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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.

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New hire reporting requirements

All employers, including agricultural employers,[1] are now subject to the requirements of a new federally-mandated program. Under the Personal Responsibility and Work Opportunity Act of 1996 (federal welfare reform, hereinafter "Act"),[2] each state has been required[3] to establish a State Directory of New Hires by October 1, 1997.[4] The purpose of the Directory is to create a database from which employment information can be obtained in order to facilitate the collection of child support payments.

The Act requires employers to submit to their state's Directory the following information on all newly hired[5] employees:

- employee's name
- employee's address
- employee's social security number
- employer's name
- employer's legal or mailing address
- employer's Federal Employer Identification Number (FEIN) issued for federal income tax purposes.

In addition to the above information, a state may require additional information to be reported.[6]

Under the Act, the existence of an employer-employee relationship is determined by federal tax law.[7] Under this law, a person is an employer if the person has control over the payment of wages for services rendered.[8] The definition of employer also includes governmental entities and labor organizations.[9] A person is an employee if that person renders services to an employer in return for payment and is not considered an independent contractor.[10]

The process used to differentiate between an employee and an independent contractor under federal tax law, and therefore the Act, is different from that used for purposes of the Fair Labor Standards Act and the Migrant and Seasonal Worker Protection Act. For purposes of the Act, whether a person is considered an employee or an independent contractor depends on a consideration of the following 20 factors:

1. Who instructs the person regarding when, where, and how to perform the service?
2. Does the employer train the person to ensure that the service is performed in a particular manner?

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Sale of farm program payments

Advertisements from investors interested in purchasing the stream of payments that come from Production Flexibility Contracts (PFCs) between farmers and the Commodity Credit Corporation (CCC) can be found in many farm publications. There appear to be various individual and institutional investors interested in purchasing PFC contract rights, and a wide range of discount rates (the purchase price compared to the payments) are offered. Similarly, the terms of the sale can greatly vary. However some general legal issues and concerns are associated with a PFC sale. This article discusses these general issues and concerns and may be of assistance to those advising farmers who are considering selling their right to PFC payments.

When an investor purchases the stream of payments that come from a PFC, what the farmer is selling is his or her right to receive the PFC payments over the term of the contract. In some ways, this may be similar to a person selling a right to receive payments under a personal injury settlement or an annuity. In this regard, the first consideration is whether it is financially advisable. In all cases, the purchase price that the farmer receives will be far less than the total of the payments that he or she is entitled to receive under the contract. The only advantage is that it comes at one time, up front, rather than over the term of the PFC contract. A potential

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3. Are the person's services integrated into the employer's business operations?
4. Are the services rendered personally?
5. Does the employer hire, supervise, and pay the person?
6. Is there a continuing relationship between the employer and the person?
7. Are there set hours of work?
8. Must a worker devote full time to the employer's business?
9. Is the work performed on the employer's premises?
10. Does the employer determine the order or sequence set of the work?
11. Must the person submit regular and/or written reports to the employer?
12. Is payment made by the hour, week, or month, instead of by the job or by straight commission?
13. Does the employer pay the person's business or traveling expenses?
14. Does the employer furnish the materials or tools used by the person to perform the work?
15. Has the person made a significant investment in facilities used to perform the services?
16. Can the person realize a profit or loss as a result of his or her services?
17. Can the person work for more than one firm at a time?
18. Does the person make his or her services available to the general public?
19. Does the employer have the right to discharge the person for failure to perform according to the employer's instructions?
20. Does the employer have the right to terminate the relationship with the person for any reason without incurring liability?

For numbers 1-14 and 19-20 above, if the answer is yes, it suggests that the person is an employee. If the answer is no, it suggests that the person is an independent contractor. For numbers 15-18 above, if the answer is yes, it suggests that the person is an independent contractor. If the answer is no, it suggests that the person is an employee. [11] However, "no one of these factors in isolation is dispositive; rather, 'it is the total situation that controls' "[12]

In the case of a crew leader,[13] federal law specifically states the status of the employer-employee relationship.[14] Individuals provided by the crew leader to perform agricultural labor for another person are considered employees of the crew leader and not the person for whom the labor is performed. Also, with respect to labor performed as a member of the crew, a crew leader is not considered an employee of the person for whom the labor is performed.[15]

The new hire information may be reported on a W-4 form or an equivalent form, and may be transmitted by first-class mail, magnetically, or electronically.[16] An employer must transmit the information to an address designated by the state no later than twenty days after the employee's hire. If an employer transmits the information magnetically or electronically, the employer must submit two monthly transmissions not less than twelve days nor more than sixteen days apart. Despite these time requirements, a state may require transmission within a shorter period of time.[17]

If an employer has employees in more than one state, that employer may designate one of those states to receive all of the employer's new hire reports. For example, if an employer has some employees who work in Pennsylvania and some who work in Maryland, that employer has to report the required information only to the new hire program in Maryland or the new hire program in Pennsylvania, not both. However, the employer must report the information on all employees, regardless of the state in which they work, and multi-state reports can be made only by magnetic or electronic means. Also, the employer making such a multi-state report must notify the U.S. Secretary of Health and Human Services in writing as to which state the employer will be sending new hire reports.[18]

Information transmitted to a state new hire program may be used for several different purposes. The primary purpose is the enforcement of child support orders. An agency that administers its state's new hire program must compare social security numbers reported to the program with social security numbers of individuals required to provide child support under a support order. When a match is found, the agency administering the state's new hire program must notify the agency administering the collection of child support of the employee's name, address, and social security number, and the employer's name, address and FEIN. The agency administering the new hire program must also direct the employer to withhold from the income of the employee an amount equal to the periodic child support obligation of the employee.[19]

The agency administering the state's new hire program must also transmit the new hire information it has collected to the National Directory of New Hires. The information will then be compared to information that the U.S. Department of Health and Human Services has collected regarding individuals required to pay child support throughout the country.[20]

In addition to its use for child support purposes, new hire information collected pursuant to the Act may be used by states to administer Medicaid, food stamp, unemployment compensation, workers' compensation, and other similar programs. A state may impose a civil money penalty that cannot exceed $25 per violation for failure to comply with new hire program requirements. In the case of a conspiracy to violate the requirements between the employer and employee, the state may impose a civil money penalty that cannot exceed $500 per violation.[22]

The new hire reporting requirements are designed not to burden employers but to provide for enforcement of existing child support obligations. Attorneys should emphasize to their farm clients that agricultural employers must comply with the new hire requirements, even if they are exempt from other labor requirements. Also, prior to counseling clients regarding a state's new hire provisions, attorneys should determine if and how the state's new hire program imposes requirements in addition to those of the Act.

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Interpretation of Pennsylvania's law governing division fences

There where it is we do not need the wall:
He is all pine and I am apple orchard.
My apples trees will never get across
And eat the cones under his pines, I tell him.
He only says, 'Good fences make good neighbours.'
Robert Frost, "Mending Wall"

Do good fences really make good neighbors? In Pennsylvania, perhaps, only if the adjacent landowners both own livestock. Until the Pennsylvania's Superior Court decision in *Fogle v. Malvern Courts, Inc.*, 701 A.2d 265 (1997), courts and lawyers having read Pennsylvania's Fence Law, title 29, Purdon's Statutes, section 41, concluded that the cost of erecting and maintaining a line or division fence between two owners of improved and occupied land adjacent to one another was shared equally between the adjoining landowners. A person could be relieved of liability for his share of maintaining the fence, but only by the consent of the adjoining owner. 29 Purdon's Stat. § 41. However, *Fogle* addressed the question whether this shared obligation could be imposed on a property owner who had no reason to build the line or division fence as the owner did not keep livestock on his property. Was the statute's terms to be given their plain meaning, or did its legislative intent support a different conclusion?

The parties in *Fogle v. Malvern Courts* lived in a non-agricultural, residential neighborhood on land adjacent to each other. Plaintiffs erected a division fence on the boundary line between their property and the defendant's property where no fence previously existed. Plaintiffs brought suit under Pennsylvania's Fence Law, title 29, Purdon's Statutes, and asked the court to enter an order to require the defendants to pay an equal share of the cost of erecting the fence. The parties filed cross-motions for summary judgment. The court granted plaintiffs' motion for summary judgment, and the defendants appealed.

The appellate court's standard of review of the grant of summary judgment is to view the record in the light most favorable to the non-moving party. The trial court's judgment will not be disturbed unless the reviewing court determines that there was a genuine issue of material fact or clear error of law. *Philco Ins. Co. v. Presbyterian Med. Serv.*, 444 Pa. Super. 221, 663 A.2d 753 (1995). The parties in *Fogle* agree on the facts. Therefore, the task of the appellate court is to determine whether the trial court applied Pennsylvania's fence law correctly by its interpretation of the statute.

In interpreting the statute, the appellate court first considered the plain meaning of the statute. Plaintiffs argued that since the fence was built on the property line and the defendant owned adjoining property, the obligation to share in the cost of erecting and maintaining the fence was settled. The court was not satisfied and addressed the issue of whether the statute, when viewed in its entirety, would require a shared obligation when there is no reason for the defendant property owners to build such a fence in the first instance.

The court addressed the remaining language of title 29, Purdon's Statutes, section 41 and noted if an adjoining property owner fails to erect or maintain his portion of the division fence, the aggrieved party must notify the county surveyor to examine the fence and make a determination whether it is sufficient. If the result is that the fence is not sufficient, the surveyor then determines if a new fence is required, or the fence can be repaired. This determination of sufficiency led the court to conclude that the division fence is to be constructed and maintained for a particular purpose which can only be gathered from its legislative history and earlier case interpretations.

The court noted from earlier versions of the law that the purpose of the fence law was to resolve disputes involving trespassing livestock. In *Barber v. Mensch*, 157 Pl. 390, 27 A.708 (1893), a case that interpreted an earlier version of this requirement, the court held to be "sufficient" a division fence must prevent livestock from entering the adjoining owner's land and triggering the owner's common law liability for damage caused by his trespassing livestock. Finding that there is no other discernible purpose for the fence law but to protect property from trespassing livestock, the court concluded that the obligation to share in the cost of erecting and maintaining the fence would not apply to an adjoining property owner who does not keep livestock on his property. This conclusion, the court noted, avoids the unreasonable result of requiring every owner of improved and occupied property to pay a portion of the cost as a division fence that he or she neither wants nor needs. As supported by decisions in other states, this result would be unreasonable.

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NEW HIRE/*Continued from page 2*

[1] 26 U.S.C.A. § 3401. It appears that the intent of the Act is to include all employers, even if the employer could be indirectly exempted by other statutory provisions. For instance, some employers may not be "employers" for withholding tax purposes because of the amount and type of wages paid. However, these employers would probably be subject to the new hire requirements.

[2] 110 Stat. 2105 (1996).

[3] If a state fails to create a Directory of New Hires, the federal government will withhold money otherwise available to the state in the form of a "family assistance grant." 42 U.S.C.A. § 603.

[4] 42 U.S.C.A. § 653a.

[5] The Act does not define "newly hired." Therefore, a state may apply its own definition. For instance, Pennsylvania defines a "newly hired" employee as any employee hired since January 1, 1998 as well as any employee who has returned to work after being laid-off for more than 30 days. 23 Pa. Cons. Stat. Ann. § 4392.

[6] For instance, Pennsylvania also requires the reporting of the employee's date of birth and date of hire, as well as the name and telephone number of an employer contact person. Id.

[7] 42 U.S.C.A. § 653a.

[8] *Supra* note 1.

[9] 42 U.S.C.A. § 653a. The definition of "labor organization" is that used in the National Labor Relations Act (NLRA) and includes "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C.A. § 152(5). As stated in note 1, *supra*, it appears that all labor organizations are subject to the Act. However, an argument could be made that, because a farm labor union is not considered a "labor organization" for NLRA purposes because of the fact that agricultural laborers are exempt from NLRA provisions, a farm labor union might not be a "labor organization" and therefore not an "employer" for New Hire Directory purposes.

[10] 26 U.S.C.A. § 3401.

[11] For a discussion of these factors, see Rev. Rul. 87-41, 1987-1 C.B. 296. *See also*, John C. Becker & Robert G. Haas, *The Status of Workers as Employees or Independent Contractors*, 1 Drake J. Agric. L. 51 (1996).

[12] *E. Inv. Corp. v. U.S.*, 49 F.3d 651, 653 (1995)

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How might an increase in the minimum wage affect U.S. farms?

By Martin Shields and Jill Findeis

In March, 1998, legislation was introduced in the U.S. Congress proposing to increase the federal minimum wage to $6.15 per hour, a $1 increase over its current level. If the legislation passes, the new wage will be phased in by January 1, 2000. While supporters of the increase believe a higher minimum wage will be a significant step toward reducing family poverty, opponents argue that higher labor costs will force businesses to lay off workers, thus hurting the very people the legislation seeks to help.

In this article we examine the arguments surrounding the proposed minimum wage increase, emphasizing its potential effects on both agricultural producers and workers in Pennsylvania. Because the effects of the minimum wage increase can be influenced by a number of factors, including U.S. and Pennsylvania law, farm-level labor demand, and the extent to which the work is seasonal or year-round, it is difficult to predict the exact long-term effects of the proposed wage hike.

Minimum Wage and the Fair Labor Standards Act of 1938

A guaranteed minimum hourly wage and maximum work week were important issues during the 1930s. On June 25, 1938, President Roosevelt signed into law the Fair Labor Standards Act of 1938 (FLSA), thus marking a milestone in the history of American labor. The overarching purpose of the law is to maintain a standard of living necessary for the health, efficiency, and general well-being of workers. In addition to establishing a minimum wage, the broad-sweeping act contains provisions and standards concerning equal pay, overtime pay, record keeping, and child labor.

Since its enactment in 1938, the minimum wage has been increased 18 times, from $0.25 per hour to its current level of $5.15 per hour. In general, the Act applies to all workers who help produce goods for interstate commerce. There are, however, some instances where agricultural labor is exempt from the requirements. Perhaps the most important exemption is that the minimum wage requirement applies only to those employers with more than 500 man-days of hired labor in any calendar quarter of the preceding year. In this context, a "man-day" is any day an agricultural employee works at least one hour. For example, a farm that had 10 employees working 5 days a week for a full calendar quarter of 13 weeks would be required to pay the minimum wage, as this level of staffing would represent 650 man days (10 employees x 5 days x 13 weeks = 650 man-days). Although the proportion of farms in the U.S. that meet this requirement is small, these farms hire a surprisingly large proportion of the total number of hired farm workers.

While the data indicate that many farm employees are covered by the minimum wage law, many are not. In instances where the minimum wage law is not binding, the FLSA provides individual states flexibility in setting their own minimum wage (states are always free to set a minimum wage above the national level). For example, according to Pennsylvania's minimum wage law, employment in agriculture is exempt from both the minimum wage and overtime wage provisions. Still, the law is not steadfast. For instance, an employee considered a "seasonal farm laborer" under Pennsylvania's Seasonal Farm Labor Act must be paid at least the minimum wage, with no consideration given to the number of hours worked. A seasonal farm laborer is loosely defined as one who works 150 days or less in agriculture. According to data from the USDA, more than 31 percent of Northeast II (Northeast II includes Pennsylvania, Maryland and Delaware) farm workers employed in July, 1997 fell under the definition of seasonal.

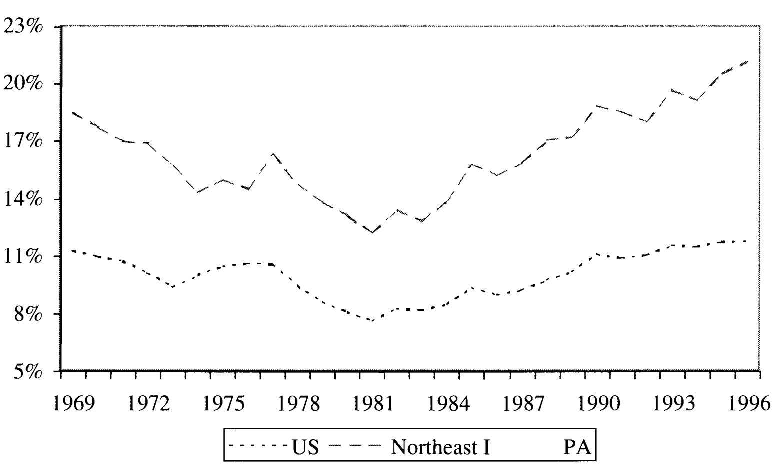
Average farm wages currently exceed the proposed wage

Farm labor represents an important cost to agricultural employers. Figure 1 shows labor's share of total farm expenditures in Pennsylvania, the Northeast and the U.S. Focusing on Pennsylvania, labor costs remained fairly steady at about 13 percent of total expenditures for the period 1969-77. This share then dropped sharply until 1981, after which it steadily increased. Currently, farm labor accounts for about 13.3 percent of total farm expenditures in Pennsylvania.

Just as other farm inputs have become more expensive, the average wage paid for hired farm workers in the U.S. has generally increased over time, although at a rate less than inflation. Figure 2 shows the average July hourly wage paid to farm workers for the U.S., and the Northeast I and Northeast II regions for the years 1982-97.

Figure 2 shows recent trends in the federal minimum wage. In 1982, the average farm wage of $4 per hour was more than 31 percent higher than the minimum wage. The difference between the minimum wage and the average farm wage peaked in 1995, when the average wage was $6.44 per hour and the minimum wage was $3.80 per hour. After the most recent increase in the minimum wage, the average farm wage of $6.90 per

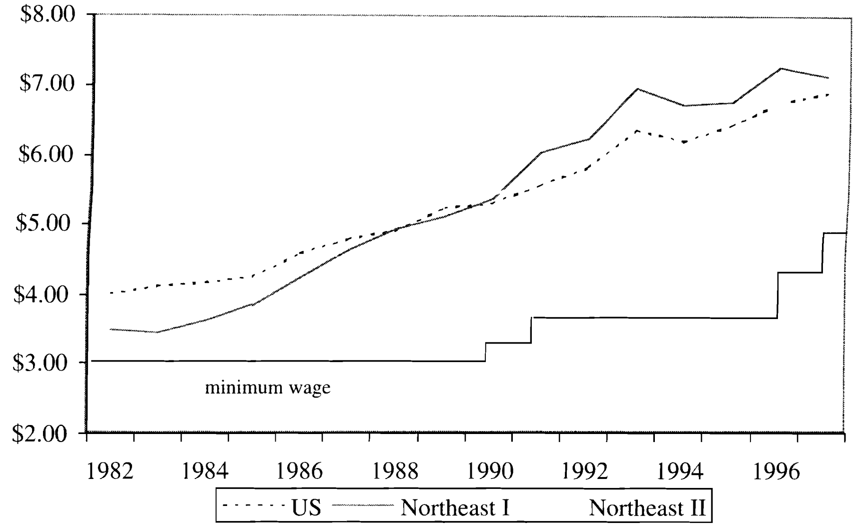
Fig. 1 Labor's share of farm expenses



Source: Bureau of Economic Analysis, Table CA45

Martin Shields is Assistant Professor of Agricultural Economics and Jill Findeis is Associate Professor of Agricultural Economics, Dept. of Agricultural Economics and Rural Sociology, The Pennsylvania State University, University Park, PA.

Fig. 2 Average July hourly wage



Source: *Farm Labor* (Select Years), National Agricultural Statistics Service, USDA

hour was about 34 percent higher than the minimum wage, roughly comparable to the situation in 1982.

At first blush, the data seem to suggest that increasing the minimum wage would have little impact on farm costs; after all, if farm labor is earning more than the minimum wage, a small increase would seem to have no real effect on labor expenses. It is important to note, however, that Figure 2 presents the *average* farm wage. Thus, this wage series reflects the cost of all hired labor, including supervisors, who earn a wage much higher than field and livestock labor. The implication is that there may be a substantial number of farm workers earning the minimum wage or even less. Consequently, any law increasing the minimum wage could have substantial impacts on farm employment and farm earnings.

This point becomes apparent in Figure 3, which shows that the average wage rate varies by type of work. Here, we see that the average wage for a farm supervisor in the U.S. exceeds $10 per hour. In comparison, the hourly wages of field and livestock workers are about $6.50 per hour, a rate only slightly greater than the proposed minimum wage. Because the average wage for nonsupervisory employees is much closer to the proposed minimum wage, there is a distinct possibility that the new wage will put upward pressure on the wage rate for those employees.

Basic economics of the minimum wage

Proposals to raise the minimum wage are often politically popular because many people believe that a higher wage will help redistribute income and reduce poverty, especially in a time of economic growth. Summarizing this sentiment, one White House official commented that the proposed wage hike "ensure(s) that as the recovery goes forward people at the low end of the income scale will share in the benefits."

If the minimum wage were to be raised today, about 12 million workers would be affected nationally. For a worker who is now paid the minimum wage for a 40-hour work week, the proposed increase would mean an annual pay increase of $2,080 to a total of $12,792, a jump of nearly 20 percent. Based on this casual analysis, increasing the minimum wage appears to be an effective way of providing what many call a "living wage."

Still, the proposed legislation has its detractors, including a number of prominent economists who argue that an increase in the minimum wage will lead to an increase in unemployment. The reasoning is straightforward. Businesses are no different from people in that if something becomes relatively more expensive, they typically respond by buying less of that product. If we think of the minimum wage as the price of labor, a wage increase will cause many businesses to hire less labor. The result is that the number of people employed will decrease.

Compounding the problem is that a higher minimum wage may entice some people not previously in the labor force to begin looking for work–the prospects for higher starting pay serves as an incentive to seek a job. The result is an increase in the labor supply at the same time that there is a decrease in the quantity of labor demanded. In this case there are more people looking for jobs than there are jobs available, and unemployment increases.

But increased unemployment is just one aspect that concerns opponents of an increase. While many workers will indeed benefit from the increased wage, it is argued that businesses will have to cut back the number of entry-level job opportunities they offer. The primary concern is that low-skilled workers with little job experience will be unable to compete for scarcer jobs, thus cutting off a potential path to prosperity. The end effect is that

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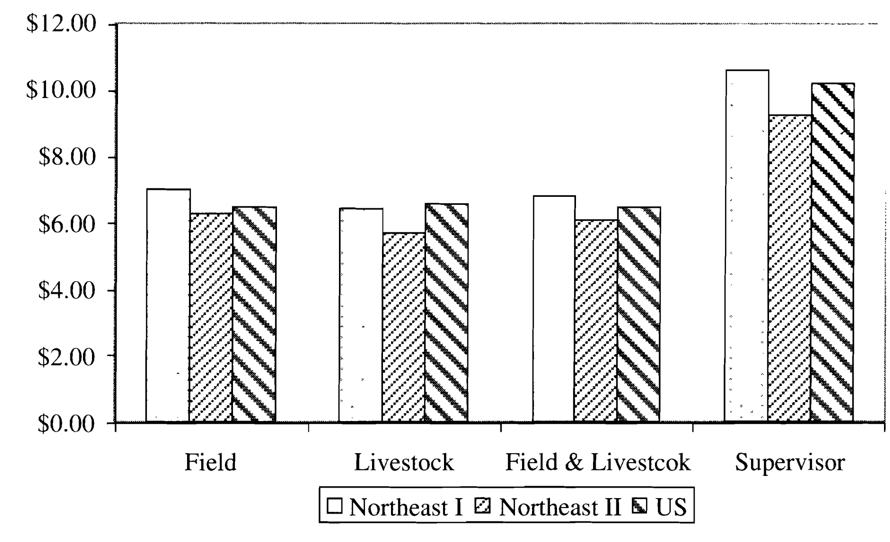
Fig. 3 US farm worker wage rates



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MINIMUM WAGE/*Cont. from page 5*
the proposed legislation could end up most hurting the very individuals it seeks to help.

Of course, arguments on both sides of the issue are theoretical ones. Is there any historical evidence supporting the belief that a higher minimum wage will increase unemployment and reduce economic opportunity. Or, alternatively, is there any evidence suggesting a higher minimum wage reduces poverty? While much research has been done addressing these topics, the true impacts of a change in the minimum wage are hotly debated.

Consider the claim that an increase in the minimum wage will reduce employment opportunities. Until recently, most studies conducted over the past 25 years consistently concluded that a 10 percent increase in the minimum wage would result in a corresponding 1 percent to 2 percent decline in entry-level employment opportunities, with each percentage point representing about 120,000 jobs. However, recent research by Princeton University economists David Card and Alan Krueger questions the traditional conclusions that higher minium wages will lead to increased unemployment. Comparing fast food employment in a state where the minimum wage was increased (New Jersey) with a state where the wage remained unchanged (Pennsylvania), Card and Krueger found "no evidence that the rise in New Jersey's minimum wage reduced employment at fast food restaurants in the state." While the methodology underlying this finding has been questioned by some, several other studies have agreed with the overall findings of Card and Krueger. The upshot of these contradictory results is that it becomes difficult to predict the employment effects of an increase in the minimum wage.

Is the minimum wage a moot point?

Clearly a discussion of the effects of the minimum wage on employment would be irrelevant if the minimum does not impose a binding constraint on wages. Currently, the minimum wage does not constrain wages in many Pennsylvania labor markets. Due to low unemployment rates of between 4 and 5 percent and an excess demand for unskilled labor in much of the state, wages for low-skilled labor increased to levels significantly higher than the minimum wage. In these labor markets, the proposed legislation is essentially a moot point, as it would have little effect on the observed market wage.

These same labor market conditions make it more difficult for many farms in Pennsylvania to find farm workers. A survey conducted several years ago at Penn State showed that many Pennsylvania farms, and particularly those in southeastern Pennsylvania, have difficulty hiring workers. Farm representatives responding to the survey noted that it was becoming increasingly difficult to hire the workers they need, because the nonfarm sectors often pay higher wages, have more reasonable work hours, and have easier work. These conditions make it difficult for farms to compete.

How might rural labor markets respond to an increase in the minimum wage?

Although the economic arguments just given are fairly straightforward, the unique status of agriculture under the minimum wage law muddies the analysis. Specifically, given the fact that a large proportion of agricultural labor is not subject to the minimum wage law, we can envision that there are effectively two broad rural labor markets: one market where the minimum wage is applicable and a second labor market where it is not. This notion of a dual labor market gives rise to a number of complicating factors that must be considered with respect to both labor supply and labor demand.

Concerning the nonfarm labor market, suppose we accept the conventional wisdom that a higher minimum wage will cause industries required to pay the minimum wage to reduce their labor requirements. As businesses pare their labor force, it is reasonable to expect the local unemployment rate to increase. In this situation, the number of people who want to work exceeds the number of available jobs.

Turning to the farm labor market, if agricultural hires are *not* subject to the minimum wage law, it follows that there should be an increase in the number of workers available to work on farms; in other words the *agricultural* labor supply increases. Because an agricultural employer would then have a larger labor pool from which to choose, it is quite possible that the employer could actually attract workers with a *lower* wage than was previously required; for many workers, a low-paying job is better than no job. In this scenario, farms may be better off because they can reduce their labor costs.

But this is still not the whole story, and even those farms not subject to the minimum wage law could be adversely affected by the proposed increases. In rural areas, farms must compete with other local (nonfarm) businesses when hiring their workers. If wages are the same in the farm and nonfarm sectors, then workers may be indifferent to where they work – they may not care if they work in a local convenience store or on a farm.

Now, suppose the minimum wage increases and the convenience store is suddenly required to pay higher wages while the farm is not. This will have two effects. First, the convenience store will want to retain (and attract) the best workers available. Thus, if the store is forced to lay off workers, it is likely to shed its most marginal employees. It is these unskilled workers who then become the additional farm labor supply. The second effect is that the best farm workers may be attracted to the higher wages offered in nonfarm employment. Together, these developments could result in a dramatic decline in the quality of farm workers. If farms are to successfully compete for quality labor, it may be necessary to offer higher wages, even if there is no mandated wage rate.

Impacts of a higher minimum wage depend on local factors

Based on this discussion, it is obvious that it is difficult to predict how U.S. farms and farm workers will be affected by an increased minimum wage. While proponents tout a higher minimum wage as an effective means of alleviating poverty, basic economic theory predicts that an increased wage will raise farm costs, forcing agricultural employers to lay off some workers. In this article we have raised several questions about the local labor market that should be asked to better understand potential impacts.

- First, to what extent is agricultural labor subject to the minimum wage legislation? If farms are exempt, the effects may be limited.
- Second, is the minimum wage binding? If agricultural employers are already paying higher wages, there should be few effects.
- Third, do extensive nonfarm employment opportunities exist? Farming is hard work. If local unemployment is low and is possible for local labor to get higher wages in alternative occupations, then farmers may need to offer higher wages to compete for the best workers.

Policy makers, farmers and concerned citizens need to carefully examine these issues to fully comprehend the potential impacts of a higher minimum wage.

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[1]There are several other specific exemptions from the minimum wage set at the federal level relevant for agricultural situations, mostly relating to family labor. For details, see "Raising the Minimum Wage and the Impact on U.S. Farms" by Jill Findeis and John Beck in *Farm Economics*, Sept./Oct. 1995

NEW HIRE/*Cont. from p. 3*

quoting *Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947).

[13] A crew leader is "... an individual who furnishes individuals to perform agricultural labor for another person if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by them and if such individual has not entered into a written agreement with such person whereby such individual has been designated as an employee of such person . . ." 26 U.S.C.A. § 3121(o).

[14] "Rules similar to the rules of section 3121(o) shall apply for purposes of this chapter." Therefore, § 3121(o) applies to the definitions of "employer" and "employee." 26 U.S.C.A. § 3401(h).

[15] 26 U.S.C.A. § 3121(o).

[16] Some states may design their own form. However, it is the decision of the employer as to which form to use. Also, the state may design its own requirements for magnetic or electronic submission.

[17] 42 U.S.C.A. § 653a.

[18] *Id.*

[19] *Id.*

[20] 42 U.S.C.A. § 653.

[21] 42 U.S.C.A. § 653a.

[22] *Id.*

Federal Register *in brief*

The following is a selection of items that were published in the *Federal Register* from May 22 to June 21, 1998.

1.Farm Service Agency; amendment to cotton warehouse regulations for the purpose of defining "unnecessary delay;" proposed rule; comments due 7/27/98. 63 Fed. Reg 28488.

2.Farm Service Agency; post bankruptcy loan servicing notives; final rule; effective date 5/29/98. 63 Fed. Reg. 29339.

3.Conservation Reserve Program; solicitating proposals for the Conservation Reserve Enhancement Program. 63 Fed. Reg. 28965.

4.CCC; Agreements for the development of foreign markets for agricultural commodities; final rule; effective date 5/29/98. 63 Fed. Reg. 29938.

5.CCC; Amendment to production flexibility contract regulations; final rule; effective date 6/8/98. 63 Fed. Reg. 31102.

—LindaGrim McCormick, Alvin, TX

PFC/*Cont. from page 1*

disadvantage is that there may be negative tax consequences to receiving this income at once, and this consequence should be considered when evaluating the proposed sale.

There are two fundamental differences, however, between selling rights under a PFC and selling rights under most other contracts. First, the PFC is tied to the land that is operated by the farmer. By selling the PFC payments, the farmer is bound to continue to own and operate the land subject to the PFC, and the farmer's rights with regard to that land are severely restricted. This is emphasized in several of the documents reviewed for this article. Under these documents, the farmer cannot "lease, sell, mortgage, encumber, transfer, assign, or convey all or any portion" of the land without the written consent of the investor.

Second, according to the terms of a PFC, the farmer has a continuing obligation to earn the payment each year. The contract with the investor does not affect the contract between the farmer and the CCC. When the farmer sells the right to receive the payment each year, the farmer must continue to meet these obligations to CCC even though the payments go to the investor. Thus, it is the farmer who remains legally responsible for fulfilling all of the obligations under the PFC. If he or she violates the PFC, the payments will cease. For example, under the terms of one typical sale contract with an investor, if the payments are not made, the farmer will be required to reimburse the investor for any missed PFC payments and pay a penalty of sixteen percent.

Other areas of concern include:

• In the event that the farmer has other debt to the government (for example, an FSA loan, an obligation to CCC or a tax obligation), the government will continue to have a right to offset against the PFC payment. Under the PFC sale documents reviewed, this would constitute a default on the part of the farmer, and he or she would be required to pay the investor the amount offset plus a 16% penalty.

• A "testamentary agreement" may be required as part of the PFC sale. This agreement requires the farmer to include a provision in his or her Last Will and Testament that directs the executor of the will to see that the PFC payments are paid to the investor. This appears to mean that the farmer's surviving family will be obligated to continue to honor the contract. This may or may not be enforceable under the relevant state law.

• Generally speaking, if one of the farmer's creditors has a security interest in "farm program payments," "contract rights," "general intangibles," or expressly in the PFC payments, it would be conversion for the farmer to sell the PFC payments to an investor without the creditor's permission.

•Similarly, once the PFC payments have been sold, they can no longer be used as collateral for obtaining operating financing.

•As some of the investors are companies located outside of the farmer's state of residence, if a dispute between the investor and the farmer arises, local law may not apply. Similarly, the litigation may have to be in another state. The contracts reviewed designated the state law that would be applied to contract disputes and litigation.

• Finally, it is unclear what responsibility the farmer would continue to have if Congress were to change the program and impose new obligations or decrease the payments.

Farm Service Agency (PFC) apparently also has some concerns regarding the proposed sale of the PFC payments. FSA has issued two notices to all state and county offices on this subject. In November 1997, Notice FI-2258 advised State and County Offices not to "endorse, advise, promote, take a position on, or have any involvement with any financial products in which a producer is to sell the right to receive a stream of future Federal Program payments."

In May 1998, FSA stated that it had been notified that some finance companies who were purchasing PFC or CRP payment rights were requesting County Offices to guarantee their first priority as assignee of the payments. According to FSA, these finance companies were requesting that FSA personnel sign addenda letters attached to the usual assignment forms. The addenda letter would create a "special priority" for the assignee that would require the County Office to issue the payment and make CCC liable if it is not made. These requests, and the apparent execution of some of these addenda letters, prompted the FSA to issue recently Notice FI-2297, which notice advises County Offices that assignments cannot be accepted with any alteration to the terms and provisions of CCC-36 (the assignment form) or 7 C.F.R. pt. 1404 (the regulations governing assignment). The notice also provides County Offices with instructions on how to "handle" assignments that were accepted in error. The notice contains a form letter to be sent out in situations where an addenda letter was signed by the County Office revoking any changes to the standard assignment provisions as "accepted in error."

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Help get the word out!

We need you to help get the word out about the AALA's Annual Educational Symposium, October 23-24, in Columbus, OH. Brochures for the meeting should be available shortly. If you receive more than one or cannot attend yourself, would you please pass the brochure on to a colleague who may be interested in attending. If you will be attending a meeting or gathering where an interest might exist, would you hand out copies to other attendees? We will mail you extra copies. Can you get an announcement in your Bar newsletter(s) or do you have a mailing list we could use?

This is a great conference.Your help in getting the word out will be appreciated.

Call Bill Babione, at 501-575-7646 if you need extra brochures or can publicize the conference in other ways.

WHY IS THIS ISSUE LATE? Our apologies for the lateness of this issue. It was sent to the printer by e-mail on schedule, but somehow it got lost in the transmission. Its loss was just discovered, and we are printing and mailing now as expeditiously as possible.