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# Ditches and wetlands and Swampbuster: the Eighth Circuit draws distinctions

Keith and Dorothy Barthel are Nebraska dairy farmers. A segment of the South Fork of the Elkhorn River runs along the south side of their 450-acre hay meadow. This segment of the river, however, is not called by its geographical name. Instead, because it was straightened in 1916 to improve drainage, it is known as "the ditch."

The ditch drains the Barthels' hay meadow, at least that is what the Barthels wanted it to do. Sometimes, however, the ditch froze, and a portion of the meadow temporarily flooded. More troublesome were silt and debris, which, when they accumulated, clogged the ditch. The Barthels were not able to stop the ditch from freezing, but they were able to dredge it. In 1983, they did just that. In 1986, the county replaced a downstream culvert where the ditch meets a road. Though apparently no dip in the road resulted, the new culvert was nested eighteen inches lower than the one it replaced, thus speeding the ditch's flow to its ultimate end in the Gulf of Mexico.

But silt and debris are relentless, and by 1987 the ditch was again clogged. As they successfully had done in the past, the Barthels sought the help of their downstream neighbors in dredging the ditch. This time, however, the neighbors refused. The Barthels then went to state court. There they obtained a mandatory injunction directing their neighbors to clean their portion of the ditch so that the water would flow. The neighbors appealed.

When the neighbors appealed, the USDA entered the fray. Invoking "Swampbuster," known to those who read the United States Code as the wetland conservation provisions of the Food Security Act of 1985, 16 U.S.C. §§ 3801, 3821-24, the USDA reversed an earlier position and objected to the proposed dredging. More precisely, mindful of the lowered culvert, the USDA contended that any dredging that exceeded eighteen inches above the bottom of the downstream culvert would result in a Swampbuster violation. For the Barthels, this was unfortunate, for at this level and grade their hay meadow reflected moonlight across its inundated surface.

So, after a round of administrative appeals, it was back to court for the Barthels.

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*Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.*

## IN FUTURE ISSUES

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# Trade negotiations coming again soon

This December nations are to begin another round of trade negotiations under the World Trade Organization (WTO). Agricultural issues will again play a prominent role. While it is too early to identify specific issues facing negotiators, at a broad level much of the agenda is known. Mainly these issues reflect perceived deficiencies in the Uruguay Round Agreement. This article identifies those broad areas of discussion.

**Market access**

The language of the Uruguay Round Agreement called on nations to convert non-tariff trade barriers to tariff equivalents and to reduce these barriers by specified percentages over an implementation period. In some cases the calculated tariff equivalents were known to be prohibitive to trade, so exporting nations argued for and obtained minimum access commitments. These commitments were intended to guarantee that at least three to five percent of a market was open to imports. Tariff-rate quotas (TRQ's) have frequently been used to implement this agreement. Under a TRQ a nation sets an import quota. Imports below the quota pay a low tariff, while imports above the quota pay a higher tariff.

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This time the court was federal, and their adversary was the USDA and its Secretary. The Eighth Circuit has now had its say on the ditch, Swampbuster, and the fate of the Barthels' 450 acre hay meadow in Nebraska. *Barthel v. United States Dep't of Agric.*, No. 98-2754, 1999 WL 398715 (8th Cir. June 18, 1999).

For the Eighth Circuit, the issue boiled down to what Swampbuster is intended to protect. More specifically, the question was whether the ditch was a protected area. The court ruled it was not. Instead, according to the court, the USDA should have focused on the wetland, which was the hay meadow not the ditch.

For purposes of Swampbuster, the Barthels' meadow was a "farmed wetland or hayland," as defined in the National Food Security Act Manual (NFSM). Swampbuster permits such a wetland to be used for pasture or hayland as it was before the effective date of Swampbuster, December 23, 1985, and its hydrology can be maintained, but not improved. *See* 7 C.F.R. § 12.33(a) (1992). In other words, any hydrologic manipulation must be confined to maintaining the "scope and effect" of the manipulation that existed on December 23, 1985.

The USDA, according to the court, focused on the ditch in determining the scope and effect of the original manipulation of the hay meadow. This focus led the agency to contend that the ditch could not be maintained at the depth of the lowered culvert. Instead, it had to be maintained at its pre-replaced culvert level, which was eighteen inches higher. At this level, however, the hay meadow was flooded.

What the USDA should have done, according to the court, was to focus on the hay meadow. Before the culvert was lowered, the hay meadow was not flooded, except intermittently. It is that condition, the court concluded, that Swampbuster allowed the Barthels to maintain. That is, "[t]he statute and regulations mandate that the Barthels should be able to have the water and farming regime they had before December 23, 1985." *Barthel, supra* at *3.

As for the ditch, the court found that "the ditch and culvert depths apparently conflict with the water regime that existed prior to December 23, 1985." *Id.* It characterized the government's position to be, in the face of that conflict, "that the level of the ditch should win, at the expense of the prior conditions of the land." *Id.* That position, in the court's view, was untenable under the Swampbuster statute.

The court also stated that it was government's burden "to show that the proposed maintenance...exceeds the scope and effect of the original manipulation." *Id.* at *4 (citing *Downer v. United States*, 97 F.3d 999, 1009 (8th Cir. 1996) (Beam, J., concurring and dissenting)). This burden, however, "does not give the agency the right to arbitrarily define what the original scope and effect was." *Id.* It remanded the action to the district court with instructions to remand the matter to the USDA "for a hearing and determination of the wetland characteristics and associated use of the Barthels' 450-acre hay meadow, prior to December 23, 1985, and the necessary dredging and cleaning of the ditch to accomplish that water and farming regime." *Id.*

At this hearing, the court noted, "[a]n expert should calculate the dredging necessary to allow the Barthels to have the same use of their land as they did previously." *Id.* n.7. The court cautioned, however, that "[t]his does not mean that the Barthels get the same use of their land no matter what the circumstances. For example, if there is high water from unusual amount of rain, the Barthels cannot automatically dig the ditch deeper." *Id.* The court also noted that "[a]t oral argument, counsel for the government did concede that the Barthels are entitled to the best drainage of their land, on or before December 23, 1985, that they can prove with reliable evidence." *Id.* n.8.

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## Civil actions under Colorado's Wage Claim Act

Employers who fail to pay employees in a timely manner can suffer adverse consequences under the Colorado Wage Claim Act, which has its roots in a statute adopted in 1901.

"Employee" means "any person …performing labor or services for the benefit of an employer in which the employer may command when, where, and how much labor or services shall be performed….[A]n individual primarily free from control and direction in the performance of the service, both under his contract for the performance of service *and in fact*, and who is customarily engaged in an independent trade, occupation, profession, or business related to the service is not an 'employee.'" Colo. Rev. Stat. § 8-4-101(5)[emphasis supplied].

An "employer" is any "person, firm, partnership, association, corporation, …and any agent or officer thereof, …employing any person in Colorado…" (with exceptions for some governmental bodies, irrigation reservoir or drainage conservation companies or districts). Colo. Rev. Stat. § 8-4-101(6).

During employment, wages and compensation must be paid at least monthly or every thirty days, and must be paid within ten days of the close of a paid period unless the employer and employee agree otherwise. The employer must provide an itemization of wages earned, withholding, and deductions.

A fired employee must be paid immediately, or if the payroll office is closed, within six hours after the start of the next regular work day. The paycheck must be made available to an employee who quits at the work site, the employer's office, or by mail to the employee's last known mailing address if the employee so requests. Earned vacation pay is treated as compensation required to be paid on termination; payment for earned sick leave depends on the employer's accrual policies.

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Actual implementation of the Uruguay Round Agreement market access rules has been unsatisfactory for many exporting nations for a variety of reasons. The next round will address some of these complaints.

In the Uruguay Round nations calculated the level of trade barriers from which the agreed to cuts are applied. Within the rules established by negotiators, nations could determine tariff equivalents much greater than the actual barriers imposed. This is called "dirty tariffication" or "putting water in the tariff." Countries with "water in their tariff" can, should they choose to, raise the tariff and still satisfy their WTO commitments. For example, the European Union agreed to a maximum tariff on wheat of 231 European Currency Units (ECU) per ton the first year of the implementation period. Over the following six years the tariff binding was to fall to 148 ECU per ton. But the actual equivalent of the European Union's variable levy in the base period was 125 ECU per ton—well below the binding. The European Union is not alone in doing this. Much of the proclaimed liberalization of agricultural trade has not occurred. The upcoming negotiations will try to squeeze the water out of tariffs by bringing applied and bound tariffs into closer agreement.

One reason for converting non-tariff barriers to tariff equivalents was to make the impacts of such policies clear to everybody. That is called increasing the transparency of the policy. Tariffs have clear impacts on markets and income distribution, whereas, non-tariff barriers tend to hide these impacts. Adoption of tariff-rate quotas in the Uruguay Round to replace non-tariff barriers did not improve transparency. Indeed, it may have made it worse. Tariff-rate quotas can create windfall gains for those who import before the quota is breached and pay the lower tariff. Consequently, there must be a way to allocate the quota, and several alternative procedures are being used. Different procedures create uncertainty about who gains and who loses. In some cases, the right to import a commodity has been given to individuals with no desire to import, and there is no expansion of trade.

The next round will try to improve the way TRQ's operate. One item on the agenda will be reductions in above quota tariffs, which are often so high that the new TRQ acts like the old quota it replaced. Also, some effort will be made to raise the quotas to expand the volume of imports subject to lower tariffs. Many exporting nations are unhappy at the multitude of ways quotas are administered, especially when the quotas are administered to block market access. Rules to clarify quota administration will be on the table.

**Export subsidies**

The Uruguay Round Agreement imposed quantity and expenditure limits on export subsidies. While that agreement allows some switching between similar commodities, the rules for export subsidies are stronger than those for market access. Two issues linked to export subsidies will be on the agenda.

One issue is that the export subsidy cuts of the Uruguay Round will be expected to be expanded. While the U.S. Export Enhancement Program remains officially alive, the United States has not used direct export subsidies since the high commodity prices of a few years ago. However, the European Union renewed its use of export subsidies as world prices fell. There will be pressure on the European Union to follow the U.S. example and end export subsidies. Europe will find this difficult to do because it cannot maintain domestic prices above world market levels and dispose of surplus production on world markets without export subsidies.

The other issue concerns the use of export credit guarantees and concessional sales programs. The United States will find this a difficult issue. The Uruguay Round ignored concessional sales programs, but some exporting nations, like Australia and Canada, are displeased with the heavy use of the programs by the United States and European Union. Recent U.S. concessional sales to Indonesia, Korea, and Russia have fueled the issue with other exporters complaining about "unfair" U.S. competition in their "traditional" markets. There will be efforts by other exporting nations to eliminate or limit the use of concessional sales programs.

**Domestic policy**

The Uruguay Round put domestic farm policies on the negotiating table for the first time, but little serious progress was made in reducing farm subsidies. Although the agreement called for a 20-percent cut in the aggregate measure of support, nations paying deficiency payments on 85 percent of a crop's normal area or which had a set-aside program were allowed to exclude those payments from the cuts. This meant that most U.S. and European Union farm subsidies were excluded from the subsidy cuts.

Since the Uruguay Round, the United States has passed the FAIR Act which decoupled payments to farmers from crop production. Decoupled payments are fully WTO legal with no limits on their use. Although the European Union is reducing price supports as part of its Agenda 2000, its farm payments continue to be linked to production. The European program is like U.S. farm programs from 1985 to 1996. There will an effort to drop the exclusion for deficiency payments in the presence of supply management, and possibly to further cut the allowed farm subsidies. As with export subsidies, in this round the United States can claim the moral high ground because it has already taken these steps. On the other hand, the European Union will be in an awkward position. The recent farmer protest of proposed support price reductions in Brussels illustrates the difficult situation faced by European negotiators.

**State trading**

Another area left unresolved by the previous negotiations concerns the role of state trading enterprises (STE's) in world trade. State trading enterprises are government or public agencies with exclusive control over trade by a nation. They come in many forms with very different powers. Some examples include the Canadian Wheat Board and the Japanese Food Agency. They are very common in developing nations which fear being disadvantaged in world trade. When the U.S. Export Enhancement Program was active, the United States notified the WTO that the Commodity Credit Corporation was acting as a state trading enterprise through its control on U.S. export prices and volumes. With the Export Enhancement Program suspended, the United States has withdrawn that notification.

Trading rules established by the WTO are designed to control price distortions established by governments. Such barriers are transparent in that the policy is known. State trading enterprises fit poorly into existing WTO rules because import and export decisions are not clear to outsiders. It is hard to play the trade game without knowing the rules beforehand. For example, what barriers face wheat imports into China? This is hard to answer because import decisions are made behind closed doors. This is one reason Chinese and Russian entry into the WTO had been delayed.

Tightened WTO rules on state trading is high on the U.S. agenda for the next round. Some individuals have argued for banning STE's as a WTO legal business form. The United States sees STE's as exercising undue influence on world agricultural trade through discriminatory pricing, undercutting prices, and secret trade deals. The U.S. push to put STE's high on the agenda is very controversial and upsets nations like Canada and Australia which generally share U.S. trade concerns. These nations use marketing boards to export commodities and see

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# *An introduction to agricultural labor law under the Fair Labor Standards Act*

By Susan A. Schneider

Although the majority of farm work is still performed by farm operators and unpaid workers such as family members, a significant amount of agricultural labor is performed by hired workers.[1] Hired farm workers are essential to many farming operations, and even small farming operations and "family farms" are likely to depend upon hired workers during critical production periods. For example, when targeting its loan programs to "family farms," Farm Service Agency (FSA) provides that a "family farm" is defined in part by the fact that it "[h]as a substantial amount of the labor requirements for the farm enterprise provided by ... [t]he borrower and family members."[2] Nevertheless, the operation "may use a reasonable amount of full-time hired labor and seasonal labor during peakload periods" and still retain its "family farm" classification.[3]

The importance of hired labor to agriculture means that an understanding of the basics of agricultural labor law is also important. Many farmers who have only recently expanded their operations or who have moved into the production of a more labor intensive crop may find themselves in need of good legal advice on their labor law obligations. The purpose of this article is to provide this basic understanding with regard to one of the most important federal labor statutes—the Fair Labor Standards Act. It attempts to alert attorneys to the red flags that may mean labor law violations on the part of their farmer clients and to reassure them regarding the liberal labor law exemptions that still protect many farming operations.

The Fair Labor Standards Act (FLSA)[4] sets standards for minimum wage requirements, overtime pay requirements, child labor restrictions, and certain record keeping requirements. Coverage of the statute is broadly linked to either the employee's interstate commerce connection, the sale of the goods produced in interstate commerce, or with some limitations, the enterprise's involvement in interstate commerce.[5] This article will not discuss the child labor provisions, as these demand consideration in their own right, but rather it focuses on the minimum wage and overtime requirements that may have an impact on agricultural operations.

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**Federal law vs. state law**

The FLSA expressly requires compliance with all other federal, state, and local laws that are not conflicting.[6] If any of these laws provide standards or employment requirements that exceed those required under FLSA, the higher standard is enforceable.[7] In many instances, state or local laws provide additional protections for workers, and in some instances, the exemptions provided to agricultural employers are not as broad.

**Administration of the FLSA**

The FLSA established the Wage and Hour Division as an agency within the Department of Labor.[8] This division is charged with the general administration and enforcement of the FLSA. In addition to its headquarters in Washington, D.C., there are ten regional offices and many field offices at the local level. Except for certain child labor provisions, however, the division does not have many of the powers associated with other agencies. It does not have general adjudicatory or rule-making authority. The Administrator has, however, issued various interpretive notices and opinions, which are published in the Federal Register and the Code of Federal Regulations and appear as typical regulations. Technically, these do not have the force and effect of law that official agency regulations have.[9] Nevertheless, the courts have found them to be very persuasive and have largely deferred to them as if they were official regulations.[10]

**Minimum wage provisions**

The minimum wage provision of FLSA is perhaps the most widely known employer requirement. It requires every employer, unless exempt, to pay a set minimum wage to each employee.[11] Section 213(a)(6) of FLSA, however, provides a very large exemption for agricultural employers. It provides that the minimum wage requirement does not apply to five different categories of employees "employed in agriculture."

*Employed in agriculture*

Before considering each of the five different categories of exemption, the overall requirement that the employee be "employed in agriculture" must be explored. This requires an inquiry into both the FLSA definition of "agriculture," and an analysis of the employment relationship.

"Agriculture" Under the FLSA

Given the diversity that exists within the agricultural sector, the definition of "agriculture" for these purposes is important. The FLSA defines "agriculture" as:

> farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an 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.[12]

This definition has been divided into two categories.[13] The first part of the definition, "farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities…, the raising of livestock, bees, fur-bearing animals, or poultry..." is categorized as "primary farming." An employee who performs a "primary farming" task will fit into the definition of "employed in agriculture" regardless of why or where the employment is performed.[14] "Secondary agriculture" is the second part of the definition – "any practices... performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." As noted from this language, there are additional requirements crucial to the classification of secondary agricultural work as being work identified as agricultural labor for purposes of the FLSA exemptions. This work must be either "performed by a farmer" or performed "on a farm incident to or in conjunction with" the farming operation. If it is not, the employee is not "employed in agriculture" and the agricultural exemptions from the minimum wage require-

ments will not be available to the employer.[15]

Defining the employment relationship

Particularly when a farming operation has seasonal labor needs, the farm operator may make arrangements with a "farm labor contractor" (FLC) to supply the farm with the needed crew of laborers. If the FLC is an employee of the farmer, it follows that the workers recruited by the FLC are also employees of the farmer.[16] If, however, the FLC is an independent contractor, the farmer may argue that the workers are not his/her employees. If they are not the farmer's employees, arguably, the FLSA requirements may not apply to the farmer. The only person potentially liable would be the FLC. Similarly, either the farmer or the FLC may argue that the workers are actually working as independent contractors and are not employees under the FLSA.

The courts and the Department of Labor regulations have attempted to articulate a standard for determining whether an independent contractor relationship exists, keeping in mind that there has been substantial abuse among employers seeking to use this characterization as a means for avoiding labor laws. Both have agreed that the test for independent contractor status should be based on the "economic reality" of the relationship, that is, "whether there is economic dependence" upon the farmer.[17] The regulations state that economic reality must be deduced from an evaluation of all circumstances and list six factors that are considered relevant. These factors are as follows:

(i) The nature and degree of the putative employer's control as to the manner in which the work is performed;

(ii) The putative employee's opportunity for profit or loss depending upon his/her managerial skill;

(iii) The putative employee's investment in equipment or materials required for the task, or the putative employee's employment of other workers;

(iv) Whether the services rendered by the putative employee require special skill;

(v) The degree of permanency and duration of the working relationship;

(vi) The extent to which the services rendered by the putative employee are an integral part of the putative employer's business.[18]

Even if the farmer can establish that the FLC was acting as an independent contractor and that the workers on the farm were the employees of the FLC, however, the farmer may still be liable under the FLSA requirements for employers. This result is based on the concept of "joint employment." The regulations define this concept as "a condition in which a single individual stands in the relation of an employee to two or more persons at the same time."[19] Whether a joint employment situation exists between a farmer, an FLC and an agricultural worker depends upon "all of the facts in the particular case."[20] However, once again, the determination turns on the "economic reality" of the situation, and the "ultimate question" is one of "economic dependency."[21]

Although the regulations are clear that no one factor is determinative, an "illustrative" list of seven factors is set forth. These factors are summarized as follows:

(1) Whether the farmer has the power, either alone or through control of the FLC to "direct, control, or supervise the worker(s) or the work performed;"

(2) Whether the farmer has the power, directly or indirectly, to hire or fire, modify the employment conditions, or determine the worker's wages;

(3) Whether there is a degree of permanency and duration to the relationship of the parties;

(4) Whether the services rendered by the workers are repetitive, rote tasks requiring relatively little training;

(5) Whether the activities performed by the workers are an integral part of the farmer's overall business operation;

(6) Whether the work is performed on the farmer's premises, rather than on premises owned or controlled by another business entity; and

(7) Whether the farmer undertakes responsibilities in relation to the workers which are commonly performed by employers. Examples of such responsibilities include preparing payroll records, issuing pay checks, paying FICA taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job.[22]

If it is found that a joint employment situation exists, both the FLC and the farmer will be liable for any violations of FLSA requirements. Similarly, "joint employees" count for purposes of the man-hour exemption.[23]

*Exemptions for employees employed in agriculture*

As noted, the FLSA sets forth five specific exemptions to the minimum wage requirement that are applicable to various employees who are employed in agriculture.

The first exemption applies to farming operations that do not rely upon a significant amount of non-family labor. The minimum wage requirement does not apply if the employer "did not use more than five hundred man-days of agricultural labor" during any calendar quarter during the preceding year.[24] A "man-day" is defined as a day in which an employee performs any agricultural labor for an hour or more.[25] The employment of immediate family members does not count for purposes of reaching the 500 man-days threshold.[26]

The second exemption applies to agricultural employees who are members of the farmer's immediate family.[27] These employees need not receive the minimum wage under FLSA.

The third exemption applies to certain hand harvest laborers.[28] Workers included in this exemption must be paid on a piece rate basis, and "in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment." The worker must commute daily from a permanent residence to the farm on which s/he is employed and must have been employed in agriculture less than thirteen weeks during the preceding calendar year.[29]

The fourth category of exemption applies to employees who are sixteen years of age or under and are employed as hand harvest laborers on a piece rate basis "in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment."[30] These workers fit within the exemption if they are employed on the same farm as a parent or person standing in the place of a parent, and are paid at the same piece rate as employees over age sixteen are paid on the same farm.

The fifth agricultural exemption applies to employees who are principally engaged in the range production of livestock. The employers of these workers are also exempt from the minimum wage requirement in FLSA. As the regulations explain, this exemption is dependent upon the type of work that the employee does and where this work is done.[31] As to the work that the employee does, he or she must be "principally engaged" in the production of livestock. This means that the employee's "primary duty" must be "to take care of the animals actively or to stand by in readiness for that purpose."[32] Ordinarily, primary duty means that this activity will take up more than 50% of the employee's time.[33] If this test is met, the employee may spend the rest of the employment time doing other unrelated activities.[34] As to the location of the work, the term "range" is defined generally as "land that is not cultivated." The regulations also identify it as "land that pro-

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duces native forage for animal consumption, and includes land that is revegetated naturally or artificially to provide a forage cover that is managed like range vegetation."[35] The regulations specifically provide that this exemption cannot be relied upon by feedlot operators.[36]

Although in many contexts, aquaculture falls within the definition of farming, under the FLSA exemptions, in addition to the general agricultural provision discussed above, there is a specific section that exempts many aquaculture operations. Section 213(a)(5) exempts:

> any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee.[37]

Thus, these employees are also not protected by the FLSA minimum wage requirement.

## Overtime pay

The FLSA requires many employers to pay an enhanced rate of pay, "overtime pay," for work that totals more than 40 hours per week.[38] The FLSA contains a broad based overtime pay exemption for agriculture. Section 213(b) provides that the overtime pay requirement does not apply to "any employee employed in agriculture."[39] There is no small farm/large farm distinction, nor is there any additional requirement for the exemption to apply. Section 213 also exempts certain irrigation and ditch work,[40] certain livestock auction workers,[41] certain county elevator employees,[42] employees engaged in the processing of maple sap into sugar,[43] certain workers involved in the in-state transportation of fruits and vegetables,[44] and employees employed in planting or tending trees or involved in forestry and timber operations provided that there are less than eight employees.[45] There is a special exemption with a time limitation that is applicable specifically to cotton ginning[46] and to the processing of sugar beets, sugar beet molasses, and sugar cane.[47] There is also a limited exemption for workers involved in the production, harvest, and sale of tobacco.[48]

## Enforcement

The FLSA authorizes the Administrator of the Wage & Hour Division to investigate and inspect employers' payment records in connection with the FLSA requirements.[49] If a wage violation occurs, the FLSA authorizes an employee to sue his or her employer for unpaid minimum wages or for overtime pay that was not paid.[50] The court, in its discretion, can award liquidated damages of an amount equal to the wages owed to the employee and an award of reasonable attorneys fees and costs.[51] The Secretary of Labor is also authorized to sue on behalf of aggrieved employees[52] and/or can also sue to enjoin the FLSA violations.[53] Criminal penalties can be imposed for willful and repeated violations.[54]

## Conclusion

The FLSA is one of a number of federal laws that may apply to agricultural employment. As FLSA is currently written, there are broad exemptions for agriculture. Whether this favored treatment is fully deserved is a matter of much current debate. Whether it will continue depends on Congress, although how agriculture is perceived by the public and how those in the agricultural sector treat their employees may influence Congressional action in the future. As the law stands now, however, agricultural employers enjoy many advantages over their urban counterparts. Despite this overall favorable treatment, however, particularly with regard to the minimum wage provision, a farmer may run afoul of the exemptions. For example, a finding of a joint employment relationship may dramatically change the farmer's obligations under the law. Good legal advice may be important to avoid violations.

State and local laws may strengthen provisions covered under FLSA. And, additional federal laws also govern many aspects of farm employment. For example, migrant and seasonal workers have additional protections under the Migrant and Seasonal Worker Protection Act[55]; and many working conditions are governed by requirements under the Occupation Safety and Health Act.[56] If the agricultural operation employs children, provisions within FLSA, but not discussed herein, may apply. Farmers and their advisors are well advised to keep abreast of agricultural labor law developments.

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[1] Jack L. Runyan, *Profile of Hired Farmworkers, 1996 Annual Averages*, 1, USDA, Econ. Res. Serv., Agric. Econ. Rep. No. 762.

[2] 7 C.F.R. § 1941.4 (definition of "family farm," subpt. d)(1999).

[3] 7 C.F.R. § 1941.4 (definition of "family farm," subpt. e)(1999).

[4] 29 U.S.C. §§ 201-219.

[5] 29 U.S.C. § 206. For exceptions to "enterprise" coverage, see 29 U.S.C. §203(s).

[6] 29 U.S.C. § 218(a).

[7] *Id.*

[8] 29 U.S.C. § 204(a)

[9] *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944).

[10] *Id.*

[11] 29 U.S.C. § 206.

[12] 29 U.S.C. § 203(f).

[13] *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 775, 69 S.Ct. 1274 (1949); *Bayside Enterprises, Inc. v. N.L.R.B.*, 429 U.S. 298, 97 S. Ct. 576 (1977); *Holly Farms v. N.L.R.B.*, 517 U.S. 392, 116 S. Ct. 1396 (1996). The Department of Labor regulations also adopt this two-part analysis. *See* 29 C.F.R. §§ 780.104, 780.105 (1999).

[14] 29 C.F.R. § 780.106 (1998).

[15] 29 C.F.R. §§ 780.128-129 (1998).

[16] 29 C.F.R. § 500.20(h)(4)(1998).

[17] *U.S. Dept. of labor v. Lauritzen*, 835 F.2d 1529, 1538 (7th Cir. 1987), cert. denied, 488 U.S. 898 (1988); *Beliz v. McLeod*, 765 F.2d 1317, 1329 (5th Cir. 1985); *Castillo v. Givens*, 704 F.2d 181, 192 (5th Cir.), cert. denied, 464 U.S. 850 (1983); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 756 (9th Cir. 1979); 29 C.F.R. § 500.20(h)(4)(1998).

[18] 29 C.F.R. § 500.20(h)(4)(1998).

[19] 29 C.F.R. § 500.20(h)(5)(1998).

[20] *Id.*

[21] *Id*.

[22] *Id.*

[23] 29 C.F.R. § 780.305(c)(1998).

[24] 29 U.S.C. § 213(a)(6)(A).

[25] 29 U.S.C. § 203(e)(3).

[26] 29 U.S.C. § 203(u).

[27] 29 U.S.C. § 213(a)(6)(B).

[28] 29 U.S.C. § 213(a)(6)(C).

[29] *Id.*

[30] 29 U.S.C. § 213(a)(6)(D).

[31] 29 C.F.R. § 780.323 (1998).

[32] 29 C.F.R. § 780.325(a).

[33] *Id.*

[34] 29 C.F.R. § 780.325(b)(1998).

[35] 29 C.F.R. § 780.326(1998).

[36] 29 C.F.R. § 780.329(c)(1998).

[37] 29 U.S.C. § 213(a)(5).

[38] 29 U.S.C. § 207(a).

[39] 29 U.S.C. § 213(b)(12).

[40] *Id.*

[41] 29 U.S.C. § 213(b)(13).

[42] 29 U.S.C. § 213(b)(14).

[43] 29 U.S.C. § 213(b)(15).

[44] 29 U.S.C. § 213(b)(16).

[45] 29 U.S.C. § 213(b)(28).

[46] 29 U.S.C. § 213(i).

[47] 29 U.S.C. § 213(j).

[48] 29 U.S.C. § 207(m).

[49] 29 U.S.C. § 211.

[50] 29 U.S.C. § 216(b).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] 29 U.S.C. § 216(a).

[55] 29 U.S.C. §§ 1801-1872.

[56] 29 U.S.C. §§ 651-678.

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marketing boards as legitimate institutions that reflect their historical, cultural, economic, and social experiences. They argue that boards are no more likely to engage in unfair trade practices than the large private exporting firms in the United States.

**Technical barriers and sanitary and phytosanitary barriers**

Technical barriers to trade (TBT's) and sanitary and phytosanitary (SPS) barriers have long existed. So long as traditional trade barriers like quotas and tariffs throttled agricultural trade, TBT's and SPS barriers remained low on the agenda. As traditional barriers are being reduced, TBT's and SPS barriers have emerged as major stumbling blocks to further trade liberalization.

Such barriers are WTO legal if used to protect legitimate animal, human, and plant health and safety and not as disguised protection. Separating legitimate health and safety concerns from disguised protection is difficult. The Uruguay Round Agreement attempted to reform the rules on using these barriers by introducing the concepts of scientific basis, acceptable risk, regionalization, and harmonization or equivalence. Barriers are to have a scientific basis, reflect a risk acceptable to society, to be harmonized or made equivalent across nations, and to allow open trade between disease free regions.

The increase in TBT and SPS trade disputes in recent years illustrates that establishing rules on TBT and SPS barriers will be difficult. Fundamental questions must be addressed before making effective rules. Which nation's science serves as the standard? What happens when scientists disagree on the evidence? For example, is beef treated with hormones safe for human consumption? The U.S. Government and most American scientists say yes. European governments and many European scientists say no. Are genetically modified corn and soybeans safe for the environment and people? Current U.S. testing done by companies producing these products says yes. What if the answer later turns out to be no? Do European consumers have the right to know if the product they are consuming contains genetically modified material or is such labeling a trade barrier? What is an acceptable risk? Does it vary by commodity, by society? Is the U.S. zero tolerance law defensible to the WTO? What are equivalent processes? Is chlorine dipped chicken equivalent to chicken treated in other ways?

These are extremely difficult questions to answer, especially in international trade negotiations. Whereas researchers may disagree on the magnitude of impacts from a traditional trade policy like a tariff, the directions are clear. Such is not the case for TBT's and SPS barriers. By their nature they involve complex and value-laden differences among nations on a case by case basis. Designing workable trade rules will be exceedingly difficult, but they are necessary if nations are to be prevented from undoing previous trade liberalization through disguised protection.

**Dispute settlement**

The Uruguay Round tried to improve the dispute settlement process. Under the old rules all parties, including the offending nation, had to agree to a dispute panel's conclusion. Thus, the offending nation could block any decision if it so chose. Now there is a majority rule.

The process has been improved. That more disputes are being taken to the WTO reflects increased confidence in the process. Yet there is dissatisfaction, and there will be efforts to improve the process further. A major concern is that nations use the procedure to delay dealing with an unfavorable ruling.

From the U.S. viewpoint, two critical tests of the new dispute process have exposed weaknesses. Twice the WTO has ruled against the European Union's ban on import of hormone treated beef and its banana policy. Yet those barriers remain.

In the banana case, the European Union changed its import rules, but the new rules violated the WTO rules. Will new rules satisfy the WTO, or will the process be repeated and repeated year after year? The fear is that other countries will copy this strategy. Following an adverse WTO decision a small policy change will be done, a new complaint and panel will follow. Meanwhile, the violation continues.

On hormones in beef, the United States interpretation was that it won and that the ban would be removed. The European interpretation was that it had not lost. Its scientific evidence was not sufficient to sustain the policy, but neither was the case clear for an end to the ban. The European view was that it would restudy the issue to obtain new evidence while leaving the ban in place. After 11 years and two WTO panels, the United States recently moved to impose penalties on European imports in retaliation.

The precise nature of improvements to the dispute settlement process cannot be foreseen. It would not be surprising to see specific time deadlines for decisions and policy changes considered. In U.S. trade legislation there are specific deadlines for policy recommendations and actions.

**Conclusion**

The general outline of the agenda for the next trade negotiations can be foreseen. Which issues remain on the table and how they will play out cannot be known.

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An employer may deduct lawful charges or indebtedness and does not need to pay any compensation not fully earned. Except for customary deductions, authority for permitting the employer to charge the employee for things such as lost equipment or damaged property of the employer should be in writing.

An employer who fails to pay wages on termination "without a good faith legal justification" is liable for a penalty equal to the greater of 50% of wages due or ten days' wages calculated at the rate the employee was being paid at the time of termination; provided the employee has made written demand for the wages within sixty days following job separation stating where payment can be received. Today, a "good-faith mistaken belief" that money could be withheld is not enough to avoid the penalty. The employee only needs to demonstrate that compensation is willfully withheld without a good cause.

An employee can bring an action in court for wages (and the penalty) without going through a government administrative agency. The "winning" (construed as "prevailing") party in a suit can collect attorneys fees for pursuing the wage claim, but not other related claims. If a claim for wages is dismissed as part of a settlement, Colorado's Supreme Court has held there is no "winning" party entitled to collect attorney fees with respect to the wage claim even if one party won on other claims.

*—James B. Dean, Denver, CO*