



FAQ: Managing Food Safety Liability Risks

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DISCLAIMER: This guide does not provide legal advice or establish an attorney-client relationship between the reader and author. Always consult an attorney regarding your specific situation.

Despite the many safety precautions farms take, food production is a risky business. A foodborne illness can have widespread legal ramifications. Fortunately, there are many tools available to learn how to manage the legal risks of a food safety incident. These frequently asked questions outline the basic principles of food safety liability risk management



What can I be doing now to protect myself if a foodborne illness is ever linked to my enterprise?

First, get liability insurance specific to your farm enterprise. Insurance is an incredibly useful risk management tool because it guarantees a source of funds to pay on any resulting liability. A good liability insurance policy will also cover legal expenses whether you win or lose. Also, insurance agents often make inspections to verify that unreasonable risks don't exist on the property or with your operation. These inspections are a good opportunity to correct vulnerabilities.

Second, develop a food safety plan. This includes identifying potential contaminants and how they could spread, and developing standard operating

procedures to manage those risks. It also means writing those steps and procedures down, monitoring and recording your practices and the results, and performing corrective actions if necessary.

Third, prepare a recall system in case you need to recall products you've already sold. Recalls are often voluntary, but federal or state governments can require a recall. Even if a recall isn't required, voluntarily recalling product is a good way to limit a problem. A recall system will include a method to track the product. The tracking should be narrow enough to order as narrow a recall as necessary. For example, an apple grower's tracking system would generate a code for apples by location of harvest and date of harvest, and then stamp the code on the apple containers.

Insurance is sometimes available to protect against the expense of a recall, but it will most likely be available through a general commercial rather than a farm liability policy—and those policies are sometimes expensive.

FOR MORE INFORMATION: *Read pages 6–11 and 17–21 of Farm Commons' Farmers' Guide to Reducing the Legal Risks of a Food Safety Incident. Listen to Farm Commons' podcast "Let's Have Lunch: Food Safety Issues" to hear interviews with both attorneys and farmers on food safety issues.*



What if I can't get insurance for an activity or operation?

Sometimes a farmer cannot find an insurance company who will offer coverage to the farm. Unfortunately, there is little that can be done in these situations. This happens when an insurance company doesn't clearly understand the risk posed by the farm's activities. If they can't assess the likelihood of the risk materializing, they can't accurately price the insurance policy. On the other hand, the insurance company may understand the risk fully and simply choose not to insure it. Perhaps it's not profitable to do so, or it's not a priority for that specific company.

Farmers in this situation may need to adapt their operation to become insurable. A conversation with an insurance agent may reveal exactly which element of the farm is considered too risky. Removing that element may help. Over the long term, however, farmers can work with advocates and other farmers to convince the insurance industry to cover more unique farm operations.

FOR MORE INFORMATION: *Read pages 8–11 of Farm Commons' Farmers' Guide to Reducing the Legal Risks of a Food Safety Incident. Talk to insurance agents in your community, as well as other farmers doing the same or similar things as you want to do.*



Do I have to comply with FSMA?

The FSMA has two main rules that apply to sustainable farms: (1) the Produce Rule, which mandates certain practices for growing and handling crops, and (2) the Preventative Controls Rule, which requires food facilities to implement written preventative controls and practices.

You do not have to comply with the Produce Rule if your average produce sales are \$25,000 or less per year. If your total food sales are up to \$500,000 per year, and kept local or direct-to-consumer, FSMA requires that you keep records and label your products or post signs. Farms above the \$500,000 threshold or who market outside the bounds of local or to wholesalers must comply with additional rules, including testing water sources and keeping specific records.

You do not have to comply with the Preventive Controls Rule if all your food-related activities occur on your farm, and any processing, packing, and holding you perform is limited and non-hazardous in nature (such as drying herbs.) This rule is complicated and most farms will need to work through a detailed flowchart to get specific answers.

FOR MORE INFORMATION: *Read through Farm Commons' Whether and When Farms Must Comply With FSMA: Flowchart and watch Farm Commons' webinar "Food Safety Liability and Regulations: FSMA and Beyond," especially the FSMA section.*



What if I don't agree with my local regulators or inspectors about their interpretation of a food safety-related rule?

First, communicate with them! Regulators and inspectors are human beings making decisions in an imperfect world. As an ally, your inspector may help you better understand laws by explaining the reasoning behind their interpretation. This may help you better explain how your operation is compatible with the rule they are following. It's rarely helpful to go into your regulator's office and give them a piece of your mind. Get to know your regulator and their environment. Make sure you're familiar with the relevant laws. Learn how the regulations have been applied to farmers in your community.

If working together to achieve mutual understanding fails, consider applying for an exception to the decision, or appealing it. You can often get around restrictive decisions, codes, or rules by requesting individual variances, which are one-time exemptions from the code granted to a specific person. Other times, you can go up the chain of command and file a formal complaint or write a letter of appeal. Attorneys can help you with this and are highly recommended. A good attorney can help you present a focused, persuasive case.

Third, you can try to change the rules! Get together with others in your community and petition the appropriate public officials. Through word-of-mouth and social media, people can encourage other farmers to contact elected officials. Those who want the law changed can organize public meetings, and attend the meetings of local officials. When officials hear from enough people, they'll realize this is a significant issue and take action.

FOR MORE INFORMATION: *Farm Commons' Dealing with Regulators tipsheet provides detailed suggestions for the strategies discussed here, from talking one-on-one with regulators to campaigning for changes in the rules.*

About Farm Commons

Farm Commons is a nonprofit organization dedicated to empowering sustainable farmers with the legal resources they need. We create practical, user-friendly educational resources. We also support sustainable farmers in proactively implementing legal best practices, collaborating on innovative legal solutions, and encouraging each other as leaders creating the change they seek.



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