LOUSIANA DIRECT FARM BUSINESS GUIDE

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LEGAL DISCLAIMERS

This Guide is not intended as legal advice. It is not intended to, and cannot, substitute for sound legal advice from a competent, licensed attorney. Rather, it is meant to help farmers understand the many issues that must be considered when establishing and operating a direct farm business. There is more to farming than just growing crops and selling to customers. The authors' hope is that this Guide will illustrate the legal issues that direct farm entrepreneurs must consider and then guide them towards experts and additional resources that will set their direct farm businesses on a track towards success.

The legal information provided by this Guide is a general overview of the many laws and regulations that may be applicable to a direct farm business. The reader should never assume that the information contained herein applies to his or her specific situation without consulting a competent attorney in his or her home state. Further, though the authors have made every effort to ensure the accuracy of the information in this Guide, they cannot guarantee that all of it is correct. Laws, regulations, and guidelines can change at any given time, and the status of laws and regulations in the future cannot be predicted with any certainty. Therefore, every user of this Guide should at all times independently ensure that the legal information is up-to-date before using it in any way.

Any URLs provided herein are purely for the convenience of the user, and the authors of this guide disclaim any liability for the content of the referenced websites.

Finally, any opinions, findings and conclusions, or recommendations expressed in this Guide are those of the authors and do not necessarily reflect the view of the funding organizations.

INTRODUCTION

If you are reading this Guide, then you are probably already well aware of the growing interest in local foods. Consumers seek out local producers for a variety of reasons: Some believe the food is healthier, safer and tastier. Others hope that local farmers are more invested in the community and stewardship of the land. In addition, many people simply want to put their hard-earned dollars back in their local communities so that they can learn more about where their food comes from, as well as make connections with the people who grow it.

Although consumer demand is the primary motivation for expanded local food networks, national leaders, in an era of bioterrorism threats and increased energy costs, have recognized that direct farm businesses can play a critical role in local and regional food security plans. For example, the Federal Farmer-to-Consumer Direct Marketing Act (7 U.S.C. Chapter 63) recognizes the importance of direct farm businesses by funding state direct marketing assistance programs and directing a yearly survey to determine what methods of direct farm marketing are being used.

Direct farm businesses are capable of meeting all these demands while increasing profitability. Selling directly to consumers, increases the farmer's share of the consumer's food dollar, which often goes predominantly to middlemen and processors in conventional food supply systems. Furthermore, building a connection with customers and the community can make farming a more enjoyable and rewarding experience.

However, running a successful direct farm business can be difficult due to the labyrinth of laws and regulations. These rules touch on nearly every action a producer might take, from the obvious, such as paying taxes or hiring employees, to the unexpected, such as naming the business. To add to the complexity, these rules are implemented and enforced by over a dozen agencies, spread between local, state and federal governments, which sometimes have overlapping requirements. Just figuring out who to contact may be a daunting task, let alone knowing what questions to ask and understanding the answers. Therefore, the authors developed this guide with the intent of bringing clarity to some of the rules and providing guidance on where and how to get correct information to foster a more vibrant direct farm business environment.

The introductory section of this Guide is divided into four sections, each of which offers some basic information that should be helpful in understanding the other chapters of this Guide.

These first four sections are intended as overviews that provide the general rules, but in some cases exceptions to those rules will apply. As noted below, farmers who are considering starting (or expanding) a direct farm business should consult with a licensed attorney to ensure full compliance with all applicable rules and regulations.

I. USING THIS GUIDE

This guide is divided into two primary sections. Section I outlines rules that apply to all farming operations, regardless of agricultural product and marketing strategy. Section II is organized according to agricultural products. Whether the reader starts with Section I or Section II probably does not matter, but it is important to consider the information from both sections when constructing a business plan. Following are a few additional notes about the guide.

Legal-eze: Because this guide attempts to explain the law, the authors must use terms that have precise meaning to lawyers. Some of these terms are common English words, where the legal meaning is different or more exact than the common usage, and others are phrases based in Latin. The authors have attempted to explain specialty terms in the text, but may not always do so. For the reader's convenience, there is a glossary of terms at the back of the guide. For further reference, Law.com's **legal dictionary**[1] is a useful website with explanations of many common legal terms.

Internet Links: Throughout this Guide, the authors have provided links to websites that provide additional information and resources on various topics. These online resources are highlighted in bold text; for ease of reading, the website URLs are provided in footnotes to the bolded terms. Internet links and resources do not always remain in one place, but the supporting documents referenced in this Guide are public, and a simple Google search on key terms can in some cases locate a broken link or its updated version or location.

Statutes and Regulations: Throughout the text, references to specific statutes or regulations are accompanied by citations in parentheses. The authors give these citations so that the reader can look up the exact language of the text if it is of interest. Citations also are a helpful starting point for searching the internet for more information or contacting the regulatory agency or an attorney. Below is an explanation of the most common citation formats and websites for locating the legal document. In most cases, the first number is the Title, and the numbers following the code's name are chapters or subsections.

- ### U.S.C. § ## are federal laws – otherwise collectively known as the U.S. Code. They can easily be accessed at **www.gpoaccess.gov** (official site) or at **www.law.cornell.edu/uscode/** (Cornell University). Three of the most common federal

[1] www.dictionary.law.com

statutes cited in this book are the Tax Code, which is in Title 26; the Food, Drug and Cosmetic Act, which is in Title 21; and Agriculture, which is in Title 7.

- ## C.F.R. ### are regulations implemented by federal agencies. The IRS's regulations are in Title 26 and the FDA's regulations are in Title 21. The Department of Agriculture's regulations are divided between Title 7 and Title 9. Selected CFR titles are available online at **http://www.access.gpo.gov/nara/cfr/cfr-table-search.html**

- LSA-R.S. §##:## are Louisiana laws. The first set of numbers is the title, and the following sets of numbers are the sections within a chapter or subchapter. The Louisiana State Legislature provides a link to Louisiana statutory law on its **website.**

- L.A.C. tit. ##, pt. ##, §##are regulations in the Louisiana Administrative Code. Text of the rules should be available through the Louisiana Legislature **website**.

***Federal vs. State law*:** Federal and state law do not always impose the same requirements, and often one establishes stricter standards. Always comply with the strictest standards – the existence of a more lenient law does not excuse non-compliance with the other government's standards.

***Checklists and Further Resources*:** At the end of each chapter there is a short checklist of the important issues to consider and/or information on further resources.

II. OVERVIEW OF ADMINISTRATIVE AGENCIES

Before delving into the specifics of the laws and regulations, it may be useful to have a basic understanding of the state-federal regulatory system and which agencies have authority over what operations. The Constitution gives the U.S. Congress power to regulate any goods traveling in interstate commerce (i.e., goods that cross state lines). The U.S. Supreme Court has interpreted this to include regulatory power over activities that *affect* goods traveling in interstate commerce, even if those activities might take place completely within state lines.[2] In addition, however, the Constitution allocates to the states the power to regulate everything not exclusively reserved for the federal government or protected by the Constitution. Therefore, states can impose additional regulations on items within their borders that are already subject to federal regulations, as well as regulate items and activities over which the federal government does not have authority. The one limit on this allocation of power is that federal law is supreme over state law, so if the federal law contradicts or is inconsistent with a state law, the federal law controls.

[2] Perhaps the most striking example of this idea is *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the Supreme Court held that a farmer who was growing wheat solely for his own private consumption was nonetheless subject to congressional regulation because the intrastate growth of wheat, viewed in the aggregate, had a "substantial economic effect" upon interstate commerce.

When Congress appoints an agency to implement rules, it is delegating congressional authority. Therefore, properly implemented regulations have the same authority as a statute written by Congress. "Properly implemented" means the agency promulgated the rules according to the Administrative Procedure Act (5 U.S.C. §§ 551 et seq.) (APA), which outlines procedures for agency operation. The most common rulemaking is notice and comment, in which the agency issues a notice of proposed rulemaking in the Federal Register, receives comments from the public, and issues a final rule that takes into consideration the public's comments. The less common form of rulemaking is known as formal rulemaking, and requires a trial-like procedure with hearings, testimony, and decisions on the record. Whether developed in a notice and comment or formal rulemaking, all rules are published in the Code of Federal Regulations (CFR).

Agencies also use guidance documents to establish policies that help the agency interpret and apply its own rules. These documents are also often called policy guides, technical information bulletins, or interpretive manuals. If not established through notice and comment or formal rule making, policies set forth in guidance documents are not binding upon the agency. Nonetheless, they help to guide and inform much of agency procedure, and many courts consider them to be persuasive evidence when determining the legitimacy or scope of an agency action.

State Rulemaking

Louisiana has an administrative procedure act similar to the APA (LSA-R.S. § 49:950 et seq.) that imposes a thirty-day notice and comment rulemaking procedure.

As noted above, federal laws often overlap with Louisiana laws on the same subject. For instance, although Congress has authority to regulate all foods that affect interstate commerce, the Food, Drug and Cosmetic Act gives the Food and Drug Administration (FDA) authority only over foods shipped in interstate commerce (21 U.S.C. § 331). Louisiana regulates all food, including that produced and sold entirely within the state, under its own State Food, Drug, and Cosmetic Law (LSA-R.S. § 40:601 et seq.). Often, Louisiana incorporates federal standards as Louisiana law.

One exception to the jurisdictional division based on inter- vs. intra-state food sales pertains to product labeling. Congress has exercised its power over all foods affecting interstate commerce by giving FDA the exclusive authority to regulate labeling of packaged foods (21 U.S.C. § 343-1).

III. THE FOOD AND DRUG ADMINISTRATION'S FOOD CODE

Every four years, the FDA publishes a model regulation for state and local officials to use in regulating retail food sales and food service establishments. The Code's purpose is to protect public health by providing regulators with a scientifically-sound legal basis for regulating the food industry. States do not have to adopt the Food Code, but a significant number of states incorporate the Code nearly word-for-word into their regulations. Although there are some points where Louisiana differs from the current Food Code, Louisiana has in large part adopted the Food Code. Louisiana's adoption of the Food Code has a couple of major impacts. First, FDA publishes many guidance manuals and standards for interpreting and applying the Food Code, as well as the scientific rationale for the rules the code proposes. Therefore, if a Louisiana inspector requires a particular material or process for production, the mandate likely has roots in the FDA's standards. Looking to the FDA's model rule may help the producer understand the purpose of the requirement or work with the inspector to reach an alternative solution that meets the food safety inspector's standards.

The second impact of the Food Code's near-universal adoption is that it may make it easier for some producers to engage in interstate sales. All of Louisiana's neighbors have adopted some version of the Food Code, and because the Food Code standardizes the rules, complying with Louisiana's rules brings a producer very close to satisfying both federal and neighboring states' food safety rules. To be sure, some additional steps (i.e. inspection certificates) may be necessary in order to sell products across state lines, but most producers who are in compliance with Louisiana's requirements should find the rules for other jurisdictions to be relatively familiar and easy to comply with.

IV. LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS

Numerous agencies regulate agricultural production and marketing, which the individual chapters of this guide cover in more detail. However, the Louisiana Department of Health and Hospitals (LDHH) has general rules that apply to all food sales, which the authors address below.

The State Food, Drug, and Cosmetic Law prohibits the sale of adulterated food (LSA-R.S. § 40:611). Generally, adulterated means produced, prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth or whereby it may have been rendered diseased, unwholesome, or injurious to health (LSA-R.S. § 40:607). The LDHH regulations require all food sold at retail or food service establishments to be from sources that comply with the food safety and labeling laws. This means everything sold in Louisiana, other than raw, unprocessed commodities, must come from an inspected and licensed facility.

In addition to oversight of the content and labeling of food, the Louisiana State Division of Health, a subset of LDHH, adopts many federal regulations that pertain to construction and sanitation of food production and processing facilities (*see* LSA-R.S. § 40:4). LDHH inspectors certify facility compliance subject to general regulations concerning the construction, equipment, and processes for producing food (*Id.*). These statutes mandate things such surface sanitization, vermin control, adequate clean water, sewage disposal, sanitary facilities for employees, and adequate sanitation principles and processes. These regulations are necessarily vague because they apply to a variety of production facilities, which inspectors interpret according to the applicability for the particular operation.

Processors also must comply with specific requirements for processing different types of foods, which LDHH bases on the unique risks inherent to each food. Many times, local regulators or individual inspectors make decisions on the adequacy of the processes. However, LDHH communicates guidance to its inspectors through uniform, ongoing training. LDHH relies on many of the training, guidance manuals, and technical documents the FDA publishes to accompany the FDA Food Code. Although guidance manuals facilitate consistent interpretation and application of the regulations, they are not binding and individual inspectors' interpretation of their applicability to a unique set of facts may differ. However, in no case may an LDHH inspector allow a facility to fall *below* the general standards established in the regulations.

Although LDHH is the primary agency regulating direct to consumer sales of food in Louisiana, additional agencies have significant regulatory authority over the food supply chain. The following chart summarizes the agency activities.

AGENCY OVERSIGHT OF DIRECT FARM BUSINESS ACTIVITIES

Activity	Federal	State
Environmental Permits	Environmental Protection Agency	- Louisiana Department of Environmental Quality - Louisiana Department of Natural Resources - Local and Parish zoning boards
Employees & Taxes	- Internal Revenue Service - Occupational Safety and Health Administration	- Louisiana Department of Revenue - Louisiana Department of Labor
Animal Welfare	USDA Animal and Plant Health Inspection Service	- Louisiana Department of Agriculture and Forestry - Louisiana Animal Welfare Commission - State and Local Law Enforcement
Meat, Poultry and Eggs	USDA Food Safety Inspection Service, for products shipped across state lines	- Louisiana Department of Agriculture and Forestry - Louisiana Department of Health and Hospitals
Food other than Meat, Poultry and Eggs	Food and Drug Administration, for products shipped across state lines and for labeling of *all* packaged foods	- Louisiana Department of Agriculture and Forestry
Organics	USDA Agricultural Marketing Service	n/a

SECTION 1: FARMING OPERATIONS

CHAPTER 1: STRUCTURING THE BUSINESS

I. PLANNING THE DIRECT FARM BUSINESS

There are many types of direct farm businesses, including:

- Farmer's market
- Roadside stand
- U-pick
- Agri-tourism
- Community Supported Agriculture (CSAs)
- Delivery service to homes, restaurants, schools, or other institution
- Mail order/Internet site

A direct farm business may consist of one of these options, or a combination. For example, a farmer might sell products at the farmer's market on Saturday and to a CSA during the week. Or a farmer could run a U-pick pumpkin farm, a concession stand that sells foods made from pumpkins, and offer bed and breakfast facilities to guests. But in any case, *the type of direct farm business selected triggers different legal considerations*. These considerations are covered within the different chapter topics throughout this Guide.

This guide seeks to give direct farm business owners a solid understanding of the legal consequences of these different business models. There are many other considerations necessary to a successful business, including business planning, marketability of produce, and access to markets. Although discussion of these topics generally is beyond the scope of this guide, the following are some resources that a producer may wish to read in order to develop or improve upon a business plan.

Online Business Planning Resources

***Business Planning Assistance** is available through Louisiana Small Business Development Centers (LSBDCs). The U.S. Small Business Administration (SBA) administers the overall SBDC program while implementation of each state program rests with the SBDC State Director and the participating organizations within the state. In Louisiana, 11 state universities and colleges host SBDCs. These offices can provide individual consulting services such as reviewing business plans for starting or expanding businesses. The LSBDC website is* https://www.lsbdc.org/

***The Guide to Direct Farm Marketing**, published by The National Sustainable Agriculture Information Center (NSAIC), through the Appropriate Technology Transfer for Rural Areas (ATTRA) program, details several direct farm business alternatives, including case studies, and provides resources for further reference. The guide is available at http://attra.ncat.org/attra-pub/PDF/directmkt.pdf. NSAIC publishes a wealth of other resources that can guide you in marketing, business planning, and risk management, available through their website at http://attra.ncat.org/marketing.html.*

*A potentially useful resource is the **Marketmaker™ website**, http://national.marketmaker.uiuc.edu/, which examines and establishes agricultural supply chain partners and helps direct farm marketers by improving knowledge of where food consumers are located and how they make food-related purchasing decisions. The site provides searchable and map-able demographic, consumption, and census data that a producer can use to identify potential markets. Producers can list themselves for free on Marketmaker, and become part of a searchable database that individual consumers, retailers, and restaurants use to find suppliers.*

***How to Direct Market Farm Products on the Internet** is a 50-page guide published by the Agricultural Marketing Branch of the USDA in 2002. Although somewhat dated, the guide contains useful information on reasons to consider internet marketing, how to develop a marketing plan, how to research the market, and how to set up and market a website. The appendix contains examples of actual direct farm marketers on the internet. The guide is available at http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3101222.*

Assumed Name Registration

Direct farm business owners often adopt an "assumed name" for their business (e.g., Sunnyside Farm) when they do not wish to conduct the business in their real names (e.g., Jane and John Doe Farm). In Louisiana assumed name registration is required for certain business organizations such as limited partnerships (LSA-R.S. § 51:281). In Louisiana, Assumed Name Certificates are filed with the individual parish in which the business owner plans to conduct business. Producers planning to do business in Louisiana under an assumed or fictitious name should contact their parish's Clerk of Court. For example, Jackson Parish has placed its assumed name registration certificate **online**.

II. CHOOSING A BUSINESS ENTITY

One of the first steps in establishing any business is deciding the business type – that is, the formal legal structure under which the business will operate. Typical farm business entities include the sole proprietorship, partnership or limited partnership, corporation (for-profit or nonprofit), S-Corporation, limited liability company (LLC), and cooperative.

Although this section touches on the tax implications of business form choice, the subject is discussed in more detail in the "Taxation" chapter of this Guide. Because the law treats certain forms of businesses differently than others, *the following generalized information should not be considered a substitute for consulting with a qualified attorney and/or accountant prior to choosing a business form***.** Consulting with a professional is important because the entity selected affects potential tax and legal liabilities, as well as business succession and estate planning. In addition, each form varies as to setup cost and complexity.

For those interested in learning more detail about entity choices for the farm business, the National Agricultural Law Center's *An Overview of Organizational and Ownership Options Available to Agricultural Enterprises*[3] is helpful in understanding the legal and tax implications of the various business entities.

Finally, many business entities must file registration paperwork with the Louisiana Secretary of State. The forms necessary for forming entities and schedules of fees are available through the Secretary of State's website, http://www.sos.la.gov, or by calling the business services division at 225-925-4704. In many cases, the Secretary of State provides for online registration and payment of fees.

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[3] The article is divided into two sections. Part 1, covering general partnerships, limited partnerships, limited liability partnerships, and limited liability limited partnerships is available at http://nationalaglawcenter.org/wp-content/uploads/assets/articles/goforth_ownership1.pdf. Part II covers limited liability companies, corporations, and cooperatives and is available http://nationalaglawcenter.org/wp-content/uploads/assets/articles/goforth_ownership2.pdf.

A. Sole Proprietorship

The sole proprietorship is a business owned and operated by one individual.[4] The entity forms automatically when an individual begins operating his or her own business. Due to the automatic formation and ease of administration, the majority of farms are owned as sole proprietorships.

Under a sole proprietorship, the law treats the owner and the business as one and the same. This makes the owner personally responsible for the business' *legal* and *tax* liabilities. Therefore, a creditor of the business can force the owner to sell personal assets in order to pay off the business' debts; on the other hand, assets from the business may be used to satisfy personal debts - an action normally prohibited in most forms of business entities. Additionally, the individual owner is taxed personally on the profits generated by the sole proprietorship—this makes filing taxes somewhat easier because no separate tax filing is necessary.

B. Corporations

The Louisiana Business Corporation Law governs the formation and operation of corporations in Louisiana (LSA-R.S. § 12:1 et seq.). A corporation is formed by filing articles of incorporation with the Louisiana Secretary of State. The articles of incorporation dictate the management of the corporation's affairs and outline the issuance of shares to shareholders. A board of directors manages the business, while the shareholders own (and thus finance) the business.

The corporate form is advantageous in some respects because it is a separate legal entity from its owners, such that the owners are not personally liable for the corporation's liabilities and debts. On the other hand, incorporation is time-consuming and expensive due to the paperwork and filings required by the statute. Further, there are many statutory and administrative formalities that *must* be followed when operating the corporation. Owners that fail to follow these formalities may lose personal liability protection. Finally, corporations are subject to "double taxation" whereby the government taxes the corporation on its profits and the owners/shareholders pay individual income tax on profits distributed as dividends.

The Internal Revenue Service Code classifies corporations as either "Subchapter C-Corporations" or "Subchapter S-Corporations." The IRS considers all corporations C-Corporations unless shareholders elect S-Corporation status. Electing Subchapter-S status with the IRS, if certain requirements are met, may avoid this double taxation problem.

S-Corporations

[4] In a very limited exception, spouses may co-own a sole proprietorship. This can impact filing and paying taxes, but otherwise makes little difference.

S-corporations elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes to avoid double taxation. A corporation elects S-corporation status with the IRS by filing Form 2553.[5] Only after the IRS accepts the registration may the corporation file its federal taxes as an S-Corporation. Although avoiding double taxation is appealing, an S-corporation can be difficult to establish due to many restrictions. Louisiana's law authorizing S-corporations at the state level (LSA–R.S. § 287.732) allows the corporations to similarly pass on corporate income, losses, deductions and credit to individual shareholders. All shareholders must agree to the S-Corporation status. All shareholders must be U.S. citizens or resident aliens and only individuals, estates, certain exempt organizations, and certain trusts can be shareholders. The S-corporation must be a U.S. company. Finally, an S-corporation may only have one class of stock with limitations on the type of income received. A corporation classified by the IRS as an S-corporation may exclude all or part of its income derived from the activities of the corporation, depending upon the domicile of the shareholders. Shareholders who are Louisiana residents are required to file a Louisiana individual income tax return to report their portion of the income derived from the activities of the corporation. In general terms, the portion of income that can be excluded is determined by the ratio of the number of issued and outstanding shares of the S-corporation's capital stock owned by Louisiana resident individuals to total number of issues and outstanding shares of capital stock.

Shareholders who are nonresidents of Louisiana may elect to file the individual nonresident and part-year resident return to report their portion of the income derived from the activities of the S corporation or to allow the corporation to pay the tax at the corporate income tax rate on their portion of the income. When electing the second method, the Subchapter S exclusion must not offset the net income reported on the corporation income and franchise taxes return. An S corporation is not exempt from franchise tax. The franchise tax is imposed on an S corporation in the same manner as it is for a C corporation.[6]

The primary advantages of an S-corporation include the personal liability shield and the absence of double taxation. Primary drawbacks include the difficulty and expense of incorporation, the need to maintain statutorily mandated formalities, and the registration restrictions.

C. Partnerships

A ***partnership*** (also known as a ***general partnership***) is an association of two or more persons who combine their labor, skill and/or property to carry on as co-owners of a business for

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[5] Available at http://www.irs.gov/pub/irs-pdf/f2553.pdf. Instructions available at http://www.irs.gov/pub/irs-pdf/i2553.pdf.

[6] For more information S-corporations formed incorporated under Louisiana law, see http://www.revenue.louisiana.gov/FAQ/QuestionsAndAnswers/2.

profit. Louisiana's partnership law requires a contract between parties for the formation of partnerships, and for the contract to be filed with Louisiana's Secretary of State, as well as the recorder of mortgages in the parish in which the partnership maintains its principal place of business. (LSA–C.C. Art. 2801 et seq.). However, a partnership can be formed by default if more than one person is carrying on a business. Additionally, if any immovable property (real property) is acquired by one or more persons acting in the name of any partnership, which has not been created through contract, but is subsequently created by contract, the partnership's existence shall be retroactive to the date of acquisition of an interest in such immovable property (LSA – C.C. Art. 2806).

A partnership itself is not taxed, but instead tax liability passes through to the partners in pro rata shares. Partnerships, like corporations, exist in several different forms (discussed below).

The primary disadvantage to a partnership form is that each partner is an agent of the partnership and can bind the partnership. Moreover, all partners are *personally* liable jointly and severally for the debts and obligations of the partnership. This means that if the partnership lacks the assets to pay the debts, creditors may force the partners to pay the partnership's debts out of their personal assets. If one partner has no personal property, creditors can force the other partners to personally pay the full debts of the partnership, even if they were not personally responsible for the debt. If this happens, the partner who paid can sue the other partner to recover their fair share; however, this is not a desirable situation for the partnership. Another disadvantage is that if one partner dies or leaves, the partnership may dissolve. Partnership shares, therefore, are not freely transferable and create special concerns for both business succession and estate planning. Despite these limitations, partnerships are a common form of business organization, especially among family members, due to their simplicity and tax status. From a liability perspective, however, other forms of partnership may be more desirable.

Limited Partnerships

Limited partnerships (LP) address the problem of exposure of the partners to unlimited personal liability by separating the partnership into two classes-- general partners, who remains personally liable for the partnership's obligations, and limited partners, who possess the same personal liability protection as shareholders of a corporation. Although the limited partners are shielded from personal liability, the *partnership* remains liable for the actions of the general partner's wrongful act or omission, or other actionable conduct.

The Louisiana limited partnership law (LSA–C.C. Art. 2836 et seq.) governs the formation of limited partnerships in Louisiana. Among the requirements for formation and operation of an LP is a filing with the judge of probate of the parish in which the designated office specified in the certificate of limited partnership is located.

One of the benefits of an LP over a corporation is that partners may deduct their partnership losses for taxation purposes up to the extent of their investment, which is not available to corporation shareholders. Also, limited partnership interests in personal property are freely transferable.

Limited Liability Partnership (LLP)

Under Louisiana law governing limited liability partnership (LSA–R.S. § 9:3431 et. seq.), general partners are shielded from *personal* liability for the debts and obligations of the partnership, regardless of how the debt or obligation is created (LSA – R.S. § 9:3431). The *partnership* remains jointly and severally liable, however, for a partner's wrongful act or omission, or other actionable conduct, if the partner is acting in the ordinary course of business of the partnership or with authority of the partnership. This liability shield for partners is one important benefit of the LLP over the general partnership form.

To form a LLP, the partnership must file a registration with the judge of probate in the parish in which the partnership has its principal office and with the Secretary of State, along with a required registration fee (LSA–R.S. § 9:3432). Applications are available on the Secretary of State's website.[7] In order to maintain the registration, the LLP must submit a notice and fee to the Secretary of State for each year following the initial registration. Although not overly burdensome, the filing and fee requirements are one of the downsides to pursuing an LLP business form.

Limited Liability Company (LLC)

Louisiana corporate law governs the establishment and operation of LLCs in Louisiana (*See* LSA–R.S. § 12:1301 et seq.). Generally, Louisiana follows the federal code for taxation of LLCs. Producers wishing to establish an LLC are required to complete the articles of organization, as well as submit a registration fee to the Secretary of State. Forms for the articles are available on the Secretary of State's website.[8]

An LLC is advantageous because the form enjoys the benefits of both the LP and a corporation. Members of an LLC have limited liability against claims and debts of the LLC and the favorable pass-through tax treatment of an LP. Yet they have more management flexibility because they can elect to manage the corporation themselves or designate managers through the articles of organization.

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[7] http://www.sos.la.gov/BusinessServices/PublishedDocuments/975LimitedLiabilityPartnershipRegistrationandRenewal.pdf

[8] http://www.sos.la.gov/BusinessServices/SearchForLouisianaBusinessFilings/Pages/default.aspx

LLCs, LLLPs, and LLPs are all very similar in that they provide liability shields for all the owners and managers, beneficial tax status, and flexible management options. The primary difference is how they are created, but depending on the specifics of the direct farm business one model may offer greater benefits than the others. Hence, it is important to speak with an attorney or a tax specialist when deciding to form a business.

EXAMPLES OF WHY A COOPERATIVE MIGHT FORM

A number of farmers seeking to establish Community Supported Agriculture (CSA) might wish to come together as a cooperative because their pooled money would allow them better marketing, access to capital, or increased diversity of their product offering. If they wanted to also sell at a farmers market, cooperative members could take turns attending the stall so that each individual can devote less time to marketing.

Sheep farmers could form a cooperative in order to finance purchasing the processing equipment necessary to convert raw wool into yarns and market them to consumers.

Apple farmers might form a cooperative to purchase equipment to process apples into a value added product, such as dried apples, juice, and cider. When there is a bumper crop, they could weather market variations better by converting their excess produce into a product for release onto the market at a later time, once prices have improved.

D. Cooperatives

A cooperative is a user-owned and controlled business that generates benefits for its users and distributes these benefits to each member based on the amount of usage. Common reasons for forming agricultural cooperatives include improved marketing or access to markets and increased efficiency in delivering to markets.

Title 3, Agriculture & Forestry, governs the formation of agricultural coopeartives in Louisiana (*See* LSA-R.S. § 3:71 et seq.). The statutes require an agricultural cooperative to be an association of people engaged in the production of agricultural products. The association may engage in cooperative activity in connection with a broad array of activities, including, but not limited to, financing and purchasing land or equipment, managing risk of livestock or equipment loss, marketing or producing goods, and providing health care services.

Cooperatives can be complex to establish and operate because they require coordinating numerous individuals. Moreover, there are several legal documents necessary to running an effective cooperative, including: an organization agreement securing financial commitments and patronage; articles of incorporation to be filed in accordance with the provisions of general corporation law; bylaws governing the management of the cooperative; marketing agreements between the cooperative and its members; and membership applications. The details of operating a cooperative are beyond the scope of this guide, but there are several online publications available on the legal aspects of cooperatives, as well as general information on starting a cooperative:

- *How to Start a Cooperative*, *Cooperative Information Report 7*, USDA/Rural Business Cooperative Service, September 1996.[9]
- *The Farmer's Legal Guide to Producer Marketing Associations* by Doug O'Brien, Neil Hamilton, and Robert Luedeman, September 2005.[10]
- *Understanding Cooperatives: Legal Foundations of a Cooperative, Cooperative Information Report 45*, USDA/Rural Business Cooperative Service, March 1995.[11]

[9] Available at http://www.rd.usda.gov/files/cir7.pdf.
[10] Available at http://nationalaglawcenter.org/wp-content/uploads/assets/articles/obrien_producermarketing_book.pdf.
[11] Available at http://www.rd.usda.gov/files/CIR45-9.pdf.

III. CHECKLIST

Have you…?

- Conducted a feasibility study and developed a marketing plan?
- Consulted with an attorney or accountant regarding business entities?
    - Will you be comfortable with the liability protection that the entity offers?
    - Will your choice of business entity require any registration or ongoing paperwork?

Key Contact Information

Louisiana Secretary of State Office
8585 Archives Ave., Baton Rouge, LA 70809
Ph: 225.922.2880
Fax: 225.922.2003

CHAPTER 2 - SETTING UP THE DIRECT FARM BUSINESS:

After finalizing a business plan and selecting a business entity through which to operate the direct farm business, the next steps are to:

- finalize a *site* for the direct farm business
- obtain all necessary *permits, licenses and registrations* required by the State of Louisiana and local governments
- adequately *insure* the operation

I. SITING

Parish zoning laws, environmental regulations, and potential nuisance claims are important considerations in choosing where to site a farm and may affect what activities are allowable on the land.

A. Parish Zoning

No Louisiana statute authorizes parish governments to develop parish plans with the general purpose of guiding economic development of the parish. Rather, express authority for planning and zoning is granted to local municipalities for the purpose of maintaining the general welfare of the area (LSA–R.S. § 33:4723). However, there are provisions of law under which particular aspects of the physical development of non-municipal territory may be planned and controlled to a significant degree. In effect, both parish and local municipality laws may apply. These laws may restrict some agricultural uses and building locations, therefore owners should check their land's zoning uses.

An additional zoning/siting concern arises when farmland intersects urban areas--a common situation for many direct farm operations due to the proximity to potential customers. As towns or other urban areas expand, counties or cities may change the land's zoning classifications. For example, towns may annex farmland previously under parish jurisdiction and subject the property to municipal zoning. Other land use changes may result when the parish itself rezones land due to development pressures. In either situation, governments could rezone productive farmland from "agricultural" to "residential" or "commercial," etc. Theoretically, an agricultural operation may be sued in nuisance in Louisiana, but the state legislature has made it clear that there is a presumption against the operation as being nuisance, and will award attorneys' fees for frivolous lawsuits (*See* LSA–R.S. § 3:3603).

In sum, during the planning stage of the direct farm business, a careful review of local zoning ordinances is essential. These are available by contacting the parish clerk or local library for a copy of the applicable ordinances. Owners may also wish to consult with a local lawyer who is knowledgeable about property law.

B. Impacts on Neighboring Land

Farming operations, whether through generation of odors, particulates, or even noise can, in some circumstances, have a significant impact upon land surrounding the farm. Consequently, direct farm business owners should be aware of two legal issues concerning a farm's impacts on neighboring land when choosing a farm site and planning, production, and processing activities: nuisance laws and rules pertaining to livestock facilities.

Nuisance Law

According to Louisiana law, a "'nuisance' is anything which incommodes, annoys, or produces inconvenience or damage." A 'nuisance per se' is one which is "always a nuisance in certain localities." A 'nuisance in fact' is one which "becomes a nuisance by reason of circumstances and surroundings." (*City of New Orleans v. Lenfant*, 126 La. 455, 461-62 (1910)). Traditionally, nuisance suits require the plaintiff-landowner to demonstrate that the defendant-neighbor unreasonably interfered with his ownership or possession of the land. (*See Slavant v. Calhoun Motor Speedway*, 626 So.2d 771 (1993)). Furthermore, if a lawful business is operated in an unlawful or unreasonable manner so as to produce material injury or great annoyance to others or unreasonably interferes with the lawful use and enjoyment of the property of others, it will constitute a nuisance. (*Borgnemouth Realty Co. v. Gulf Soap Corp.*, 212 La. 57 (1947)). A nuisance may be a strong smell, loud noise, unsightly object, or some other condition causing substantial discomfort. Direct farm businesses must be aware of conditions they create that rise to the level of actionable nuisance, particularly those businesses in close proximity to land used for non-agricultural purposes. Courts have found livestock facilities a "nuisance" due to the presence of strong odors, flies, contaminated water, dust and litter.

If a nuisance action is successful, the court may issue a temporary or permanent injunction, including an order shutting down the offending operation. In cases where the plaintiff seeks injunction of an alleged nuisance the court must deal with the conflicting interests of the landowners by balancing the benefits of an injunction to the plaintiff against the inconvenience and damage to the defendant. (*See Myer v. Minard*, 21 So.2d 72 (1945)).

Louisiana law presumes against any municipal or parish ordinance that has the effect of making an agricultural use a nuisance (LSA–R.S. § 3:3603). The following are definitions under Louisiana law of agricultural facilities and operations as per LSA – R.S. § 3:3602: An "agricultural facility" is any facility used for the marketing, processing, or production of agricultural products, or for providing agricultural support services; "agricultural operation" means any agricultural facility or agricultural land which is being used for agricultural production or agricultural processing and includes any facility used for the production and processing of crops or products thereof, livestock or products thereof, farm-raised fish and fish products, wood, timber or forest products, fowl or plants for breeding or sales, and poultry or poultry products for commercial or industrial purposes. "Agricultural operation" also includes the use of farm machinery, equipment, devices, chemicals, products for agricultural use, materials and structures designed for agricultural use and used in accordance with traditional farm practices. The definition for operation is extensive and will include most direct-farm operations.

Courts in other states with similar statutes have sometimes found the laws unconstitutional because the government requires neighboring property owners to bear a burden -- the nuisance -- without compensating them for it. The best defense for direct farm businesses is to operate in a reasonable, non-negligent manner, and minimize potential interference with neighboring property.

Containing Animals

In addition to avoiding activities that could be nuisances, it is important to adequately contain any animals. The applicable laws were mostly passed in the late 19th century and are therefore somewhat outdated, considering that most modern farming methods effectively confine and separate animals. However, farmers should be aware of these laws because the penalties for loose and unconfined animals can be harsh.

Louisiana law prohibits livestock from running at large on levees and public highways, etc. and imposes criminal penalties and/or fines (LSA–R.S. § 3:2531 et seq.). The farmer will be penalized for each individual stray animal. The farmer will be liable for any damages to crops the animal causes, as well as the cost of care and upkeep the animal incurs if a neighbor catches and cares for the loose animal. If the owner cannot pay those costs, the court will place a lien on the animal. The owner of the land where the animal is trespassing or the commissioner has the right to seize it and keep it in his/her possession, and may demand compensation for damages to the owner's own livestock (*See* LSA–R.S. § 3:2572).

II. Registration and Permits

A. FDA Food Facility Registration

The Federal Food, Drug and Cosmetic Act (FDCA) requires all facilities that hold, pack, manufacture, or produce food (but not meat, poultry, or egg products) for animal or human consumption in the U.S. to register with the U.S. Food and Drug Administration (FDA) prior to beginning manufacturing, processing, packing, or holding food (21 U.S.C. § 350d). Facilities that fail to register face civil fines and/or criminal prosecution. Farms, retail facilities, restaurants, nonprofit food facilities, fishing vessels, and operations regulated exclusively by USDA throughout the entire facility (e.g., meat, poultry, and egg products) are **exempt** from the registration requirement. Therefore, many types of direct farm businesses are exempt from registration requirements (21 C.F.R. §1.226).[12] Whether a direct farm business qualifies for an exception to the registration requirement depends on the definitions set forth in FDA regulations:

- ***Farm*** (21 C.F.R. § 1.227(b)(3)): a facility in one general physical location devoted to the growing and harvesting of crops, the raising of animals (including seafood), or both. Washing, trimming of outer leaves of, and cooling produce are considered part of harvesting. The term "farm" includes:

  - Facilities that pack or hold food, provided that all food used in such activities is grown, raised, or consumed on that farm or another farm under the same ownership; and,

  - Facilities that manufacture or process food, provided that all food used in such activities is consumed on that farm or another farm under the same ownership.

- ***Restaurant*** (21 C.F.R. § 1.227(b)(10)): a facility that prepares and sells food directly to consumers for immediate consumption.

  - "Restaurant" **does not** include facilities that provide food to interstate conveyances, central kitchens, and other similar facilities that do not prepare and serve food directly to consumers.

  - Entities in which food is provided to humans, such as cafeterias, lunchrooms, cafes, bistros, fast food establishments, food stands, saloons, taverns, bars, lounges, catering facilities, hospital kitchens, day care kitchens, and nursing home kitchens are restaurants; and,

  - Pet shelters, kennels, and veterinary facilities in which food is provided to animals are restaurants.

- ***Retail Food Establishment*** (21 C.F.R. § 1.227(b)(11)): an establishment that sells food products directly to consumers as its primary function. *A retail food establishment may manufacture/process, pack, or hold food if the establishment's primary function is to sell from that establishment food, including food that it manufactures/processes, packs, or holds, directly to consumers* (emphasis added). A retail food establishment's primary function is to sell food directly to consumers if the annual monetary value of sales of food products directly to consumers exceeds the annual monetary value of sales of food products to all other buyers. The term "consumers" does not include businesses. A "retail food establishment" includes grocery stores, convenience stores, and vending machine locations.

[12] FDA has published a helpful 16-page guide on facility registration titled *What You Need to Know About Registration of Food Facilities, available at* http://www.directfarmbusiness.org/storage/fsbtreg.pdf. The Guide explains who must register (including exemptions), and how to register.

Many questions arise about whether a facility qualifies for an exemption under these definitions. FDA considers some facilities "mixed-type" that require registration. For example, a maple syrup operation that harvests maple sap and then heats the maple sap into syrup for sale *to a distributor or grocery store* is an example of mixed-type facility that requires registration because even though taking sap from a tree is harvesting, heating sap into syrup is considered processing. Processing the sap for consumption off the farm removes the facility from the farm exception, and the facility would not qualify for the retail food establishment exception because the final product is not sold directly to consumers. On the other hand, if the farmer sold the sap at a road side stand, then it would qualify for the retail food establishment exception because the farmer would be selling directly to consumers.

The FDA has published a **guidance document**[13] that contains a long list of questions and answers regarding whether an exception to registration applies. There are also flowcharts at the end of this section that may assist in determining whether a facility is exempt from registration. Businesses that are uncertain whether they must register should contact an attorney or the FDA help line at 1-800-216-7331.

FDA maintains a **webpage**[14] that contains step-by-step instructions and tutorials for registering online or by mail. Facilities must only register once. However, if information about the facility changes, the facility must update the registration within 60 days of the change. If a facility relocates, it must cancel the existing registration and submit a new registration. If the facility goes out of business or changes ownership, the facility must submit a registration cancellation within 60 days. Cancellations are irreversible. Information on how to update or cancel a registration is available through the same FDA webpage for registering online.

The Food Safety Modernization Act (21 U.S.C. §§ 2201-2252), may also have a significant impact on the direct marketing of food; however at the time of this publication the regulations for implementing this legislation have not been published.

B. Federal and State Environmental Regulations

Another set of permitting issues a farmer might encounter is environmental permits and regulations. Environmental permitting is very complex and individualized because multiple agencies may have regulatory authority depending on the surrounding environment and potential pollutants involved. This section gives a brief overview of some of the most common issues; however, it is not comprehensive. Federal environmental programs also may apply to agricultural operations, such as the Endangered Species Act and the Safe Drinking Water Act.

[13] Available at http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodDefenseandEmergencyResponse/ucm082703.htm#fn1
[14] http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/RegistrationofFoodFacilities/default.htm

For brief summaries of EPA's programs, visit the **EPA's website**.[15] NASDA publishes another companion *Guide to Federal Environmental Laws Affecting Agriculture*, which is available **online.**[16]

Waste Management

There are multiple laws and rules pertaining to animal waste management in Louisiana, including the Federal Clean Water Act (CWA) (33 U.S.C. § 1541, *et seq.*), the Louisiana Hazardous Waste Management Act (LSA-R.S. 30:2171), Louisiana Water Control Law (LSA-R.S. 30:2071) the Louisiana Environmental Quality Act (LSA-R.S. 30:2001)

The CWA (33 U.S.C. §§ 1251, *et seq.*) requires facilities that house large numbers of animals and discharge into waters of the United States to obtain permits under the National Pollutant Discharge Elimination System (NPDES). Louisiana Department of Environmental Quality (LDEQ) issues NPDES permits in Louisiana through an agreement with the EPA. NPDES permits protect water quality by requiring facilities that release pollution into surface waters to treat their water discharges. LDEQ sets pollutant limits for NPDES permits based on the facility's operation and the impairment of the water body near that facility. Concentrated Animal Feeding Operations (CAFOs) that discharge must obtain a permit if there is a man-made ditch or pipe carrying runoff to a surface water or if the animals have direct contact with surface waters (33 U.S.C. § 1342; 40 C.F.R. §§ 122.23, 122.24). The regulations treat multiple facilities as a single feeding operation for purposes of determining the number of animals if they are owned by a common owner, adjacent to each other, and use a common area or system for disposal of wastes (40 C.F.R. § 122.23(b)(2)).

As of the writing of this guide, there was a petition pending before the EPA to also regulate CAFOs air emission under the Clean Air Act. Updates on the status of that petition may be available through the **EPA's website**.[17]

In Louisiana, Concentrated Animal Feeding Operations and Concentrated Aquatic Animal Production Facilities are required to have a permit. (LA. ADMIN CODE. tit. 33, pt. IX, § 301(2005)). Louisiana' regulations define Concentrated Animal Feeding Operations as "a lot or facility (other than an aquatic animal production facility) where the following conditions are met: animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period; and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility" (LA. ADMIN CODE. tit. 33, pt. IX, § 301(2005)). CAFOs are then

[15] http://www.epa.gov/agriculture/agmatrix.pdf
[16] http://www.nasda.org/nasda/nasda/foundation/state/Federal.pdf
[17] www.epa.gov

classified as either "large" or "medium" depending on the number of animals at a facility.[18] A concentrated Aquatic Animal Production Facility is "a hatchery, fish farm, or other facility which meets the criteria in LAC 33:IX.323. Appendix C,[19] or which the department designates under LAC 33:IX.301.K.3." Similar to its federal counterpart, Louisiana's regulations considers "two or more animal feeding operations under common ownership . . . to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes." (*Id*.).

Any permit issued to a CAFO requires CAFO owners or operators to implement a nutrient management plan that, at a minimum, contains best management practices, which are defined as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the state." Additionally, permits require owners and operators to meet applicable effluent limitations and standards, including those specified in 40 C.F.R. Part 412.[20]

When transferring manure or litter, or processing wastewater to other persons, large CAFOs must provide the recipient of the manure, litter, or process wastewater with the most current nutrient analysis. The analysis provided must be consistent with the requirements of 40 C.F.R. Part 412. Large CAFOs must retain for five years records of the date, the recipient's name and address, and the approximate amount of manure, litter, or process wastewater transferred to another person (33 La. Admin. Code tit. 33, Pt IX § 2703).

Wetlands

The Clean Water Act also requires landowners to obtain permits from the Army Corp of Engineers (the Corps) to discharge dredge or fill materials into waters of the United States (33 U.S.C. § 1344). This means a farm may need a permit to do construction or bulldozing in wetlands. These permits, known as Section 404 permits, are only an issue for new farms – the law has an exception for normal farming, silviculture and ranching activities that are part of an established, ongoing operation (33 U.S.C. § 1344(f)(1)(A)). Therefore, new farms and farms resuming operations on land that has been unused for so long that modifications to the hydrological regime are necessary to resume operations should determine if they need a permit. The Corps defines wetlands as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas" (33 C.F.R. § 328.3). Farmers who have land that may be considered wetlands should contact the Army Corps of

[18] For qualifying numbers see La. Admin Code. tit. 33, pt. IX, § 2505 (2005) available at http://www.deq.louisiana.gov/portal/Portals/0/planning/regs/title33/33v09-201102.pdf.
[19] Available at http://www.deq.louisiana.gov/portal/Portals/0/planning/regs/title33/33v09-201102.pdf, at 22.
[20] Available at http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title40/40cfr412_main_02.tpl.

Engineers district office in Mobile to determine whether a permit is needed. The district maintains a **website**[21] that provides additional information.

Pesticide Regulation

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. Chapter 6) requires EPA to approve all pesticides sold or distributed in the U.S. Upon approval, the pesticides will be subject to labeling requirements, and applicators must comply with the use and application approvals on the labels. Applicators must meet training and certification standards. The FIFRA is also the law that establishes the worker protection standards discussed in the Labor and Employment Chapter. The Louisiana Pesticide Law similarly requires registration and regulates the registration, sale, and use of pesticides in Louisiana (LSA-R.S. 3:3201 *et seq.*). The Commissioner of Agriculture administers the act. Farmers using pesticides should contact the Commissioner of Agriculture to determine if they require any permits or training for the pesticides they use.[22] If no permits or training are required, farmers must nonetheless always follow labeling provisions.

Environmental Incentives Programs

There are numerous state and federal programs that provide financial and technical assistance to farmers who wish to participate in certain conservation practices. Providing detailed explanations of how all the programs work is beyond the scope of this guide. The programs generally work by requiring the farmer to enroll their lands or sign a contract for a certain number of years. In exchange for implementing certain practices (or sometimes building structures), the farmer receives annual payments or technical assistance from the various agencies. A farmer's lands will probably need to be approved as eligible for the program (i.e., capable of furthering the program's purpose or priority goals) and will be subject to inspection to ensure ongoing compliance with the program. For more information on the federal programs, see the USDA's Natural Resource Conservation Service's **webpage,**[23] or the National Agricultural Law Center's Reading Room on conservation programs.[24]

Another program that direct farm businesses may wish to in participate in is the National Organics Program. Under this program, once a farm has been certified as organic, it can place the official USDA Organic label on its products. For more information on Organic certification,

[21] http://www.sam.usace.army.mil/
[22] http://www.ldaf.state.la.us/ldaf-programs/pesticide-environmental-programs/pesticide-licensing-and-certification/.
[23] http://www.nrcs.usda.gov/programs/
[24] http://nationalaglawcenter.org/readingrooms/conservation/

see the "Organic Marketing" chapter of this Guide or the Center's Reading Room on the National Organic Program.[25]

C. Animal Disease Traceability

To protect the health of U.S. livestock and poultry and the economic well-being of those industries, the USDA's Animal and Plant Health Inspection Service (APHIS) developed the National Animal Identification System (NAIS) under the Bush administration to identify and record the movement of livestock, poultry and other farmed animals throughout the United States. In the event of an animal disease outbreak, through NAIS, APHIS aimed to achieve a 48-hour traceback of the movements of any diseased or exposed animal. NAIS consisted of three components: premises registration, animal identification and animal tracing.

The program sought to protect livestock and poultry producers by enabling USDA to identify the location of a disease outbreak and which animals were exposed in order to limit the scope of quarantines and animal destruction while also adequately preventing any further spread. However, it met significant resistance from producers and state departments of agriculture. In February 2010, the USDA announced it would be overhauling the animal disease traceability system to only apply to animals traveling in interstate commerce and to be more flexible and accommodating to states' needs. On January 9, 2013, USDA issued a final rule establishing general regulations for improving the traceability of U.S. livestock moving interstate when animal disease events take place (9 C.F.R. part 86). Under the final rule, unless specifically exempted, livestock moved interstate have to be officially identified and accompanied by an interstate certificate of veterinary inspection or other documentation, such as owner-shipper statements or brand certificates. For more information on registration requirements, visit the **USDA's Animal Disease Traceability website**.[26]

III. INSURANCE

In order to best determine the insurance needs of a direct farm business, it's a good idea to start with a visit to a qualified insurance agent - preferably one who is familiar with how direct farm businesses operate. Farmers should be prepared to explain their operation in detail, and should request an insurance proposal from the agent that addresses the operation's every risk and potential amount of loss. Businesses may also wish to compare policies from multiple agents. Specific types of insurance products that may be necessary include premises liability (to cover liability for injuries that may occur on the property), workers' compensation, physical damage to business property, product liability, motor vehicle, crop insurance, and some kind of casualty insurance to cover transactions until title passes to the purchaser.

[25] http://nationalaglawcenter.org/research-by-topic/national-organic-program/.
[26] http://www.aphis.usda.gov/traceability/.

Many of these insurance needs may be incorporated into a basic farm insurance policy. These include losses to the farm dwellings and outbuildings, personal property (including tractors and other equipment), and premises liability arising from some incidental on-farm business operations. Depending upon the scale of the operation and the particular insurance company, roadside farm stands and U-pick enterprises may be covered under incidental business operations in the basic farm insurance policy. Agritourism, petting zoos or seasonal farm festival activities generally are not considered incidental farm business operations for insurance purposes and will require specific endorsements. Insurance field agents may review all of the above mentioned operations and require implementation of best management practices to eliminate or reduce potential risks in the operation.

Product liability arising from raw/unprocessed farm-grown products usually falls under basic farm insurance policies. This would include unprocessed items sold at road side stands or farmers markets. Once the product is transformed to a processed good, however, the basic farm policy may not cover injuries arising from consumption of the product. For example, a farm insurance policy may cover milk from a dairy operation, but not an artisanal cheese produced on-farm. A general commercial insurance policy would likely fill the gap in insurance in this instance. Similarly, an on-farm business with a commercial scale kitchen would not likely qualify as "incidental" to the farm operation, but rather a commercial undertaking with particular insurance coverage needs.

Due to the variability of insurance coverage and prices depending upon the specific direct farm business, insurance needs and costs should be assessed early-on in the business planning process. Bank financing may require insurance expenses to be incorporated as part of the cost structure and profitability models in the business plan. Further, some potential customers (e.g., restaurants, institutional sales) may require proof of adequate insurance.

Again, it is important to discuss these issues with an insurance specialist and an attorney to ensure the business owner *and* the direct farm business have the necessary insurance coverage to protect the business assets and minimize personal liability exposure.

IV. Checklist

Have you?

- Considered where you want to **locate** your business? Depending on what type of business (u-pick, agritourism, farm stand, etc.) you are considering, this requires:
    - Reviewing applicable **zoning laws** in your area; and,
    - investigating whether any **environmental permits** will be required under Louisiana and federal environmental laws.
- Looked into the **registration and permitting requirements**? Most of the registration steps are relatively simple, but failure to comply can have significant consequences.
- Informed yourself about **insurance options and costs**? Insurance (or lack thereof if something goes wrong) can represent a significant cost for a small-scale farmer. It should be considered as part of your initial overall business plan and not left as an afterthought.

Key Contact Information

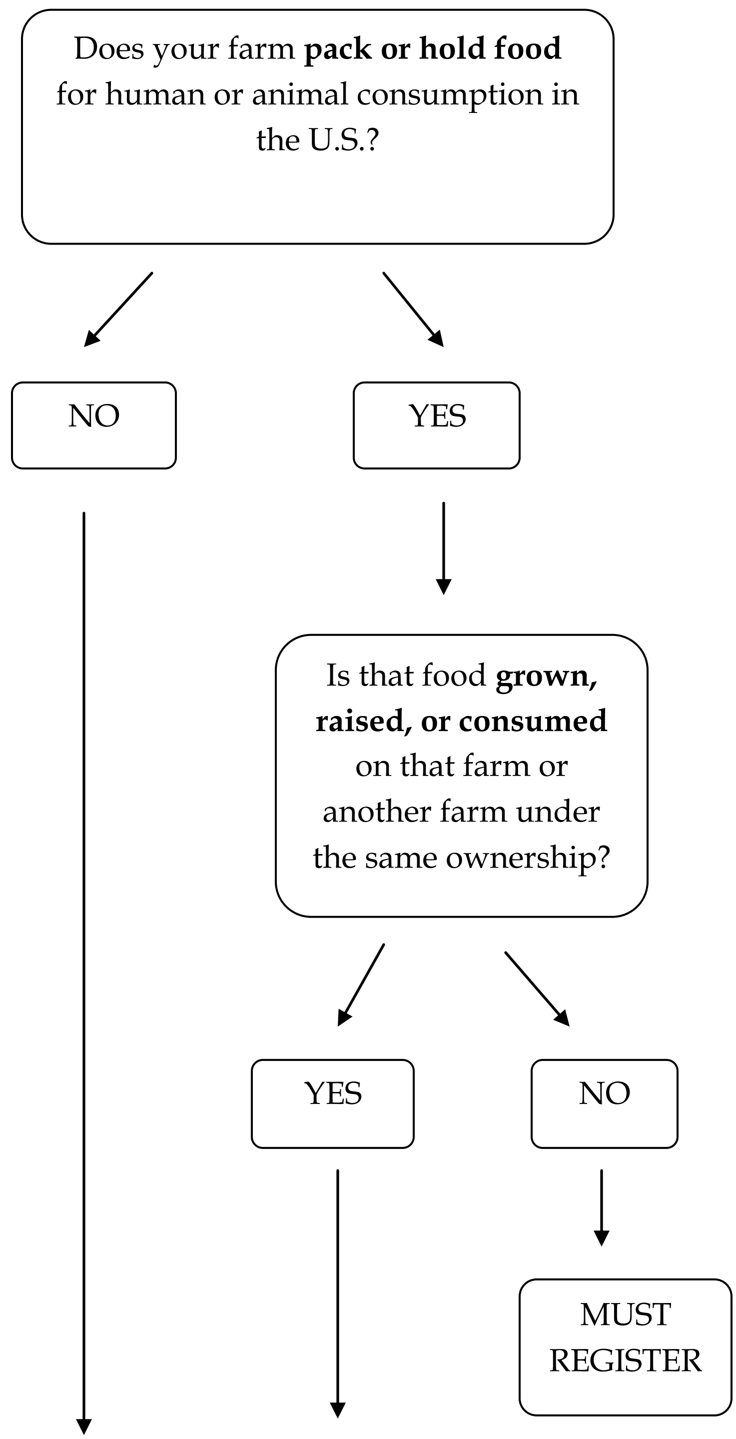
U.S. Food and Drug Administration (registration of food facilities help desk)

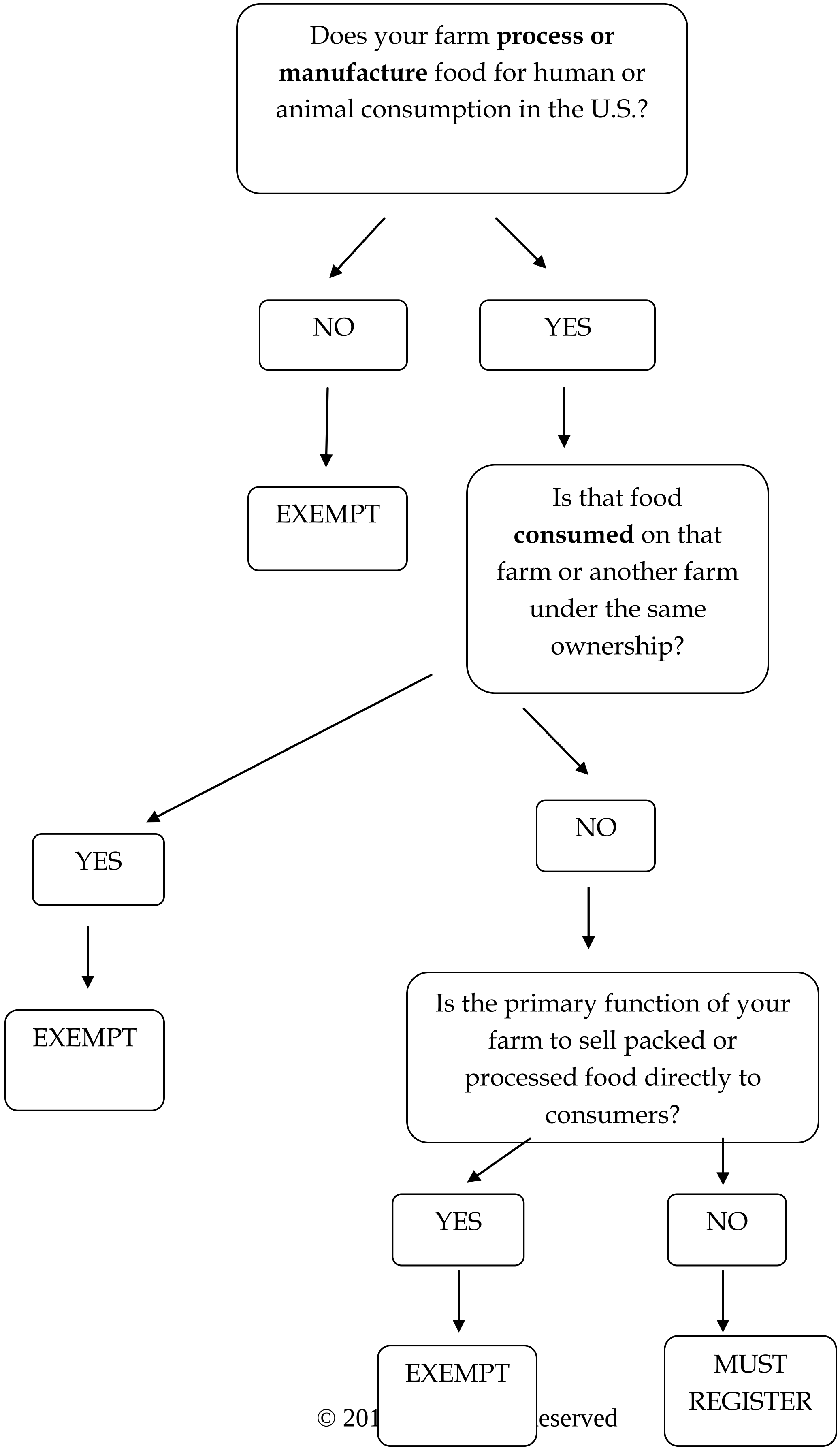
Ph: 1-800-216-7331 or 301-575-0156

The Department of Pesticide Regulation (Department of Agriculture & Forestry)

Ph: 1-866-927-2476

DO I NEED TO REGISTER MY FARM WITH THE FDA?




Does your farm **process or manufacture** food for human or animal consumption in the U.S.?
NO
YES
EXEMPT
Is that food **consumed** on that farm or another farm under the same ownership?
YES
NO
EXEMPT
Is the primary function of your farm to sell packed or processed food directly to consumers?
YES
NO
EXEMPT
MUST REGISTER

Definitions

As used in this flowchart:

Holding means, "storage of food. Holding facilities include warehouses, cold storage facilities, storage silos, grain elevators, and liquid storage tanks." 21 C.F.R. § 1.227(b)(5).

Manufacturing/processing means, "making food from one or more ingredients, or synthesizing, preparing, treating, modifying or manipulating food, including food crops or ingredients. Examples of manufacturing/processing activities are cutting, peeling, trimming, washing, waxing, eviscerating, rendering, cooking, baking, freezing, cooling, pasteurizing, homogenizing, mixing, formulating, bottling, milling, grinding, extracting juice, distilling, labeling, or packaging." 21 C.F.R. § 1.227(b)(6). For purposes of a farm facility, manufacturing/processing does *not* include "[w]ashing, trimming of outer leaves of, and cooling produce". 21 C.F.R. § 1.227(b)(3).

Packing means, "placing food into a container other than packaging the food." 21 C.F.R. § 1.227(b)(9).

Packaging, when used as a verb, means, "placing food into a container that directly contacts the food and that the consumer receives." 21 C.F.R. § 1.227(b)(8).

Selling food directly to consumers as a "primary function": A retail food establishment's primary function is to sell food directly to consumers if the annual monetary value of sales of food products directly to consumers exceeds the annual monetary value of sales of food product to all other buyers. 21 C.F.R. § 1.227(b)(11).

CHAPTER 3: MANAGING AND MARKETING THE DIRECT FARM BUSINESS

There are many components to successfully managing a direct farm business. Taxes and employment encompass such significant portions of law that they merit their own chapters in this Guide. However, there are many other management details that this chapter will address. First and foremost, contracts are subject to a myriad of laws, many of which protect farmers from potential abuses. A direct farm business also needs to have effective marketing in order to reach potential customers and sell the product. This marketing plan may encompass many facets, including Internet marketing, procurement contracts, and valid intellectual property rights. And when a sale is made, the direct farm business must accurately measure its products in order to comply with state law. Finally, a successful direct farm business should consider estate planning in order to ensure efficient transitions in the future.

I. CONTRACTING

Contracts are an integral part of every business. Contractual agreements can take many forms: some are small cash transactions and others are detailed documents resulting from lengthy negotiations. Regardless of the type of direct farm business, there are basic contract principles that owners and managers should know to assist in running a smooth operation and for protecting business interests.

A. General Contract Law

A contract is an agreement between two or more competent parties to do something in exchange for something of legal value. There are three basic elements of a valid contract: an offer, acceptance, and consideration. An offer is a committed and definite proposal that is sufficiently communicated to others. Acceptance is communicated when a party agrees to the exact proposal in the offer using clear and unequivocal terms. The final requirement, consideration, concerns the subject of the contract. Consideration is an explicitly bargained for benefit or detriment that has legal significance. This could be money, land, crops, or even a promise to provide products in the future.

The Uniform Commercial Code (UCC) is a uniform set of laws adopted in every state in order to facilitate interstate commerce. The American Law Institute develops the UCC, and then each state subsequently adopts it with any minor variations the state deems necessary for its local needs. Louisiana represents the state to have adopted the fewest UCC provisions, including

Article 2, which governs the sale of goods. However, Louisiana has adopted an equivalent to Article 2 which is codified in Chapter 13, "Sale of Movables" of Louisiana's Civil Code. Chapter 13 of Louisiana's Civil Code defines when a contract is formed, including a contract between merchants, and sets standards for how a contract's terms will be interpreted.

Oral Contracts, Written Contracts – Which One?

A contract does not necessarily have to be in writing in order to be binding and enforceable. In fact, many contracts are oral contracts, where no writing ever exists. Generally, creation of a contract requires an offer and an acceptance, and there must be performance in the form of mutual exchange of consideration. Small direct farm sales, for example most roadside stand cash transactions, are usually oral contracts. When a farmer sets up a stand and communicates the availability of his produce in some way at a certain price, he makes an *offer*. By agreeing to pay the purchase price, the consumer *accepts* the offer, forming an enforceable contract. The *consideration* is the produce the farmer provides and the money the customer pays. The contract is *performed* (and thus complete) when the farmer receives the money and the customer receives the produce. In most cases, oral contracts are binding and enforceable—just like a written contract. There are instances, however, where a contract must be in writing to be enforceable.

All states, except Louisiana observe English Common Law, which uses the concept known as the "statute of frauds" as a way to prevent misrepresentation. Under the statute of frauds, certain contractual acts must be in writing and signed by the party held responsible by the contract to be valid. The UCC incorporates this principle within Article 2, requiring all contracts for sales of goods priced at $500, or more to me in writing to be enforceable (UCC Art. 2 §2-201). Louisiana, however, has not adopted Article 2 of the UCC. Nonetheless, Louisiana does have formal writing requirements for certain contracts as a means to prevent misrepresentation. Louisiana's Civil Code requires transfers of immovable property to be made by authentic act or by private signature (La. Civ. Code Ann. art. 1839). Similar to Article 2, in Louisiana, a written contract is not required if the value of the transaction is less than $500. If the contract exceeds $500, the contract must be proved by at least one witness and other collaborating circumstances (La. Civ. Code Ann. art. 1846).

Under the common law statute of frauds, contracts which cannot be performed within one year must be in writing. However, Louisiana law specifically states, "[a] contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making." (LSA-R.S. 10:8-113).

Although it may be difficult to understand when a written contract is technically required and when an oral contract will be enforceable, it is *always* a good business practice to put contracts in writing. Doing so protects legal interests and avoids potential disagreements that can lead to a negative business reputation and possible legal battles. When preparing a written contract, it is important to be thorough and accurate. At the bare minimum, the contract should contain the identities of the parties, what item is being contracted for, including quantities and a clear description including quality standards, the negotiated price, and when performance is expected. It might also include ways the contract can be cancelled and what remedies each side will have if the other fails to perform. Contradictory oral statements made during negotiations will not override the terms contained in a written contract. Taking the time to prepare a well-crafted written document will increase the security of each side's interest in the contract, reduce the chance of unmet expectations due to ambiguity, and create a tangible record in case any problems do arise. Regardless of the dollar amount or the time involved in a contract, it is advisable to have an attorney at least review any important contract before signing it.

Excused Contract Performance

Sometimes one or both parties break one of the requirements of a contract, but courts nonetheless refuse to impose liability for the breach of contract. Situations where a party might be excused from performing a contractual obligation fall into three broad categories. First, if circumstances create a situation where it is impossible to perform the contract, then a party may be released from their obligations. Second, if performance is technically possible but requiring a party to perform would be extremely unfair under the circumstances, then performance might be excused. Finally, a party might not be required to perform if the purpose for entering into the contract no longer exists or would no longer be furthered by performance of the contract.

In Louisiana, the doctrine of impossibility is addressed within its own chapter of Louisiana's Civil Code entitled "Extinction of Obligations" (La. Civ. Code Ann. tit. III, ch. 6, § 2). Impossibility in Louisiana is a "fortuitous event" occurring after creation of a contract but before performance that makes performance of the contract not possible. This could occur when a particular piece essential to the contract is destroyed or when a particular essential person to the contract dies or is otherwise incapacitated. The thing destroyed or the person incapacitated must be absolutely necessary to the contract in order to fall under the doctrine of impossibility

Destruction of a small non-essential element does not excuse performance for impossibility. For example, if a farmer has a contract to sell a particular animal, such as a prized boar, and the animal dies, then both parties may be excused from performing under the contract. However, if a farmer has a contract to sell ten healthy piglets, and the piglets become ill but can be treated and then delivered when healthy, performance is not excused for impossibility. Instead, the farmer must treat the illness.

Impossibility often does not allow termination of contractual obligations, even when unforeseen disasters make performance onerous. For example, if parties have a contract to sell 100 bushels of corn and, before delivering the harvest, a flood destroys the corn, impossibility does not excuse the farmer's performance. This is because the farmer could still purchase corn from another source and use it to fulfill the obligation. Unlike a deceased animal selected for particular breeding purposes, corn is a commodity that could be replaced. A contract becoming more difficult or more expensive to perform is not enough to make it impossible to perform.

Some courts may have sympathy for parties who find themselves in a position where their performance, while not technically impossible, would be so difficult that requiring performance would be overly harsh. Courts have substantial discretion in deciding whether or not to excuse performance when performance may be impracticable or extremely unfair. For example, if a farmer contracts with a trucking company to deliver 100 truckloads of crops and all of the company's trucks are subsequently destroyed by fire, it would not be impossible for the trucker to perform, but it may be impractical. The company could purchase a new fleet of trucks and perform the contract, but a judge could find, at her discretion, that requiring performance under these circumstances is overly harsh and should be excused.

A third way that contract performance could be excused is frustration of purpose. This means that a contract was entered into for a particular underlying reason and that purpose no longer exists as it did at the time of contract formation. For example, if a farmer contracts to buy feed for his cattle and all the cattle die from disease, the purpose of the contract (feeding the cattle) has been frustrated. It is still possible for the farmer to buy the feed, but he entered into the contract specifically to feed animals that no longer need to be fed. When the reason for the contract no longer exists, the contract may be set aside because of frustration of purpose.

Whether or not a contract performance will be excused is a highly fact specific determination. As a practical matter, if problems arise that may lead to a breach or inability to perform the contract, one should first attempt to renegotiate the terms of the agreement with the other party. If negotiations fail, hiring an attorney is the best way to protect oneself and explore legal options.

B. Contract Laws that Protect Farmers

Although contracts are personal and can vary greatly from negotiation to negotiation, even between the same two parties, there are some restrictions, obligations and remedies that federal and Louisiana law impose upon particular agricultural contracts.

The Packers and Stockyards Act (P&SA) (7 U.S.C. §§ 181-229b) was enacted in 1921 to facilitate fair competition in livestock, meat, and poultry markets. The Act prohibits unfair, deceptive, unjustly discriminatory, fraudulent and anti-competitive practices. Livestock dealers are required to register and be bonded to protect producers. The P&SA will not apply to most direct farm businesses because farmers are not subject to the Act when buying livestock for their own purposes or when marketing their own livestock and livestock products. However, the Act's registration and bonding requirements may apply to agricultural cooperatives marketing livestock on their members' behalf. Furthermore, the Act provides several protections for farmers engaged in production contracts. The section on production contracts, below, discusses these in more detail. The Grain Inspection, Packers, and Stockyards Administration (GIPSA), a sub-agency of the USDA, administers the P&SA. GIPSA has more information on its **website**.[27]

The Perishable Agricultural Commodities Act (PACA) (7 U.S.C. §§ 499a *et seq.*) seeks to ensure fair trading practices for fruits and vegetables by requiring farmers to deliver produce as promised and buyers to pay within a reasonable period of time of receipt. The law requires anyone buying or selling or brokering contracts for more than 2,000 lbs per day or selling more than $230,000 worth of produce in a year to obtain a PACA license. Farmers who sell only their own produce are not subject to the Act, but cooperative marketing associations that market the qualifying quantities are subject to it. USDA's Agricultural Marketing Service (AMS) enforces the law. If anyone violates the fair marketing requirements of the Act, the other party to the contract can file a complaint with AMS. More information on licensing and complaints is available through **AMS's website.**[28]

ADDITIONAL RESOURCES: PACA'S PROVISIONS

Farmer's Legal Action Group Handout, available at *http://www.flaginc.org/topics/pubs/arts/PACAhandout2007.pdf*

National Agricultural Law Center's Overview, available at *http://www.nationalaglawcenter.org/assets/overviews/perishablecommodities.html*

The PACA also establishes a trust right to protect farmers who sell fruits and vegetables. If the farmer notifies a buyer that they intend to be covered by the trust, the buyer must hold the produce or any proceeds from the sale of it in trust for the farmer until the buyer has paid for the produce in full. The primary benefit of the trust is to make it easier for farmers to get paid when they file a court action. The trust also puts farmers ahead of other creditors if the buyer goes out of business or declares bankruptcy. Producers who are not subject to the Act can nonetheless get a PACA license in order to benefit from the PACA trust protections.

The Agricultural Fair Practices Act (7 U.S.C. §§ 2301-2306) was enacted in 1967 to protect farmers, who belong to cooperatives, from retaliation or coercion by handlers trying to limit producers' capacity to market and bargain cooperatively. The Act defines handlers as anyone who acquires agricultural products from producers or associations of producers for processing or sale; or

[27] http://www.gipsa.usda.gov/psp/psp.aspx.

[28] http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateG&navID=FileaPACAClaimorApplyforaLicense&rightNav1=FileaPACAClaimorApplyforaLicense&topNav=&leftNav=CommodityAreas&page=PACA&resultType

grades, packages, handles, stores, or processes agricultural products received from producers or associations of producers; or contracts or negotiates contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or acts as an agent or broker for a handler in the performance of any of the above functions (7 U.S.C. §2301(2)). The Act prohibits handlers from coercing or refusing to deal with a producer for joining a cooperative, discriminating against a producer in price, quantity, quality or other terms due the producer's membership in a cooperative, attempting to bribe producers to quit or not join cooperatives, making false reports about the activities and finances of a cooperative, or conspiring with anyone else to do any of aforementioned (7 U.S.C. § 2303). If a producer feels a handler has violated the Act, they may bring a civil action in the courts for injuries incurred to them, or they may complain to the Secretary of Agriculture, who can then investigate and report the offender to the Attorney General for prosecution (7 U.S.C. § 2305). If a producer brings a civil action, the courts may award attorneys' fees to the prevailing party, so the loser may have to pay the winner's litigation costs (*Id.*) But because the Act requires the USDA to refer enforcement actions to the Department of Justice rather than bringing them directly against violators, it is often not strongly enforced.

C. Special Contracts

Production Contracts

Production contracts are contracts where a company hires a farmer to raise animals or crops for the company, using seed or animals, feed, and other inputs that the company supplies or specifies. Federal law provides several additional protections for poultry and swine producers entering into production contracts.[29] The Packers and Stockyards Act (P&SA) generally

[29] Although much of the federal legislation covered in this Guide does not apply to purely intrastate commerce, the Packers and Stockyards Act likely does, due to the provision which states "for the purpose of this Act . . . a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the live-stock and meat-packing industries…" (7 U.S.C. § 183). In *Stafford v. Wallace*, 258 U.S. 495 (1922), the U.S. Supreme Court held that a wholly intrastate transaction at a stockyard was nonetheless part of the "current of commerce" and therefore fell within the purview of the P&SA. More recently, relying on the Supreme Court's decision in *Stafford v. Wallace*, the U.S. Court of Appeals for the D.C. Circuit interpreted a nearly identical provision in the Perishable Agricultural Commodities Act, 7 U.S.C. § 499(b)(4), ruling that fruit shipped and delivered purely intrastate, but handled by a dealer who commonly ships fruit out of state, had entered the current of commerce. *The Produce Place v. U.S. Dept. of Agriculture*, 91 F.3d 173 (D.C. Cir. 1996). In their analogy, the court stated:

> [T]he current of interstate commerce should be thought of as akin to a great river that may be used for both interstate and intrastate shipping; imagine a little raft put into the Mississippi River at Hannibal, Mo., among the big barges bound for Memphis, New Orleans and ports beyond, with St. Louis as the rafter's modest destination. On this view, a shipment of strawberries can enter the current of interstate commerce even if the berries are reserved exclusively for sale and consumption within the state where they were grown.

prohibits poultry dealers and swine contractors from engaging in unfair, unjustly discriminatory or deceptive trade practices (7 U.S.C. § 192). When hiring growers to perform production contracts, the P&SA requires the first page of the contracts to conspicuously disclose whether capital investments are necessary to perform the contract (7 U.S.C. § 197a(b)). The P&SA authorizes the Secretary of Agriculture, through GIPSA, to institute investigations and compel dealers and contractors to pay damages to injured parties for violations of the Act; producers may also petition GIPSA for an investigation and reparation (7 U.S.C. § 210). Alternatively, the producer may bring a lawsuit against the dealer or contractor in federal court (7 U.S.C. § 209).

GIPSA exercises its authority over swine contracts on a case by case basis; therefore, there are no regulations that specifically address what constitutes unfair, unjustly discriminatory, or deceptive trade practices for swine contracts. However, there are specific GIPSA regulations applicable to poultry production contracts. The rules require poultry dealers to provide the grower with the true written contract on the day they provide the grower with the poultry house specifications (9 C.F.R. § 201.100(a)). This is intended to guard against the practice of inducing producers to take out expensive loans to build production houses, then changing the terms of the promised contract after the producer is in a situation where rejecting the contract would put the farmer at risk of losing their business and their home. The contract terms must include the contract's duration and grounds for termination, all terms relating to the payment (including how feed costs and live weights and slaughter weights will be calculated), and whether a Performance Improvement Plan (a probationary program for growers who fail to meet minimum performance standards) exists and if so, the factors for its application (9 C.F.R. § 201.100(c). The GIPSA regulation also expands the scope of the anti-non-disclosure rules to allow producers to consult with other producers who have contracts with the poultry dealer (9 C.F.R. § 201.100(b)).

Requirements and Output Contracts

Requirements and output contracts are two types of agreements that can provide some security to producers as well as those who buy directly from farmers in bulk. The concept behind these agreements is simple: In a requirements contract, the buyer agrees to purchase all of a product that they may require or use from a certain party. Similarly, an output contract is an agreement by a purchaser to sell all of a product that they produce to a particular buyer. Direct farm businesses may find these types of contracts useful when dealing with institutional buyers or restaurants.

Id. at 175-176. Under such a standard, a Louisiana producer who contracts with a Louisiana poultry dealer to raise poultry to be sold exclusively to Louisiana consumers *may* not be subject to the Packers and Stockyards Act and GIPSA's regulations. However, given the broad sweep of jurisdiction courts have given the agencies, it would be more reasonable to tailor actions to the assumption that the rules do apply.

However, entering into a requirements or output contract is not a green light for producers to simply increase their production to dramatic levels, secure in knowing that a party is contractually bound to purchase everything that they can churn out. Louisiana Civil Code imposes a duty of "good faith" on the parties to the contract (La. Civ. Code. art. 1759). This means that neither side can demand or produce a quantity that is unreasonably disproportionate to the quantity estimated by the parties when striking their deal. In Louisiana, objects of a contractual obligation to be determined by the output of one party (La. Civ. Code art. 1975), meaning that a party's demand of a quantity unreasonably disproportionate to any estimate or prior output constitutes a breach of the good faith (*United Carbon Co. v. Interstate National Gas Co*., 176 La. 929 (1933)).

The specific language used in a requirements or output contract can be very important. The contract must use assertive language such as "require," "need," "can use," and so on. Using equivocal language such as "might want to use" or "wish" does not create a binding requirements or output contract. While such language does not prohibit parties from agreeing to deal with one another, it is not sufficiently definite to impose an enforceable duty on the parties. When parties fail to use definite language but act as though they formed a valid requirements or output contract, they are really acting under a series of mini-contracts. While such ad-hoc mini-contracts may produce satisfactory results in the short term, producers should realize that indefinite contractual terms may, in the event of a dispute, result in a contract that fails to bind either party to its terms (and is thus unenforceable). However, when drafted carefully, requirements and output contracts can provide some security for the parties. Farmers can produce at normal levels with confidence that all of their output will be purchased, and buyers are given some assurance that their needs will be filled. Because of the large volume typically associated with these types of arrangements, parties should be careful when agreeing to terms and should, at a minimum, have an attorney review these documents prior to agreeing to the terms to ensure that they fully understand the obligations and likely outcomes of the contract.

Procurement Contracts

Procurement contracts can be another advantageous way for a direct farm business to make significant sales. The USDA purchases large quantities of commodities through various procurement programs in order to supply food for school lunch programs, prisons, international food aid and other programs. USDA's programs are varied and complex, although they generally consist of some sort of notice of intent to purchase followed by a competitive bidding process. Information for small businesses is compiled by the USDA and **available**

online.[30] The Agricultural Marketing Service (a subsidiary of the USDA) also maintains commodity-specific information available on its **website**.[31]

Generally, to participate in these programs, producers will need to be capable of producing significant output and may need to comply with more rigorous food safety handling requirements, depending on the destination of the food. The Louisiana Small Business Development Center has a Procurement Technical Assistance Center (PTAC) to help small businesses successfully contract with governmental entities.[32]

II. MARKETING

At its core, marketing is about informing consumers about the direct farm business's products and building an established reputation to ensure repeat business. There are many ways to engage in marketing, such as sales flyers, eye-catching posters at the farmers' market, roadside signs, and Internet marketing. This guide only addresses legal issues pertaining to labeling and advertising, a few specific issues related to the Internet, and basic intellectual property issues that may arise in the context of direct farm businesses.

A. Labeling and Advertising

Labeling is regulated by the Food and Drug Administration (FDA) under the Food, Drug and Cosmetic Act (21 U.S.C. Ch. 9), which prohibits selling "adulterated" or "misbranded" food (21 U.S.C. § 331). The Federal Trade Commission (FTC) regulates advertising pursuant to the Federal Trade Commission Act (FTCA) (15 U.S.C. §§ 41-58), which prohibits untruthful and deceptive or unfair advertising. Although the line between advertising and labeling is a bit fuzzy, both are subject to consistent rules because the FTC and FDA have a collaborative enforcement arrangement. FTC guidance documents treat advertising as deceptive if it contains a statement or omits information that is material (that is, important to a consumer's decision-making process) and is likely to mislead consumers. A statement is unfair if it causes or is likely to cause substantial consumer injury that a consumer could not reasonably avoid and that is not outweighed by the benefit to consumers. These laws have implications for several types of claims a direct farm

ADDITIONAL RESOURCES: Food Labeling

The FDA's Food Labeling Guide details the intricacies of food claims.

http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/FoodLabelingGuide/ucm064919.htm

The FTC generally uses the same guidelines for claims made in food advertising.

http://www.ftc.gov/bcp/policystmt/ad-food.shtm

[30] http://www.dm.usda.gov/procurement/business/procedure.htm

[31] http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateQ&navID=CommodityPurchasing&leftNav=CommodityPurchasing&page=CommodityPurchasing&acct=AMSPW

[32] http://www.la-ptac.org/homePage.do;jsessionid=B30FEC6D5756406E4971F524A487A2BB.

business may wish to make about its products, whether on its labels or in its advertising: Health claims, structure/function claims, and nutrient content claims. Each will be briefly addressed below.

Health Claims

Health claims describe a relationship between the food (or a component of it) and reducing the risk of a disease or health-related condition. For instance, a label might claim "low fat diets rich in fiber-containing grain products, fruits, and vegetables may reduce the risk of some types of cancer, a disease associated with many factors." Producers who wish to place a health claim on a label must first have that claim approved by the FDA. Approved health claims are listed in Appendix C of FDA's food labeling guide. If a claim is not approved, a food producer can petition the FDA to approve the claim, and must support the petition with sufficient scientific evidence. A label may also contain a *qualified health claim*, which is a health claim supported by emerging scientific evidence which suggests that the claim may be valid but that is not strong enough to meet the standard necessary to be a health claim. Like with health claims, qualified health claims must be preapproved by the FDA through a petition. Failure to obtain pre-approval causes the food to be "misbranded" and therefore subject to FDA enforcement.

Structure/Function Claims describe the role of a nutrient in affecting normal structure or function in humans. For instance, "calcium helps build strong bones." These types of claims are not preapproved by the FDA, but must be truthful and not misleading. For more information on these types of claims, see the FDA's **Small Entity Compliance Guide on Structure/Function Claims**.[33]

Nutrient content claims characterize the level of a nutrient in a food, such "high in vitamin A;" they also encompass claims such as "low fat" and "light" foods. The FDA prohibits these claims unless specifically approved in FDA's regulations (21 C.F.R. § 101.13 and subpart D). Raw fruits and vegetables and fish are not required to contain nutritional content labels, but the FDA provides posters for voluntary labeling of their nutritional content.

B. Internet Marketing

Many small businesses consider an Internet presence an essential part of their business strategy. The Internet and other forms of electronic communication (e.g. email or social networking sites such as Facebook) can open doors to a direct farm business for customers otherwise unable to visit the retail operation due to distance, time, or other factors. USDA's Agriculture and Marketing Service (AMS) has published an informative brochure, **How to Direct-Market Farm**

[33] Available at http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/DietarySupplements/ucm103340.htm

Products on the Internet,[34] that explains many issues related to Internet marketing of farm products. The brochure encourages farm businesses to identify Internet marketing goals (save time, save labor, increase market access, provide customers information) and to research the potential market before setting up a website. Other things to consider are the cost and feasibility of shipping products and loss of personal interaction (which may be precisely what customers are looking for in a direct farm business).

In addition to setting up a webpage or sending customers email, a direct farm business may wish to list itself on some local or national online farm business directories such as http://la.foodmarketmaker.com/ (a Louisiana-wide directory). Such directories help farmers disseminate information on their products and reach consumers as well as commercial retailers or businesses such as restaurants. Although the Internet's flexibility as a marketing tool makes it an attractive option for direct farm businesses, farmers should be aware of several important legal issues that may arise in the context of doing business on the Internet.

Shipping Products

If the farm's products are capable of shipping via mail, a website that allows customers to place orders online can be an important aspect of the direct farm business. Sending perishable goods through the mail, however, can be costly and requires careful packaging. If food needs to be shipped cold, the USDA recommends shipping with dry ice, foam coolers, and polyethylene film to provide additional insulation. The package should contain clear labels that say "contains dry ice" and "keep refrigerated," and it should be shipped by the fastest means possible - preferably overnight. The USDA advises consumers to make sure that the food temperature is below 40 degrees Fahrenheit when it arrives. The USDA also provides a helpful **guide of safe handling times**[35] for a large variety of mail-order foods. Also, keep in mind that shipping food out of state can subject the business to federal laws the operation may not otherwise have to comply with. In addition, shipping food out of state may subject the business to federal laws the operation may not otherwise have to comply with.

The Federal Trade Commission's (FTC) Mail, Internet, or Telephone Order Merchandise Rule (16 C.F.R. Part 435) applies to sales made by telephone, mail, or over the Internet. The Rule regulates shipment promises, unexpected delivery delays and customer refunds. To comply with the Rule, a seller must have a reasonable basis for promising shipment within a certain time frame. If online advertising does not specify the shipment period, the seller must have a reasonable basis for believing that they can ship within 30 days. If shipment cannot be made within the promised time period, then the seller must notify the customer of the delay and provide the customer with the option of cancelling the order and receiving a full refund. If a

[34] Available at http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3101222
[35] Available at http://www.fsis.usda.gov/Factsheets/Mail_Order_Food_Safety_Table/index.asp

seller cannot fill an order, then they have the right to cancel it but must notify the customer of the cancellation and refund payment to the customer in full.

Protecting Customers' Personal Information

If a business allows consumers to enter personal information into its website, the FTC requires that the business have a plan to safeguard that information. There are no specific requirements that a business information security plan must follow. Adequate safeguard measures depend on various factors, such as the size and nature of the business and the amount and type of information collected on the Internet. The FTC maintains a **website**[36] to assist businesses in complying with consumer protection requirements.

Email Marketing

Emailing a weekly, monthly, or annual newsletter requires little time or money, and avoids the costs and hassle of printing and sending documents via mail. Short email updates concerning revised hours of operation or seasonality may be a convenient method of communication between the direct farm business and its customers. All commercial email from a business to a consumer is regulated by the FTC's CAN-SPAM Act (15 U.S.C. § 7701 *et seq.*). When sending commercial emails, the "from" and "to" lines and routing information must be accurate and identify who initiated the email, and may not contain deceptive subject lines. The email must give the recipient an opt-out method if they do not wish to receive any more commercial emails from the business. The email must also be identified as an advertisement and include the sender's valid physical postal address. As a general rule, emails concerning an agreed-upon business transaction or updating the customer on that business relationship are allowed under the Act. Violations of the rules in this Act can result in significant fines.

Taxation of Internet Sales

If the direct farm business sells over the Internet, determining what taxes are owed can be complex. For the most part, Louisiana direct farm businesses will need to collect state and local sales taxes if a sale takes place in Louisiana or the product is delivered to an Louisiana address. The local tax where the purchase is delivered applies. Local tax rates are available through the Louisiana Association of Tax Administrators (LATA) website.[37] If a Louisiana retailer ships merchandise out of Louisiana, a U.S. Supreme Court decision prohibits states from requiring out of state retailers to collect and remit the sales tax for the state where the product is delivered *if the retailer has no physical presence in the state* (*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). Instead, it is the responsibility of consumers within the state to report and remit the taxes they owe in their own state.

[36] http://www.ftc.gov/infosecurity/
[37] http://www.laota.com/index.php?option=com_content&view=category&id=2&Itemid=14.

III. Intellectual Property

Marketing a business often involves developing and protecting intellectual property (IP). Intellectual property is basically creations of the mind: inventions, literary and artistic works, as well as symbols, names, images, and designs used in commerce. Specific forms of IP include trademarks, patents, copyrights, and trade secrets. Each may be important to the direct farm business in that ownership gives the right to *prevent others* from doing certain activities without permission. These rights are important because they protect the investment the owner has made in developing the IP. Understanding IP will also help the direct farm business avoid having any actions for violations of IP rights brought against them.

A. Trademarks and Trade Names

Trademarks may be the most useful form of IP for the direct farm business. A trademark is used to distinguish *goods and services* from those manufactured or sold by others – it is the symbol that customers use to identify a product by and equate with goodwill. A trademark can be a name, symbol, sound, or color. It is also possible to register the design, packaging, or other element of appearance so long as the element is both nonfunctional and distinctive. This is known as "trade dress." By contrast, trade names are used to identify a person's *business or vocation*. While there may be some overlap between trade names and trademarks, if a name is used only as a trade name it may not be registered with the USPTO. Courts have held, however, that a trade name may have trademark protection if the business adopts a stylized font and other design features that would set the name apart from regular text (*Book Craft, Inc. v. BookCrafters USA, Inc.*, 222 USPQ 724, 727 (TTAB 1984)).

Registration of Trademarks and Trade Names

Mere use of the mark makes it a trademark – the mark does not need to be registered in order to establish rights. However, rights may be limited to the narrow geographic region where the unregistered mark has been used if another business subsequently registers an infringing mark. The older, unregistered mark owner will have superior rights in the region where the mark was being used, and the newly registered mark owner will have superior rights in the rest of the state or country. Therefore, registration is beneficial because it gives notice of the claim of ownership throughout the state or nation, so that the owner can challenge someone else's use of the mark anywhere, even if the owner is not currently marketing any products in the region. The symbol for trademark, TM, may be used whenever rights are asserted, but the use of the federal registration symbol, ®, may only be used after a mark is registered with the USPTO (not while the application is pending).

Trademark registration is available at both the state and federal level. To be valid, the trademark needs to appear on the goods, their container, or on the displays associated with the goods. Federal registration of a trademark is through the United States Patent and Trademark Office (USPTO). Federal registration can be costly: $275-325 per mark per class of product (for instance, a sheep farmer wishing to trademark their wool yarn and their cheese would have to file two applications because yarns and cheeses are in different classes). The USPTO also recommends hiring an attorney who is familiar with trademark law because applicants are expected to comply with all procedural and substantive rules. Despite its cost and complexity, federal registration has several benefits. First, it allows the trademark owner to bring suit in federal court (rather than state court) and to register with the United States Customs and Border Protection (CBP) in order to stop the importation of infringing goods into the United States. Second, federal registration has the added benefit of protecting and ensuring the legitimacy of the trademark throughout the country. For more information, including a link the USPTO's searchable trademark database, visit the **USPTO's trademark website**.[38]

State registration is much less expensive and cumbersome than the federal system, but it only provides protection within Louisiana. Currently it costs $75 to file a one page application, which is accompanied by straightforward instructions. Application forms can be found online at the Secretary of State's website.[39] A searchable database of trademarks currently registered in Louisiana is available through the same website. Federal trademark registration last ten years, state registration lasts five years, and both can be renewed so long as the mark is being used in commerce.

In order to be registered and enforceable, trademarks may not be generic or highly descriptive terms and cannot infringe on an existing trademark. A phrase or slogan commonly used to refer to a category of product or that merely describes or praises the product is incapable of being distinctive enough to be used as a trademark. For example, an attempt to register the phrase "the best beer in America" as a trademark for Sam Adams Beer was rejected by the USPTO as too descriptive. Similarly, a court rejected the trademark "Beef Stick" because the term merely described the kind of good and did not distinguish the manufacturer (*Hickory Farms v. Snackmasters*, 509 F. Supp. 2d 716 (N.D. Ill. 2007)). The USPTO will use the "likelihood of confusion test" to determine whether an applicant's mark infringes on an already registered mark. The examiner looks at the similarity of the two marks and the commercial relationship of the products to assess whether consumers are likely to be confused about who/what company is the source of the product. If the USPTO finds likelihood of confusion, it rejects the application. Courts use the same likelihood of confusion test when a trademark owner brings a suit asserting trademark infringement against another's use of a particular mark.

[38] http://www.uspto.gov/trademarks/index.jsp

[39] http://www.sos.la.gov/BusinessServices/PublishedDocuments/309TradeNameTradeMarkandServiceMarkRegistration.pdf.

Registering a trademark has two primary advantages. First, as a direct farm business builds a reputation with customers, registration guards against others who might wish to capitalize on the business's success by using or closely mimicking the trademark. Secondly, registration protects the business from infringing upon already-existing registered trademarks. If a business is found to be infringing on another's trademark, it will have to stop using the mark, which could confuse customers. It may also have to pay fines, disgorge profits made from use of the infringing mark, and pay the other side's attorney's fees--all of which could be very costly.

B. Patents

A patent grants the inventor the right to exclude others from making, using, or selling the invention in the United States or importing the invention into the United States for a limited period, generally 20 years. In the United States, a patent is issued by the USPTO. To obtain a patent, an invention must be *new*, meaning that it was not known or used by others in the United States or "patented or described in a printed publication in a foreign country," and it cannot be *obvious*. There are different kinds of patents, but the most common patents relating to farms are plant patents and patents on genetically modified plants. Plant patents are also available to one who has invented or discovered and asexually reproduced a distinct and new variety of plant, other than a tuber propagated plant or a plant found in an uncultivated state. A plant patent precludes others from asexually reproducing or selling or using the patented plant for 20 years from the filing of the patent application. Plant protection certificates, which are not patents but provide patent-like protection for sexually reproduced seeds and tubers, are available for newly developed plant cultivars. The Plant Variety Protection Office of the USDA's Agricultural Marketing Service issues plant protection certificates. If a direct farm business has a license to use a patented product, such as genetically modified seed, it should rigorously comply with the licensing agreement. Some companies are very aggressive about enforcing their contracts.

If a direct farm business believes it has a new and non-obvious process or device, they should contact a patent attorney for assistance in obtaining a patent. The inventor should keep in mind that obtaining a patent can be very costly and time consuming, and the potential profitability of the device may not justify pursuing a patent. General information on patents and resources for finding a patent attorney are available on the **USPTO's website.**[40]

C. *Copyrights*

A copyright protects "original works of authorship fixed in any tangible medium of expression." Although literary works come easily to mind as examples of copyrighted material, in the direct farm business context, copyright protection could extend to categories such as pictures and

[40] http://www.uspto.gov/web/offices/pac/doc/general/index.html#patent

graphics, sound recordings, movies, and other information related to the direct farm business operation. A copyright does not protect the actual ideas or methods, but rather it gives the owner certain exclusive rights to the way the copyrighted work is *used*. For example, in many circumstances a copyright owner has the exclusive right to reproduce the work, to make derivative works, and to display the work publicly. The owner also has the exclusive right to authorize others to do the same. Pictures of growing crops or a farmers market used on the direct farm business website or promotional material would qualify for copyright protection. On the other hand, unpermitted use of another's pictures (perhaps copied from the Internet) could constitute infringement upon the copyrights of another.

A work does not have to be published or even registered with the Copyright Office to gain protection. Copyrights attach once a work is "created," meaning once it has been fixed in a tangible medium of expression such as a copy or recording. Even so, registration is important for providing a public record of the copyright claim. Registration also provides significant advantages regarding the enforcement of rights in courts and with Customs and Border Protection. Other information on copyrights, including a searchable database of registrations and up-to-date fee information, can be found at the United States Copyright Office's **website**.[41] The webpage also contains a link to step-by-step instructions on obtaining a copyright.

D. Trade Secrets

A trade secret is information companies make an effort to keep secret in order to give them an advantage over their competitors. Unlike other forms of intellectual property, there is no federal regulation of trade secrets. Even so, most states, including Louisiana, have adopted laws like the Louisiana Uniform Trade Secrets Act (LSA-R.S. 51:1431 et seq.). Enforceability generally relies on showing two things: (1) that the information had been secret enough to give a competitive advantage, and (2) that measures were taken to keep others from obtaining or using the information. Although the agriculture community has traditionally shared innovation, there may be certain trade secrets that provide the direct farm business an important commercial advantage that warrants protection. Typical examples could include a list of regular customers built up over time, a special recipe for apple preserves, or a secret fertilizer method for growing the best vegetables. In such cases the employer should require employees to sign non-disclosure agreements and/or non-compete agreements. A typical non-disclosure agreement includes a definition of the confidential information, any exclusion from confidential information, the obligations of the employee to not disclose the information, and a time period for former employee's to maintain the secret. There are exclusions on the scope and duration of non-disclosure agreements, so an attorney may be helpful in drafting a proper enforceable agreement.

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[41] http://www.copyright.gov/

IV. WEIGHTS AND MEASURES

The Louisiana Weights and Measures Law (LSA–R.S. § 3:4601 et seq.) applies to all sales of commodities and commercial goods within the state. The weights and measures program, within the Department of Agriculture, administers the law. The law ensures accurate measurement and delivery of wholesale and retail commodities by establishing standards for how commodities can be measured or weighed and requiring certification of the accuracy of scales. Direct farm business must make sure that any instruments and devices used in commerce for weighing and measuring comply with the provisions of the law. Generally, the law requires weighing and measuring devices and packaging labels to comply with standards set by Congress (LSA–R.S. § 3:4606). For this purpose, Congress created the National Institute of Standards and Technology (NIST), which makes technical standards and uniform laws and regulations available through its weights and measures website.[42] Inspectors from the Department of Agriculture and Forestry within the state, the parish sealer within the parish, and the city sealer within the city may inspect commercial weighing and measuring devices at any time (LSA–R.S. § 3:4607). To ensure compliance with the laws, businesses should contact the state's weights and measures program to have a state-authorized service agent inspect scales and measuring devices.

V. LOOKING TO THE FUTURE: ESTATE PLANNING

Estate planning may not seem like an important component of managing a direct farm business, but it is critical for farmers who wish to keep the farm in the family for future generations. The USDA estimates that 80% of farmers do not have estate plans in place. Without an estate plan, the estate will have to go through probate court, which means that it may take years to settle the distribution of land and assets among heirs and creditors. Meanwhile, younger generations may not be able to make business decisions or plant the crops necessary to continue the operation. The probate court also applies a set of default rules for distribution that may not be beneficial for the business or the family's wishes: For instance, if the farm has been used to secure equipment, land may be sold off to pay debtors instead of passed down to children, even though there may be other ways to satisfy the debts. Estate planning is highly personal because it involves decisions concerning family and wealth distribution. This guide cannot provide comprehensive information on estate planning; rather, business owners are strongly encouraged to contact an attorney to develop an estate plan.

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[42] http://ts.nist.gov/WeightsAndMeasures/index.cfm.

VI. Checklist

Have you…

- Addressed contractual issues for your operations? This requires:
  - Understanding terms and consequences of any contracts you have agreed to, both oral and written.
  - Knowing when the law requires you to have a written contract in order to enforce it against the other party.
  - Complying with the formal requirements for the creation of production contracts and requirements/output contracts, if used.
- Developed a marketing plan?
  - Do your current practices comply with FDA and FTC law? Are any methods you are considering likely to create legal problems?
    - Are your products properly labeled?
    - Is your Internet business in compliance with all requirements for shipping products, protecting personal information, email marketing, and taxation of goods?
  - Do you have intellectual property you want to protect? Are you infringing on someone else's intellectual property?
- Arranged for state inspection and approval of your scales and measuring devices?
- Considered estate planning for your farm?

Key Contact Information

U.S. Department of Agriculture's Agricultural Marketing Service (Farmers' Markets and Local Food Marketing Program)

Ph: (202) 720-8317

U.S. Patent and Trademark Office (Customer Support Center for patents & trademarks)

Ph: 1-800-786-9199

U.S. Copyright Office (general questions)

Ph: (202) 707-5959 or 1-877-476-0778 (toll free)

CHAPTER 4 - TAXATION

Farm taxation rules are detailed, complex and subject to frequent change. The following generalized information is not a substitute for consulting with a qualified attorney and/or accountant. The information provided herein is for general information purposes only.

This chapter is organized by the type of tax for which the direct farm business may be liable, such as income, self-employment and employment, sales, excise, and property taxes. Because the uniqueness of each direct farm business requires particularized tax analysis, a thorough discussion of tax liability is beyond the scope of this Guide. The sections in this chapter provide basic information on types of taxes, forms and sources of additional information, but it is important to contact a professional for more detailed guidance.

An excellent place to start any research is *Publication 225: Farmer's Tax Guide*.[43] The guide, published by the IRS, is available through the IRS **Agricultural Tax Center website**.[44] The guide covers tax issues specific to farming, including records, accounting methods, income and expenses, expenses associated with soil and water conservation, asset basis, depreciation/depletion/amortization, gains and losses, disposition of property, installment sales, casualties/theft/condemnation, self-employment tax, employment tax, excise tax, estimated taxes, filing a return, and where to get help. In addition, the website **www.ruraltax.org** covers a wide range of tax issues relevant to farmers and direct farm businesses, including who is a "farmer" for tax purposes, filing dates and estimated tax payments, self-employment taxes, and others.

The IRS also maintains a **website of resources**[45] for small businesses and self-employed individuals. The website contains IRS publications for small businesses as well as links to workshops, educational videos, resources provided by state and other federal agencies and other relevant information.

[43] http://www.irs.gov/pub/irs-pdf/p225.pdf.
[44] http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Agriculture-Tax-Center.
[45] http://www.irs.gov/businesses/small/index.html.

I. Registration Requirements

A. *Federal registration requirements*

A direct farm business may need to obtain a federal employer identification number (EIN) to identify the business entity. If the answer to any of the following questions is yes,[46] the operation needs an EIN:

- Does the business have employees?
- Is the business operated as a corporation or a partnership?
- Does the business file any of these tax returns: Employment, Excise, or Alcohol, Tobacco and Firearms?
- Does the business withhold taxes on income, other than wages, paid to a non-resident alien?
- Does the business have a Keogh plan[47]?
- Is the business involved with any of the following types of organizations?
    - Trusts, except certain grantor-owned revocable trusts, IRAs, Exempt Organization Business Income Tax Returns
    - Estates
    - Real estate mortgage investment conduits
    - Non-profit organizations
    - Farmers' cooperatives
    - Plan administrators

B. *Louisiana Registration Requirements*

If a seller or lessor qualifies as a dealer under the definition of the term at R.S. 47:301(4), they must apply for a sales tax certificate, collect the proper taxes from customers, and file returns with the Department of Revenue. The Department provides helpful information on obtaining a retail license for purposes of the sales and use tax on its website.[48]

[46] These questions are also on the IRS's website: http://www.irs.gov/businesses/small/article/0,,id=97872,00.html.
[47] A tax deferred pension plan available to self-employed individuals or unincorporated businesses for retirement purposes.
[48] http://www.rev.state.la.us/SalesTax/GeneralSalesAndUseTax

II. TAXATION OF BUSINESS INCOME

A. Federal Taxation (26 U.S.C. Subtitle A)

ADDITIONAL RESOURCES: Federal Taxation

Partnerships

IRS Publication 541 provides a more detailed overview of federal taxation of partnerships.

http://www.irs.gov/pub/irs-pdf/p541.pdf

Corporations

IRS Publication 542 outlines some of the basic tax considerations relevant to corporations.

http://www.irs.gov/pub/irs-pdf/p542.pdf

Investment Income

Taxation of investment income is covered in IRS Publication 550.

http://www.irs.gov/pub/irs-pdf/p550.pdf

As noted above, a thorough discussion of the intricacies of business tax is beyond the scope of this guide. This is particularly true of business income taxes, where complex rules specific to each type of entity, base income, and any deductions and/or credits are highly dependent on the operations of the particular business.

To obtain further information and publications on the taxation of each type of business entity, as well as necessary forms, go to the online IRS **A-Z Index for Businesses**.[49]

Sole Proprietorships

Sole proprietorships file taxes along with the owners' income tax using Form 1040. The IRS considers a sole proprietor as self-employed, and also liable for self-employment tax, estimated taxes, social security and Medicare taxes, income tax withholding (if the business has employees), and federal unemployment tax (FUTA). These taxes are imposed on all employers and discussed in detail in Section 4, below.

Partnerships

Partnerships file Form 1065 to report earnings, but do not pay taxes. Rather, the tax liability "passes through," meaning that each partner pays taxes on her share of the partnership's earnings as part of her personal income taxes. Accordingly, a partner who owns a 70% share in the business would pay taxes on 70% of the partnership's earnings. Each partner must pay taxes on the partnership's earnings, even if no distribution is made. For instance, if the partnership reinvests all of the earnings in expanding the business, partners would still pay taxes on their share of the undistributed earnings. Similarly, partnership losses pass through to individuals and are deductible by the individual up to the partner's basis[50] in the partnership.

[49] http://www.irs.gov/businesses/small/article/0,,id=154770,00.html
[50] Basis, in simple terms, is the value of any capital and property the partner contributed the partnership, subject to adjustment based on various factors.

Corporations

Corporations pay taxes on their profits (and can deduct a certain amount of their losses). Generally, the corporation must make estimated tax payments throughout the year (using form 1120-W). At the end of the year it makes a final calculation and reports its taxes using Form 1120.

As noted in the introduction, shareholders must pay taxes on the corporate profits distributed to shareholders. Corporations may distribute profits in several ways, such as dividend payments, increased stock ownership, changes in types of stock, etc. The IRS considers all of these distributions to be taxable income. If shareholders work for the corporation, a common situation in small corporations, the shareholder/employee also must pay individual income taxes on their wages or salary.

S-corporations

S-corporations, except in limited circumstances, do not pay taxes. Instead, earnings and losses pass through to the shareholders, who pay taxes on these earnings based on their individual income level. The earnings are allocated on a per share, per day basis, with shareholders liable for taxes on these earnings even if there is no cash distribution. An S-corporation reports earnings and losses on Form 1120S.

Limited Liability Company (LLC)

The IRS may classify an LLC as a sole proprietorship (as an entity to be disregarded as separate from its owner, or "disregarded entity"), partnership, or corporation. If the LLC has one owner, the IRS automatically will treat the LLC as a sole proprietorship unless the LLC elects treatment as a corporation. Similarly, if the LLC has two or more owners, the IRS automatically will treat the LLC as a partnership unless it elects otherwise. The LLC may elect corporate status using Form 8832. Sole proprietorships or partnerships do not have to file Form 8832 unless they wish to be treated as a corporation.

Single-member/owner sole proprietorship LLCs file an individual tax return (1040, Schedule C, E or F). Multiple-member/owner LLCs file a partnership return (Form 1065). LLCs electing corporate treatment file a corporate return (1120 or 1120S).

Cooperatives

Subchapter T of the Internal Revenue Code governs federal taxation of cooperatives. A cooperative, as a non-profit, typically is not taxed, as any earnings pass through to individual patrons of the cooperative. The cooperative reports profits on Form 1120-C and patrons report income on form 1099-PATR. As simple a concept as this may seem, certain applications of the code are complex. For a primer on the federal taxation of cooperatives, the USDA Rural

Development maintains a **website**[51] that contains many publications related to the taxation of cooperatives, including *Cooperative Information Report 23, The Tax Treatment of Cooperatives*,[52] published by the USDA Rural Development program. *IRS Publication 225: Farm Income* also touches on cooperative reporting of taxes.

B. State Taxation

In addition to federal income taxes, the direct farm business is subject to Louisiana business income taxes. Louisiana income tax laws (LSA–R.S. § 47:21 et seq.) govern income taxation for Louisiana businesses. The tax structure for Louisiana is similar to the federal tax structures, although there may be some variations in taxable income based on differences in the deductions and credits allowed.

Corporations in Louisiana pay a state income tax at a rate proportional to the amount of income the business derives within the state. The rates are as follows:

- Four (4) percent for the first $25,000 of net income
- Five (5) percent for the next $25,000 of net income
- Six (6) percent for the next $50,000 of net income
- Seven (7) percent for the next $100,000 of net income
- Eight (8) percent for net income exceeding $200,000

Corporate income tax forms are found on the Department of Revenue website.[53]

S-Corporations

S-corporations are treated the same in Louisiana as they are under federal law (LSA-R.S. 47:287.732). Shareholders who are nonresidents of Louisiana may elect to file the individual nonresident and part-year resident return to report their portion of the income derived from the activities of the S corporation or to allow the corporation to pay the tax at the corporate income tax rate on their portion of the income. When electing the second method, the Subchapter S exclusion must not offset the net income reported on the corporation income and franchise taxes return.[54]

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51 http://www.rd.usda.gov/publications/publications-cooperatives.
52 http://www.rd.usda.gov/files/cir23.pdf.
53 http://revenue.louisiana.gov/SECTIONS/taxforms/default.aspx?code=CIF.
54 http://rev.louisiana.gov/FAQ/QuestionsAndAnswers/2.

Partnerships

Partnerships are exempt from Louisiana income tax pursuant to LSA-R.S. 47:201. Rather, each partner is to record and include his/her share of partnership income on the partner's respective income tax return (*Id*.). The gross income and taxable income of the partnership is determined in the same manner prescribed by the Internal Revenue Code.

Limited Liability Companies

A LLC is treated and taxed in the same manner for Louisiana income tax purposes as it is treated and taxed for federal income tax purposes. (LSA-R.S. 12:1368).If the LLC is taxed as a corporation for federal income tax purposes, the LLC will be taxed as a corporation for Louisiana income tax purposes. If the LLC is considered a partnership for federal income tax purposes, which is the most common situation, the LLC is treated as a partnership for Louisiana income tax purposes.

An LLC is never considered to be a corporation for franchise tax purposes, and therefore is not subject to Louisiana franchise tax.

Cooperatives

Louisiana agricultural cooperatives do not have to pay a franchise fee, but they do have to pay a $10 fee to the Secretary of State. (LSA-R.S. 3:84).

The Louisiana tax code does not address the taxation of agricultural cooperatives. Since they are essentially a type of pass-through entity, they may be taxed in a similar manner to S-corporations and partnerships. If establishing a cooperative, the direct farm business should consult with an attorney or tax professional specializing in cooperative law to fully understand the tax implications of this business structure.

III. EMPLOYMENT AND SELF EMPLOYMENT TAXES

This section provides brief summaries of the taxes employers must withhold. For more comprehensive information, see *IRS Publication 15: Employers Tax Guide*,[55] which contains instructions on the intricacies of withholding federal taxes from employee wages. *Publication 51: The Agricultural Employer's Tax Guide*[56] covers common issues that arise in the agricultural context such as social security numbers (SSN) (which prove an employee is authorized to work in the United States) versus individual taxpayer identification numbers (which look similar to SSNs, but are given to aliens who *are not* authorized to work in United States). If readers wish to conduct further research on a particular employment tax topic, federal laws governing

[55] http://www.irs.gov/pub/irs-pdf/p15.pdf.
[56] http://www.irs.gov/pub/irs-pdf/p51.pdf.

employment taxation are in Subtitle C of Title 26 of the U.S. Code, with implementing regulations in Part 31 of Title 26 of the Code of Federal Regulations.

A. If the Direct Farm Business Has Employees

Employers are responsible for withholding and submitting federal and state employment taxes on behalf of their employees. Federal employment taxes to be withheld include the Federal Income Tax and Social Security/Medicare (FICA) taxes; employers must also withhold Louisiana income tax.

Employee Income Taxes

Withholding federal income taxes from employees entails obtaining a W-4 form from each employee that indicates what withholding allowances they qualify for and what class (e.g. single or married) they fall into. The employer uses this information to calculate the employee's tax rate using the IRS's withholding tables, which are available in IRS publication 15-T.[57] The IRS bases withholdings on base pay, as well as supplemental wages (such as overtime pay) and fringe benefits (for instance, providing employees produce to satisfy their weekly needs). The IRS excludes some fringe benefits, such as the *de minimis* exception that covers small benefits for which it would be inconvenient and unreasonable to have to keep an accounting of (for instance, allowing employees to occasionally take home small quantities of produce). If an employee is a non-resident alien, the employee must register as single (even if married) and the employer must adjust the calculation of the taxable income for each pay period. Some employees may qualify for an exemption from income tax withholding if they did not owe taxes in the previous year and do not expect to owe taxes the next year. Such employees should indicate this on their W-4.

Employers must deposit taxes with an authorized repository either bi-weekly or monthly, depending on tax liabilities during the lookback period, which is two years preceding the current calendar years. For instance, the lookback period for 2009 is 2007. Employers who reported $50,000 or less of Form 943 taxes during the lookback period are monthly filers; employers who reported more than $50,000 are semi-weekly depositors.

Employers must file quarterly or annual tax returns. Agricultural employers use Form 943 to report all taxes on agricultural employee income. If employing farm workers and non-farm workers, employers must treat the farm workers and non-farm workers taxes separately. Employers use Form 941, the quarterly tax return, to file returns on the non-farm workers' income. Employers who receive written notice from the IRS that they qualify to file annually must use Form 944.

[57] http://www.irs.gov/pub/irs-pdf/p15.pdf.

If an employer must withhold federal taxes, he or she will also most likely have to withhold Louisiana income taxes. In general, a business hiring employees must register with the Department of Revenue by completing and returning an Employers Withholding Registration (Form 105). A Federal EIN is necessary to complete the form, which is available **online.**[58]

In order to properly compute withholding tax, the employer must obtain a completed exemption certificate from each employee (LSA-R.S. 47:112). All employers or other withholding agents who are registered with the Department must file a quarterly withholding tax return (LSA-R.S. 47:114). The Department provides useful information on its website for information on calculation of the amount of tax to be withheld as well as the necessary forms to do so.[59]

Social Security and Medicare Taxes

Social Security and Medicare taxes pay for benefits that employees receive upon retirement. These taxes are known collectively as Federal Insurance Contributions Act taxes, or "FICA" taxes. Social Security and Medicare taxes have different rates and must be reported separately. In both cases, the employer withholds the appropriate tax amount from the employee's wages and the employer pays a matching contribution. The Social Security Tax in 2015 is 12.4% total-–the employee pays 6.2% and the employer pays 6.2%. There is a maximum limit on the wages subject to the Social Security tax, known as a wage base cap. In 2015, the cap is $118,500. The Medicare tax is 1.45% for wages under $200,000, with the employer and employee each paying half. For individuals earning more than $200, 000 ($250,000 for married couples filing jointly, $125,000 for married couples filing separately, and $200,000 for filing single) pay an additional 0.9% in Medicare taxes, making the for a total of 2.35%. Medicare has no wage base cap. Employers should use form 943, the same form used for income taxes, to file FICA taxes withheld for farm workers.

Unemployment Insurance Taxes

Almost every employer pays federal and state unemployment taxes. These taxes support the unemployment compensation programs that pay workers who have lost their jobs. Some agricultural employers are exempt from paying. The Federal Unemployment Tax Act (FUTA) (26 U.S.C. § 3301 et seq.) and the Louisiana Employment Security Law (LSA-R.S. 23:1471 et seq.) govern whether agricultural operations must pay an unemployment insurance tax on wages paid to its employees.

An agricultural operation is considered an employer subject to the federal and state laws if: (a) during any calendar quarter in the calendar year or preceding calendar year the operation paid

[58] http://www.revenue.louisiana.gov/Forms/ForBusinesses.
[59] http://www.revenue.louisiana.gov/Forms/ForBusinesses.

wages of $20,000 or more for agricultural labor, ***or*** (b) the farmer employs 10 or more individual employees for some portion of a day during each of 20 different calendar weeks (26 U.S.C. § 3306 (c)(B)(1)(A).

Louisiana further defines agricultural labor as 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 of any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing 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 such 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 such services are performed on a farm;

(c) In connection with the production or harvesting of any commodity defined as an agricultural commodity in Section 15(g) of the Agricultural Marketing Act, as amended (46 Stat. 1550, sec. 3; 12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes, or in connection with the hatching of poultry, the drying of rice, the ginning of moss, and the handling, care, and sale of nursery stock, but only if such service is performed on a farm.

(d) I. In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, an agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such services are performed;

II. In the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of services described in Subparagraph (I) of this Paragraph, but only if such operators produced more than one-half of the commodity with respect to which such services are performed (LSA R.S. 23:1472).

Louisiana does not consider any services performed in connection with commercial canning, commercial freezing, or after an agricultural or horticultural commodity has been delivered to a terminal market for distribution for consumption. Additionally, any service performed at a farm operated for profit in the employ of the owner or tenant or other operator for services not related to employer’s trade or business (*Id.*).

Employers pay the federal tax using form 940,[60] with deposits generally required quarterly. For 2014, the rate was 6.0% of the first $7,000 paid to each employee after subtracting any payments except from FUTA tax, with no FUTA taxes due on wages over $7,000. Employers who also pay state unemployment taxes receive a credit of up to 5.4%, which reduces the amount of Federal taxes owed. *Publication 51: Agricultural Employer's Tax Guide* describes the applicability of federal unemployment taxes to agricultural employers.

The calculation of Louisiana's unemployment tax rate depends on the business employment record, which primarily consists of taxable payroll and history of employee termination. Employers should contact the Louisiana Workforce Commission (LWC).

For more information on employer forms, agency contact information, and on-line services LWC provides, visit LWC's website.[61]

B. Farmers Who Are Self-Employed

The self-employment tax is the Social Security and Medicare tax paid by persons who work for themselves. Individuals carrying on the direct farm business as a sole proprietor or as a member of a partnership, or who are otherwise in business for themselves, are "self-employed" and must pay self-employment tax on earnings of $400 or more. The self-employment tax rate for income earned in 2014 is 15.3% on the first $117,000, and 2.9% on any further income. In 2013 an additional Medicare tax rate of 0.9 percent went into effect and applies to wages, compensation, and self-employment income above a threshold amount received in taxable years beginning after Dec. 31, 2012. Individuals must report self-employment taxes on Schedule SE. The IRS's *Farmer's Tax Guide* provides additional details regarding the self-employment tax rules.

IV. SALES AND SERVICES TAXES

Direct farm businesses that sell food and/or other goods to customers are responsible for collecting state and local sales and services taxes. Direct farm businesses that purchase goods may be responsible for paying sales tax, but in some instances the purchases will be exempt.

A. Sales Tax

Louisiana levies a tax against all gross sales and receipts in the state (LSA-R.S. 47:302). Generally, gross proceeds refer only to tangible personal property (*Id*.).

[60] Forms and instructions are available at http://www.irs.gov/pub/irs-pdf/i940.pdf.
[61] http://www.laworks.net/unemploymentinsurance/ui_lainsurancetaxrates.asp.

All businesses in Louisiana must obtain a sales tax permit from the LDOR prior to commencing business. Helpful information pertaining to the permit application is available on the **LDOR website.**[62]

Sales Tax Exemptions for Farm Purchases

In addition to understanding how taxes apply to sales to customers, the direct farm business should also be aware of tax exemptions that may apply to some purchases for the direct farm business. As a general rule, many states exempt any purchases for farm businesses. However, Louisiana explicitly lists which products are exempt and imposes limits on the exemption of some of them. Exemptions relevant for direct farm businesses include:

(1) Direct farm sales of livestock, poultry, and other farm products (LSA-R.S. 47:301); (2) feed used to produce and maintain livestock (*Id*.); (3) insecticides, chemicals, fertilizers, soil conditioners; (4) seeds used in planting of any crops of farm products (LSA-R.S. 47.305.3); (4) containers for farm products when sold directly to the farmer (LSA-R.S. 47.305.3); (5) the first $50,000 towards the purchase of certain farm machinery[63] (LSA-R.S. 47:305.25); (6) diesel fuel, butane, propane, or other liquefied petroleum gases used or consumed for farm purposes (LSA-R.S. 47:305.37); (7) polyroll tubing sold or used for commercial farm irrigation (LSA R.S. 47:305.63); and (8) any pharmaceuticals administered to livestock used for agricultural purposes (LSA-R.S. 47:301).

Farmers and agricultural facilities eligible for such exemptions need certain agriculture certificates. For the necessary forms see the Louisiana Department of Revenue's **website**.[64]

Computing the Sales Tax

Retailers compute the liability by applying the effective tax rate to the gross proceeds from the sale. Tax rates can be found on the LDOR's website.[65] The effective rate depends on the type of product and location of the sale, as explained in more detail below. The term "gross sales" means "the sum total of all retail sales of tangible personal property, without any deduction whatsoever of any kind or character except as provided by" LSA-R.S. 47.301.

The general sales tax rate is 4%. Depending on the location of the sale, additional local taxes, such as parish or city taxes, may apply. The location of the sale is where the consumer takes

[62] http://revenue.louisiana.gov/SalesTax/GeneralSalesAndUseTax.
[63] Eligible farm equipment includes, rubber tired farm tractors, cane harvesters, cane loaders, cotton pickers, combines, haybalers, and attachments and sprayers; clippers, cultivators, discs, plows, and spreaders; irrigation wells, drives, motors, and equipment; other farm implements and equipment used for agricultural purposes in the production of food and fiber; and on the farm facilities used to dry or store grain or any materials used to construct such on the farm facilities.
[64] http://revenue.louisiana.gov/SalesTax.
[65] http://revenue.louisiana.gov/SalesTax.

delivery. For instance, if a direct farm business operating in Richland Parish takes Internet orders to make weekly deliveries to New Orleans, both New Orleans city taxes and Orleans Parish taxes would apply to the sale. The LDOR provides a local tax rate list on its **website**.[66]

Paying Sales Tax

Businesses must pay sales taxes online. Electronic filing is done through Louisiana Department of Revenue's LaTAP **website**.[67] Sellers must file a tax return due and payable in monthly installments on or before the 20th day of the month next succeeding the month in which the sale occurs (LSA-R.S. 47.301).

EXCISE TAXES

An excise tax is a tax levied on the purchase of a specific good. The most common excise tax that a direct farm business may encounter is the motor fuel excise tax. Under federal statutes, certain uses of fuel, such as farm use, are nontaxable. The user, therefore, may be able to seek a credit or refund of the excise tax paid for fuel. Credits or refunds are available for many types of fuel.

A. Federal Fuel Excise Taxes

The Internal Revenue Code (26 U.S.C. §§ 4081 and 4041) and regulations (26 C.F.R. §§ 48.6420-1 and 48.4041-9) govern federal fuel taxation. *IRS Publication 510: Excise Taxes*[68] and *IRS Publication 225: Farmer's Tax Guide*[69] explain fuel excise taxes as well as what uses of fuel qualify for tax credits and refunds. Federal excise taxes on fuels range from 18.40 to 24.40 cents per gallon. Fuel used on a farm for farming purposes and fuel used for off-highway business purposes are exempt from excise taxes. One may claim the tax as a credit at the end of the year or obtain quarterly refunds of the tax, depending on the fuel's use. To substantiate claims, the IRS requires businesses to keep certain records, such as the name and address of the person who sold the fuel.

The term "farm" includes operations such as livestock, dairy, fish, poultry, fruit, fur-bearing animals, and truck farms, orchards, plantations, ranches, nurseries, ranges, and feed yards, as well as greenhouses used primarily for the raising of agricultural or horticultural commodities. "Farming purposes" include cultivating crops, raising livestock or other animals, operating and maintaining the farm and its equipment, handling and storing raw commodities, and caring for trees if they are a minor part of the overall farm operation. Fuel used for aerial spraying also qualifies for an exemption, including fuel used to travel from the airfield to the farm. Non-farm

[66] http://www.revenue.louisiana.gov/taxforms/1003(10_02).pdf.
[67] http://revenue.louisiana.gov/eservices/newlatap.
[68] http://www.irs.gov/pub/irs-pdf/p510.pdf.
[69] http://www.irs.gov/pub/irs-pdf/p225.pdf.

uses that *are subject to the excise tax* include fuel used off the farm such as on the highway for transportation of livestock, feed, crops or equipment; in processing, packaging, freezing, or canning operations; and in processing crude maple sap for syrup or sugar. Farmers can recoup excise taxes paid on fuel used on the farm for a farming purpose by using form 4136 to claim a credit on their business income taxes at the end of the year.

The IRS also exempts fuel used off-highway in a trade, business or income producing activity. This exemption does not apply to fuel used in a highway vehicle registered or required to be registered for use on public highways, including boats. Nontaxable uses in this category include fuels used in stationary machines such as generators, compressors, power saws and similar equipment; fuels used for cleaning purposes; and fuel for forklift trucks, bulldozers, and earthmovers. Some fuels that would not qualify for the farming exemption may qualify for this exemption, for instance fuel used to boil sap into syrup. A business can recoup excise taxes on fuel used off highway for business purposes either by claiming a credit (using Form 4136) or a refund. Taxpayers use Form 8849 and Schedule 1 (which details the federal excise tax rates) to claim a refund of excise taxes paid on fuel used off-highway for business purposes. Taxpayers that pay over $750 in excise taxes in one quarter can claim a refund at the end of a quarter rather than waiting until the end of the year. Claims not exceeding $750 in one quarter can carry over to the next quarter.

B. Louisiana Motor Fuel Tax Laws

Title 47, Chapter 7 of the Louisiana Revised Statutes governs motor fuel taxation in Louisiana (LSA–R.S. 47:711 et seq). It is generally the responsibility of the seller to calculate, collect, and remit the excise taxes on these fuels. The law, in essence, provides an exemption for agricultural use of motor fuels. Unlike the majority of states, which wholly exempt fuel taxation for agricultural purposes, Louisiana has provided special exceptions for tractor fuel and distillate. (LSA–R.S. 47:714).

V. PROPERTY TAXES

Direct farm businesses must pay local property taxes each year on real property owned by the business. If a farmer leases land from an owner who is otherwise exempt from paying property taxes (e.g., a governmental entity), the farmer most likely must still pay property taxes on the rented land. In Louisiana bona fide agricultural, horticultural, marsh, and timber lands are assessed for tax purposes at ten percent of use value rather than fair market value (La. Const. art. VII, § 18). To be deemed agricultural lands, the property must be “devoted to the production for sale, in reasonable commercial quantities, of plants and animals, or their products, useful to man” (LSA-R.S. 47:2302). Horticultural lands are lands used for “production for sale, in reasonable commercial quantities, of fruits, vegetables, flowers or ornamental plants” (*Id*.). Additionally, to qualify for assessment at ten percent of use value, the property must be three acres or more in size, produce an average gross income of at least $2000 for the preceding four years, and the landowner must sign an agreement attesting that the land will be devoted to the purpose of either agricultural, horticultural, marsh, or timber land (LSA-R.S. 47:2303). Louisiana also exempts "agricultural products" including agricultural machinery, animals on the farm, other implements used exclusively for agricultural purposes, and any property belonging to an agricultural fair association (La. Const. art. VII, § 21).[70]

VI. Checklist

Have you...?

- Obtained an Employer Identification Number from the Internal Revenue Service?
- Registered with the Louisiana Department of Revenue?
- Obtained the necessary forms and established proper taxing procedures for your business entity?
- Obtained the appropriate forms and established good record keeping procedures for:
    - income, Medicare and social security tax withholdings?
    - collection and remission? Don't forget about local sales taxes on top of the state's!
    - fuel excise tax reimbursements and credits?
- Looked up your land's assessed value and calculated your current property taxes and how changed land uses could alter the tax value?

Key Contact Information

U.S. Internal Revenue Service (general help)

Ph: 1-800-829-1040 (assistance for individuals)

Ph: 1-800-829-4933 (assistance for businesses)

To find a local Taxpayer Assistance Center (which offer face-to-face tax assistance), visit **http://www.irs.gov/localcontacts/index.html** (zip code search).

Louisiana Department of Revenue

Contact information by department webpage:

http://revenue.louisiana.gov/Contact

CHAPTER 5: LABOR AND EMPLOYMENT

Several federal and Louisiana laws address labor and employment issues in the agricultural context. This labor and employment chapter is meant to provide an overview of fair labor standards, migrant and seasonal workers protections, occupational health and safety, workers compensation, and employee liability. These are only some of the employment issues a direct farm business might encounter. The chapter should not be understood as all-inclusive, and in all situations an attorney should be consulted regarding compliance with labor and employment laws applicable to a specific operation.

I. FAIR LABOR STANDARDS

A. The Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) (29 U.S.C. Chapter 8) is the federal law that establishes minimum wages (currently $7.25) and maximum hours (forty hours, over which amount employees must be paid time and a half), and prohibits employment discrimination and child labor (29 U.S.C. §§ 206; 207; 215; 212, respectively).

However, t*here are exceptions to these laws for agricultural employees* (29 U.S.C. § 213; 29 C.F.R Part 780). To qualify for the exceptions, the employee's activity must fall under the Act's definition of agriculture, which is "farming in all its branches and among other things includes the cultivation and tillage of soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities. . . the raising of livestock, bees, fur-bearing animals, or poultry, or any practices (including forestry or lumbering operations) performed by a farmer or on a farm *as incident to or in conjunction with* such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market" (29 U.S.C. § 203(f), emphasis added).

The Department of Labor divides the definition into two branches: primary agriculture and secondary agriculture (29 C.F.R. § 780.105). The primary definition includes farming in all its branches and the specific farming operations enumerated in the above definition (*Id.*) These activities always qualify for the agricultural exemption, regardless of the employer's purpose in performing the activities (for instance, a factory owner operates a farm for experimental purposes for the factory) (29 C.F.R. § 780.106). The secondary meaning of "agriculture," which encompasses operations that do not fall within the primary meaning of the term, requires that work be " … performed by a farmer or on a farm as an incident to or in conjunction with such [primary agriculture] farming operations …" (*Id.*) Analysis of whether the work is performed "by a farmer" (29 C.F.R. §§ 780.130-780.133) or "on a farm" (29 C.F.R. §§ 780.134-136) and is "incidental to or in conjunction with" the primary agricultural farming operations (29 C.F.R.

§§780.137-780.157) is complex and highly fact specific. If employees are doing work that may be "incidental or in conjunction with" the primary farming activity, or doing work off the farm, or performing work on other farmer's products, the DFB should consult an attorney or contact the local U.S. Department of Labor's Wages & Hours division before relying on the agriculture exemption. For more information, the U.S. Department of Labor maintains an **agriculturally oriented compliance webpage**.[71]

Minimum Wage & Overtime Exceptions

Agricultural employees always are exempt from federal *overtime* requirements (29 U.S.C. § 213(b)(12)). The agricultural exemption applies on a workweek basis. An employee who performs any activities that do not qualify under the definition of agriculture would not be exempt from FLSA rules (under the Agricultural Labor Exemption) for that workweek (29 C.F.R. § 780.10). The Act also exempts from the overtime requirements a significant number of agricultural-related activities, including (1) drivers or driver's helpers making local deliveries if the employee is compensated on a per trip basis; (2) agricultural employees who are also employed in affiliated livestock auctioning; (3) employees involved in the processing of maple sap into sugar or syrup; (4) employees engaged in the transportation of fruits or vegetables from the farm to the place of first processing or first marketing within the same state; and (5) employees that transport other employees to any point within the same state for the purpose of harvesting fruits or vegetables (29 U.S.C. § 213(b)(11),(13),(15), & (16)).

Agricultural employees (as well as fishing and fish farming employees) are exempt from *both the federal minimum wage and overtime* requirements if any of the following apply (29 U.S.C. § 213(a)):

- the employer did not use more than 500 man days of labor during any quarter of the preceding year. A man day is defined as any day where any employee performs agricultural work for at least one hour;
- the employee is an immediate family member;
- the employee is a hand laborer that is paid on a piece rate basis who commutes from his/her home each day and was not employed in agriculture more than 13 weeks in the preceding year;
- the employee is a family member under the age of 16 working on the same farm as the parent or surrogate parent that is paid on a piece rate basis and is paid at the same rate as those over 16; OR

[71] http://www.dol.gov/compliance/topics/wages-agricultural.htm.

- the employee is principally engaged in the production of range livestock.

Louisiana does not have a state minimum wage law.[72]

B. Federal Child Labor Laws

Generally, children must be at least 16 to work on a farm during school hours (29 C.F.R. § 570.2). During non-school hours, children who are 14 can work on a farm, and 12 and 13 year-olds may work on a farm with parental consent or when working on the farm with the parent. Children under 12 may only work on their family's farm or on a farm that is exempt under 29 U.S.C. § 213(a)(6) (29 U.S.C. § 213(c)(1)). Children under the age of 16 cannot work in agriculture in a particularly hazardous position, except when employed by their parents on a farm owned or operated by the parents (29 U.S.C. § 213(c)(2)). Hazardous positions include, but are not limited to, operating large farm machinery, working in enclosed spaces with dangerous animals (studs and new mothers), working from a ladder or scaffold more than 20 feet high, working inside certain spaces such as manure pits, and handling hazardous farm chemicals. The full list is available at 29 C.F.R. § 570.71.[73]

Under very limited circumstances, ten to twelve year olds can be employed off of the family farm for hand harvesting, but an employer must apply for the waiver and demonstrate that the industry seeking to employ the children will suffer severe disruption without the child labor (29 U.S.C. § 213(c)(4); 29 C.F.R. §§ 575.1-575.9). However, as noted below, Louisiana child labor laws place additional restrictions on employers.

As discussed in the introductory chapter, Congress has authority to regulate activities that *affect* interstate commerce. The FLSA fully exercises this authority and covers nearly every activity an employee may engage in, such that it is very rare for the FLSA to be inapplicable.

The FLSA covers employees who "in any workweek [engage] in commerce or in the production of goods for commerce, or [work for] an enterprise engaged in commerce or in the production of goods for commerce" (29 U.S.C. § 206(a)). Under the FLSA, "commerce means trade, commerce, transportation, transmission, or communication among the several States" (29 U.S.C.§ 203(b)).

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[72] http://www.dol.gov/whd/minwage/america.htm
[73] http://www.gpo.gov/fdsys/pkg/CFR-2010-title29-vol3/pdf/CFR-2010-title29-vol3-sec570-71.pdf.

Thus, the FLSA applies to an employee engaged in commerce or production of goods for commerce. According to DOL regulations, an employee engages in commerce if goods arrive from out of state for production, such as seed, fertilizer, or equipment, and the employee regularly unloads these goods (29 C.F.R. § 779.103). If a buyer incorporates the goods into another product that then leaves the state, the goods were produced for commerce, and the employee that produced or handled the goods engaged in commerce (29 C.F.R. § 779.104). Although this may seem to limit the Act so that it does not apply to Louisiana farmers who sell their goods only in Louisiana, that is likely not the case. Courts have expansively applied the definition of “commerce” to cover every enterprise possible, and the federal Department of Labor generally considers most agricultural production to be part of interstate commerce.

The second situation where the FLSA applies is when an enterprise engages in commerce or production of goods for commerce. In this situation, the FLSA entitles all employees of the enterprise to the minimum wage, regardless of whether they themselves engage in commerce or production of goods for commerce. An enterprise engages in commerce or the production of goods for commerce if the gross volume of sales made or business done exceeds $500,000 *and* any employee engages in commerce, or the production of goods for commerce, or handles, sells, or otherwise works on goods or materials that moved in or were produced for commerce (29 U.S.C. § 203(s)(1)). The expansive application of the terms “engages in commerce” and “production for commerce” makes it extremely difficult for a business to be exempt.

Finally, although it is extremely rare, it is theoretically possible for an employer to be outside the scope of the FLSA. Businesses believing the FLSA does not cover their activity should consult with an attorney specializing in labor law or department of labor official, preferably from the Louisiana district office.

D. State Child Labor Laws

The Louisiana Child Labor Law

The Louisiana Child Labor Law (LSA–R.S. § 23:151 et seq.) has many prohibitions similar to the FLSA and adopts most of the FLSA’s definitions for what constitutes oppressive child labor. When state law differs from federal law, an employer must comply with the more protective standards. Minors ages 14 and 15 may not engage in the following work activities: warehousing and storage; car repair; public utility duties; work involving the use of ladders or scaffolding; work involving food preparation; the use of grinders; or the operation of lawnmower and golf carts (LSA-RS 23:161).

The Louisiana law also limits the hours and times children may work. Children 14 or 15 years of age may not work more than six days in any one week, or more than 40 hours in any one week, or more than eight hours in any one day, or before 7:00 a.m. or after 9:00 p.m. during school summer vacation. (LSA-R.S. 23:211). During the time school is in regular session, children 14 or

15 years of age may not work more than six days in any one week, or more than eight hours on a non-school day, or more than three hours on a school day, or more than 18 hours in any school week, and not before 7:00 a.m. or after 7:00 p.m. (LSA-R.S. 23:214). No person 16, 17, or 18 years of age, who is enrolled in any public or private primary or secondary school system, shall work between 10:00 p.m. and 5:00 a.m. on any night preceding a school day (LSA-R.S. 23:215). There is a long list of dangerous occupations children under 16 may not engage in, including welding, working with any machines used in picking wool, cotton, and other material as well as working in proximity to any hazardous or unguarded gearing, in occupations causing dust in injurious quantities, working at the top of ladders, lifts, or scaffolds exceeding a height of six feet, and working in any activity involving slaughtering, butchering, or meat cutting. While the list includes other jobs a farm worker may perform, owners and managers should be wary of having young employees perform seemingly dangerous work unless they are sure it does not violate child protection laws.

II. Occupational Safety and Health

A. The Occupational Safety and Health Act

The federal Occupational Safety and Health Act (OSHA) (29 U.S.C. Chapter 15) and implementing regulations (29 C.F.R. Parts 1900-2009) establish safety and health standards for agricultural employees. The Act does not cover self-employed persons or farms that employ only the farmer's immediate relatives. Additionally, the funding appropriations bill for 2009 (as well those of the previous thirty years) prohibits the Occupational Safety and Health Administration (OSHA) from spending any funds on enforcement against farms that have fewer than ten employees and have not had a temporary labor camp in the previous twelve months (Fiscal Year 2009 Omnibus, P.L. 111-8 (3/11/09)). This means that, technically, the law and regulations apply to small farms, but functionally, OSHA cannot take actions against small farmers that fail to comply with the rules.

The OSHA regulations for farms are mostly in 29 C.F.R. Part 1928. The regulations require roll-over protective structures for tractors, protective frames and enclosures for wheel-type agricultural tractors, safety mechanisms for farming equipment and provision of bathrooms and hand washing facilities for field sanitation (29 C.F.R. §§ 1928.51, 1928.52-.53, 1928.57, and 1928.110, respectively). Part 1928 incorporates some regulations from Part 1910, including requiring employers to maintain minimum standards at temporary labor camps, communicate information to employees on hazardous chemicals (discussed in more detail below), retain DOT markings, placards and labels, store and handle anhydrous ammonia safely, adhere to safety standards in logging operations, attach a "slow moving vehicle" sign on any equipment that travels at less than 25 miles per hour on public roads, and institute monitoring of and controls for employee's exposure to cadmium (29 C.F.R. §§ 1910.142, 1910.1200, 1910.1201, 1910.111(a)&(b), 1910.266, 1910.145, and 1910.1027, respectively). *Agricultural operations are* *exempted from all the other provisions of Part 1910, which establishes operational safety standards* (29 C.F.R. § 1928.21(b)).

Although exempt from many of the operational standards, agricultural employers are still subject to several other important OSHA provisions and regulations pertaining to signs, record keeping, injury reporting, and first aid training. Employers must post signs in the workplace notifying employees of the protections OSHA provides (29 C.F.R. § 1903.2). Employers must keep records of all work related injuries that are a new case and qualify as reportable (29 C.F.R. § 1904.4). An injury qualifies as reportable if it causes death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness or if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional (29 C.F.R. § 1904.7). Employers who never employ more than 10 employees at any given time do not need to keep OSHA injury and illness records, unless OSHA informs them in writing that they must keep such records (29 C.F.R. § 1904.1). However, theses employers must still report any fatalities and any hospitalizations of three or more employees (*Id.*) If an incident kills an employee or hospitalizes more than three employees, employers must report the incident to OSHA within eight hours (29 C.F.R. § 1904.39). The employer can report orally by phone by calling their area OSHA office or by calling OSHA's central line at 1-800-321-OSHA (1-800-321-6742) (*Id.*). At the end of every year, employers must review their log of injuries, ensure and certify its accuracy, and provide a report to OSHA (29 C.F.R. § 1904.32). Employers must keep these records for five years (29 C.F.R. § 1904.33). Lastly, OSHA's hazard communication regulations require employers to maintain information on how to handle and detect dangerous chemicals in the workplace, as well as provide training and information to employees (29 C.F.R. § 1910.1200). The regulations do not apply to toxic substances regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Instead, FIFRA requirements for labeling/posting apply.

B. Federal Insecticide, Fungicide and Rodenticide Act

The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Chapter 6) requires the U.S. Environmental Protection Agency (EPA) to regulate the production and use of farm chemicals. Pursuant to FIFRA, the EPA has promulgated a Worker Protection Standard (WPS) for agricultural pesticides (40 C.F.R. part 170). The standard requires employers to provide safety training and access to information on pesticides used on the farm. Employers must protect workers from exposure during pesticide mixing and application, as well as notify workers and restrict entry to sites after application. Finally, employers must provide adequate soap and water for clean up, and emergency assistance if a worker is injured by a pesticide. The EPA has a manual for employers on how to comply with the WPS, which is available **online**.[74] On February 20, 2014, EPA announced proposed changes to the agricultural Worker Protection

[74] http://www.epa.gov/oecaagct/htc.html.

Standard (WPS). Proposed changes include: requiring training every year, instead of every 5 years; require recordkeeping of training for 2 years; require a minimum age of 16 years old for handling pesticides; and require posting of treated areas. For the complete list of proposed changes see EPA's **website**.[75] As of March 2015, EPA has not finalized the proposed changes to WPS.

III. Migrant and Seasonal Workers

A. The Migrant and Seasonal Worker Protection Act

The Migrant and Seasonal Worker Protection Act (MSWPA) (29 U.S.C. Chapter 20) and its regulations (29 C.F.R. Part 500) establish standards for the employment of migrant and seasonal agricultural workers. It also requires employers to make certain disclosures and keep employment records.

Hiring

Some direct farm business may choose to use a Farm Labor Contractor (FLC) to obtain migrant or seasonal workers. FLCs recruit, pay, and transport workers to the needed locations. In return, the direct farm business pays the FLC a fee. FLCs must register and obtain a Certificate of Registration with the U.S. Department of Labor pursuant to the MSWPA (29 C.F.R. § 500.1(c)). An employee of a registered farm labor contractor must obtain a Farm Labor Contractor Employee Certificate of Registration (29 C.F.R. § 500.40). The direct farm business should ensure that it deals only with a registered FLC.

If, instead of contracting with an FLC, the owner or an employee of the business does the recruiting of the workers, the business need not register as a farm labor contractor if it qualifies as a family business or as a small business (29 C.F.R. § 500.30). If the owner of the farm or their immediate family member does the labor contracting, the business qualifies for the family business exception (29 C.F.R. § 500.20(a)). If the business used less than 500 man-days of seasonal or migrant labor during every quarter of the preceding year, it qualifies for the small business exception (29 C.F.R. § 500.30(b)). The regulation defines a man-day as any day where an employee performs agricultural labor for at least an hour. The small business exception does not apply to businesses that solely are agricultural labor contractors.

Wages

Employers must pay migrant and seasonal workers when wages are due, which must be at least every two weeks (29 C.F.R. § 500.81).

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[75] http://www.epa.gov/oppfead1/safety/workers/proposed/index.html.

Disclosures

FLCs and employers not exempt from the Act must disclose certain information to the employee at the time of recruitment, including (1) the location of the work, wage rates, the type of work involved; (2) the period of employment; (3) any transportation or housing to be provided and how much this will cost the employee; (4) whether workers' compensation or unemployment benefits are provided, and if so, disclosure of the insurance company's information; (5) whether the operation is the target of a strike; and (6) any arrangement whereby the employer is to receive a commission from another establishment for sales made to workers (29 U.S.C. § 1821(a); 29 C.F.R § 500.75(b)). The employer must display and maintain a poster provided by the Department of Labor outlining employee rights under the MSWPA (29 U.S.C. § 1821(b); 29 C.F.R. § 500.75(c)). The employer must provide the terms of employment in writing (29 C.F.R. § 500.75(d)). Information must be provided to the worker in his/her own language, where necessary and reasonable (29 U.S.C. § 1821(g); 29 C.F.R 500.78).

Providing Housing or Transportation

If the employer provides housing, the employer must disclose in writing, or post in a conspicuous place, the terms of such housing (29 U.S.C. § 1821(c); 29 C.F.R. § 500.75(c)). A state or local health authority (or other appropriate entity) must certify that any housing the employer provides complies with federal health and safety standards (29 C.F.R. §§ 500.130, 500.135). Likewise, the employer must insure any transportation the employer provides and it must comply with vehicle safety standards (29 C.F.R. §§ 500.100, 500.121).

Recordkeeping

Employers must keep individual employees records for the following: (1) the basis on which wages are paid; (2) the number of piecework units earned, if paid on a piecework basis; (3) number of hours worked; (4) total pay period earnings; (5) specific sums withheld and the purpose of each sum withheld; and (6) net pay. Employers must keep the records for three years and *provide all the information to the employee no less often than every two weeks* (29 U.S.C. § 1821(d); 29 C.F.R. § 500.80).

Prohibitions

The MSWPA prohibits employers from requiring that migrant or seasonal workers purchase goods or services solely from their employer (29 U.S.C. § 1829(b); 29 C.F.R. § 500.73).

H-2A Visas

If there is a seasonal shortage of domestic agricultural workers, a direct farm business may be able to recruit foreign agricultural workers under the H-2A visa program of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(15)(H)) and its accompanying regulations (8 C.F.R. § 214.2(h)(5) (INA regulations) and 20 C.F.R. §§ 655.90-655.215 (Department of Labor Regulations)). The employer must petition for certification to recruit foreigner workers and demonstrate a shortage of domestic workers. If certified, the employer must comply with several requirements, including ongoing recruiting of domestic workers and providing housing, meals and transportation to foreign recruited workers. The MSWPA does not apply to workers employed under the H-2A visa program, but H-2A employers must comply with all other federal laws such as the FLSA and OHSA.

The Department of Labor maintains a **website**[76] that provides step-by-step instructions on how the H-2A program works, including links to forms.

B. Unpaid Interns

For many small farms, hiring unpaid interns is a common practice. They provide much needed labor, and the intern benefits by receiving valuable mentoring and experience. However, if the intern is doing work on the farm that contributes to the farm's profitability, he or she is an employee and the farm business must take care to comply with applicable employment laws. If a farm qualifies for the minimum wage exception delineated above (employing fewer than 500 man days per quarter), federal rules set no minimum wage, thus allowing employers to not pay interns. This is somewhat unusual – many states have minimum wages, even for agricultural employees, and there are numerous instances of the government assessing small farms large fines for violating minimum wage rules. If interns are not receiving pay, the farm should nonetheless have them clock in and out as if they were paid employees and keep meticulous records of who worked for them, for how long, and when. If there ever is a problem in which a disgruntled intern complains to the Department of Labor, and the farm becomes the subject of an investigation, it is important to have a paper trail documenting the farm's compliance with the laws. Even if an internship is exempt from the minimum wage requirements, the farm is not exempt from complying with the other employment laws – for instance, OSHA and FIFRA rules still apply, housing and transportation must meet minimum standards, and workers' compensation (see discussion below) is necessary if the farm employs more than 400 man days per quarter. Farms employing paid and unpaid employees must count the unpaid employees' man-days towards the 400 for workers compensation.

Federal law authorizes employers to employ student-learners at less than minimum wage. Likewise, federal and state laws authorize apprenticeship programs to provide on-the job training. In all cases, the employer must obtain certification or a permit from the Department of Labor, and the programs generally need to be affiliated with an accredited educational program. Although employers may pay a reduced wage for a limited period of time, these savings on cost of labor may not be worth the added burden of governmental bureaucracy and

[76] http://www.foreignlaborcert.doleta.gov/h-2a.cfm.

collaborating with accredited educational programs. Nonetheless, businesses interested in establishing a formal program should contact the Louisiana Department of Labor for more information.

Making an internship a positive experience for the farmer and the intern requires investing much more effort than simply expecting the intern to show up and work. It requires carefully recruiting and selecting interns mentally and physically prepared for the nature of the work and developing a realistic plan for what and how they will learn. The New England Small Farms Institute publishes two guides that can assist in hiring interns and ensuring positive experience. *Cultivating a New Crop of Farmers – Is On-Farm Mentoring Right for You and Your Farm? A Decision Making Workbook*, for $20, contains worksheets covering all aspects of mentoring. *The On-Farm Mentor's Guide – Practical Approaches to Teaching on the Farm*, for $35, provides more detailed guidance. Although they require an investment of some money, both are valuable resources for ensuring both sides get the most out of the internship experience. The publications are available through **NESFI's website**.[77]

One of the best ways to ensure a positive experience is to develop an internship agreement, outlining the hours and work expected, the housing provided (if any), food and fresh produce arrangements, and what mentoring the farmer will provide. Both the farmer and the intern should sign the agreement. Clearly defined expectations at the outset will help prevent conflicts, or worse yet, an intern that abandons the farm mid-season. It will also be beneficial to the farmer to have a clearly delineated agreement in case of a Department of Labor audit or inspection.

IV. Employer Liability

Many injuries can occur on a farm. If a farming operation hires employees, the owner must take into consideration the attendant risk that an employee may be injured. An employer should (and must in circumstances governed by OSHA) take affirmative measures to ensure a safe workplace. When prevention fails, employers may be liable for an employee's injury, or when an employee commits a tort (an injury or wrong) against a fellow employee or third party. This section discusses the employer's liability exposure from an injured employee and the employer's potential liability arising from a situation in which an employee injures a third party.

If an employee of a direct farm business is injured, the injured employee can seek compensation in typically just *one* of two ways-- a claim under the Louisiana Workers' Compensation Law or a common law action for tort. In order to bring a claim under both the Act and in tort, the injured employee must prove that the injury sustained was deliberate and intentional on the part of the employer (*Reeves v. Structural Pres. Sys.*, 731 So. 2d 208, 209 (La. 2009)).

[77] http://www.smallfarm.org/main/bookstore/publications/.

A. Workers' Compensation

Louisiana's Workers' Compensation Law (LSA-R.S. 23:1020.1 et seq.) generally requires employers to pay compensation to their employees for injuries or deaths sustained on the job (*Id*.). Employers must carry workers' compensation insurance to guarantee that they will be capable of paying any compensation necessary (LSA-R.S. 23:1168). Alternatively, if the employer can prove to the Workers' Compensation Commission that they have sufficient capital to pay for workers injuries, they may self-insure (LSA-R.S. 23:1168.1.). Payments under the workers compensation law are an injured employee's exclusive rights and remedies – they may not file a separate lawsuit for their injuries (LSA-R.S. 23:1032). This protects employers from unpredictable jury awards as well as the costs of litigation.

However, the Act excludes agricultural farm laborers working for a private unincorporated farm and whose annual net earnings for their labor and services amounts to $1000 or less and the total net earnings of all employees of such farm do not exceed $2,500 (LSA-R.S. 23:1035). Therefore, agricultural employers meeting the foregoing requirements do not have to participate in the workers' compensation insurance program. Additionally, all members of an airplane involved in the spraying or dusting are exempt from coverage. (LSA-R.S. 23:1045).

If a court holds that a direct farm business was liable for an employee's claim and the operation was required to obtain workers' compensation insurance but failed to do so, the direct farm business will have to pay all of the workers' compensation benefits. It is unlikely that the operation's general insurance policy would cover such a liability, and the benefits owed to the injured employee can be quite costly. On the other hand, workers' compensation insurance itself can be very expensive. For these reasons, it is important to consult a lawyer to determine the business's needs. Furthermore, an employer who fail to carry workers' compensation insurance can be fined up to $250 per employee for a first violation and $500 per employee for subsequent violations up to $10,000. Additionally, an employer can be charged with criminal violations for his/her willful failure to provide workers' compensation insurance, for providing false information regard to having a workers' compensation insurance policy, or for provide false information in order reduce the amount of a workers' compensation insurance premium.[78]

B. Employer Liability When Exempt from Workers' Compensation Requirements

In Louisiana only "intentional acts" are exempt from the exclusivity of the worker's compensation remedy. (LSA-R.S. 23:1032). Louisiana courts have interpreted "intentional act" to either be an act in which tortfeasor intended or "desired" to bring about the resulting injury (*Bazley v. Tortorich*, 397 So.2d 475 (La. 1981)). The second interpretation is an act in which the tortfeasor knew that the resulting injury was substantially certain to follow from his or hers actions (*Id*.). If a tort is an injury or harm to another person or person's property that the law

[78] http://www.laworks.net/FAQs/FAQ_WorkComp_EmployerCoverage.asp#answer_11.

recognizes as a basis for a lawsuit. Louisiana's tort law is codified within Article 2315 of Louisiana Civil Code.

Although there are many legally recognized harms, the most common claim is for negligence. Whether a person was negligent and caused an injury is a highly fact specific issue which courts must decide on a case-by-case basis. To avoid being negligent, an employer must use the standard of care to protect his/her employees from workplace injury that an ordinary, prudent and reasonable person would under the circumstances. The standard of care obligates an employer to protect against reasonably foreseeable injuries, not every injury that may occur. An employer is liable for defects or dangers that he/she reasonably should have had knowledge of and must warn employees of workplace hazards the employers knows of, or should know of. "Knows or should know of" requires that an employer must also act prudently and reasonably in discovering workplace dangers.

Contributory Negligence of the Employee

Louisiana recognizes the doctrine of *pure comparative negligence*, which except for intentional torts, offsets the defendant's liability by plaintiff's percentage of liability (L.S.A. - C.C. Art. 2323).

Assumption of the Risk

Assumption of the risk, like contributory negligence, is a defense that an employer can raise to completely bar an employee from recovering for workplace injuries. The defense is an implied or express agreement between the employer and employee that the employee assumes the risk of injury that is inherent to performing the tasks necessary to accomplish the job. In Louisiana, contractual or an express contractual assumption of risk has been designated as a "waiver"(*See Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123 (La. 1988)); *see also* L.A.-C.C. § 2004)). Louisiana also recognizes implied secondary assumption of the risk, which does not longer bar recovery, but only reduces it (*Id.*). In *Murray* the court held that the plaintiff who knows of the risk that he or she encounters may still recover if the defendant violated a duty owed to a blameless plaintiff. In such a case, the blameworthy plaintiff's knowledge of the risk should only reduce his recovery (*Id.*).Therefore, the employer still has the duty to reasonably maintain a safe workplace. For instance, an employee helping with cattle assumes the risk of getting kicked and could not hold the employer responsible for any injuries resulting from a kick from a steer, but an employee helping harvest apples probably does not assume the risk of being knocked off a ladder by an errant cow in the orchard.

Employer Responsibility for Employees Injuring Others

As noted in the previous section, many injuries can occur on a farm. This section discusses the employer's potential liability when an employee injures a third party (whether on or off-farm) or a fellow employee.

Employees Injuring Third Parties

Employers are not responsible for all wrongs their employees commit. Rather, under the doctrine of *respondeat superior,* an employer may be vicariously liable for the tortious conduct of an employee if the conduct was within the scope of employment (LA-C.C. Art. 2320).

For the employer to be liable, there must have been an employer-employee relationship, rather than that of an independent contractor. Generally, an employer cannot be held liable for the tortious acts of an independent contractor, although there are exceptions in some cases. (*Duana v. Presley Const. Co., Inc.*, 270 S.C. 682, 244 S.E.2d 509 (1978)). Differentiating between an employee and an independent contractor depends on the facts of each individual case. A number of evidentiary factors may be taken into account. "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work." (*Young v. Warr*, 252 S.C. 179, 189, 165 S.E.2d 797 (1969)). A common example is the employee that causes a traffic accident while making a delivery of farm produce to the market. If the accident occurred on the way to/from the market, the activity would be within the scope of employment. On the other hand, if the employee was on personal detour to another town for personal reasons unrelated to employer's business, the accident would be "outside the scope of employment," and the employer would not be liable. Of course, in either case, the employee would be personally liable for their negligence.

Employees Injuring Other Employees

In the context of workplace violence, the key issue is whether the employer is vicariously liable for the intentional torts or acts of its employees. In *LeBrane v. Lewis*, 292 So. 2d 216 (La. 1974), four factors were established as criteria for determining whether an employee is in the course and scope of his employment at the time he commits an intentional act of violence: (1) whether the tortious act was primarily employment rooted; (2) whether the violence was reasonably incidental to the performance of the employee's duties; (3) whether the act occurred on the employer's premises; and (4) whether it occurred during the hours of employment (292 So. 2d 216 (La. 1974)). Since the *LeBrane* decision, courts have required some connection between the intentional harm and the employment in order to impose liability upon the employer. Even if an employer has a valid defense against vicarious liability if the intentional act of their employee was not within the course and scope of his employment, they may still be liable if they were negligent in their hiring, training, or supervising of their employees (LA-C.C. Art. 2315; 2323). Under the doctrine of negligent hiring or training, if the employer knew, or had reason to know, that the negligent employee should not have been hired or should not have remained in his/her employ, or failed to properly train the employee, the employer may be liable (*Griffin v. Kmart Corp.*,, 776 So. 2d 1226 (La. App. 5th Cir. 2000).

These potential liabilities are one of many reasons it is important for farmers to have insurance that covers tort liability and the cost of defending a lawsuit. Although a general farm liability policy may cover some bodily injuries that could occur on the farm, such as injuries to trespassers, it likely does not cover everything. In particular, as discussed above, workers' compensation insurance may be necessary to cover injuries to employees. Therefore, it is imperative that businesses discuss and verify liability coverage with their insurance agent.

V. CHECKLIST

- Have you read and understood the agricultural exceptions to the FLSA? If you intend to take advantage of the exceptions, have you verified that employees' activities qualify?
- If you intend to employ minors, do you understand the restrictions on the hours and activities they may be employed in? Have you obtained necessary certificates for each minor?
- Have you obtained equipment and developed operational procedures necessary to comply with OSHA, FIFRA and other employee-protection laws?
- Have you complied with any necessary paperwork and disclosure requirements for migrant workers you may employ?
- If employing unpaid interns, have you established reasonable recordkeeping for ensuring and verifying compliance with all minimum wage, hours and worker safety laws? Have you developed a plan for ensuring the experience meets yours and the intern's expectations?
- Have you discussed workers' compensation insurance, and any other employee liabilities, with your insurer or an attorney?

KEY CONTACT INFORMATION

U.S. Department of Labor, Wage and Hour Division (compliance assistance)

Ph: 1-866-4USWAGE (1-866-487-9243)

Columbia District Office (Ph: 803-765-5981)

Louisiana Workforce Commission (general contact info)

http://www.laworks.net/PublicRelations/PR_Contacts.asp

SECTION II – REGULATION BY PRODUCT

1 - DAIRY

Food safety authorities impose more regulations on dairy than almost any other food product. Multiple and intertwined federal and state laws and regulations impose very high standards on anyone handling dairy. Consequently, dairy farmers must work closely with regulators to ensure compliance with the complex regulations. Establishing a successful dairy takes significant effort, time, and money. This chapter will attempt to provide an overview of the various regulatory entities and dairy specific legal issues, but it cannot serve as a substitute for contacting the Louisiana Department of Agriculture and Forestry or the Louisiana Department of Health and Hospitals *before starting*.

I. FEDERAL REGULATION

Federal law technically applies only to dairy operations engaged in interstate commerce. However, Louisiana law replicates many of the federal regulations. Furthermore, various federal services, such as the USDA grading system, are available to dairy farmers regardless of whether they sell products across state lines.

A. The Food and Drug Administration

The Food and Drug Administration (FDA), under the Federal Food, Drug, and Cosmetic Act provision prohibiting adulterated or misbranded food entering interstate commerce (21 U.S.C. § 331), generally requires all milk and milk products shipped across state lines to undergo pasteurization. All milk and milk products must comply with FDA's standards of identity (21 C.F.R. § 1240.61; parts 131; 133).[79] Further, all milk and milk products must also adhere to the Grade A Pasteurized Milk Ordinance (PMO), which is available on the **FDA's website**.[80]

The PMO is a 300-page model regulation published by the FDA. Many states, including Louisiana, apply the PMO to sanitation of all milk products (LSA-R.S. 40:922). whether the products are shipped in-state or out-of-state. Producers who are interested in starting a dairy direct farm business, including processing or production of milk products (cheese, ice cream, etc.), should read the PMO carefully. If a dairy wants to be on the Interstate Milk Shippers list, the National Conference of Interstate Milk Shippers requires the State Milk Sanitation Rating Authorities to certify that the dairy attains the milk sanitation compliance and enforcement

[79] 21 C.F.R. § 1240.61 exempts certain cheeses from pasteurization if they are subject to alternative pasteurization procedures that are defined in the cheese's standard of identity, for instance aged for at least 60 days (21 C.F.R. part 133).
[80] http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/milk/ucm301297.htm.

ratings in the PMO. More information about inclusion on the IMS list is available on the **FDA's website**.[81]

The PMO prohibits the misbranding and adulteration of milk and milk products, requires permits and inspection of milk production and processing (including transportation), and prescribes labeling rules. The PMO also sets forth specific standards for production and processing. Grocery stores, restaurants, and other similar establishments that sell milk and milk products at retail are exempt from PMO requirements as long as no processing occurs and a permitted establishment supplies the milk. Brokers, agents, and distributors that purchase milk and milk products from permitted establishments are also exempt from permitting requirements. Because the LDAF oversees the permitting, the general obligations the PMO imposes on producers and processors are discussed in more detail in the section on Louisiana's laws and regulations.

B. United States Department of Agriculture

The USDA administers a variety of programs to promote dairy and benefit producers. A full listing of USDA dairy programs can be found online on the **AMS website**.[82] This section will only address grading and standards, milk marketing orders, and mandatory reporting.

Grading and Standards

The USDA provides grading and standards services to certify that products are of a certain quality (7 C.F.R. Part 58). To qualify for the grading and standards service, the USDA must first inspect a dairy plant and approve it as in compliance with USDA's sanitary standards. A producer can then request grading services. Using the program is voluntary, but it is important for producers who want to market to schools and institutions that require foods to meet certain standards. Because the program is voluntary, federal funds cannot cover grading services and producers requesting grading services must therefore pay for them. For more information on the benefits of the grading and standards program, as well as information on how to apply for inspection and certification, visit the **USDA's website**.[83]

Federal Milk Marketing Orders

Milk marketing orders (7 C.F.R. Parts 1000-1170) are the USDA's means of stabilizing supply for consumers and providing uniform prices for producers. The Agricultural Marketing Service

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[81] http://www.fda.gov/food/guidanceregulation/federalstatefoodprograms/ucm2007964.htm

[82] http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateA&navID=CommodityAreas&leftNav=CommodityAreas&page=DairyLandingPage&description=Dairy

[83] http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateM&navID=GradingCertificationandVerfication&leftNav=GradingCertificationandVerfication&page=DairyGrading&description=Dairy+Grading

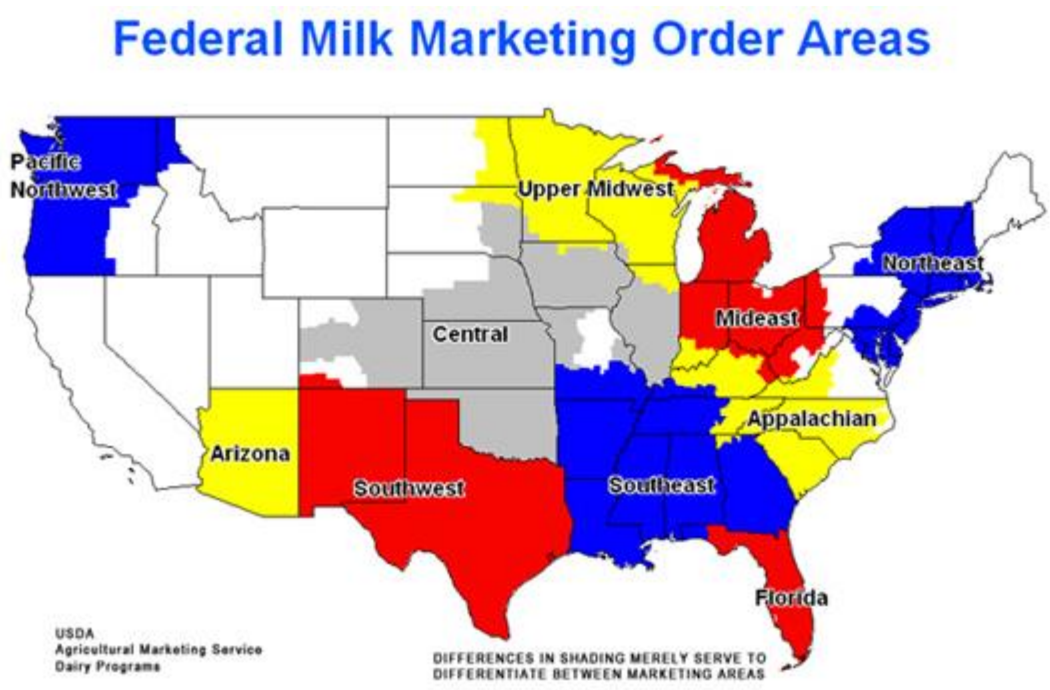
(AMS, a department of the USDA) uses the orders to set the minimum price dairy farmers must receive for fluid milk sold within a given geographic area (7 U.S.C. § 608c(5)). The orders apply to "handlers" (7 C.F.R. §§ 1030.30, 1032.30), which are anyone operating pool or non-pool plants, anyone receiving milk for processing and redistribution, or anyone brokering milk for processing (7 C.F.R. § 1000.9). AMS also considers cooperatives to be handlers, although they have a slightly different structure for determining payment amounts to their producers (*Id.*). Most direct-to-consumer dairies are producer-handlers, which are producers who also process and distribute their own milk (7 C.F.R. §§ 1030.10; 1032.10). In order to be a producer-handler, a producer must be able to demonstrate that they own the animals and control their care, that they own the production and processing equipment, and that the operation is entirely at the owner's risk (7 C.F.R. §§ 1030.10(e); 1032.10(e)).

Prior to June 1, 2010, producer-handlers were not subject to the minimum price orders. However, on April 23, 2010, the USDA issued a final rule that subjects producer-handlers who distribute over 3 million pounds a month to the marketing orders (75 Fed. Reg. 21157). The effect of this new rule is that exceptionally large dairies must now comply with the Milk Marketing Orders. More information on this change to the law is available on the **AMS website**.[84]

There are currently 10 Federal Milk Marketing Order Areas. Louisiana is in the Southeast Order (7 C.F.R. Part 1007; http://www.fmmatlanta.com/). Each Order sets the minimum price a fluid milk handler must pay producers in that region. The intended use of the milk determines the "class," which in turn determines the price (7 C.F.R. § 1000.40). Class I, which covers milk intended for consumption as milk, is the most valuable (*Id.*). Class II includes, but is not limited to, milk that will be cottage cheese, frozen desserts, sour cream, custards, pancake mixes, and buttermilk biscuits (*Id.*). Class III is milk for things such as cream cheese and cheeses that may be grated, shredded or crumbled (*Id.*). Class IV, the least valuable, is milk for butter, sweetened condensed milk and dried milk (*Id.*). Each month, the Milk Market Administrator will issue adjusted price orders based on the value of the components of the milk (butterfat, protein and other solids) and the price differential for the parish where the product is delivered. The calculations are somewhat confusing, although the AMS attempts to explain the method on **its website**.[85] Dairy farmers who believe that their handler is not paying the mandated minimum price for milk should contact the director of the applicable Milk Marketing Order region.

84 http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateO&navID=prodhandlerHearingFederalMilkMarketingOrders&rightNav1=prodhandlerHearingFederalMilkMarketingOrders&topNav=&leftNav=CommodityAreas&page=FMMOrder21&resultType=&acct=dgeninfo.

85 http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateD&navID=IndustryMarketingandPromotion&leftNav=IndustryMarketingandPromotion&page=MIBPriceDescription&description=Description&acct=dmktord.



Mandatory Price and Storage Reporting

Mandatory price and storage reporting requirements are authorized by amendments to the Agricultural Marketing Act (7 U.S.C. § 1637b). Mandatory reporting provides reliable information to calculate the pricing factors used in the Milk Marketing Order formulas. Even if a producer-handler is not subject to the Milk Marketing Order, they are likely still subject to some reporting requirements.

Price reporting requires manufactures of cheddar cheese, butter, nonfat dry milk, and dry whey to submit weekly reports including the price, quantity, and moisture content, where applicable (7 C.F.R. §§ 1170.7, 1170.8). Manufacturers that process and market less than 1 million pounds of dairy *products* (cheese, butter and other items that are not fluid milk) per year are exempt (7 C.F.R. § 1170.9). Dairy products with a higher value than the basic commodity (for instance, kosher butter produced with a rabbi on site or organic milks) are also exempt from price reporting requirements (7 C.F.R. § 1170.8). It is the obligation of the producer to track annual production and report if they exceed the 1 million pound exemption. Reports must include the "name, address, plant location(s), quantities sold, total sales dollars or dollars per pound for the applicable products, and the moisture content, where applicable." (7 C.F.R. § 1170.7(a)). A weekly price report must be submitted to the Agricultural Marketing Service (AMS) by 3:00

p.m. (EST) every Wednesday using the appropriate form. Example forms are available on the **AMS website**.[86]

Storage reporting requires those who store butter, anhydrous milk fat (AMF), butter oil, and natural cheeses to submit monthly reports on quantities in storage (7 C.F.R. §§ 1170.7(b), 1170.10)). There is no exemption based on quantity for the storage report requirement. Manufacturing plants must make monthly storage reports of the dairy products that they have on hand (7 C.F.R. § 1170.7(b)). Dairy products are those that are used to set prices for Class III and Class IV milk under the Milk Marketing Orders (7 C.F.R. § 1170.4). This includes cream cheese, cheeses that can be shredded, grated or crumbled, butter, evaporated and sweetened condensed milk, and any dried form of milk (7 C.F.R. § 1000.40). The report must indicate the name, address, and stocks on hand at the end of the month for each storage location.

The reporting requirement applies to "all warehouses or facilities, artificially cooled to a temperature of 50 degrees Fahrenheit or lower, where dairy products generally are placed and held for 30 days or more." (7 C.F.R. § 1170.10(a)(1)). Stocks in refrigerated space maintained by wholesalers, jobbers, distributors, and chain stores are exempt, but a direct farm business maintaining stocks of its own products would not be exempt from reporting. Reportable products include salted and unsalted butter, anhydrous milk fat (AMF), butter oil, and natural cheese including: barrel and cheese to be processed; American type cheeses, (cheddar, Monterey, Colby, etc.); Swiss, and other natural cheese types (brick, mozzarella, Muenster, Parmesan, etc.). Processed cheese is excluded (7 C.F.R. § 1170.10(a)(2)(i)). All manufacturers of nonfat dry milk and dry whey must report all stocks on hand (7 C.F.R. § 1170.10(b)). NASS mails the monthly reporting forms to producers (73 Fed. Reg. 34175, 34176 (June 17, 2008)).

II. State Regulation

It is *imperative* that producers contact the Louisiana Department of Health & Hospitals(DHH) as early as possible in the planning stages of a dairy operation, because requirements are complex and exacting. DHH will work with the dairy to ensure the operation is clean and safe. However, this may require investing in costly equipment, especially if making farmstead cheeses, and will likely require rigorous processing standards and frequent testing to ensure safety. Louisiana does not allow for the sale of raw milk, but does allow for the sale of pasteurized milk. Both will be discussed in the following pages.

[86] http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5097071.

A. Inspections & Permitting

Pasteurized Milk and Milk Products

Similar to the Federal Food, Drug, and Cosmetic Act, Louisiana has regulations prohibiting the sale of adulterated or misbranded products (La. Admin Code. tit. 51, pt. XXIII, § 4315). Louisiana law gives the Louisiana Department of Health and Hospital the authority to promulgate and enforce rules and regulations to promote public health when it comes to sale of milk and dairy products (LSA-R.S. 40:5). If the milk or milk product is found to be adulterated or misbranded, it can be impounded and disposed of (La. Admin Code. tit. 51, pt. XXIII, § 4315). The Louisiana "State Food, Drug, and Cosmetic Law" (LSA-R.S. 40:601 et. seq.) is similar to the Federal FDCA in that the general prohibition against misbranding and adulteration gives the LDHH much of its authority to regulate dairies. The regulations implementing the Act (discussed in more detail below) clarify the steps producers must take to prevent food adulteration or misbranding.

Louisiana requires each establishment or unit that sells dairy products to obtain a retailer license from the Louisiana Milk Commission (LSA-R.S. 3:4109). The state health officer retains the ability to suspend the permit if it has reason to believe that a public health hazard exists, or if a producers refuses to allow inspection (La. Admin Code. tit. 51, pt. VII, § 337). If you have additional questions about permitting you should access the dairy/food safety pages of the LDHH's website[87] or contact the Department at (225) 342-9500.

Rule and Regulations for Dairy Production

The LDHH has adopted many standards to ensure that milk and milk products are sold in conformity with chemical, bacteriological, temperature, and sanitation requirements (51 La. Admin. Code Pt VII, 353). In order to rid a bulk shipment of milk or milk product of certain microorganisms producers are asked to heat the product to a minimum of 125 degrees Fahrenheit; up to a maximum of 161 degrees Fahrenheit (La. Admin Code. tit. 51, pt. VII, § 357).

All operators, processors, and retailers of milk products must obtain a license prior to operating as such (LSA-R.S. 3:4109). Operators of dairy farms, receiving stations, transfer stations, dairy plants (including frozen dessert manufacturing plants, filled dairy products processing plants, anomalous milk and milk products processing plants, anomalous dairy products processing plants, imitation milk and milk products processing plants, single-service containers and closures for milk and milk products manufacturing plants, milk tank truck cleaning facilities, finished dairy product depots/transfer points and milk tank trucks) within Louisiana must obtain a permit to operate from the state health officer prior to beginning operation. Bulk milk tank truck operators/samplers and dairy plant receivers/samplers must also obtain a permit

[87] http://dhh.la.gov/index.cfm/page/626.

from the state health officer prior to performing to operating (La. Admin. Code tit. 51, pt. VII, §109).

The regulations also provide requirements for the locations in which livestock may be milked (La. Admin Code. tit. 51, pt. VII, § 511). A milking barn, stable, or parlor should be present on all dairy farms, which is where the milking herd is to be housed during the hours that milking occurs (La. Admin Code. tit. 51, pt. VII, § 511). The floors, walls, and ceiling of the building must be built of concrete or a similarly impervious material and the walls as well as ceiling must be smooth, painted or finished in an approved manner (La. Admin Code. tit. 51, pt. VII, § 505, 507). There also must be ample natural or artificial light during milking hours as well as plenty of air space/ circulation (La. Admin Code. tit. 51, pt. VII, §§ 511). Finally, the milking barn or stable must be kept clean and the food kept dry to promote the healthiness of the milking herd as well as the cleanliness of the milk itself and prevention of contamination (La. Admin Code. tit. 51, pt. VII, § 521, 523). The regulations are informative as to how a milk producer may satisfy the requirements set forth by the LDHH and producers should contact the Department to ensure they are following the more specific regulations, outside the scope of this guide.

As per the other regulations, very generally, insects, rodents, fowl, swine and any other creatures capable of contaminating the milk must be kept out. Doors must be self-closing and all openings must have screens. Bulk milk tanks must meet 3-A Sanitary Standards for dairy equipment, and must be leveled and permanently anchored by concrete or other permanent methods to insure proper weights from the calibration charts. They must also be at least six inches off the floor to allow for adequate cleaning underneath and cannot be located over a floor drain. Lighting, which sometimes must consist of 15-20% natural lighting, must be adequate for cleaning and may not be mounted above storage tanks. Water supplies must be safe, clean, protected and in ample supply; it must also be capable of being heated for steam cleaning if necessary.

All animals in the herd must be healthy and from areas or herds accredited free of Tuberculosis and Brucellosis or test negative for the diseases (La. Admin Code. tit. 51, pt. II, § 503). Cows must be cleaned prior to milking, especially udders and flanks, and wiped dry. Cows with mastitis or other prohibited substances or diseases must be milked on separate equipment or milked last. Milk must cooled to 45 degrees Fahrenheit immediately after milking (La. Admin Code. tit. 51, pt. VII, § 345). Equipment should be cleaned immediately and must be sanitized prior to the next use, then stored in a sanitary manner. Manure in milking barns must be removed daily. The regulations prohibit any other activity from occurring in the same room or vicinity as the milking.

All fluid milk, cream, buttermilk, and milk beverages sold, offered for sale, or delivered for the purpose of human consumption as such, must be Grade A according to specifications in the rules and regulations promulgated by the Department of Health and Hospitals (LSA-R.S 40:921). All powdered whole milk (dry whole milk), powdered skim milk (nonfat dry milk) and other powdered milk products (dry milk products) in packages or other containers offered for sale, sold or delivered for the purpose of human consumption must be in a manner sufficient to inform the purchaser of the grade of the product (*Id.*).

B. Organic Milk

Farmers interested in producing and marketing certified organic milk must follow USDA's Agricultural Marketing Service (AMS) organic standards (7 C.F.R. § 205). The regulations generally require the dairy to manage the animals according to certain standards and obtain certification from an accredited certifying entity. For more information on organic management and certification, see the "Organic Marketing" chapter of this Guide.

Milk Promotion

The National Dairy Board, created by the Dairy and Tobacco Adjustment Act of 1983 (Pub. L. 98-180, 97 Stat. 1128), requires all milk producers to pay a fee, known as a checkoff, of 15 cents per hundredweight for national milk promotion programs. The rates are authorized by Section 1150.152 of the Dairy Promotion Order promulgated pursuant to the Act, which is available on the **AMS website**.[88] Generally, the first purchaser of milk (the cooperative or processor) collects checkoff contributions from the dairy farm operator. This fee is mandatory for all producers of Grade A and Grade B milk, whether they are selling it as fluid milk or processing it into dairy products for direct sale to consumers. Dairy farmers that produce and distribute their own dairy products must submit the checkoff directly. Dairy producers have a strong culture of enforcement of the checkoff program, and the National Dairy Board audits co-ops and other producers to ensure compliance with the act. More information on activities of the National Dairy Council is available on the **Dairy Checkoff website**[89] or at the Checkoff Programs Reading Room at the **National Agricultural Law Center's website**.[90]

III. Hormone Free Labeling

Recombinant Bovine Growth Hormone (rBGH, commercially sold as Posilac, but also known as recombinant Bovine Somatotropin (rBST)) is an artificial hormone that increases milk production by dairy cattle. Although the FDA takes the position that there is no difference between milk from cows treated with rBGH and those not treated with it, many consumers prefer milk from untreated dairy herds. To address this consumer demand, some milk producers wish to label their milk as "rBGH free", "rBST free" and "hormone free." Louisiana

[88] http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3004583
[89] http://www.dairycheckoff.com/DairyCheckoff
[90] http://nationalaglawcenter.org/readingrooms/checkoff/

does not impose any standards for the labeling of milk, other than the general prohibition against misleading labels. In part, this is because no producers in the state widely market their milk as rBGH free.

The Food and Drug Administration (FDA) guidance on Voluntary Labeling of Milk and Milk Products from Cows That Have Not Been Treated with Recombinant Bovine Somatotropin, available **online**,[91] outlines marketing terms the FDA considers acceptable. Louisiana bases many of its regulatory decisions and interpretations on the FDA's standards; therefore, statements in compliance with FDA standards are more likely to receive approval in the event of an ADH examination of labeling claims.

The FDA considers labels proclaiming the milk "hormone free" to be misleading because all milk contains hormones. Instead, the FDA allows statements such as "from cows not treated with rBGH." The agency considers these statements potentially misleading if not placed in the proper context through additional statements such as "No significant difference has been shown between milk derived from rbST-treated and non-rbST-treated cows." The FDA requires these qualifying phrases because they do not want consumers to believe milk from cows not treated with rBGH is superior to milk from cows treated with the artificial hormone. Nonetheless, many consumers are wary of rBGH and wish to avoid it, and many large retailers and dairy co-ops are increasingly disclaiming their use of the hormone. Although these actions reduce the uniqueness of a product, it may be worth distinguishing milk from cows not receiving rBGH injections as long as Posilac is commercially available.

91 http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm059036.htm

IV. CHECKLIST

Have you…?

- Contacted the dairy division of the DHH to discuss what is necessary to produce the product you wish to sell?
- Researched and identified suppliers that can provide the equipment necessary to satisfy HDD requirements?
- Chosen a record keeping system for tracking, reporting and remitting fees for the price and storage reporting and milk checkoff program?
- Developed labeling and marketing strategies?

KEY CONTACT INFORMATION

Louisiana Department Health & Hospital

http://dhh.louisiana.gov/index.cfm/page/660

Ph: 225-342-9500

2- EGGS

Several laws and agencies regulate egg sales. At the federal level, the United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA) share regulatory authority. In Louisiana, the Commissioner of Agriculture and Forestry administers the state level program pursuant to the Louisiana State Egg Law (LSA-R.S. 3:821 et seq.).

I. FEDERAL OVERSIGHT OF EGGS

As mentioned above, there are two primary federal agencies that regulate eggs, the USDA and the FDA. The Egg Products Inspection Act (EPIA) (21 U.S.C. Chapter 15) authorizes the USDA to inspect eggs and egg products and establish standards for uniformity of eggs. The EPIA applies to eggs shipped in interstate and intrastate commerce, but has exemptions for small producers. The Food and Drug Administration (FDA), under the authority of the Federal Food, Drug, and Cosmetic Act (FDCA) (21 U.S.C. § 301 et seq.), issues and enforces standards of identity for egg products and requires shell egg producers to implement measures to prevent *Salmonella Enteritidis* (SE). The FDCA only applies to eggs shipped in interstate commerce. Many direct farm businesses selling their eggs will not be subject to the federal rules, but determining the applicability of the federal law to a specific operation can be difficult. A brief discussion follows.

USDA's Oversight of Eggs

Within USDA, the Agricultural Marketing Service (AMS) and Food Safety and Inspection Service (FSIS) administer programs relevant to egg producers.

AMS Requirements

AMS prohibits buying, selling, or transporting or offering to buy, sell, or transport restricted eggs, unless exemptions apply (7 C.F.R. § 57.700). Exemptions are discussed in the next section. Restricted eggs are eggs that are checks, dirties, incubator rejects, inedible, leakers or loss (unfit for human food) (7 C.F.R. § 57.1). Restricted eggs must be sent to a processing facility (overseen by FSIS, discussed below), destroyed, or processed into animal food (7 C.F.R. § 57.720). AMS enforces the prohibition through periodic inspections of business premises, facilities, transport vehicles, and records of anyone transporting, shipping, or receiving eggs (7 C.F.R. § 57.28). The EPIA requires AMS to inspect handlers packing shell eggs for sale to the end-consumer at least once per calendar quarter, unless exempt (21 U.S.C. § 1034). The term handler means any person who engages in buying or selling any eggs or processing any egg product for human food; the term includes poultry producers (21 U.S.C. § 1033(e)). Inspector may be federal employees or employees of cooperating state agencies (7 C.F.R. § 57.110).

AMS also provides voluntary grading services for class, quality, quantity, or condition and any combination thereof (7 C.F.R. Part 56). Inspection by federal or authorized state graders must be requested, and will cost a fee. More information on requesting egg grading services, as well as the form to do so, is available through AMS's grading **website**.[92] AMS's official standards, grades and weight classes are available **here**.[93]

AMS's Exemptions

AMS exempts egg producers from the restrictions and inspections if they sell eggs from their own flocks directly to consumers via door-to-door sales or at a place of business away from the site of production *so long as* they sell fewer than 30 dozen eggs per sale (7 C.F.R. § 57.100(c)). The producer must own and operate the business and transport the eggs him or herself, and the eggs must meet the standards for U.S. Consumer Grade B shell eggs (*Id.*) Producers with fewer than 3,000 hens, producers selling directly to household consumers, and egg packers selling on site directly to consumers are also exempt from AMS's regulations (7 C.F.R. § 57.100(d)-(f)).

Processing Subject to FSIS

The EPIA requires USDA to continuously inspect plants processing eggs into egg products (21 U.S.C. § 1034). The Act defines egg products as "any dried, frozen or liquid eggs, with or without added ingredients" (21 U.S.C. 1033(f)). All egg products must undergo pasteurization (21 U.S.C. § 1036). FSIS oversees the inspection of egg processing plants (9 C.F.R. § 590.24). The procedures and standards for inspections are in 9 C.F.R. Part 590. Producers who process their own eggs and sell directly to consumers are exempt from continuous inspection under the FSIS regulations (9 C.F.R. § 590.100(e)). However, they must apply for an exemption and their facility and operating procedures must meet all otherwise applicable standards. Although not subject to continuous inspection, exempted facilities must undergo periodic FSIS inspections (9 C.F.R. § 590.600-650).

FDA's Oversight of Eggs

In addition to USDA's regulation under the EIPA, the FDA regulates eggs under the FDCA. FDA specifies standards of identity for egg products, including dried and frozen eggs (21 C.F.R. Part 160). If a food does not meet the standard of identity, it is misbranded according to the FDCA (21 U.S.C. § 343(g)).

[92] http://www.ams.usda.gov/AMSv1.0/Grading
[93] http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3004376

Furthermore, some shell egg producers must adhere to FDA's Salmonella testing, handling and treatment standards. Producers with 3,000 or more laying hens at a particular farm that produce shell eggs for the table market, and do not sell all of their eggs directly to consumers, are subject to the additional handling requirements for Salmonella prevention (21 C.F.R Part 118).[94] The regulations require covered producers to (1) develop a written *Salmonella Enteritidis* (SE) prevention plan that involves procuring SE monitored pullets, (2) use a bio-security program limiting visitors and controlling cross contamination between houses, (3) control rodents, flies and pests, and (4) clean poultry houses between flocks in the event of a positive SE test (21 C.F.R. § 118.4). Producers must perform environmental testing for SE when laying hens are 40 to 45 weeks old and 4 to 6 weeks after molt; if an environmental test is positive for SE the producer must conduct shell egg testing (21 C.F.R. §§ 118.5 and 118.6). Producers must maintain a written SE prevention plan as well as records to verify compliance, which they must provide to the agency within twenty four hours of receipt of an official request (21 C.F.R. § 118.10). Shell eggs must be held or transported in refrigeration at or below 45 degrees Fahrenheit ambient temperature within 36 hours after laying (21 C.F.R. § 118.4). This refrigeration requirement applies to shell egg producers as well as individuals transporting or holding shell eggs (21 C.F.R. § 118.1).

Regardless of whether eggs are sold interstate or intrastate, the FDA requires all shell eggs for distribution to the consumer to have a safe handling label or undergo treatment to kill SE (21 C.F.R. § 101.17(h)). If untreated, the safe handling label must read: "**SAFE HANDLING INSTRUCTIONS:** To prevent illness from bacteria: keep eggs refrigerated, cook eggs until yolks are firm, and cook foods containing eggs thoroughly." The statement must appear on the label prominently, conspicuously, and in a type size no smaller than one-sixteenth of one inch. The statement must appear in a hairline box and the words "safe handling instructions" must appear in bold capital letters.

II. LOUISIANA REGULATION OF EGGS

Egg Marketing and Labeling

The Louisiana Egg Grading and Marketing Law imposes permitting, handling, and labeling requirements on most individuals handling and selling eggs (La Rev. Stat. Ann. § 821 through § 832). Louisiana also has accompanying regulations enforced by the Department of Agriculture La. Admin Code. tit. 7, pt. V, § 903 of the state code of regulations. Generally, the regulations make it unlawful to sell eggs that are inedible or unfit for human consumption (La. Admin Code. Tit. 7 pt. V, § 1517). The Act incorporates USDA's grading and quality standards (La. Admin Code. Tit. 7 pt. V, § 1519).

[94] The inverse of this is that producers who have fewer than 3,000 hens and sell all of their eggs directly to consumers are exempt. Producers who process their eggs into egg product are also exempt, but may be subject to FSIS's egg processing oversight.

Eggs sold at retail must be prepackaged and labeled with the information including, grade, size, date when repackaged, the statement "keep refrigerated at or below 45° F" (La. Admin Code. Tit. 7 pt. V, § 1517). Egg standards and tolerances must be in accordance with USDA standards (La. Admin Code. Tit. 7 pt. V, § 1503). After washing, processing, and packaging, eggs must be transported or stored at a temperature of forty-five (45) degrees Fahrenheit or less (La. Admin Code. Tit. 7 pt. V, § 1516).

Every person, firm, or corporation engaged in selling shell eggs, frozen eggs, liquid eggs, or any egg product to a retailer or manufacturer must apply and secure a license the Louisiana Egg Commission. (7 La. Admin. Code Pt V, 919). Application forms for license are provided by the Louisiana Department of Agriculture and Forestry, and each application has a $10 fee payable to the Louisiana Egg Commission. An awarded license is valid for one-year. Producers selling eggs of their own production on their own premises to individuals are exempt from the provisions of these regulations, so long as they sell no more than 30 dozen eggs to one person at one time (7 La. Admin. Code Pt V § 931). Any packer/producer/processor/dealer-wholesaler/broker that does not apply for a license, after being informed that such business requires a license or having received the necessary applications from the department, shall have all eggs sold by such business put off-sale until such time as the business obtains a license (7 La. Admin. Code Pt V § 919). For more information about the application process and regulations visit the Louisiana Egg Commission's **website**.[95]

[95] http://www.laeggs.com/.

III. CHECKLIST

If you're going to sell eggs, make sure you have answered the following questions:

- How many chickens to you have?
- Who are your customers (end user, institutions, processors)?
- Where will your sales take place (on or off the premises)?
  - On farm sales have fewer regulations, but limit available customers.
  - Flock size can impact which regulations apply.
- If you plan to sell off the farm:
  - Do you have the capacity to grade, candle, and inspect your eggs?
  - Have you figured out how to package and transport the eggs?
  - Are you responsible for keeping track of and remitting any fees? If so, what is your record keeping system?
- Have you obtained the appropriate licenses? You may want to check with local health departments in addition to the Louisiana Department of Agriculture and Forestry to see if they require other licenses, such as retailers' license.

KEY CONTACT INFORMATION

USDA's Agricultural Marketing Service, Poultry Programs, Shell Eggs (egg grading and certification)

Ph: (202) 720-3271

Louisiana Department of Agriculture and Forestry

Ph: (225) 922-1234

http://www.ldaf.state.la.us/animal-health/poultry-egg-programs/

Louisiana Egg Commission

Ph: (225) 925-3772

http://www.laeggs.com/

3 - Fish, Shellfish and Other Aquatics

Aquaculture production encompasses a broad array of goods: popular items such as catfish and shrimp, traditional foods such as frog legs, and novel products such as alligator's skins or meat. While some of these industries are very successful in Louisiana, it remains to be seen whether others can operate profitably in the state. Competition with inexpensive imported foreign products creates particular difficulty for many producers. Direct-to-consumer and specialty niche market sales may be one means of helping a business succeed.

Aquaculture represents an important component of agriculture and producers in Louisiana have access to extensive technical resources. The Southern Regional Aquaculture Center, has a variety of useful fact sheets on its **website**[96] that cover topics such as establishing aquaculture production and small scale marketing, as well as species-specific information on animal care and production. Louisiana State University's Aquaculture Research Station also has helpful resources on aquaculture in Louisiana. Producers interested in learning more about the aquaculture program may visit its website.[97]

I. Production

Aquaculture production is subject to regulation by the Louisiana Department of Environmental Quality (LDEQ), Louisiana Department of Wildlife and Fisheries (LDWF), and partially by the Department of Agriculture and Forestry (LDAF). All aquaculture producers must obtain a permit by contacting the LDWF.

Fish

All persons and businesses within Louisiana who wish to engage in aquaculture must apply for an aquatic organism license from the LDWF (LSA-R.S. 56:412). The cost of the license is $15 and must be renewed each year (*Id.*). The license allows the licensee to transport live aquatic organisms throughout Louisiana, and allows the licensee to sell domesticated aquatic organisms in any size, quantity, or limit without restriction within the state or outside the state (Id.). The LDWF has the authority to cancel sales or to confiscate and destroy shipments of fish fingerlings that are determined by department personnel to have fish diseases or parasites that would endanger native fish populations (*Id.*).

The Louisiana Department of Environmental Quality (DEQ) may require farmers to register their aquaculture facility *prior to commencing operations* under the National Pollutant Discharge

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[96] .https://srac.tamu.edu/.
[97] http://www.lsuagcenter.com/en/crops_livestock/aquaculture/.

Elimination System and other state regulations (La Admin. Code tit.33 Chapter IX). General environmental laws have been discussed earlier in this guide, and specific requirements for environmental permitting of aquaculture facilities will depend on the type, size, and location of the operation. Fish farmers should contact the DEQ in the initial planning stages to determine specific requirements.

Crawfish

There are no specific regulations for farm-raised crawfish and crawfish farmers are not required to have a license to raise crawfish on agricultural lands or to sell to customers. However, if the buyer plans to resell their crawfish, they must have the appropriate licenses from LDWF and or the Louisiana Department of Health and Hospitals.

II. FEDERAL RULES

Fish Processing

Pursuant to the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Chapter 9), the Federal Food and Drug Administration requires fish processors to use Hazard, Analysis, and Critical Control Point Plans (HACCP, pronounced ha-sip) (21 C.F.R. § 123.6). "Fish" means "fresh or saltwater finfish, crustaceans, other forms of aquatic animal life (including, but not limited to, alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals) other than birds or mammals, and all mollusks, where such animal life is intended for human consumption" (21 C.F.R. § 123.3). "Processing" means freezing, changing into different market forms, manufacturing, preserving, packing, labeling, dockside unloading, or holding (*Id.*) The regulations do not apply to (1) harvesting or transporting fish or fishery products, without otherwise engaging in processing; (2) practices such as heading, eviscerating, or freezing intended solely to prepare a fish for holding on board a harvest vessel; or (3) the operation of a retail establishment.

As with most other FDA rules, the HACCP requirements only apply to food moving in interstate commerce. Therefore, fish and shellfish producers raising and direct marketing their goods wholly within Louisiana are not subject to the HACCP rules. If the producer or processor sells to a wholesaler and has good reason to believe the product may be sold across state lines, then they must comply with HACCP. And because the local public health inspector may require standards for processing of seafood that approach HACCP-level standards, producers who are exempt from the federal HACCP requirements should nonetheless study and understand the requirements and consider developing an internal HACCP plan.

Implementing HACCP requires identifying chemical, biological and physical hazards that are reasonably likely to occur and the critical control points where the hazard is likely to occur, establishing limits for the hazard at each critical control point, and implementing procedures for testing for limits and verifying effectiveness of the plan (21 C.F.R. § 123.6). The processor must also have a record keeping system to document the monitoring of the critical control point systems (*Id.*). HACCP plans must be in writing and signed by the most responsible individual on site or a higher-level official within the company. An individual trained in the application of HACCP principles to fish and fisheries products must develop the HACCP plan (21 C.F.R. § 123.10). This individual can be a trained employee or an outside contractor.

More information on applying HACCP principles to seafood is available in FDA's *Fish and Fisheries Products Hazard Control Guidance*, available **online.**[98]

Emerging USDA Food Safety Regulations for Catfish

Title XI, Section 11016 of the Food, Conservation and Energy Act of 2008 (The 2008 Farm Bill) (Pub. L. 6124) amended the Meat Products Inspection Act to subject catfish (as defined by the Secretary of Agriculture) to mandatory inspection by the United States Department of Agriculture Food Safety Inspection Service (21 U.S.C. § 601(w)(2)). The law's purpose is to impose higher inspection standards on imported catfish, but it will likely have an impact on domestic processors as well. On February 24, 2011, USDA issued a proposed rule to implement the catfish inspection program. The proposed rule provides two options for the definition of catfish, describes requirements that will apply to catfish produced in or imported into the United States as well as how FSIS will inspect US catfish farms, transportation, and processing. The proposed rule calls for a transition period during which domestic and international operations will come into compliance with the catfish inspection program. Once the catfish inspection program rules are issued in final form, FSIS plans to follow-up by announcing the implementation dates for key provisions in the rule. As of the writing of this guide, USDA has not issued a final rule. Catfish producers should subscribe to industry publications for up-to-date information on this emerging issue. The proposed rule can be found **here**.[99]

Shrimp

Any commercial fisherman wishing to shrimp in federal waters must have permit from NOAA. Currently, there is a moratorium on Gulf Shrimp permits, meaning no new permits will be issued; however, existing permits are transferrable and may be purchased with or without the sale of the vessel (50 C.F.R. §622.50). Shrimp trawlers should also be aware of federal Turtle Excluder Device (TED) regulations, which require an approved TED installed in each net that is

[98] http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/Seafood/FishandFisheriesProductsHazardsandControlsGuide/default.htm

[99] http://www.fsis.usda.gov/wps/wcm/connect/e9389210-5d6a-4322-b0a7-85cbb4294ef9/2008-0031.pdf?MOD=AJPERES

rigged for fishing skimmer net fishermen to limit tow times (50 C.F.R. §223.50 (d)(2)(i)). A shrimp trawler will be exempted from TED requirements so long as they limit their tow times to a maximum tow time of 55 minutes from April 1 – October 31 and 75 minutes from November 1 – March 31 (*Id*.).

III. CHECKLIST

Have you…?

- Identified realistic market demands for your product?
- Obtained any necessary permits from the LDWF or the SCDNS?
- Planned how to process your product by?
    - Contracting with a third party or building your own processing facility?
    - If building your own facility, obtained pre-construction approval from SCDHEC and looked into HACCP rules?

4- FRUITS AND VEGETABLES

Health regulators generally have a more permissive approach to raw fruits and vegetables relative to other products direct farm businesses might sell. However, if a direct farm business (DFB) sells value added products, such as canned goods and juices, it is a different story. Because these items have a long and sordid history of harboring dangerous bacteria, the Louisiana Department of Health and Hospitals has significant concerns about safety in production. Consequently, all processed products must be prepared in approved facilities and most processes will have to receive pre-market approval.

Before covering the regulations that pertain to each group, it is important to understand the difference between raw and processed foods. Generally, raw produce is exempt from food regulations. However, as soon as it is processed, it is subject to LDHH regulation. An example of the distinction is raw versus processed lettuce – a washed head of lettuce is raw, while bagged salad mix is processed. A good rule of thumb is that produce sold in any form other than how it came off the plant or out of the ground may be "processed" and subject to additional regulations.

I. UNPROCESSED FRUITS AND VEGETABLES

Probably the most common way to sell fruits and vegetables is as raw, unprocessed commodities. Direct farm businesses that sell raw, unprocessed fruits and vegetables should limit pesticide residues by thoroughly washing produce and avoid selling rotten or filthy food.

The Federal Food, Drug, and Cosmetic Act (FFDCA) (21 U.S.C. § 346a) authorizes the Federal Environmental Protection Agency (EPA) to set tolerance levels for pesticides on and in foods. The Louisiana Department of Agriculture and Forestry (the agency with authority over pesticides) primarily enforces federal tolerance standards for pesticide residues on produce. Although testing is unlikely, this guide nonetheless mentions the rules for producers who may wish to look up the tolerance levels for pesticides they use.

The EPA bases the tolerance level for each pesticide on the potential risks to human health posed by the pesticide. Tolerances are usually in the parts per billion, making it difficult to test for levels as a regular business practice. EPA lists tolerance levels for over 1,000 pesticides, so it is impossible for this guide to cover all the standards. However, there are several ways farmers can determine the tolerance levels for pesticides they are using. One method is to look up the pesticide in the Code of Federal Regulations (CFR) (40 C.F.R. Part 180). EPA maintains a **website**[100] that explains how to search the CFR to determine the tolerance level for a particular crop. Another EPA **website**[101] contains general information on pesticides by family, commodity type, and crop type. The site also has a database to look up tolerance levels for particular pesticides, which users can search using pesticides' common names. Finally, the tolerance information sometimes is available on the pesticide's label.

If a food consists in whole or in part of a diseased, contaminated, filthy, putrid or decomposed substance, or if it is otherwise unfit for food, it is "adulterated" under Louisiana FDCA (LA-R.S. 40:606). This legal distinction, in general terms, means food should not be rotten or contaminated with feces. As many direct farm businesses build their customer base through delivery of superior products and rely on reputation, common business sense would eliminate many of these potential violations. Nonetheless, it merits mentioning because this legal standard applies to both raw and processed foods.

II. PROCESSED FRUITS AND VEGETABLES

As discussed above, the difference between raw and processed food is slight. Beyond washing and packing, there are several popular processing methods a direct farm business may employ to create "value-added" products, such as drying, canning, jarring, and pressing into a juice or other beverage. Louisiana strictly regulates these activities for consumer safety. Louisiana uses the Federal Food and Drug Administration's (FDA) Food Code, which establishes standards for safety of food products and processing equipment (LSA-R.S. 40:601). In addition to the Food Code, the FDA publishes numerous guidance documents on interpreting and applying the Food Code, which are also available to the LDHH. Local departments and individual regulators often must make judgment calls during the permitting process, depending on the particular food and conditions, so "safe practice" could mean different things between different regulators and different regions. Moreover, standards, and therefore processing requirements, could change as regulators come and go. The bottom line is that careful cooperation is required between the DFB and local public health inspectors during the approval process and subsequent periodic inspections.

In addition to inspection and permitting, many processed foods must have labels containing particular information. For instance, processed foods must conform to their standards of identity (if any) and bear labels giving the common name of the food (LSA-R.S. 40:608). Product labels also must list all ingredients (*Id.*) Packaged foods must have labels identifying the

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[100] http://www.epa.gov/opp00001/food/viewtols.htm.
[101] http://www.epa.gov/opp00001/regulating/part-180.html.

manufacturer, packer or distributor and an accurate accounting of the quantity of the contents (*Id.*) In addition, federal regulations require foods processed with sulfites to disclose the presence of a sulfating agent (21 C.F.R. § 130.9).

Canning, Jarring, Pickling

Another popular way to create value added products for fruits and vegetables is jellies, jams, fruit butters, pickles and salsas. These methods, which can create anaerobic conditions conducive to the growth of dangerous microbes such as botulism, represent a significant public health concern. Louisiana has deemed jams, jellies, preserves, pickles, acidified foods, sauces, and syrups as prepared at home for sale as "low risk foods" and has specifically exempted such products from its regulations, so long as gross annual sales of products does not exceed $20,000 under the state cottage food law (LSA-R.S. 40:4.9).

Juice & Cider

Like all foods, juice and cider processing facilities must undergo inspection and approval by LDHH. However, rather than LDHH pre-approval of production processes, juice processors must comply with federally mandated Hazard Analysis and Critical Control Point (HACCP) procedures, even if the product is being sold solely intrastate (21 C.F.R. Part 120).[102] The HACCP rules require producers to develop a written analysis that identifies points in the production process where microbial, toxic, chemical, physical or other hazards may contaminate the juice, and a written plan for preventing hazards reasonably likely to occur (21 C.F.R. §§ 120.7 and 8). The developer of the written analysis and plan must have specialized HACCP training (21 C.F.R. § 120.13). For more information on the juice HACCP, the FDA has issued *Guidance for Industry: Juice HACCP; Small Industry Compliance Guide,* which is available **online**.[103]

Processers who sell their own produce as juice directly to consumers do not have to comply with the HACCP rule, so long as they store, prepare, package, serve, and vend their product exclusively and directly to consumers (21 C.F.R. § 120.3(j)). Producers who sell to other retailers (even if retailing their product directly as well) or who have anyone else store, prepare or package their juice must comply with HACCP.

Producers exempt from the HACCP requirements must still comply with all LDHH and FDA food safety requirements, such as facility certification and potentially pre-approval of the production process. FDA proscribes standards of identity for many juices by establishing

[102] The FDA's authority over food is generally limited to foods shipped in interstate commerce (21 U.S.C. § 331). However, FDA asserts authority to enforce the HACCP rules under the Public Health Services Act (21 U.S.C. §§ 241, 242l, 254) because juice is a vehicle for transmitting food borne illnesses (see 66 Fed. Reg. 6137, 6148, 6158-6160 (Jan. 19, 2001).
[103] http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/ucm072602.htm.

minimum contents and allowable other ingredients for canned fruit juices and vegetable juices (21 C.F.R. Parts 146 and 156). Additionally, FDA's labeling rule (21 C.F.R. § 101.17(g)) requires a warning label for juices that have not been pasteurized or otherwise treated to kill pathogens. The statement must read:

WARNING: This product has not been pasteurized and, therefore, may contain harmful bacteria that can cause serious illness in children, the elderly, and persons with weakened immune systems.

Wine, Beer and Spirits

Once an operation begins pressing juice, it may be a natural progression to begin fermenting wine, beer or spirits. Like all other foods, these products fall under the jurisdiction of the LDHH, which must inspect and permit their operation for safety. However, these operations *also* are subject to oversight by the Federal Alcohol and Tobacco Trade and Tax Bureau (TTB) (27 U.S.C. §§ 201 et seq.; C.F.R. Title 27). Additionally, production and sales of alcohol may be completely prohibited if a producer is located in a "dry" parish, although there are limited exceptions for private clubs.

At the federal level, TTB requires producers to obtain several permits prior to commencing operations and submit annual forms and taxes. Forms are available through TTB's **website**[104] or in a packet by calling 1-800-398-2282. TTB also provides **online packets of information**[105] tailored to particular manufacturers. Federal rules apply to all alcohol production, whether for sale in intrastate or interstate commerce.

In Louisiana, the Department of Revenue (LDOR) has authority over licensing and distribution on initial contact by an applicant, the enforcement agent will collect the filing fee and may assist in filling out the application, retaining the original and giving the applicant a copy upon request. There are a number of various license types that require varying fee amounts. They are listed on the LDOR **website**.[106] The LDOR may issue the permits immediately after proper investigation but, for a period of thirty-five days after issuance, such permits shall operate on a probationary basis subject to final action on, opposition to, or withholding of, the permits as hereinafter provided (LSA-R.S. 26:79). There are a number of factors that determine whether the LDOR issues a permit, including, but not limited to, the number of permits already issued in the parish, whether the parish or township permits alcohol sales, and the residency status of owners or partners. Businesses interested in initiating production of alcoholic beverages should

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104 http://www.ttb.gov/forms/index.shtml.
105 http://www.ttb.gov/applications/index.shtml#Manufacturers.
106 http://www.atc.rev.state.la.us/alcohol-applications-manufacturer.php.

contact the LDOR for further information on whether their intended activity is permissible at their location, what permits are necessary, and how to apply. The LDOR's website is http://www.atc.rev.state.la.us/index.php.

Other Considerations for Fruits and Vegetables

Other sections of this Guide cover several additional issues that might arise when a direct farm business chooses to grow and sell fruits and vegetables. First, producers may wish to make certain health or nutrient claims when marketing their goods. These statements are regulated by the FDA and are discussed further in the "Marketing and Managing" chapter. Second, organic production and marketing must follow additional rules, which are outlined in the "Organic Marketing" chapter. Finally, the "Weights & Measures" section of the "Marketing and Managing" chapter covers additional marketing rules applicable to direct farm businesses.

III. Checklist

Have you…?

- Determined what the residue limits are for any pesticides on the product?
- If you are processing raw fruits and vegetables, obtained an SCDHEC inspection and permit for your processing facility? Do you need pre-approval of recipes or processes?
- Are you pressing juice? If so, you need to undergo HACCP training and develop a written HACCP plan or hire a trained professional to do so for you.
- Thinking about selling alcohol…
    - Determined whether alcohol production and/or sales are permissible in your parish and township?
    - Looked into the all the permits you need to get from federal, state and local agencies, and determined their costs?
    - Will you be able to sell directly or need to contract with a distributor?

Key Contact Information

- **U.S. Environmental Protection Agency's National Pesticide Information Center**

- Ph: 1-800-858-7378

U.S. Dept. of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB)

- Ph: 877-882-3277 (general info)

- **The Louisiana Office of Alcohol and Tobacco Control**

- Ph: (225) 925-4041

5 - Grains and Cereals

Normally, marketing grain is a complex business requiring decisions on when to sell, what type of contract to use, proper storage, and many other factors. Although selling directly means the business may not be selling on the volatile open market that most grain growers are accustom to, many of these decisions are still pertinent to the business. There are additional considerations for a direct farm business such as whether and where to have the grain milled and how and where to store the grain.

Although there are extensive resources for assisting conventional farmers in marketing their grain, there is limited information available for direct-to-consumer marketers. Most producers who are not selling through the traditional commodities markets have made their business planning choices using their personal judgment and experience and little else. An important resource to keep in mind is **MarketMaker**,[107] which allows producers to list their business in a searchable database as well as search for processors and potential institutional customers. Another excellent resource on processing and marketing grains is the National Sustainable Agriculture Information Service's ***Grain Processing: Adding Value to Farm Products***.[108] The guide gives examples of farmers who have successfully established processing and distribution infrastructure in order to direct market their grains. Finally, although geared toward organic farming, the Rodale Institute has a variety of educational resources on alternative crop marketing on their **website**.[109]

I. Grain Inspection Standards

The federal Grain Standards Act (7 U.S.C. § 71 et seq.) authorizes the Department of Agriculture to establish standards and procedures for the inspection of grain shipped in interstate commerce and out of the country (7 U.S.C. §§ 76, 77). The Grain Standards Act is administered by USDA's Grain Inspection, Packers & Stockyards Administration (GIPSA). Inspection of grain shipped domestically (within the United States) is voluntary, and performed upon request by GIPSA-authorized state agencies and private firms (7 U.S.C. § 79(b)). The regulations concerning

[107] http://www.marketmaker.uiuc.edu/
[108] http://www.attra.org/attra-pub/summaries/grainpro.html
[109] http://www.tritrainingcenter.org/course/

Additional Resources: Grain Inspection

GIPSA maintains general information about grain and rice inspection on its website:

http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=grpi&topic=landing

A list of official service providers that inspect or weigh grain is available on GIPSA's website:

http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=fc&

inspection procedures and establishing standards are in 7 C.F.R. Parts 800, 801, 802 and 810. Very generally, inspectors rate grains on their moisture content, levels of contaminants such as insects or gravel, toxins caused by mildews or pesticide residues, and amount of crushed or broken grains.

II. Licensing of Warehouses

The United States Warehouse Act (USWA) (7 U.S.C. §§ 241-273) authorizes USDA to license warehouse operators that meet the standards established by the USWA and its regulations (7 U.S.C. § 242(j), 7 C.F.R. Part 735). Being federally licensed is voluntary, but licensees must post bonds (or other financial assurance) (7 U.S.C. § 245) and comply with record keeping, contracting, and inspection requirements (7 U.S.C. §§ 246, 7 C.F.R. Part 735).

The storage of grain in Louisiana is regulated by the Agricultural Commodity Dealer and Warehouse Law (LSA-R.S. 3:3401). Licenses can be obtained from the Louisiana Agricultural Commodities Commission (LACC) (LSA-R.S. 3:3403). To obtain a license from LACC, warehouses must file a surety bond with a minimum of $25,000 and a maximum of $500,000 depending on the number of bushels stored (LSA-R.S. 3:3410). If a direct farm business stores its grain in a warehouse, it should ensure that the warehouse has either a federal or state license. The LACC may operate a self-insurance program (LSA-R.S. 3:3410.1).

The federal and state licensing programs both serve the same purpose: protect producers by requiring warehouses and dealers to have enough financial security to pay the producers and authorize inspections to ensure bad management practices do not damage products or the financial stability of the warehouse operation. Louisiana regulations grant authority to LACC inspectors to inspect public warehouses, audit warehouse books, check the articles or goods stored with the records or receipts, and exercise any other power relative to public warehouses as is necessary to determine whether or not the business is conducted in such a manner as to protect the interest of the persons who are storing, or may store, articles in the warehouse (LSA-R.S. 3:3405).

III. Selling Grains

As with all other processing, if the producer processes the grain by bagging, packaging or grinding, they must do so in an approved facility according to the home based food regulations (LSA-R.S. 40:4.9). Processing also includes blending, roasting, sprouting, grinding, or any other process that changes the condition of the grain, such as hulling and polishing rice. Although some wheats may be ground on the farm, for many grains, this will mean having to find a processor willing to keep the product separate from others' products and incurring the extra costs of specialty processing and possibly storage.

Producers should also be aware of the FDA's Defect Action Levels, which are maximum allowable levels of natural or unavoidable defects in foods that present no health hazard (21 C.F.R. § 110.110). Common defects with specific action levels include molds, insect parts, and excrements. More guidance on the action levels is available on the FDA's **website**.[110]

Another step in the processing of grains for sale may be to produce baked goods. Bakers must use LDHH-approved kitchens and package the baked goods to protect them from contamination. Potentially hazardous baked goods, such as custard pies and goods containing milk, eggs, or meat, must be stored, transported and displayed in accordance with the provisions of subpart 3-501.16(A)(2)(b)(ii) of the 2005 edition of the United States Department of Health and Human Services Food Code, pertaining to cold storage temperature. Prepackaged foods must, at minimum, identify (1) the common name of the product; (2) the name and address of the packer, processor, or manufacturer; (3) the net contents; and (4) provide ingredients listed by their common name (LSA-R.S. 40:608). Without such information, the food is considered misbranded. Louisiana also has a Flour and Bread Enrichment Act (LA-R.S. 40:781), requiring all bread and flour to have certain minimum levels of vital nutrients such as B1, niacin and iron.

[110] http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/ucm056174.htm.

IV. CHECKLIST

Have you?

- Come up with a marketing and business plan? What type of growth do you envision and when? Given the rarity of direct marketing grain, this may be a particularly difficult step that is especially important for establishing a successful business.
- Do you want to have your grain inspected and graded?
- Will you need to use a warehouse, or do you have on-farm storage capacity? If necessary, have you identified a warehouse that will store your grain?
- Will you be processing your grain, or selling it as harvested? If you are processing, do you have the necessary facilities and permits, or do you need to access a commercial, certified kitchen?

KEY CONTACT INFORMATION

U.S. Grain Inspection, Packers & Stockyards Administration

- Ph: (202) 720-0219 (main)

- For a list of official GIPSA service providers, visit http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=fc&topic=fsp

7 - HONEY & MAPLE SYRUP

This chapter summarizes the basics of Louisiana laws pertaining to beekeepers involved in honey production. This section concludes with a brief discussion of rules for maple syrup production, which are similar to those for honey.

I. BEEKEEPING

This section discusses state, but not local, regulations on beekeeping. Some counties and municipalities may limit where, how, or how many bees can be raised in an area. Therefore, beekeepers should contact their local authorities. For more information on technical aspects of beekeeping, local beekeepers' associations hold regular meetings to educate and inform fellow beekeepers. A list of local beekeeping associations is available through the Louisiana Beekeepers Association's website.[111]

Domesticated honeybees play an integral role in agricultural sectors needing pollinators. Diseases and pests affecting honeybees can cause significant economic damage. Therefore, Louisiana's laws on the introduction of honey bees into the state (Louisiana Revised Statutes. Title 3, Chapter 16, Part VI) establish registration and inspection requirements to facilitate protection of the health of Louisiana's bee colonies.

If a producer wishes to have bees or fixtures shipped into the state he/she must hold a Class A permit and the bees or equipment must be accompanied by a certificate of inspection from the state entomologist, which certifies that the bees are free from infectious or contagious disease based on an actual inspection within sixty (LSA – R.S. § 3:2306). The State Entomologist and its Representatives/Inspectors from the Louisiana Department of Agriculture and Forestry are permitted to enter a warehouse, premises, or area in order to determine that the colonies are not infected and were transported properly (LSA – R.S. § 3:2308). The Commission will either destroy or issue quarantines for all areas found to be contaminated with disease and until it decides how to move the affected colonies it is illegal for the producer to try to do so (*id*.).

II. SELLING HONEY

The definition of honey in Louisiana is simply the raw food product produced by honeybees for human consumption. Labels for honey must comply with Louisiana Department of Agriculture and Forestry standards, at a minimum, including the name of the product, the name and address of the manufacturer, and the net weight. Sell of honey is regulated under Louisiana's

[111] http://www.labeekeepers.org/

Food, Drug, and Cosmetic Act. It is unlawful for any person to sell a product predominantly labeled as honey unless it is raw honey produced by honeybees. (LSA – R.S. § 40:608.1(a)). Any person violating this provision may be fined up to five-hundred (500) dollars; each sale constituting a separate punishable offense. (LSA – R.S. § 40:608.1(b)).

Unless honey is sold as sliced comb, it must undergo some processing to remove it from the comb and bottle it. Honey is naturally anti-microbial because of its high sugar content, making it a relatively low risk food. Therefore, many states allow producers to sell their honey without first pasteurizing it. However, local inspectors determine what is adequately safe within their community and may nonetheless require processing in an inspected and certified facility (and possibly pasteurization as well). Regardless of any requirements, a producer might choose to pasteurize honey because pasteurization delays crystallization and makes the product free-flowing, thereby destroying osmophillic yeast (i.e., prevents molding).

Some consumers seek out local raw honey because they believe it helps alleviate allergies. Due to U.S. Food and Drug Administration regulation of health claims, producers should not include this claim on their labels or in their advertising. FDA must specifically approve all health claims prior to use (21 C.F.R. § 101.14),[112] but it has never approved the claim linking honey and allergies (21 C.F.R. §§ 101.70-.83). Therefore, labels and advertisements *should not* include any health claims connecting raw honey to allergy relief.

Organic Honey

To market honey as organic, the bees and processing plant must be certified organic according to USDA's National Organic Program. Although the regulatory definition of livestock specifically excludes bees (7 C.F.R. § 205.2), **USDA guidance documents**[113] direct certifiers to use the livestock standards for certification of bees. The livestock regulations generally require the producer to handle the livestock organically from the day of birth, use 100% organic feed, avoid most synthetic chemicals unless they are on the National Organic List, and refrain from use of antibiotics and certain other medical treatments. For bees, this may mean things like

[112] The Nutrition Education and Labeling Act of 1990 prohibits states from establishing any labeling requirements for food in interstate commerce that are not identical to FDA labeling regulations (21 USC § 343-1). Consequently, Illinois has not promulgated regulations on labeling. It is unclear whether FDA's labeling requirements apply to purely intrastate food, but it is likely they do.
[113] Available at http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5069312&acct=AQSS

locating the hive to prevent foraging at non-organic flowers, building the hive out of particular materials, or treating hive diseases in a manner that would comply with standards set out by the certifier. The chapter on organics covers the livestock regulations in more detail, as well as information on the certification process, record-keeping requirements, labeling rules, and processing of organic foods. Given the special nature of bees, it is best to contact an accredited certifying agent that certifies bees to discuss specific organic certification requirements.

III. Checklist

Have you…?

- Contacted the Louisiana Department of Health and Hospitals to learn if an inspection and permit is necessary for processing?
- If you intend to market your honey or maple syrup as organic, read the chapter on Organics and contacted an accredited certifying agent that has experience certifying honey or maple syrup?

8 - MEAT AND POULTRY

In the recent past, most farm operations included at least minimal animal production. Declining livestock auction markets and vertical integration in the livestock and poultry industries has limited marketing opportunities for small-scale livestock and poultry farmers. However, selling direct to consumers is one means of retaining a presence in this potentially lucrative and rewarding business. Ongoing consumer concerns regarding food safety and the increasing interest in animal welfare should increase demand for direct farm sales of meat and poultry products. Moreover, in a 2004 study of restaurant and commercial food buyers, the most important factor in selecting a new supplier was obtaining the highest quality available--a characteristic that provides an opportunity for local, direct-to-market farm operations.

In order to participate in this market, however, producers must navigate a series of state and federal regulations relating to the production, slaughter and processing of meat and poultry products. This chapter will address legal issues relating to raising, slaughtering and processing requirements. The facility may also be subject to environmental regulations, discussed in the chapter on setting up the direct farm business.

For a potentially useful resource on other issues that may arise in marketing livestock and poultry, producers may want to read through Cornell's Small Farms Livestock Program's Resource Guide to Direct Marketing Livestock and Poultry, which is available **online**.[114] Though the guide's discussion of laws is New-York-specific and therefore not particularly reliable for Louisiana producers, it does also addresses many other issues critical to a successful business, such as effectively building relationships with buyers, identifying age and grading meat, the cuts of meat that each animal produces, and the kind of weight-to-yield ratios to expect.

I. RAISING AND CARING FOR ANIMALS

Animal Welfare Laws

Louisiana has a few laws pertinent to animal welfare in the context of the direct farm industry. For example, it is illegal to offer for sale a horse or mule, by reason of debilitation or lameness, at a public or private forum, in a city with a population more than 10,000, if that animal would not be able to work in the city itself (LSA–R.S. § 3:2361). A violation of this law allows for the violator to be arrested without a warrant, to be fined, or both (LSA–R.S. § 3:2362). Furthermore, the sale of dyed, chicks, goslings, etc. is expressly prohibited by Louisiana's animal welfare

[114] http://www.smallfarms.cornell.edu/pages/projects/workteams/LP/livestock.cfm

laws, and is punishable by fines and jail time, for which each day the practice continues constituting a separate offense. (LSA–R.S. § 3:2363).

Another major area of potential violations of the law concerns the "abandonment" of animals. The law is titled the Louisiana Animal Abandonment Act (Louisiana Revised Statutes. Title 3, Chapter 17, Part IV). An animal is considered abandoned by its owner through various circumstances. Although livestock will most likely be abandoned through running at large and failure of the owner to retrieve, generally, an animal is considered to be abandoned if the owner has failed to pay for veterinary services within ten days of the completion of the services (LSA–R.S. § 3:2452). Furthermore, necessities of life include adequate water, food, and shelter. Therefore, owners need not literally "abandon" the animal to violate the law, but may simply be negligent in the care of that animal.

Louisiana's Brands and Marks Law

Louisiana's Branding of Livestock laws (Louisiana Revised Statutes Title 3, Chapter 7) require any livestock owner who uses a brand to register their brand with Louisiana Livestock Brand Commission by sending a facsimile including a picture of the desired brand, the application, where the brand will appear on the livestock (LSA–R.S. § 3:736). The Louisiana Livestock Brand Commission provides a copy of the "Brand Book" on its website.[115] The initial branding fee to accompany the application is fifteen (15) dollars.(LSA–R.S. § 3:749). Finally, it is unlawful for a person to brand any livestock with a brand that has not been registered with the Commission, a brand registered to another person's name, or a brand for which the registration has been cancelled. Similarly, it is unlawful to purchase livestock for slaughter (or already slaughtered livestock) if it appears that the brand is not registered or has been tampered with (LSA–R.S. § 3:744-6). Brands have to be renewed every 5 years (LSA-R.S. 3:737).

Diseased Animals and Dead Animal Disposal

One purpose of the Department of Health and Hospitals is to control, suppress and eradicate livestock and poultry diseases and pests. For that reason, Louisiana regulations require many diseased or deceased animals, excluding swine, to be buried in a certain way so as to prevent potential spread of disease. The regulation states that the body of any animal or fowl that has been found to have died of disease or accident is to be disposed of in a way that prevents the disposal

[115] http://www.ldaf.state.la.us/portal/Portals/0/AHS/Brand/BrandBook2010.pdf

from being a nuisance to public health. In most situations, the carcass should be buried, incinerated, or rendered into tankage. (La. Admin. Code. tit 51, pt. XI, § 105). The general promulgations of the Louisiana Legislature, concerning disposal of waste in protection of public health can be found at Title 40, Chapter 1, § 40:4 of the Louisiana Revised Statutes. This section is the Louisiana Sanitary Code, which through regulations, provides for the proper disposal, maintenance, and sanitation of any potentially hazardous substance. Producers should check with the Department to make sure their plans for burying dead livestock are allowed under the regulations, which can be rigorous.

Inspections and Controls on Animal Movement

The LDAF and the Department of Agriculture have numerous programs for the control of brucellosis, trichomoniasis, tuberculosis, scrapies, hog cholera, avian influenza and other diseases. Explaining the details of these rules is beyond the scope of this guide. Programs range from the inspection of virtually all herds of cattle and swine to surveillance of auction barns, livestock dealers and garbage feeding establishments. The agency currently places a primary emphasis on controlling and eradicating brucellosis in Louisiana.

Although details depend on the disease and animal type, the regulations are capable of some generalizations. Bringing animals into Louisiana from out of state usually requires a certificate of health proving the animal tested negative for common diseases within 30 days of entry, or come from herds or areas certified free of the disease. In some instances, animals may enter Louisiana without this certificate if transported directly to slaughter. Animals moving within the state or undergoing ownership transfer are subject to many similar restrictions, with additional testing sometimes possible at major points of sales (such as auctions and feedlots). Owners should contact the LDH and the LDAF for specific information on the type of animal they wish to transport before importing or moving animals within the state.

To enforce the laws, inspectors and veterinarians have authority to enter the premises or to go into any barns or other buildings where livestock are kept or found in the State of Louisiana in the discharge of his or her duties (LSA-R.S. 3:2094). State officials and employees also have authority to stop vehicles transporting livestock to examine the livestock, the sanitary conditions of the vehicles, and any documents relating to the health of the animals (LSA-R.S. 3:734).

II. SLAUGHTERING & PROCESSING

A. Humane Slaughter

The Federal Humane Slaughter Act (7 U.S.C. § 1901) requires humane slaughter of animals. Approved humane methods either render the animal unconscious quickly or comply with Jewish or other religious methods that quickly cause unconsciousness due to anemia from a cut to the carotid artery (7 U.S.C. § 1902). Although most farmers do not slaughter their own animals, the laws pertaining to the humane slaughter of animals are worth noting. For one thing, if part of the retail marketing of the meat entails advertising humane treatment, slaughtering methods matter as much as raising and care. The laws are also relevant because a slaughterhouse that fails to comply with these rules may also fail to comply with other rules pertaining to food safety, which could damage a producer's reputation and increase exposure to legal liability.

B. Processing Meat and Poultry Products

Meat and poultry processors are subject to federal or state laws and regulations regarding licensure and inspection. The USDA's Food Safety and Inspection Service (FSIS) oversees meat and poultry processing facilities in Louisiana. The Poultry and Eggs Program (part of the LDAF) has authority to provide state inspections of poultry in accordance with federal standards (LSA–R.S. § 7:901). There are some facilities in Louisiana that are only state inspected, so it is important to determine whether the product will be shipped across state lines at any point. If it will be, the slaughter facility must be federally inspected.

As a general rule, each facility engaging in processing must have an inspection and license from the FSIS or the Commission. For instance, in sausage production, the facility that slaughters the animal must have a permit and the facility that processes the sausage, if it is a separate facility, also must have a permit. Producers can slaughter and process their own livestock and poultry for their own personal use. Two other exemptions may also apply. First, producers who raise and slaughter their own livestock or poultry may sell directly to household consumers or restaurants, hotels and boardinghouses for use in their own dining rooms or in the preparation of meals for sale directly to consumers, so long as the annual value of sales under this exemption does not exceed $200.00 (*Id.*). The other exemption pertains to custom slaughterhouses that slaughter livestock or poultry raised by an individual or firm

ADDITIONAL INFORMATION: Animal Processing Licenses

More information on obtaining federal animal processing licenses is available on the FSIS website:

http://www.fsis.usda.gov/regulations_&_policies/Grant_of_Inspection_Guideline/index.asp

The USDA has a toll-free help desk for small meat and poultry processing plants. Staff specialists can answer questions or direct callers to appropriate assistance. Contact:

1-877-FSISHelp (1-877-374-7435)

infosource@fsis.usda.gov

and then delivers the product back to that individual or firm (*Id.*). Although most slaughtering and processing operations occur at slaughterhouses, mobile processing units – which are often more accommodating to small-scale producers – may be available in certain areas.[116]

Meat

The Federal Meat Inspection Act (21 U.S.C. §§ 601-695) and accompanying regulations (9 C.F.R. Parts 300-599) govern facilities that slaughter or process meat. Although Louisiana authorizes its own state meat inspection program, the law expressly provides that the state program will be no less equal to the provisions and requirements of applicable federal laws which authorize and provide for such inspection (LSA-R.S. § 3:4202).

The FSIS has stringent standards for the construction of slaughterhouses and meat processing facilities, generally requiring enclosed facilities that separate live animals from slaughtering and butchering operations in order to prevent contamination. Facilities must be well lit with easily cleanable equipment and washable, nonporous walls and ceilings. Facilities must have potable water for cleaning and sufficient septic and/or sewage service. Rail heights must be appropriate to the animals intended for slaughter and all equipment – including coolers, rails, drains and hooks – must be appropriate and well running.

In addition to meeting construction and equipment requirements, slaughtering and processing facilities must have a sanitary Standard Operating Procedure (SOP) (9 C.F.R. § 304.3) and a written Hazard Analysis and Critical Control Point (HACCP) plan (9 C.F.R. § 304.3). HACCP is a science based program that requires identifying critical points in the production processes where biological, physical and chemical hazards can contaminate food, developing plans for the prevention of the hazard, and implementing testing to verify control of the hazards (9 C.F.R. Part 417). Producers considering establishing their own processing facility will need to familiarize themselves with HACCP requirements and possibly obtain HACCP training and certification. More information on HACCP and links to further resources are available on the **FSIS website**.[117]

A slaughterhouse must apply for a grant of inspection for each type of animal it will slaughter. Therefore, not all slaughterhouses may slaughter all animals. Producers should determine the capacity of nearby slaughterhouses, or how far they will need to transport their animals for slaughter, before beginning operations.

All animals at USDA slaughterhouses must undergo pre- and post-slaughter inspections for health and soundness (21 U.S.C. § 603; 9 C.F.R. Parts 301 and 302). If the animal is fit for human

[116] Additional information on mobile processing units is available at: http://www.extension.org/pages/19234/mobile-slaughterprocessing-units
[117] http://www.fsis.usda.gov/Science/Resources_&_Information/index.asp

consumption, the inspector places an "inspected and passed" stamp on the meat, using food-grade ink (21 U.S.C. § 606). The mark is put on carcasses and major cuts, but might not appear on retail cuts such as roasts and steaks.

Whereas an inspection qualifies the meat for sale to consumers, grading certifies that the meat is of a particular quality. Producers may request that USDA grade their meat (7 C.F.R. Parts 53 and 54). Mandatory USDA inspections are free of charge, but producers must pay for grading services (7 C.F.R. §§ 53.18, 54.28). For more information on how inspections and grading differ, visit the **FSIS website**.[118] To transport meat across state lines, the packer must affix a federally pre-approved label in order to transport meat across state lines (9 C.F.R. § 317.1). More information on the approval process for labels is available on the **FSIS website**.[119]

A good source for guidance on marketing meat is ***How to Direct Market Your Beef***.[120] The guide is written by Jan Holder, a rancher who successfully direct markets beef with a "grass-fed" claim. The Sustainable Agriculture Network (an arm of the USDA's Sustainable Agriculture Research and Education (SARE) program) funded publication of the guide. In the guide, Mrs. Holder discusses her experience in complying with laws governing the slaughter, processing, and marketing of their beef.

Another means of selling meat is to sell the live animal to a customer for processing at a custom slaughter facility. Federal rules allow facilities to slaughter and process an owner's animal for their own consumption without undergoing continuous inspection (9 C.F.R. § 303.1). The facilities must still comply with all the sanitary and HACCP requirements and remain subject to periodic inspection. If farmers sell live animals for custom slaughter, the customer can take ownership over the phone and allow the farmer to deliver the animal to the slaughtering facility or the customer may come to the farm, choose the animal themselves, and deliver it to the processing facility.

Poultry

The *Federal Poultry and Poultry Products Inspection Act* (PPIA) (21 U.S.C. §§ 451-471) and regulations (9 C.F.R. Part 381) apply to all poultry moving in *or affecting* interstate commerce. Therefore, the Act applies to all

[118] http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/inspection-and-grading-of-meat-and-poultry-what-are-the-differences_/inspection-and-grading-differences.
[119] http://www.fsis.usda.gov/regulations_&_policies/Labeling_Procedures/index.asp.
[120] http://www.sare.org/publications/beef/beef.pdf.

poultry processing, whether the producer sells the product in state or out of state. The Act authorizes states to implement their own programs (21 U.S.C. § 454), and Louisiana's state poultry program is provided for under the same laws outlined for meat inspection above, therefore, state standards are no less than equal to the federal standards outlined below.

The Act mandates all poultry slaughtering and/or processing of poultry products undergo inspection (21 U.S.C. § 455). The construction requirements for federal inspection of poultry facilities are generally quite similar to those for meat processing (9 C.F.R. § 381). Likewise, slaughtering and processing facilities must have a sanitary SOP and HACCP plan (9 C.F.R. § 381.22). Some operations, however, are exempt from inspection.

Federal Inspection Exceptions for Poultry

Direct farm businesses meeting certain criteria listed below may sell poultry products directly to consumers without undergoing PPIA's otherwise mandatory inspection requirements (21 U.S.C. § 464; 9 C.F.R. § 381.10). In general, all exempt facilities must slaughter healthy chickens in a sanitary manner, and ensure that they handle the birds properly (*Id.*). On a basic level, slaughtering is exempt when it is done by:

- the producer for personal use;
- a slaughterer who provides a service to an owner of live chickens and *is not* selling poultry to any consumers;
- a producer-grower who slaughters and sells the poultry they themselves have raised (1,000 bird limit, or 20,000 limit as long as only distributed intrastate);
- a producer-grower that sells directly to consumers;
- slaughterers who purchased live poultry specifically to sell direct to consumers;
- small businesses that process less than 20,000 birds annually *and* the processing only goes as far as cutting up the birds; and
- retail business that merely cut up birds for the store.

The intricacies of whether a producer or slaughterer qualifies for the exemption, and which sales are exempt, are more complex and nuanced than the list above. Therefore, producers should contact an FSIS district office for an individualized analysis before proceeding without obtaining an inspection and license. FSIS has published *Guidance for Determining Whether a Poultry Slaughter or Processing Operation is Exempt from Inspection Requirements of the Poultry*

Products Inspection Act, which is available **online**.[121] The guidance document contains a helpful decision flowchart (page 5) and a table (page 21) to determine whether the operation is exempt from the PPIA.

Regardless of the exemption, processors are never exempt from the PPIA's prohibitions against misbranding and adulteration (injurious to health, or held, packed or produced under unsanitary conditions). Attachment 2 to the *Guidance for Determining Whether…Exempt* (linked above) summarizes sanitary hygiene requirements contained in the Code of Federal Regulations (9 C.F.R. § 416) and the *FSIS Sanitation Performance Compliance Guid*e, which is available on the **FSIS website**.[122]

Exotic Animals

In addition to the meat and poultry commonly consumed by Americans, there are many animals that sell well to specialty markets. Farm raised game animals, such as venison or pheasant, may be attractive to some restaurateurs. Less traditional meats, such as bison or ostrich, are gaining popularity with consumers because they provide the taste and nutritional benefits of red meat, but are lower in fat and cholesterol. Marketing these meats will require additional effort because consumers are less familiar with the benefits and cooking methods.

Although the laws do not explicitly cover many of these specialty animals, they most likely must undergo slaughter and processing at inspected facilities since all food sold at retail must come from an approved source. Federal regulations include ratites (emus and ostriches, for example) in the definition of poultry subject to mandatory federal inspection under the Poultry Products Inspection Act (9 C.F.R. 381.1). Since these inspections are mandatory, the federal government pays for the cost of inspection and the producer is not responsible for paying the inspector. Most other animals, such as rabbits (9 C.F.R. Part 354), game birds (including but not limited to pheasants, quail, and mallard ducks) (9 C.F.R. Part 362), and exotic game such as deer, reindeer, elk and bison (9 C.F.R. Part 352) may undergo voluntary USDA inspection. Producers must pay for voluntary inspections.

Before beginning a specialty meat operation, a producer should thoroughly research potential markets and processing operations. To find nearby slaughterhouses, FSIS provides a listing of all licensed slaughterhouses in the U.S., available on the **FSIS website**.[123] The list, updated monthly, is organized alphabetically or by facility registration number.

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[121] http://www.fsis.usda.gov/wps/wcm/connect/0c410cbe-9f0c-4981-86a3-a0e3e3229959/Poultry_Slaughter_Exemption_0406.pdf?MOD=AJPERES.
[122] http://www.fsis.usda.gov/wps/wcm/connect/4b2a84de-6ba3-4c45-afa6-7b7636ce63b0/San_Guide.pdf?MOD=AJPERES.
[123] http://www.fsis.usda.gov/regulations_&_policies/Meat_Poultry_Egg_Inspection_Directory/index.asp.

Another resource for finding nearby slaughter facilities is the University of Illinois **MarketMaker site**.[124] From the search page, select "processor" as the business type and "meat products" as the line of business, which will generate a page for searching by facility type (state or federal) and by geographic region (city, parish, state, multi state, or zip code radius).

III. Marketing Meat & Poultry Products

A. Labeling Meat and Poultry Products

FSIS regulates meat and poultry product labeling under the FMIA and the PPIA. These laws explicitly preempt any state law that adds to or is different than these federal laws (21 U.S.C. § 678; 21 U.S.C. § 467(e)). The FDA also establishes labeling requirements for "food products" under the Federal Food, Drug, and Cosmetic Act. Depending on the product, the agencies' jurisdictions may overlap or become very unclear. To resolve this potential for jurisdictional overlap, USDA exempts foods containing less than certain quantities of poultry or poultry products from the PPIA (although they must still be inspected) so long as the producer does not represent the item as a poultry product (9 C.F.R. § 381.15). The standards are:

- Less than 2 percent cooked poultry meat and less than 10 percent cooked poultry skins, giblet, or fat when measured separately; and less that 10 percent cooked poultry skins, giblets, fat and meat when measured in combination

- Bouillon cubes, poultry broths, gravies, sauces, seasonings, and flavorings

USDA does not have a comparable regulation for meat, but has applied the same standards for several decades. Which agency is exercising jurisdiction matters because FDA requirements differ from FSIS requirements in some respects. For example, the FSIS requires pre-market label approval for meat and poultry (9 C.F.R. §§ 317.4 (meat), 381.132 (poultry)), while the FDA does not.[125]

A producer can obtain pre-market approval by submitting a sketch for premarket approval (9 C.F.R. §§ 317.4, 381.132) or by using a pre-approved generic label (9 C.F.R. §§ 317.5, 381.133). Generically approved labels cannot contain special claims, including quality claims, nutrient content or health claims, negative claims, geographical claims, or guarantees (*Id.*) These restrictions limit the usefulness of general labels for most direct to consumer producers.

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[124] https://il.foodmarketmaker.com/.

[125] Point of purchase materials (such as signs displayed near the product and stickers on the shelves) do not require pre-approval, but if the point of purchase materials ship with the meat, they must have pre-market approval (*Id.*) FSIS also requires preapproval of labels or stickers applied at the point of purchase that make animal production claims (e.g. grass fed).

Labels must appear directly on the immediate packaging (9 C.F.R. §§ 317.1, 381.116), unless it meets special circumstances. For instance, poultry packages destined for institutional customers can have the label on the outside package (rather than each immediate package) as long as the label states "for institutional use" and the customer must not offer the unlabeled product in the container for retail sale (9 C.F.R. §§381.115). FSIS also requires the principal display label to contain the name of the product, net quantity of contents, the official inspection legend, number of the official establishment, and, if necessary, a handling statement (9 C.F.R. §§ 317.2(d), 381.116(b)). Information panels (contiguous to principal display panel) may contain an ingredients statement, name and address of the manufacturer or distributor, and nutrition labeling, if required (9 C.F.R. §§ 317.2(m), 381.116(c)). Safe handling instructions may be placed anywhere on the label (*Id.*) Further regulations dictate product names, the prominence of the statement of identity, country of origin labeling, net quantity, and many other provisions. USDA's *Guide to Federal Food Labeling Requirements for Meat and Poultry Products* provides more detailed information on these labeling requirements, which is available **online**.[126]

USDA regulates many terms that direct producers may wish to use on their products. Their **meat and poultry labeling website**[127] explains what USDA requires of specialty product labels. As noted above, many of these labels require pre-approval and many involve inspections and certification fees. Separate agency regulations outline the specific requirements for each claim. Some of the terms are:

- Natural: A product containing no artificial ingredient or added color and is only minimally processed.

- Organic: product was raised in compliance with USDA's National Organics Program standards.

- Antibiotic free: allowed on red meat and poultry if supported by sufficient documentation.

- Hormone Free: The claim "no hormones added" may be approved for labeling beef products if the producer provides sufficient documentation to the USDA showing that no hormones have been used in raising the cattle. The claim "no hormones added" cannot be used on pork or poultry products unless it is followed by a statement that says "Federal regulations prohibit the use of hormones."

- Grass fed: Grass and forage must be the fed for the lifetime of the animal, with the exception of milk consumed prior to weaning. The diet must be derived solely from forage consisting of grass (annual and perennial), forbs (e.g., legumes, *Brassica*), browse, or cereal grain crops

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[126] http://www.fsis.usda.gov/PDF/Labeling_Requirements_Guide.pdf.
[127] .http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms.

in the vegetative (pre-grain) state. Animals cannot be fed grain or grain byproducts and must have continuous access to pasture during the growing season.

- Free range: allowed if producer can demonstrate to USDA that the poultry has had access to the outdoors.

- Fresh: Poultry may be labeled as "fresh" if its internal temperature has never been below 26° Fahrenheit.

B. Specialty Products

Organic Meat

The USDA Agricultural Marketing Service administers organic production and labeling standards through the National Organic Program (NOP) (7 C.F.R. Part 205). Generally, NOP requires that animals receive all organic feed and minimum access to the outdoors and prohibits use of hormones to promote growth or antibiotics for any reason. To label the meat or poultry as organic, an accredited organization must certify the production and processing practices, in which case the product can bear the USDA Organic logo. For more information on the organic standards, see the "Organic Marketing" chapter of this Guide.

Kosher

Marketing meat as kosher is another way to distinguish products and access a niche market. "Kosher" is the term for foods that comply with Jewish dietary laws. A very oversimplified explanation of kosher is that it prohibits consuming certain animals, most notably pork and shellfish, and requires meticulous separation of meat and dairy production and consumption. The dietary laws are complex, and certified kosher can sell at a premium price.

FSIS's policy book[128] requires rabbinical supervision of meat processing before meat can be sold as kosher. FSIS does not certify to kosher preparation of products, but rather accepts the statements and markings of the rabbinical authority. Producers must provide the identity of the rabbinical authority upon request from the agency. The FSIS does not maintain a listing or any guidance on who or what constitutes an acceptable rabbinical supervision.

Certification requires meticulous standards of health for the animals when presented for slaughter and entails ritual cleaning of all equipment, ritual slaughter by a sochet in a humane fashion, removal of all blood, and restrictions on which parts can be sold as kosher.

Marketing issues related to kosher foods are important to consider. First, according to one kosher certification agency, the kosher poultry market is largely saturated. Second, although

[128] http://www.fsis.usda.gov/oppde/larc/Policies/PolicyBook.pdf.

some cattle cooperatives have successfully established kosher slaughterhouses in order to market directly to consumers, doing so requires consistently processing enough cattle to justify the cost of certification and operation. Many kosher slaughterhouses largely process meat from industrial cattle yards and may be unwilling to separate meat for the direct farm business.

Halal

"Halal" is the term in Islam for something that is lawful or acceptable. Although it most commonly refers to foods, it in fact means anything permitted under Islamic law. Halal meat can only come from certain animals (pork and meat from carnivores is banned), must be raised according to certain standards (humanely and vegetarian, most notably) and slaughtered according to the ritual Zibaha (humane, swift cut to the throat of a healthy animal by a Muslim as he/she states a prayer over the animal, which must be facing Mecca).

Like kosher meat, halal meat commands a premium price. Moreover, some consumers will seek out halal meat because of concerns over mad cow disease (bovine spongiform encephalopathy – BSE). However, although there are similarities between halal and kosher meat, they *are not* interchangeable because the religions impose different requirements. For instance, both Judaism and Islam require the meat be slaughtered by someone of their religion. As another example, Islam prohibits the use of any alcohol to clean the carcass, whereas Judaism allows kosher wine.

Federal policy on halal labeling is identical to the policy for kosher labeling. The same policy book used for kosher foods requires handling according to Islamic law and oversight by an appropriate authority. FSIS does not certify to Halal preparation of products, but rather accepts the statements and markings of the Islamic authority. The producer must provide the identity of the Islamic authority upon request from agency official. The FSIS does not maintain a listing or any guidance on who or what constitutes an acceptable Islamic organization for purposes of supervision.

Finally, if a slaughterhouse processes pigs in the same facility (which many certifying entities prohibit completely), the slaughterhouse must take steps to ensure they are kept separate from the halal meat, such as using different equipment, cleaning (to a level acceptable to the certifying entity), slaughtering on a separate day, and storing and processing in separate rooms. Halal rules require the slaughterer or processor to completely drain the carcass of its blood, prohibit cleaning or processing with alcohol or any other intoxicating food, and they must prevent processing or contamination with any non-halal food.

IV. Checklist

Have you…?

- Confirmed that you have the time, resources and facilities to provide the standard of care required for your animals? If they become ill, do you have the resources to address the disease? Do you have a disposal plan for dead animals?

- Obtained any necessary permits for transporting your animals?

- Chosen a slaughterhouse that meets your needs? Is it adequately licensed?

- Do you need to have your labels approved? Have you done so?

- Developed a marketing strategy that realistically assesses your production capability and potential demand? If meat will need to be stored, do you have a plan for where, how long, and what it will cost you?

    - For niche markets, have you researched the market demand for your product and assessed your ability and willingness to undertake the work necessary to meet that demand?

- Read the chapter on setting up a direct farm business and done research on any additional siting, construction or environmental permits you might need?

Key Contact Information

U.S. Department of Agriculture, Food Safety & Inspection Service

Dallas, TX Regional Office (covers Louisiana, Oklahoma, New Mexico, and Texas)

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9 - ORGANIC MARKETING

Organic production is an ecologically oriented process of growing crops or raising animals that encompasses a variety of social, environmental and ethical principles, including soil fertility, biological diversity and minimization of risks to human and animal health and natural resources." In the early 1970s, farmers started using the term "organic" to attract consumers interested in agriculture that was more environmentally and socially responsible than "conventional" agriculture. As the term caught on, allegations quickly emerged that some producers were selling non-organically produced food under an "organic" claim. As a result, several states (e.g, Oregon, California, Montana, North Dakota, and Virginia) passed organic certification laws.

In 1990, the U.S. Congress passed the Organic Foods Production Act (OFPA) (7 U.S.C. § 6501 to 6522 (1990)) to reconcile inconsistent state standards and prohibit fraudulent labeling. The statute seeks to provide national standards for organic production so that farmers know the rules, so that consumers are sure to get what they pay for, and so that national and international trade in organic foods may prosper.

The USDA's Agricultural Marketing Service (AMS) created the National Organic Program (NOP) to implement the statute (i.e., set the specific requirements for using the "organic" label). The National Organic Standards Board (NOSB) advises the USDA on the development and implementation of the NOP. (7 U.S.C. § 6518). The NOSB is a 15 member board comprised of four farmers/growers, two handlers/processors, one retailer, one scientist, three consumer/public interest advocates, three environmentalists, and one USDA accredited certifying agent (*Id.*)

The NOP has three components important to direct farm businesses considering marketing their products as organic. First, the rules regulate the use of the term "organic" in labeling and marketing. Generally, producers using the term must obtain certification. Second, the NOP incorporates a comprehensive organic certification process, which involves transitioning the farm and undergoing inspections. Finally, the rules require particular production practices for various types of operations and the processing/handling of goods.

I. Labeling and Marketing

The most important thing to know about labeling and marketing organic products is that goods cannot be marketed as "organic" unless they have been produced in compliance with USDA's organic production standards (7 C.F.R. §§ 205.100 and 205.101). Moreover, producers who sell more than $5,000 in goods must have an accredited certifying agent certify their production practices (*Id.*). The certification process is covered in Section 2.

Organic labeling and marketing is relatively straightforward. A producer can label or advertise goods as "100 % organic" if the product consists entirely of organic ingredients (7 C.F.R. § 205.301). Raw fruits, vegetables and meat grown or raised according to USDA's organic standards satisfy this labeling requirement. The ingredients in processed items, such as jams, jellies and sausages, must be entirely certified organic. Another option is to label food simply as "organic", in which case at least 95% of the ingredients must be organic, and the remaining 5% of ingredients must be on the list of approved organic processing substances, or, if they are agricultural products, commercially unavailable in organic form (*Id.* and 7 C.F.R. §§ 205.605 and 205.606). Products at both the 100% and 95% level may use the USDA organic seal (7 C.F.R. § 205.311). If a product is made from 70 to 95% organic ingredients, it may be labeled as "made with organic [specified ingredient]" but it may not use the official USDA organic seal (7 C.F.R. §§ 205.301 and 205.311). If a product is less than 70% organic, only the ingredient list may identify individual organic ingredients (7 C.F.R. § 205.305).

II. Certification Process

Before seeking organic certification, a producer should become as knowledgeable as possible about the benefits and costs of organic production. *How to go Organic*, a website sponsored by the Organic Trade Association, maintains an **online listing**[129] of resources for organic producers in the South.

The first step to becoming certified organic is to begin transitioning land (i.e. production practices) from conventional to organic methods. This process may take at least three years. Producers may not apply prohibited substances[130] for 36 months prior to certification.

[129] http://www.howtogoorganic.com/index.php?page=south-central

[130] The lists of permitted and prohibited synthetic/non-synthetic substances are codified in 7 C.F.R. §§ 205.601 & 205.602.

Eliminating certain conventional inputs often requires implementing new, unfamiliar practices, which is why education before starting transition is critical.

The second step to certification is selecting and contacting a certifying agent. The National Sustainable Agriculture Information Service (also known as ATTRA) has a **website**[131] that lists certifying agents operating in the south. In selecting an agent, ASAP's guide suggests considering the entity's experience certifying the particular type of operation, their willingness to answer questions about the certification program, and their stability as a business.

The certification process can take several months. Certifying agencies typically require an application and development and implementation of a farm management plan that complies with NOP, using only approved substances and practices (7 C.F.R. § 205.401). The agency will also inspect records or other documentation proving organic management of the land and animals for the requisite transition time.

The last step to certification is an on-site inspection to verify compliance with the Organic System Plan (OSP) (7 C.F.R. § 205.403). Only after a successful inspection will the agency grant certification (7 C.F.R. § 205.404).

According to estimates by the Midwest Organic and Sustainable Education Service, certification will likely cost between $400 and $1000 per year for non-livestock operations. Livestock operations may cost more.

III. PRODUCTION REQUIREMENTS

Organic systems plans vary by production activity. This section will provide a brief overview of the major requirements for organic production. For detailed explanations of each component of the program, see Harrison Pittman's *Legal Guide to the National Organic Program*, which is available **online**.[132]

Regardless of the end product, organic farmers must have an organic system plan (OSP) to submit to their certifying entity (7 C.F.R. § 205.201). The OSP should include written plans concerning all aspects of production, including practices and procedures to be performed, monitoring practices and procedures, record keeping systems, management practices and physical barriers established to prevent commingling of organic and nonorganic products on a split operation, and any other additional information the certifying agent deems necessary (7 C.F.R. § 205.201).

[131] http://attra.ncat.org/sorg/certifying.html.
[132] http://nationalaglawcenter.org/wp-content/uploads/assets/articles/pittman_organicprogram.pdf.

A. Crops

Organic crop production has several components. The first pertains to how land is managed. The farmer may not apply prohibited substances to the land, and must stop applying these substances three years prior to certification (7 C.F.R. § 205.202). The land must have buffer zones and boundaries to prevent runoff and contamination from neighboring, non-organically managed fields (*Id.*). The land must also be managed according to soil fertility and crop nutrient management practice standards, which require producers to "select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of the soil and minimize soil erosion" (7 C.F.R. § 205.203). Management methods include crop rotations, use of cover crops, and application of plant and animal materials. Requirements for the use of plant and animal materials include, but are not limited to, composting of raw animal manure (unless it meets exceptions), use of materials that have a carbon to nitrogen ratio of 25:1 to 40:1, and a prohibition on compost from plants that had prohibited substances applied to them or ash that was produced using burning as a method of disposal for crop residues (*Id.*). Many of these practices contribute to another requirement, which is maintaining management practices that manage crop pests, weeds, and disease (7 C.F.R. § 205.206). These practices are generally natural, such as mulching to control weeds or developing habitat to support natural enemies of pests. Producers may also use non-synthetic substances, but must ensure they are not on the list of prohibited non-synthetic substances (7 C.F.R. § 205.602). If these do not work, producers may use synthetic substances on the list of allowed synthetic substances. The OSP must detail when and how synthetic substances may be used (7 C.F.R. §205.206).

The regulations generally require all seeds and planting stock to be organically grown. However, there are five exceptions to this rule (7 C.F.R. § 205.204):

(1) when an equivalent organically produced variety is commercially unavailable, a producer may use non-organically produced, untreated seeds and planting stocks.
(2) when organically produced equivalents and untreated, non-organically produced equivalents are not commercially available, a producer may use a non-organically produced crop that has been treated with a synthetic substance included in the list of permitted substances.
(3) A producer may use non-organic annual seedlings if USDA grants a temporary variance.
(4) A producer can use non-organic planting stock to produce an organic crop after maintaining the planting stock under a system of organic management for at least one year.
(5) when federal or state phytosanitary regulations require application of a prohibited substance, a producer may use treated seeds, annual seedlings, and planting stock.

The NOP defines "commercially available" as "the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling *as determined by the certifying agent* in the course of reviewing the organic plan" (7 C.F.R. § 205.2). Producers who believe a seed or planting stock is commercially unavailable should consult their certifying agent to determine what documentation the agent will require for the producer to prove they diligently sought an organic source and it is truly commercially unavailable.

B. Livestock and Poultry

The NOP rule defines "livestock" as

> [a]ny cattle, sheep, goat, swine, poultry, or equine animals used for food or in the production of food, fiber, feed, or other agricultural-based consumer products; wild or domesticated game; or other nonplant life, except such term shall not include aquatic animals or bees for the production of food, fiber, feed, or other agricultural-based consumer products (7 C.F.R. § 205.2).

To market livestock products as organic, they must be under "continuous organic management from the last third of gestation or hatching" through slaughter (7 C.F.R. § 205.236). Farmers may raise poultry as organic from the second day of life. Farmers must organically manage dairy cattle for at least a year prior to marketing milk as organic. They can market the meat from the cows' calves as organic if they managed the cows organically for the last third of gestation. For future calves to be organic, the cow must remain under continuous organic management. This prevents producers from gaming the system by managing cows as organic only during the last third of gestation, and otherwise caring for them conventionally.

"Organically managed" means feeding animals 100% organic feed for their entire lives (and the last third of their gestation); avoiding prohibited substances such as growth promoters, plastic feed pellets, formulas containing urea or manure, and mammalian or poultry slaughter by-products; and providing living conditions that accommodate health and natural behaviors, such as allowing access to fresh air, outdoors, exercise, clean and dry bedding and access to pasture for ruminants (7 C.F.R. § 205.239). Revisions to this rule, effective June 17, 2011 for currently certified organic farms and June 17, 2010 for operations that obtain certification by June 17, 2010, will require producers to provide year-round access for all animals to the outdoors, recognize pasture as a crop, establish a functioning management plant for pasture, incorporate the pasture management plan into their organic system plan (OSP), provide ruminants with pasture throughout the grazing season for their geographical location and ensure ruminants derive not less than an average of 30 percent of their dry matter intake requirement from pasture grazed over the course of the grazing season (7 C.F.R. §§ 205.102, 205.237, 205.239 and 205.240). If need be, synthetic and non-synthetic substances that are listed on the national list of permitted substances may be used as supplements or additives (7 C.F.R. § 205.237, the list of permitted substances is in 7 C.F.R. § 205.603). It is important to note that the USDA does not issue variances or exemptions when there is an organic feed shortage.

Preventing illness and caring for sick animal is a point of concern for some organic producers (and consumers). Many modern medicines are synthetic, which is contrary to the principles of organics, but allowing animals to suffer in the name of avoiding synthetic chemicals is also contrary to ethical concerns. As much as possible, producers must care for animals in a manner that prevents disease by doing things such as selecting animals appropriate for the environment and the site, providing feed that satisfies nutritional needs, and establishing housing, pasture conditions, and sanitation practices that minimize the spread of disease and reduce stress. However, livestock can be given vaccines to prevent disease and other "veterinary biologics" (products of biological origin) when needed. When these are insufficient, farmers may use synthetic medications that are listed on the National List of allowed substances (7 C.F.R. § 205.238). The NOP prohibits all antibiotics, but it also prohibits denying an animal medical treatment with the intention of preserving the animal's organic status. This is a careful balancing act, as farmers cannot market meat as organic if the animal received any antibiotics. Dairy products, however, can be organic if the farmer manages the cow organically for a year after she received antibiotics.

C. Handling and Processing

In addition to certification of the production process, the NOP requires processing and handling facilities to obtain organic certification (7 C.F.R. § 205.100). "Handling" means to "sell, process, or package agricultural products" (7 C.F.R. § 205.2). If a facility handles organic and non-organic agricultural products, only the portion that handles the organic product needs certification (7 C.F.R. § 205.100). However, the facility must implement practices to prevent the comingling of organic and non-organic agricultural products (7 C.F.R. § 205.272), including not using storage containers that have been treated with prohibited substances or have held products that were treated with prohibited substances. For a handling facility to receive certification, it must have an organic handling plan (7 C.F.R § 205.201), only use allowed substances, avoid the prohibited substances listed in sections 205.602 through 205.606 (7 C.F.R. §§ 205.105 and 205.270) and maintain appropriate records (7 C.F.R. § 205.103). As far as actual process methods are concerned, the NOP generally allows any mechanical or biological process, including cooking, curing or fermenting, packaging, canning and jarring (7 C.F.R. § 205.270).

For direct farm businesses seeking to both grow and process organic products, it is critical to work carefully with the certifying agent to design a compliant processing method to maintain the "organic" status of the final product.

Further Resources – Organic Marketing

National Organic Program (NOP)

1. For more information on the USDA's organics program, including a list of banned and allowed substances, visit their ***website:***

http://www.ams.usda.gov/AMSv1.0/nop.

2. The National Sustainable Agriculture Research and Education program (SARE, which is a branch of the USDA) has published a guide, ***Transitioning to Organic Production****, which addresses some of the difficulties a farmer can encounter and lists resources for assistance.*

http://www.sare.org/publications/organic/organic.pdf

Retail food establishments who receive and sell products labeled as organic are usually exempt from certification, but they must nonetheless maintain proper records and comply with the requirements for the prevention of comingling (7 C.F.R. § 205.101).

IV. CHECKLIST

If want to go organic, you will need to:

- Research, study, and learn as much as you can about organic practices. Switching to organic takes time and requires considerable labor investments – you do not want to make a mistake that costs you money, or worse yet, prevents certification.

    - Talk to other producers in your area to learn about your local market and what grows well in your area.

    - Attend conferences, workshops, and training sessions on growing and marketing organic

- Develop an Organic System Plan, a record keeping system, and a business and marketing plan. Make sure your plans are consistent with each other.

- Research and choose an organic certifying entity. Make sure the certifier has experience certifying your type of production, and then obtain their information on what you need to do.

- Start transitioning crops and animals to organic production practices. Keep good records!

- Contact your chosen certifying agent, obtain certification, and start marketing.

GLOSSARY OF TERMS

Adulterated: The full legal concept of adulteration is complex, but essentially, a food is "adulterated" if it contains any poisonous or added deleterious substance which may render it injurious to health or if it consists of or has been exposed to a diseased, contaminated, filthy, putrid, or decomposed substance during production, preparation, or packaging, or if held under unsanitary conditions.

Agency (agent): A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.

Agricultural Enterprise: Agriculturally-related activities performed by any person(s) for a common business purpose. This includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units. This could include a leasing of a department of another establishment.

Agronomic Rate: A specific rate of application that provides the precise amount of water and nutrient loading, which selected grasses/crops require without having any excess water or nutrient percolate beyond the root zone.

Amortization: The paying off of debt in regular installments over time; the deduction of capital expenses over a specific period of time.

Annex: To incorporate territory into the domain of a city, parish, or state.

Articles of Incorporation: A document that dictates the management of the affairs of a corporation, including the purpose and duration of the corporation and the number and classes of shares to be issued by the corporation.

Assumed Name: (also known as "doing business as" or "d/b/a"): The name under which a business operates or by which it is commonly known.

Assumption of the Risk: A legal concept in negligence (tort) law wherein an individual knows of or is otherwise aware of a risk posed by a particular activity and nonetheless engages in the activity. The doctrine thus limits that individual's right to hold others liable for injuries incurred as a result of engaging in the activity. Assumption of the risk most commonly arises in the context of employer-employee relationships and agri-tourism.

Business Plan: The business plan helps guide the business owner through a proposed business' goals, objectives, and marketing and financial strategies. It also may serve as an introduction to potential investors if outside financing is required.

Candling (egg): The use of a bright light source behind the egg to show details of the embryo through the shell.

Case Study: An intensive analysis of an individual unit (such as a person, business, or community) that stresses developmental factors in relation to environment.

Checkoff: A mandatory fee for all producers of a particular commodity that is used to fund commodity-specific research or marketing.

Commercially Available: Under the National Organic Program, the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling as determined by the certifying agent in the course of reviewing the organic plan.

Commodity: A tangible item that may be bought or sold; something produced for commerce.

Commodity Agriculture: The agricultural production of commodities with the primary objective of farming being to produce as much food/fiber as possible for the least cost. It is driven by the twin goals of productivity and efficiency.

Common Law: The body of laws and rules that courts create as they issue decisions.

Consideration: A vital element in contract law, consideration is something (i.e., an act, forbearance, or return promise) bargained for and received by a promisor from a promisee. It is typically the underlying purpose for entering into a contract.

Contract: A legally enforceable agreement between two or more persons involving an offer, acceptance, and consideration. It may be oral or written.

Cooperative: A user-owned and controlled business that generates benefits for its users and distributes these benefits to each member based on the amount of usage.

Copyright: (1) The right to copy a work, specifically an original work of authorship (including a literary, dramatic or other work) fixed in any tangible meaning of expression, giving the holder exclusive right to reproduce, distribute, perform, or otherwise control the work. (2) The body of law related to such works.

Corporation: a separate legal entity in which the owners (shareholders) are not personally responsible for the liability of business.

- **S-corporations** elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes to avoid double taxation.
- **C-corporations** are separate taxpaying entities that conduct business, realize net income or loss, pay taxes, and distribute profits to shareholders.

Cow-share Program: A program in which consumers sign a contract to purchase a "share" in a cow or herd and pay the farmer to care for and milk the cows. The consumer then receives the milk from "their" cow without technically "purchasing" the milk.

De Minimis**:** something so small that it would be inconvenient and unreasonable to keep an account of; the impact is insubstantial.

Depreciation: A decline in an asset's value due to use, wear, obsolescence, or age.

Double Taxation: The government taxes the corporation on its profits and the owners/shareholders also pay individual income tax on profits distributed as dividends from the same corporation.

Estate Plan: The preparation of a plan to carry out an individual's wishes as to the administration and disposition of his/her property before or after death.

Excise Tax: A tax levied on the purchase of a specific good as opposed to a tax that generally applies to the sale of all goods.

Farm Labor Contractor (FLC): 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 consideration, performs recruiting, soliciting, hiring, employing, furnishing, or transporting of any migrant or seasonal agricultural worker.

Feasibility Study: a process used to analyze an existing business opportunity or new venture. The questions on a feasibility checklist concentrate on areas one must seriously consider to determine if an idea represents a real business opportunity.

Good Faith: Acting honestly, fairly, and with a lawful purpose without malice or any intent to defraud or take unfair advantage. Whether a party has acted in good faith is often an issue that the court or the jury has to decide in a lawsuit.

Grading: USDA certification that a product is of a particular quality.

Grandfather Clause: A portion of a statute that provides that the law is not applicable in certain circumstances due to preexisting facts.

Gross receipts: All considerations received by the seller, except trades in personal property.

Halal: an Islamic term that refers to something lawful or acceptable.

Hazardous Positions: In the employment context, hazardous positions include, but are not limited to, operating large farm machinery, working in enclosed spaces with dangerous animals (studs and new mothers), working from a ladder or scaffold more than 20 feet high, working inside certain spaces such as manure pits, and handling hazardous chemicals.

Health Claim: a health claim describes a relationship between the food (or component of it) and the reduction of the risk of a disease or health-related condition.

Hold Harmless: A provision in an agreement under which one or both parties agree not to hold the other party responsible for any loss, damage, or legal liability.

Injunction (prohibitory): An order of a court commanding a person, corporation, or government entity to stop doing something and/or refrain from doing such actions in the future.

Intellectual Property: Creations of the mind; inventions, literary and artistic works, and symbols, names, images, and designs used in commerce, as well as the body of law (trademark, patent, copyright, trade secret) used to protect such works.

Interstate Commerce: the buying and selling of products and services between people and entities located in different states or territories.

Intrastate Commerce: The buying and selling of products and services within a single state.

Joint and Several Liability: A legal obligation under which a party may be liable for the payment of the total judgment and costs that are associated with that judgment, even if that party is only partially responsible for losses inflicted.

Karst Area: area(s) where surface water easily flows through rock formations to ground water, posing potential risks for contamination of groundwater

Kosher: The term for foods that comply with Jewish dietary laws.

Livestock Management Facility: Any animal feeding operation, livestock shelter, or on-farm milking and accompanying milk-handling area.

Man-day: Any day where an employee performs agricultural labor for at least one hour.

Material Representation: A convincing statement made to induce someone to enter into a contract to which the person would not have agreed without that assertion.

Migrant Agricultural Worker: 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.

Misbranding: The label, brand, tag or notice under which a product is sold is false or misleading in any particular as to the kind, grade or quality or composition.

Negligence: a tort law concept; the failure to exercise the standard of care that an ordinary, prudent and reasonable person would exercise under the circumstances.

Notice-and-Comment Rulemaking: A rulemaking process by which government agencies provide the public with an opportunity to participate in the interpretation of laws by giving feedback on draft regulations.

Nuisance: A substantial interference, either by act or omission, with a person's right to use and enjoy their property.

- **Public Nuisance**: An interference or invasion that affects a substantial number of people, or an entire neighborhood or community
- **Private Nuisance**: An interference or invasion that affects a single party, or a definite, small number of individuals in the use or enjoyment of private rights.

Nutrient Content Claims: These claims characterize the level of a nutrient in a food; they must be approved by FDA.

Organic: A system of food production that is managed in accordance with the Organic Foods Production Act of 1990 to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that promote biodiversity and ecological balance. Organic certification is managed by the Agricultural Marketing Service (AMS) division of the U.S. Department of Agriculture.

Output Contract: A written agreement in which a producer agrees to sell its entire production to the buyer, who in turn agrees to purchase the entire output.

Partnership: A partnership (also known as general partnership) is an association of two or more persons who combine their labor, skill, and/or property to carry on as co-owners of a business for profit.

Patent: a patent grants the inventor the right to exclude others from making, using, or selling the invention in the United States or 'importing' the invention into the United States for a limited period, generally 20 years.

Piecework: Work completed and paid for by the piece.

***Prima-facie*:** (Latin for "at first sight"): An evidentiary standard that presumes particular evidence proves a particular fact; however, the fact may be disproven by providing contradictory evidence.

Processing: The manufacturing, compounding, intermixing, or preparing food products for sale or for customer service.

Procurement Contract: A term that refers to contracts used by governments and institutions to acquire products.

Properly Implemented: An administrative law concept that requires agencies to issue rules according to state or federal administrative procedure.

Qualified Health Claim: A health claim where emerging scientific evidence suggests the claim may be valid, but the evidence is not strong enough to meet the standard necessary to be a health claim; must be pre-approved by FDA.

Raw Agricultural Commodity: Any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form before marketing.

Real Property: Land and anything growing on, attached to, or erected upon it, excluding anything that may be severed without injury to the land.

Requirements Contract: A contract in which buyer promises to buy and a seller promises to supply all the goods or services that a buyer needs during a specified period. The quantity term is measured by the buyer's requirements.

Respondeat Superior: In tort law, the doctrine holding an employer or principal liable for an employee's or agent's wrongful acts committed within the scope of the employment or agency.

Retailers' Occupation Tax: A tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption.

Sales Tax: A combination of occupation taxes (imposed on a business' receipts from the sale of goods used or consumed) and use taxes (imposed on consumers that purchase items for personal use or consumption from a business).

Seasonal Agricultural Worker: 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-

1. When employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or

2. when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.

Setback: The distance a facility must be from property lines or neighboring residences.

Sole Proprietorship: A business owned and operated by one individual.

Statute: a federal or state written law enacted by the Congress or state legislature, respectively. Local statutes or laws are usually called "ordinances." Regulations, rulings, opinions, executive orders and proclamations are not statutes.

Tangible Personal Property: A term describing personal property that can be physically relocated. The opposite of real property, in a sense, as real property is immovable.

Technical Bulletins: Non-binding guidance documents published by agencies that facilitate consistent interpretation and application of the regulations issued by the agency.

Three-Tier Distribution System: In the alcohol supply chain, a system that requires manufacturers to sell with distributors, who sell with retailers, who then may sell the product to the end consumer.

Tort: An injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit.

Trade Dress: A design, packaging, or other element of appearance that is both nonfunctional and distinctive.

Trademark: An identification used to distinguish goods and services from those manufactured or sold by others – it is the symbol that customers use to identify a product and equate with goodwill.

Trade Name: A name used to identify a person's business or vocation (see also ASSUMED NAME).

Trade Secret: Information companies make an effort to keep secret in order to give them an economic advantage over their competitors

Use Tax: A privilege tax imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer.

Veterinary Biologics: Products of biological origin that are used to diagnose and treat animal diseases.