment and hire workers, as well as cut, collect and store the hay.

One of the workers was Mitchell's fourteen-year-old grandson, who was recruited at the last minute by Inman's thirteen-year-old son. While taking harvested hay from the field to the barn, Mitchell's grandson, who was riding on top of the hay, was thrown off and injured when the hay truck struck a mud hole.

The boy's parents filed a claim on the basis that their son's injuries were caused by a lack of supervision of his activities and the negligent operation of the hay truck. The insurer denied coverage because of the employee exclusion clause.

A trial was held on the coverage issue. Inman testified that, although he had not given much thought about payment to the boys, he would have paid them something. The evidence also showed that in the past, when Mitchell's grandson had assisted him, the boy had occasionally been compensated for his labor. The evening following the accident, Inman paid both boys \$10.00. Oddly enough, the \$10.00 was paid upon the advice of the insurance agent who sold the FCPL policies to Owens and Inman. The agent contended that payment to the boys was necessary to "invoke coverage."

The court refused to apply the employee exclusion. The court held that the term "employee" usually describes the continuous service of a person who works full time for another for consideration. Although the term can refer to a person who engages in part-time, casual or incidental work, with or without compensation, the term's possible dual meaning makes the term ambiguous. When a term is ambiguous, the doubtful language is to be interpreted to include coverage.

The court found that the injured minor's employment was not permanent or regular, but only occasional. As a result, he was not an "employee" for the purpose of excluding coverage.

2. Medical Payments and the FCPL

Many of the FCPL policies also exclude medical payments for farm employees unless such coverage is specifically added. They also exclude coverage for any "other persons" engaged in work "incidental to the maintenance or use of the premises as a farm." This exclusion does not apply, however, to persons injured on the property while involved in a neighborly exchange of assistance for which the insured is not obligated to pay any money. For there to be medical coverage for a neighbor injured while assisting a farmer, the situation must be a typical neighborly exchange with the insured performing services in return. Furthermore, there must be no obligation on the part of the insured to pay money for the help. This feature applies only to injuries that happen on the insured premises.

3. Inclusion of Employees

An employer's liability and employee's medical payments endorsement can be added to an FCPL policy to provide farm employers liability coverage. The endorsement covers the insured for liabilities arising out of a farm employee's injury.

For there to be coverage three conditions concerning the injury must be met: (1) it must be caused by an occurrence; (2) it must be sustained by a "farm employee"; (3) it must arise out of and in the course of the employee's employment and duties relating to the ownership, maintenance, or use of the "insured location" owned or operated for "farming purposes."

The bodily injury need not occur on the insured location. If employment duties take the farm employee off the location and the employee is injured, coverage still exists.

Even if the policy covers injuries to employees, a number of exclusions restrict or eliminate the coverage. For example, coverage does not apply to liabilities arising out of injuries to a farm employee if the injuries are in the scope of workers' compensation coverage, disability benefits, or unemployment compensation, or any similar laws.

Other exclusions which apply to farm employer's liability coverage include:

"(1) any contractually arranged obligation; (2) any claims or suits brought against the insured more than 36 months after the end of the policy period; (3) an employee's operation or maintenance of aircraft, if it is designed to carry people or cargo; (4) injury to an illegally employed person, if the insured has knowledge of the illegal employment; (5) punitive damages for injury to any employee employed in violation

of law; and (6) consequential damages sought by the spouse, child, parent or sibling of an injured "farm employee."

In addition to providing compensation for bodily injury, the employer's liability and employees' medical payments endorsement also covers medical payments for employees.

Expenses must be incurred or ascertained within three years of the date of the accident causing the bodily injury. Also, only reasonable medical expenses are covered. Reasonable medical expenses include first aid, medical, surgical, X-ray, and dental services; prosthetic devices; and ambulance, hospital, professional nursing, and funeral services. Payments under the policy are excluded, however, if the insured voluntarily provides, or is required to provide, benefits under any workers' compensation, disability benefits, or unemployment compensation law, or any similar law.