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# **Selected Essentials in Farm Employment Law: Nebraska**

Get selected classification, minimum wage, overtime, workers' compensation, tax, and anti-discrimination rules for Nebraska farms.

**SELECTED ESSENTIALS IN FARM EMPLOYMENT LAW: NEBRASKA**

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## Introduction

Farm employment law can be complicated. We've broken down essential rules and regulations into key categories and explained the vital points. These sections also help farmers and ranchers discover which of our in-depth guides offer answers to more complex issues.

Get all the answers by expanding and reading each section, even if you already have a strong grasp of the subject. Some of the information can be surprising.

This resource is an introduction to selected basic issues in farm employment law. Where relevant, readers will be directed to more advanced guides on specific issues. Many relevant farm employment law issues are not addressed, here, including employing youths under 18, migrant worker issues, and more.

If you find you need more support to take action on what you learn here, take our [Advanced Farm Employment Law Course: Self-Paced](#).



## Minimum Wage

The Nebraska minimum wage is \$12.00/hour, but agricultural employees are exempted from the minimum wage rate under certain circumstances. In some situations, the federal minimum wage rate of \$7.25/hour could be required.

Nebraska farm and ranch businesses are obligated to pay a minimum wage for all hours worked in a workweek IF the farm assigns non-agricultural labor at any time during the week. Precisely what minimum wage applies depends on the size of the business. If the business employs 4 or more people in that week, the farm must pay at least the state minimum wage of \$12.00/hour for all hours worked that week. If the business employs 3 or fewer people in that week, the farm must pay at least the federal minimum wage of \$7.25/hour for all hours worked that week.

Nebraska farm and ranch businesses that assign exclusively agricultural labor in a workweek might still be obligated to pay at least the minimum wage rate, depending on the size of the business. If the farm business employed more than 500 man-days in any calendar quarter of the previous year, the business must pay at least the state minimum wage of \$12.00/hour for all hours worked that entire year (regardless of whether the work assigned is agricultural or not). If the farm business employed fewer than 500 man-days in any calendar quarter of the previous year, then the farm business is not obligated to pay a minimum wage (except for a week in which non-agricultural labor was assigned as described above).

If the farm or ranch only has seasonal employees (fewer than 20 weeks in any calendar year), then the state minimum wage rate would not apply to the farm. The federal minimum wage rate would apply only if the farm exceeds the 500 man-day threshold within those 20 weeks.



A “man day” is defined as any day during which an employee performs agricultural work for at least one hour. For example, if two individuals perform at least one hour of agricultural work in a day, the employer has two-man days. The distinction between agricultural and non-agricultural labor can be complex! Resilient farmers should be sure to read the details in our Farmers’ Guide to Hiring Obligations.

### **Overtime**

Nebraska farm and ranch businesses are not obligated to pay overtime wages to workers, as long as the worker performs exclusively agricultural labor. If the worker performs non-agricultural labor, non-agricultural rules apply and the employee is owed overtime pay for all hours worked over 40 in that week.

The distinction between agricultural and non-agricultural labor can be complex! Resilient farmers should be sure to read the details in our Farmers’ Guide to Hiring Obligations.

### **Meal and Rest Breaks**

Farm businesses in Nebraska are not required by law to offer meal and rest breaks at specific intervals or of specific length to employees performing agricultural work. Meal and rest breaks may be required when an employee performs non-agricultural work.

### **Payroll Taxes**

Farms and ranches in Nebraska must begin paying unemployment insurance tax for agricultural workers through the Federal Unemployment Tax Act (FUTA) and state unemployment program when either of the following occurs: 1) during any calendar quarter of the current or preceding calendar year the farm paid wages of \$20,000 or more, OR 2) the farm employed 10 or more individuals in agricultural labor during at least some part of a day

(whether or not at the same time) during any 20 or more different weeks of the current or previous year.

Farms and ranches that exceed the above thresholds are required to pay into the unemployment insurance system. When a farm is required (or chooses) to contribute to the unemployment insurance system, its employees may file unemployment insurance claims according to the state's eligibility criteria and processes.

For more details about selected unemployment insurance tax and other payroll tax issues, including withholding, see the Farmers' Guide to Hiring Obligations.

## **Workers' Compensation**

Nebraska farm and ranch businesses are not obligated to purchase workers' compensation for agricultural workers unless they employ 10 or more unrelated, full-time employees for 13 weeks during the calendar year (the weeks do not have to be consecutive).

If your farm or ranch fails to secure workers' compensation as required, the penalties can be severe including responsibility for all costs of the medical treatment plus a hefty fine for noncompliance.

Many business owners see workers' compensation as a regulatory obligation, which it often is. However, many farmers don't realize that the workers' compensation system was designed to protect the business owner from lawsuits. Workers who have workers' compensation available to them are prohibited from suing the business owner for the injury. For this reason, some farmers choose to purchase workers' compensation even if it isn't a legal requirement. To learn more about how workers' compensation works to protect the farm, read our Farmers' Guide to Hiring Obligations.

If your farm or ranch is not obligated to secure workers' compensation and doesn't choose to buy a policy, the farm may be sued by injured workers. A resilient farm will have an insurance policy in place that 1) provides for an attorney to defend the farm against injury lawsuits by workers and 2) pays out on the liability judgement that may result. Again, to learn more about how workers' compensation works to protect the farm, read our Farmers' Guide to Hiring Obligations.

Note that farms assigning non-agricultural labor to their workers may be required to secure workers' compensation immediately or as otherwise required for a non-agricultural business.

### **Anti-Discrimination Rules**

Learning more about discrimination in farm hiring can empower farmers to create the best work environment possible and prevent legal problems for the operation. Everyone benefits when we learn to identify potentially discriminatory practices and avoid them in various on-farm practices.

*We would never purposely pay men more than women or refuse to hire workers of a particular ethnic background. What more do we need to know about discrimination?*

The risk of discrimination goes beyond just gender, race, and ethnicity. The laws speak to various characteristics and factors when defining fair employment practices. Some of these laws apply when farms have specific amounts of workers for certain time periods, while others apply if the operation has only one worker. Below, we include general information only, and you'll want to look at our detailed guide, "Avoiding Discrimination in Employment for Farm and Ranch Businesses," for more specific information.



Farmers and ranchers want to create excellent programs that hire and keep the best person for the job. Recognizing inadvertent discrimination can help everyone do that while avoiding legal risk.

*Okay, it's worth our time to explore this issue. Where do we start?*

The first step to avoiding discrimination is to learn the factors for which a business cannot make employment decisions. If hiring, firing, or disciplinary processes involve any of the factors below, we may have a case of illegal discrimination. The second step is to examine hiring practices to see if we are considering these factors. It isn't enough to simply know the prohibited factors if we haven't examined if the business is taking them into account. It also isn't enough to determine if our hiring practices take prohibited bases into account, if we don't know the bases in the first place.

Let's start with step one- the prohibited factors. The list below includes the federal factors that apply to everyone at this time. We will supplement this list with additional state factors soon. Please note: these descriptions are simplified explanations. We highly recommend that everyone read the detailed guide to understand how these factors might impact employment decisions at your business.

1. Sex: Employers can't make employment-related decisions or treat employees differently because of their gender, sexual orientation, or gender identity, or because of conditions associated with a person's gender such as pregnancy, breastfeeding, and contraceptive use, for example.
2. Health conditions: If a person with a health condition or disability (physical or mental) can perform the job effectively so long as they receive reasonable accommodation, the business is required to offer that accommodation. To refuse to offer the accommodation, as long as it's reasonable, is considered discrimination. Read our detailed guide for more information on this and any other factor in this list.



3. Age: Employers may not take age into account when making employment-related decisions.
4. Military service: Employers can't make employment-related decisions on the basis that a person served in the military (and therefore might suffer from PTSD or other service-related disability, for example). Employers also can't refuse to hire or fire someone because they are currently serving in the military (and therefore might be deployed at any time, for example).
5. Arrest and conviction records: Employers taking such factors into account in the hiring process need to read the full guide, as the factor can be complex.
6. Race, national ancestry, ethnic origin: Employers can't consider a person's birthplace, their citizenship status, or even their cultural traditions or personal characteristics that reflect their cultural background— for example, having an accent or a preference to communicate in a certain language. This can be complex as employers also have an obligation to ensure eligibility for work in the United States. Read the full guide for details.
7. Religion: Employers can't make employment-related decisions on the basis of faith traditions. Not just affiliation with an organized religion is protected, but moral beliefs and practices, as well as religious attire, are protected from employment discrimination.

Not all of these factors are self-explanatory, and there is a lot of nuance in their definitions. Read our full guide for more information on how these prohibited factors are interpreted.

On to our second step! Now that we understand the factors we can't consider, let's examine our business practices and how these factors might sneak into our hiring and firing processes. For example, we understand that discrimination based on sex is prohibited, but what does that mean for writing a job description or firing folks? Let's discuss how to avoid potential discrimination in the stages of employment.

### ***Advertising the position***

Write a position announcement that does not show any preference for a certain gender, age, race, or religion – all of those bases for discrimination listed above. The best way to avoid that is to focus on the job itself and write a description that addresses what is necessary to undertake the duties and responsibilities of the job in terms of the working conditions and required knowledge, skills, and abilities. For more ideas and perspective on advertising your job without discrimination, read our full guide.

### ***Interviewing and Hiring***

Prepare a list of questions that relate directly to the job's qualifications, and ask them of all applicants. If you have a good interview process where you are consistent and ask every applicant the same questions, you have helpful evidence that you compared each applicant on the same, allowable bases. Of course, make sure all questions don't involve assessment on any of the discriminatory factors listed above. This can be easier said than done, and our full guide provides more information on how to make this work for your operation.

### ***Workplace Practices***

Create an employee manual with clear processes for work-related decisions that are consistently applied to all workers. A strong employee manual is the best way to ensure consistency and fairness in the workplace regarding discipline, benefits, and promotion. Sticking to the same vacation or sick time policy and disciplinary process for everyone reduces the chance of discrimination. We have a great sample employee manual on our website that farms and ranches can tailor for their operation. Read it thoroughly, as a poorly drafted manual can accidentally create risk! Read our Model Farm Employee Manual for more information on using an employee manual to minimize discriminatory practices.



### ***Firing***

Firing is an uncomfortable process for everyone, so it's no surprise that most discrimination complaints occur after an employee has been fired or laid off. Refer back to the employee manual. The employee manual comes in really handy in the firing context. An employee manual that outlines transparent processes for addressing workplace issues such as employee performance (or a lack thereof) is invaluable. Ensure employees understand what will happen if they don't do as expected, and what is grounds for immediate termination.

Again, for questions about whether a process is taking prohibited factors into consideration or if hiring and management practices may cause discrimination, read our full guide for more details. Everyone, even the most well-meaning among us, can make mistakes sometimes, and it's worth it to be sure we're creating fair work environments.

### **Classification**

*Is a worker an independent contractor or an employee?*

This is an important question, as these are the two main options for classifying any work position on the farm or ranch. (If you think you may have a volunteer or an intern/apprentice, please see those sections of this resource.)

**The first thing to know is that the default classification for any worker is an employee.** This means that by default, and until the evidence proves otherwise, anyone who does the work of the farm/ranch is considered an employee. A worker can only be an independent contractor if the worker's position fits the criteria necessary to become an independent contractor.

Determining if a worker fits the criteria for an independent contractor can be a complicated endeavor. The federal government's criteria for their departments, such as the Internal Revenue Service, differ from the criteria

states use for their departments. Even within a state, the criteria used by the workers' compensation division may differ from the criteria used by the unemployment insurance division or the wage enforcement division.

Meeting one set of criteria does not guarantee that a farm or ranch will meet the other criteria. A farm seeking a thorough answer on whether a specific position meets all the varied enforcement agencies that may come to bear may wish to work with an attorney. That being said, generalities can be very useful in helping a farm or ranch business make careful choices.

Below, we offer the six criteria that are representative of federal enforcement, although the list is not specific to any agency.

1. The worker is not performing work that's integral or core to the farm business
2. The worker controls how and when the work gets done
3. The worker can suffer a loss and has potential to make a profit
4. The worker invests in his or her own facilities and equipment
5. The worker has business skill and initiative
6. The worker is hired for a project; it's not a permanent relationship

For more information on exactly what these criteria mean and how to apply them to your operation, read the [Farmers' Guide to Classifying Workers](#).

If a worker meets the above criteria, they may be classified as an independent contractor for federal purposes. This means the farm or ranch is not obligated to withhold federal income taxes or contribute payroll taxes such as Social Security and Medicare (also called FICA). For an independent contractor, the business issues a Form 1099-Misc at the end of the year documenting the amount paid to the contractor. This form is required where payments equal \$600 or more for the year. Farm Commons also recommends an independent contractor agreement.



## Volunteers

The law does not permit for-profit farms (or any other for-profit business) to use volunteers to accomplish the business' work. This is surprising to many business owners, as it's not uncommon to see businesses utilize volunteers from time to time.

The law is clear, however. Let's look at the definition of a volunteer under federal employment laws (which apply in every state). A volunteer is defined as someone who performs service for charitable or humanitarian reasons for a nonprofit or public agency without expecting compensation. The law also clearly defines employment as permitting an individual to do the work of a business, even if no compensation is given to or expected by the worker.

Anyone who does the work of a for-profit farm is considered an employee unless they fit the definition of an independent contractor or a non-employee intern, as described earlier in this article. This means that employment laws apply to volunteers who do the work of a for-profit farm.

For more details, including nuanced explanations of what it means to do the work of a for-profit business and for examples specific to work-trade arrangements and more, read our [Farmers' Guide to Classifying Workers](#).

In some situations, farms in Nebraska are not obligated to pay at least the minimum wage (see the Minimum Wage section above) to employees. Where this is the case, a person may have an employee who is not paid any wage at all. This worker looks like a volunteer but legally speaking, the worker is simply an employee who is not paid a wage. All other employment laws still apply, including issues such as non-discrimination, workers' compensation and more, as described in this article.

A for-profit farm offering volunteer positions is taking on risk if they do not fully comply with applicable employment laws for those positions. Risk management means considering the likelihood of enforcement and the consequences of enforcement. For more information on these, read the [Farmers' Legal Guide to Intern and Volunteer Programs](#).

Non-profit organizations are allowed to have volunteers under some circumstances. Volunteers on a non-profit farm are not considered employees and employment laws do not apply, generally speaking. We say “generally speaking” because even where non-profit farms have volunteers, they still must follow certain requirements discussed in detail in the “Volunteers” chapter of our [Farmers' Legal Guide to Intern and Volunteer Programs](#).

## **Interns and Apprentices**

Generally speaking, interns and apprentices at a for-profit business are employees, and thus, employment laws such as minimum wage and workers' compensation (see earlier sections of this article) apply. This applies to farms, ranches, and all other businesses equally.

That being said, it is possible to have an intern or an apprentice who is not also an employee where *very specific criteria* are met. If the intern/apprentice is not an employee, employment laws do not apply to that worker.

The following criteria determine if an intern/apprentice is also an employee under federal law, which applies in every state. (Some states have additional nuances, which are not included here now but will be in the future.) Where the following statements are true, the position may qualify as an internship that is not also employment.

1. The farmer and the intern both understand that the intern is not entitled to compensation.
2. The internship program provides training that would be given in an



educational environment.

3. The intern receives academic credit upon completion of the internship program.
4. The internship program corresponds with the academic calendar.
5. The duration of the internship program is limited to the time when the intern receives the education or training provided.
6. The tasks the intern performs provide significant educational benefit and they complement rather than displace the tasks of paid employees.
7. The intern and the farmer both understand that the intern is not entitled to a paid job when the internship program ends.

Farms and ranches who believe their intern or apprentice position may meet the criteria above need to read Farmers' Legal Guide to Intern and Volunteer Programs in detail. The guide offers additional information and interpretive guidance that is very important.

The criteria above are called the Primary Beneficiary Test, and are what is called a "balancing test." A balancing test is one where not every single criterion needs to be met to succeed in meeting the test. Rather, the more of these criteria that are present and the greater the degree to which they are present, the more likely the test is met and that the position is a non-employee intern. Complying with a balancing test involves some degree of risk as it is difficult to impossible to predict when the scales will tip to either side. Farmers committed to offering non-employment internships should keep careful records of whether and how they are complying with these criteria, in case they are called into court to defend their position. Risk-averse farmers will want to treat all interns as employees, just to be safe. Read Farmers' Legal Guide to Intern and Volunteer Programs for more information on assessing internships and the criteria above.

For this overview, we are conflating an internship with an apprenticeship. Technically, the law does define apprenticeships, but the distinction between

an internship and an apprenticeship is not meaningful for our legal context of employment law, here. Employment laws relative to minimum wage, overtime, workers' compensation, payroll taxes, and more apply in the same exact way to interns and apprentices.

For nonprofit operations, the situation is slightly different. A nonprofit may have volunteers, so interns may be classified as volunteers. Farmers' Legal Guide to Intern and Volunteer Programs provides full details on the limits of volunteer positions at nonprofit organizations.

### In Kind Wages

*I need workers for my farm, but I don't have much money to work with. Is there any way to pay employees in something other than cash?*

Some farms offer food, lodging, and other resources instead of or in addition to dollars as payment of wages to workers. From a legal perspective, these non-cash goods and services are called "in-kind wages." Offering in-kind wages is a lifesaver to "cash-poor" farmers while helping resource-rich farmers provide value to workers. But, paying wages in-kind comes with extra baggage, and farms need to be prepared to manage their obligations.

Any farm offering in-kind wages will need to read our comprehensive Farmers' Guide to In-Kind Wages, as the subject is complex. This guide also offers state-specific information for select states in an appendix.

Please note that a farm choosing to go forward with in-kind wages may need additional support from an accountant or an attorney. This tip sheet will help those exploring the option of paying wages in-kind grasp the extent of their potential obligations and requirements. The legal obligations vary according to several parameters, introduced below and discussed in further detail in Farmers' Guide to In-Kind Wages. Before you move forward with in-kind





wages, we strongly recommend taking the time to read the information in the detailed guide.

*Does my farm have an obligation to pay at least the minimum wage to workers?*

Consult the minimum wage section of this article to determine if farm operations in your state are legally required to pay at least the minimum wage (make sure to also consult the interns and volunteers section). Farms that are not obligated to pay at least the minimum wage have flexibility. The farm can offer meals, transportation, housing, groceries/farm products, and more as wages. However, the value of these items needs to be documented on the paystub, a W2 reflecting their value needs to be given, and all payroll taxes assessed against wages need to be paid (such as Social Security and Medicare), just as if the wages were paid in dollars.

Most farms WILL have an obligation to pay at least the minimum wage to workers. In this case, farms generally can only use meals, housing, and transportation as in-kind wages, but folks must check the Farmers' Guide to In-Kind Wages to see if their state has any modifications to that rule (only selected states addressed at this time). Additionally, farms have to prove that the non-cash items are for the employee's benefit and not a condition of employment. This means the farm must offer (and be able to pay) cash to workers who prefer it. To understand whether an in-kind wage is being offered for the employee's benefit and whether it is a condition of employment, read the Farmers' Guide to In-Kind Wages.

*Can I use a combination of in-kind wages and cash to meet my state's obligated minimum wage?*

After we've determined the farm is obligated to pay the minimum wage, we consider whether the farm is providing at least the minimum wage in cash or whether they are using in-kind wages to get up to the minimum wage threshold.

For example, a farm might pay the local minimum wage rate in cash (say, \$7.25 per hour) with an additional \$5 per hour in food, lodging, and transportation. By contrast, a second farm may provide \$3 per hour in cash and an additional \$9.25 per hour in in-kind wages. Both farms offer the same total wage of \$12.25 per hour, but they get there with different resources.

The distinction matters, from a legal perspective. Folks in the latter example—farms offering less than the minimum wage in cash and using in-kind wages to achieve the minimum wage—those farms must follow additional rules about how to calculate the value of meals, housing, and transportation. The farm may only assess the lesser of the fair market value of the item versus the actual cost to the employer of providing the item. Farms are also limited in the type of resources they can offer—groceries are not allowed as in-kind wages to meet a minimum wage obligation. A more comprehensive explanation can be found in the Farmers' Guide to In-Kind Wages.

Farms in the first example—those paying at least the minimum wage in cash—still have rules to follow such as documenting the valuation of the in-kind items, including the value on paystubs, issuing a W2 reflecting their value, and remitting/paying payroll taxes assessed against wages (such as Social Security and Medicare), just as if all wages were paid in dollars.

*What if I want to offer housing to my workers?*

No matter what, farms offering housing as in-kind wages will have to comply with zoning and other local health and safety rules, such as OSHA (Occupational Safety and Health Act) and MSPA (Migrant and Seasonal Workers Protection Act). These laws require things like providing enough bathrooms, drinking water, and beds for your workers, with an inspection determining whether or not the farm has met the criteria. **Note: Migrant workers do not mean “not from the United States”— they include anyone who must stay**

**overnight away from their regular home to make it feasible for them to work on the farm!**

There are many exceptions and exclusions involving OSHA and MSPA, and farms offering housing must understand this in more detail– see our Part 2 of Farmers’ Guide to In-Kind Wages to read more about housing.

For greatest legal resilience, farmers providing housing to workers will want to talk to their insurance agent to be sure they have adequate coverage, especially if a worker-tenant or a guest gets injured on the farm property. Workers who live in employer-provided housing will be considered tenants for insurance purposes. A general farm liability policy or homeowner’s policy usually will not cover the full scope of the landlord-tenant relationship, so for maximum resilience, work closely with an insurance agent.

 **H2A Workers**

For information on how the H2A visa program works from a practical and ethical perspective, please watch the video linked in the footer. This 60-minute program discusses the background, legal obligations, and ethical concerns around the H2A visa program in a recorded webinar format: Is H-2A a solution for your farm?



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