



FARM COMMONS

Basic Wisconsin Employment Laws for Farms

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By: Rachel Armstrong

Executive Director and Attorney, Farm Commons

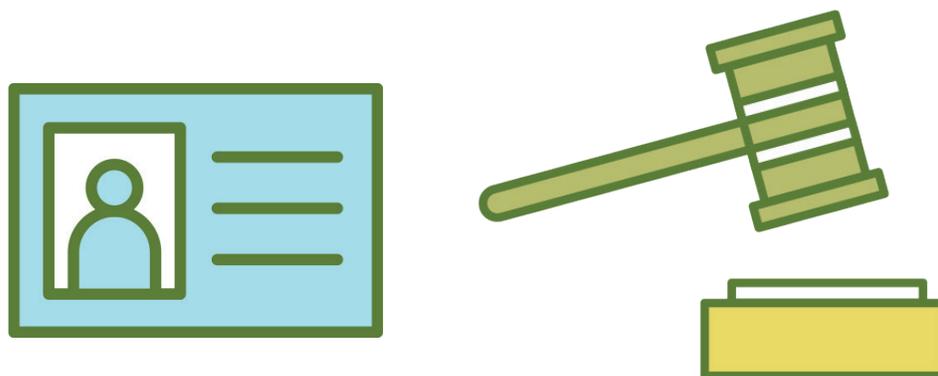
rachel@farmcommons.org

www.farmcommons.org

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Introduction

This resource is a basic guide to some of the Wisconsin laws affecting farm employers and employees. It's not an exhaustive guide by any means. It also follows a different style than Farm Commons' usual legal education materials. Stories are generally helpful to illustrate how the law affects farms. But, when it comes to employment law, it's sometimes helpful to simply get the facts. This guide lays out just the basics.

This guide owes its existence to two entities. The Wisconsin Department of Agriculture, Trade, and Consumer Protection requested the development of this resource for the agency's Wisconsin Local Food Marketing Guide. The author originally developed guides under a similar format and with similar content for the Direct Farm Business series by A. Bryan Endres at the University of Illinois. Credit and thanks goes to both.

Minimum Wage and Overtime in Wisconsin

Minimum Wage

Wisconsin minimum wage laws set a separate minimum wage for agricultural workers. But, the rate for the agricultural minimum wage is currently the same rate as for non-agricultural workers: \$7.25 per hour. All farm employees must be paid at least \$7.25 per hour. The minimum wage applies to family members. Business owners and salaried management staff have some exceptions from minimum wage. Farmers may choose to pay employees on a by-the-piece or volume basis, but the total wages provided in a pay period must equal at least the minimum wage for the number of hours worked in that pay period. Wisconsin farmers may have heard of the opportunity wage, which is \$5.90 per hour and may be paid to individuals under 20 years old for the first 90 days of the individual's employment. The opportunity wage is not available to farm employers, however.

Farmers must pay wages for all hours in which the worker's time is controlled by the farmer. For example, if a farmer requires employees to attend farm events or monitor CSA drop sites, the time likely needs to be included in the individual's paid hours. If the employee receives less than 30 minutes to eat a meal or is not allowed to leave the farm during the meal period, the 30 minutes must be included in the individual's time worked.

Overtime

Agricultural workers are not entitled to overtime pay for hours worked in excess of 40 hours per week. Often, when the law grants an exception to agricultural workers, the definition of agriculture becomes very important. For the purposes of the overtime rules, agricultural workers are those who are employed on dairies, in crop production, or in the raising of livestock, bees, poultry, and furbearing animals. In addition, activities incidental to agricultural production such as preparing, delivering or transporting products to market are considered agricultural activities and, thus, are not entitled to overtime.

To enforce employment laws, the state of Wisconsin and the federal government require employers to keep specific records. Farmers must keep the following records for at least three years:

1. Name, address, and occupation of each employee

2. Dates each employee began and ceased employment
3. Time each employee began and ended work on each work day
4. If the meal break is deducted from the length of the work day: time each employee began and ended the meal break
5. Rate of pay for each employee; if the rate is on a per-item basis, the quantity must also be recorded

Wisconsin's Department of Workforce Development (DWD) enforces minimum wage and overtime rules. Employees may submit a complaint to DWD if they feel their rights have been violated. DWD will contact the employer and work with the business to try and resolve the issue. If a resolution cannot be found and DWD finds that the employer owes wages to the employee, the local district attorney may enforce the law.

Volunteers, Interns, and In-Kind Wages

Volunteers

Volunteers present an interesting case under minimum wage laws. Although many farm customers want to volunteer to learn about where their food comes from, farms take a risk by utilizing free volunteers. The law does not recognize an exemption from minimum wage for volunteers of for-profit businesses. Only volunteers of non-profit businesses and government agencies are exempt from minimum wage. At the same time, the Department of Workforce Development has said that a written, signed agreement between farmer and volunteer may be persuasive in establishing that a volunteer is not entitled to the minimum wage.

Interns and Apprentices

Increasingly, young people and beginning farmers want a regular work position with a farm to improve their knowledge. Many of these beginners do not need or expect to be paid for their work. As a result, farms are setting up unpaid internship or apprenticeship programs. Internships can be positive experiences for farmer and worker. The farm benefits by receiving 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, the intern is likely an employee and employment law applies.

The federal Department of Labor provides a fact sheet that lists 6 criteria to determine if an internship program is exempt from the federal minimum wage laws because the intern is not an employee. These criteria are as follows:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The Wisconsin DWD also follows the DOL's 6 criteria when determining whether an intern is an employee who must be paid minimum wage under Wisconsin law. These 6 criteria, especially the lack of advantage to the employer, will be difficult for most farmers to meet.

Some farmers prefer to use the term "apprentice." Technically, an apprentice is an individual who participates in a state- or federally-run program to facilitate training in a specific trade. Both Wisconsin and federal programs have opportunities for agricultural apprentices. However, when most people use the term apprentice, they mean a work position intended to education. The above 6 criteria for minimum wage rules are relevant when determining if all educational-purpose workers needs to be paid minimum wage.

Some farms provide a stipend rather than an hourly wage. Providing wages in the form a stipend is not prohibited, but the minimum wage rules still apply. The stipend received, divided by the time worked, must equal at

least the minimum wage. The employee's hours still need to be tracked and additional pay provided, as necessary, to meet minimum wage. Wisconsin law requires that agricultural employers pay employees at least quarterly, so stipends must accommodate that restriction. (But, note that there is an exception for seasonal workers who come from out of state under the "Migrant and Seasonal Workers" section. They must be paid more frequently.)

In-Kind Wages

Some farms may wish to offer room and board to employees, and may wish to deduct the value of the room and board from wages. For farmers with ample space and plenty of great food, but without strong cash flow, this option may make hiring more economically viable. Farmers should know that special rules apply to these situations. First, the employer cannot require that the employee accept meals as part payment of wages. Then, there are rules on the valuation of the meals and lodging. No more than \$58 per week (or \$8.30 per day) for lodging and \$87 per week (or \$4.15 per meal) may be deducted. If these rates exceed the fair value to the employee or cost to the employer for providing it, the farmer must charge the lesser rate. In addition, deductions can only be made for meals the employee actually eats, unless room and board are combined into a weekly charge.

One of the best ways to ensure a positive experience is to develop an internship agreement that outlines 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 who abandons the farm mid-season. It will also be beneficial to the farmer to have a clearly delineated agreement in case of a DWD or DOL audit or inspection.

Workers' Compensation and Injuries

Workers' Compensation

Farm work is hazardous and the likelihood is high that farm employees will be injured at some point. Farmers should investigate whether they are required to carry workers' compensation insurance. Even if the law does not require the farm

to provide workers' compensation, it may be the best option to cover employee injuries.

Workers' compensation is an insurance-based program to protect employers from negligence claims and the unpredictability of compensation awards. Before workers' compensation, employers could be sued for negligently causing employee injuries. With workers' compensation, employees injured on the job must accept the benefits provided by the insurance program if they want compensation for their injuries. Although some employers think of workers' compensation as an employee benefits program, employers are the original beneficiaries of state laws creating these programs. Every state in the nation has a workers' compensation program.

A farm business must provide workers' compensation when the farmer employs 6 or more people. The 6 individuals do not have to work in the same location. Also, the 20 days do not have to be consecutive. If the farm employs 6 or more employees on any 20 days in a calendar year, the requirement applies. After reaching the 20th day, the farm has 10 days to secure workers' compensation insurance. Note that the 6 employees do not have to be full-time employees. If, for example, 6 employees work only one hour on Tuesdays for 20 weeks, the threshold is met.

By contrast, non-farm businesses must provide workers' compensation if a single employee is hired. This distinction is important because the 6-employee exemption for farmers only applies to those fitting the definition of "farmer." The definition is broad, and covers the usual cultivation of soil, raising of livestock, and all activities attendant to production. However, farms processing, packing, or delivering a substantial amount of product that they did not produce on their own farm may not meet the definition. If a farmer processes, packs, or delivers another farm's product, the farmer should check with an attorney about whether workers' compensation may be required.

Farms should also be cautious about who is included when counting the number of employees. Parents, spouses, children, siblings and in-laws are not

counted as employees of the farmer (as long as the farm is not organized as a corporation). Shareholder/owner-employees are also not included. Beyond those exclusions, the definition of employee is quite broad. Individuals who to work for and under the direction of the farmer may be employees. If volunteers work in exchange for farm products or food and lodging, it may be that the individual is actually an employee. For-profit farms with volunteers (and non-profit farms with volunteers who receive compensation) should talk with an attorney and their insurance agent about workers' compensation. Note that once the 6-employee threshold is crossed, workers' compensation is required for all employees, including anyone excluded for the purposes of calculating the threshold, such as parents and siblings.

If a farmer is required to carry workers' compensation and does not, the penalties may be twice the insurance premium that should have been paid. If a farm does not carry workers' compensation and an employee is injured on the job, the employee (or his or her health insurer) may sue the farm under tort law. A tort is an injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit. Torts are part of the common law, which is the body of laws and rules that courts (rather than legislatures or other lawmaking bodies) create as they issue decisions. If the lawsuit is successful, the farmer may be personally responsible for all damages and his or her personal property made available to pay the employee back.

Injuries Without Workers' Compensation

Although there are many potential tort claims an injured employee may make, the most common claim is for negligence. Whether a person was negligent and caused an injury is a highly fact-specific issue that courts decide on a case-by-case basis. To avoid being negligent, an employer must use the same care to protect his or her employees from workplace injury that an ordinary, prudent and reasonable person would use under the same circumstances. An employer must protect only against reasonably foreseeable injuries, not every injury that may occur. An employer is liable for injuries resulting from any workplace hazards that she knows or should have known about, including, but not limited to, product defects and dangers on her property. She also has a duty to warn her employees of these hazards. "Knows or should have known of" requires that an

employer must also act prudently and reasonably in seeking out and discovering potential workplace dangers. Unsafe or defective tools are automatically evidence that the employer should have known about the hazard, regardless of whether she actually knew the tools were unsafe. If the employee's own negligent actions contributed to his or her injury, the damages awarded may be reduced.

It is possible that farm employees could injure customers, visitors, or business guests, so farms should know when they might be liable for those injuries. If the employee negligently causes a third party's injury while performing the employee's duties, then the farm business may be responsible for the injury caused by the employee. Employers may also be liable for negligently hiring an employee. In these cases, if an employer knew or should have known that the employee was likely to harm someone, the employer is liable for having hired the person in spite of that knowledge.

Employees might also injure other employees. If workers' compensation is provided, the injured employee may only draw on those benefits as compensation. In the absence of workers' compensation, generally speaking, the employee causing the injury will be responsible to the injured employee. An employer is not liable for the negligent actions of one employee against another employee unless the employer knew the employee was likely to harm someone. An employer can also be held liable if the employer did not provide the proper means for the negligent employee to carry out his or her duties. An employer is responsible for ensuring that all employees follow health and safety procedures. An employer cannot shield itself from liability by delegating this responsibility to supervisors. If the employer has delegated health and safety duties to a supervisor or foreman, the supervisor's negligent actions causing injuries to a fellow employee may be imputed to the employer. This means the employer can be held responsible for the supervisor's actions as if the employer had done the act.

If the farm has insurance to cover such suits, the insurance company will provide the defense in court. Typical farm property and liability policies do not cover injuries to employees that are the fault of the farm. A commercial policy that includes coverage for seasonal and temporary employees

may provide coverage. Typical farm property and liability policies will provide coverage if employees injure non-employees on the farm.

Workplace Safety Laws

OSHA Standards

The federal Occupational Safety and Health Act (the “Act”) establishes safety and health standards for employees of private businesses. The Act covers farms that employ individuals other than the farmer’s immediate relatives. Although the Act technically applies to all farms with non-family employees, funding appropriations bills consistently prohibit the Occupational Safety and Health Administration (OSHA) from spending any funds on enforcement against small farms. Small farms are those with fewer than ten employees who have not had a temporary labor camp in the previous 12 months. Any housing provided for seasonal farm employees is considered to be a temporary labor camp, which means that OSHA may enforce the Act against a farm providing housing to an intern or seasonal employee.

OSHA’s farm regulations require workplace precautions to protect employees. The regulations require things such as rollover 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. Employers must communicate information to employees on hazardous chemicals, 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. For a full list of requirements, farmers should read Part 1928 of the Act, available online. The regulations also establish minimum plumbing, sewage, laundry, trash, and first aid standards for any housing provided to seasonal farm workers. For a listing of all standards enforced against farm labor camps (meaning housing provided for one or more seasonal employees) search the OSHA webpage.

Agricultural employers are subject to 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. Employers must keep records of all reportable work-related injuries. 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. 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. However, these employers must report to OSHA within eight hours if an incident kills an employee or hospitalizes more than three employees. The employer can report via phone by calling a local OSHA office or OSHA's central line at 1-800-321-OSHA (1-800-321-6742). At the end of every year, employers must review their log of injuries, ensure and certify its accuracy, and provide a report to OSHA. Employers must keep these records for five years. More details are located in Part 1904 of the Act, available online.

Farms using herbicides and pesticides (including organically-approved products), must adhere to the employee safety and training standards outlined in Chapter 2, under the section on pesticide regulation.

OSHA Enforcement When Farms Provide Housing

Although OSHA cannot generally enforce farm safety standards against farms with fewer than 10 employees, OSHA is enforceable against any farm with a temporary labor camp. Although the phrase may conjure up images of something more extreme, the definition is much broader. If a farmer requires seasonal employees to live on the farm or if on-farm housing is a practical necessity because few other options exist, the farm may be running a temporary labor camp. In such a case, OSHA is enforceable and the housing must meet specific requirements. The regulations set specific standards for hygiene, security, privacy, and safety found in Standard Number 1910.142, available online.

Other Circumstances: Youth, Migrant or Seasonal Workers, and Independent Contractors

Youth

Youth of any age may be employed on their parent's own farm and directly under the child's parental direction, as long as the employment is outside school hours.

If the work is not on the child's family farm or under the child's parental direction, rules apply. The child must be at least 12 years old and the parent must provide consent. For the age brackets 12-13, 14-15, and 16-17, the law limits the number of hours per day and hours per week, when school is in session and when it is not in session. At the same time, the law also allows farmers to exceed the hours limitations for minors 14 or older during the peak season. Youths 17 and younger may not start work before 5am while school is in session. These rules are very detailed and beyond the scope of this resource. Farmers should contact DWD to confirm that the contemplated work schedule is consistent with the age of the youth before hiring.

Youths of any age must be paid the minimum wage, even if the youth are family members. All minors must be given at least 30 minutes for a meal break at typical meal times and may not be permitted to work more than 6 hours without a meal break.

If a youth is under 16 years of age, and not working on the child's home farm for the child's parents, he or she is prohibited from working in hazardous agricultural positions. These positions are specifically listed under state and federal law, and include operating or assisting in the operation of tractors and self-propelled vehicles, hay balers, potato diggers, feed grinders, and many other machines. Youth under 16 also may not work in the same enclosed space as bulls, sows with pigs, or cows with calves. Young persons may not climb ladders or scaffolding over 20 feet high for pruning or picking fruit. The full list is available at the Guide to Wisconsin's Child Labor Laws, available from the Wisconsin DWD.

Migrant or Seasonal Workers

Both state and federal laws establish standards for the employment of migrant and seasonal agricultural workers. It also requires employers to make certain disclosures and maintain employment records. A thorough discussion of the requirements is outside the scope of this resource.

Farmers who employ seasonal and temporary agricultural workers should speak with an attorney or an agency employee for further information on the subject. This resource is an introduction to selected issues, only.

Under the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA), a “seasonal agricultural worker” is one who is employed in agricultural employment of a seasonal nature and who performs fieldwork such as harvesting or planting (as opposed to processing or packing) on a farm or ranch. Wisconsin’s migrant worker law applies to any seasonal, temporary non-dairy worker who moves to Wisconsin for work lasting 10 months or less and is not a student. Despite the title, these laws are not limited to workers who move from place to place. A summer intern who is also a Wisconsin resident is a migrant worker under MSPA. Under state law, a summer intern is a migrant worker if he or she moved from any state other than Wisconsin for the position.

Farm employers must give migrant or seasonal workers details of the work position in writing, in English and in the workers’ native language. To ensure compliance with state and federal laws, the work details should be provided at the time of recruitment. The agreement must specify the following items:

1. Where the individual will be employed
2. Wage to be paid
3. Types of activities the worker will perform and the crops involved
4. Length of employment and hours per week
5. Pay period
6. Hours of employment

7. Any benefits that will be provided and any charges for the benefits
8. Any transportation arrangements, if provided
9. Information on workers' compensation and unemployment insurance
10. Existence of any strike or similar work interruption
11. Each person employed in a family
12. Any commission arrangements the farm owner has with local businesses regarding sales made to the farm workers

Migrant or seasonal worker laws have special rules for worker wages and hours. Employers must pay migrant and seasonal workers when wages are due, which must be at least every two weeks. Farmers are required to issue a pay stub that details gross wages, net wages, and any deductions. The worker must be provided with at least 20 hours per week or 45 hours in a two-week period.

If the employer provides housing, the employer must disclose in writing, or post in a conspicuous place, the terms of such housing. 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. The process for receiving housing approval should be done well before workers arrive, and must be done 30 days in advance, to ensure the facilities will meet the detailed certification requirements. Farm employers who provide transportation must meet vehicle safety standards.

Employers must keep individual employee records that contain the following: (1) name, social security number, and permanent address (2) the basis on which wages are paid; (3) the number of piecework units earned, if paid on a piecework basis; (4) number of hours worked; (5) total pay period earnings; (6) specific sums withheld and the purpose of each sum withheld; and (7) net pay. Employers must keep the records for three years.

Some direct farm businesses use a Farm Labor Contractor (an "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 with the United States DOL and with the Wisconsin DWD. An employee of a registered FLC must obtain a Farm Labor Contractor Employee Certificate of Registration. The direct farm business should ensure that it deals only with a registered FLC. The United States Department of Labor maintains a list of MSPA Ineligible Contractors online that should be checked before doing business with any FLCs.

If the owners or employees of a direct farm business recruit their own workers instead of contracting with an FLC, the business need not register as a farm labor contractor if it qualifies as a family or small business. Entities qualify for the family business exception if the owner of the farm or immediate family member does the labor contracting. If the operation 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. The regulation defines a “man day” as any day in which an employee performs agricultural labor for at least one hour.

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. The employer must petition for certification to recruit foreign 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 recruited foreign workers. The MSPA 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 that provides step-by-step instructions on how the H-2A program works, including links to forms.

Independent Contractors

Businesses of all shapes and sizes, including many Wisconsin farms, choose to hire independent contractors rather than employees. Using independent contractors can be save time and money. But, only specific types of workers

may be classified as independent contractors. A household plumber is an example of an independent contractor. If a house has a clogged drain, the homeowner may call a plumber, and the plumber may charge a flat fee or an hourly rate to fix the drains. Even though the plumber is under the general direction of the homeowner in terms of what to accomplish and the timeline for finishing the task, the plumber is responsible for everything else. The homeowner doesn't have to provide minimum wage, workers' compensation, or other elements of employment law- that's the plumber's job as a small business owner. True independent contractors are akin to small business owners.

The reduced costs and paperwork burdens of hiring independent contractors create some temptation to misuse the classification. As a result, the law outlines strict rules for when a person is an employee and may not be classified as an independent contractor. These rules are very specific to the issue in question. For example, the rules may be slightly different depending on whether state unemployment insurance, federal social security withholding, or another employment law is at issue. To generalize, independent contractors are small business owners. Independent contractors provide the same services others, set their own hours of work, bring their own tools, and take the risk of loss and the reward of gains on individual jobs. The more an individual works under the direction of the farmer and with the farmer's tools, the less likely a person may be classified as an independent contractor.

Additional Obligations

All states require that businesses report the names of new employees, which is intended to assist the states in enforcing child support orders. Each state has a website and Wisconsin's is www.wi-newhire.com. Farms may also report hires using form WT-4. Form WT-4 is required if an employee reports a different number of exemptions or withholding amount for state tax purposes, as opposed to the federal exemptions reported on the IRS form W-4.

Farms may only hire individuals who are eligible to work in the United States. For regular employees (not hired through a guest worker program) eligibility is verified when the potential employee completes Form I-9. This form is available from the U.S. Citizenship and Immigration Services

agency. It is available online and instructions are included. The form is not submitted to the agency. Rather, the employer copies the necessary documentation and keeps the form on file. The forms and documentation must be made available if an enforcement agency inspects of the farm.

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<http://farmcommons.org/survey>

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rachel@farmcommons.org



RACHEL
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