

A Word from the Editorial Committee

This edition of the Ag Law Update includes articles on some of your favorite sessions at the annual symposium in New Orleans. Thomas Redick discusses the implications of the emerging contaminant PFAS in the agricultural industry. Amber Miller, Jesse Richardson, and Laura Vaught tackle the vexing issue of heirs property and attempt to provide some solutions.

Agriculture Labor Laws are rapidly changing in many states. Austin Vincent describes these issues and gives suggestions on what to watch for in this important area of the law. Finally, Brigit Rollins updates us on glyphosate and other emerging pesticide regulation issues.

Enjoy this issue of the Ag Law Update. Please contact the editors with any comments or suggestions for future issues.



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PFAS in Farming and Food

by **Thomas Parker Redick**

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The poly-fluoroalkyl toxins, collectively called PFAS, are fluoride-carbon “Forever Chemicals” whose health effects are problematic, and which are found around the world. Despite knowledge, early on, of eco-toxic effects, PFAS foolishly found its way into useful products. Over decades of improper, if not yet illegal, disposal, PFAS has contaminated soils and water in communities nationwide. This article will discuss impacts to our farming and food production system, and suggest approaches to resolving this problem.

Products Containing PFAS

In descending order, largest first, are sources of PFAS:

1. Firefighting foam – the ‘super-spreader’ aqueous film-forming foam (AFFF). Use of AFFF continued for decades after known eco-toxicity (per dead fish, and recorded on MSDS sheets accompanying source chemicals).
2. Protecting consumer surfaces – ‘Scotchguard’ for cloth, ‘Teflon’ for cooking pans, etc.
3. Food packaging – Resistant surfaces improve microbial food safety but leave a trail of PFAS as they end up recycled, composted or in landfills, or as litter.
4. Cosmetics – up to ¾ of mascara have PFAS.¹
5. Industrial Processes – e.g., semiconductor lithography. Nearly all have substitutes that are safer to use.

We’ve Known About Toxicity of PFAS A Long Time

The first research into the toxicity of PFAS occurred in the 1950s. In the 1960’s and 1970’s, DuPont had data in its files from animal studies showing toxic effects of PFAS in multiple species: rats, dogs, rabbits, monkeys in different types of organ systems: the liver, the testes, the adrenals. Dupont conducted a test of AFFF in 1970 and killed fish in a nearby river, leading to a U.S. Navy study finding that AFFF had adverse effects environmentally and killed aquatic life.² Litigation against Dupont started in 1999 over PFAS exposures, and became another major motion picture (Dark Waters, starring Mark Ruffalo).³

Press reports cite an inadequate government response to PFAS threats. The EPA has recognized that Dupont’s behavior is a case study in ignoring risks by fining them under their authority. This occurred while others in the industry, like 3M, ceased production in 2000 of some PFAS citing excessive risks.⁴ Citing looming regulation, 3M committed to cease production of PFAS by 2026.⁵

Disposal Patterns of PFAS

AFFF used in practice sessions has easily drifted to nearby rivers or aquifers. Other PFAS products leach from unlined civic landfills. For agriculture, one key source is biosolids from publicly owned treatment works (POTWs). For any compost operation using biosolids, PFAS testing and tracing will avoid sources to farmers or home gardeners using biosolids.

PFAS at a dairy farm in Maine arrived through the common practice of amending the soil with biosolids. This was traced to PFAS in biosolids but other problems in soil amendments may come from compostable food packaging lined with PFAS, which was popular with sustainability lifestyles, and need not have occurred. Other options exist for coating such paper products. Moreover, testing has shown that the trees used to create brown additions to compost have PFAS which fell from the sky (probably from incinerators burning PFAS, or dust from dried biosolids).

The Maine dairy farm was ordered to shut down after sludge spread on the farmland was linked to high levels of PFAS in grass, which cows ate and passed on in their milk. Maine agricultural officials recently reported that they are working with more than 50 farms around the state that have been found to be contaminated with the “forever chemicals” known as PFAS: more may be shut

¹ [Gigen Mammoser, PFAS identified in nearly half of cosmetics tested, Healthline, \(Jun 12, 2019\)](#)

² [Amy Linn, Toxic timeline: A brief history of PFAS, Searchlight New Mexico](#)

³ [Nathaniel Rich, The Lawyer Who Became DuPont’s Worst Nightmare, \(Jan. 6, 2016\)](#)

⁴ [House of Representatives, U.S. Congress, The Devil They Knew: PFAS Contamination and the Need for Corporate Accountability \(Sep 10, 2019\)](#)

⁵ [Matt Jaworowski, 3M to stop producing, selling PFAS products by 2026](#)

down depending on the amount of PFAS contamination found.⁶ Studies are underway to determine if food plants take up PFAS into food – early indications show PFAS is definitely in leafy greens, but not in the corn cobs. Given the ubiquity of PFAS in America, testing of various industrial and agricultural sources will need to be maintained to avoid PFAS.

Health Effects of PFAS

99% of U.S. citizens have low levels of PFAS in their blood; how will this relatively inert molecule react with human tissues and organs? Average PFAS exposure level ranges from 2,100 to 6,300 ng/L per liter of blood or 30 to 90 shot glasses (1.5 oz 1 ng/L = 0.001 ppb) in 150 million gallons of water. Scientists are uncertain about PFAS exposure's impact on human health, but preliminary evidence has linked high PFAS exposure to cancer, reproductive/immune system harm.

An Ohio court in 2022 certified a medical monitoring class whose lawsuit includes “[citizens of Ohio] who have 0.05 parts per trillion (ppt) of PFOA (C-8) and at least 0.05 ppt of any other PFAS in their blood serum.” The putative class are United States citizens with “a detectable level of PFAS...in their blood.”⁷ Other states will join, depending on their law relating to medical monitoring. Space limitations preclude a listing of all the PFAS litigation, but a quick google search turns up many a PFAS case.⁸

Linda Birnbaum, the former director of the National Institute of Environmental Health Sciences (NIEHS) said EPA should regulate PFAS as a class, or at least as subclasses, given testing limits and similarities among the thousands of chemicals. EPA has a long history of addressing persistent chemicals, such as dioxins, by grouping. Birnbaum

wrote that “U.S. policy has not accounted for evidence that chemicals in widespread use can cause cancer and other chronic diseases, damage reproductive systems, and harm developing brains at low levels of exposure.”

With everyone carrying around PFAS in their blood, and some Americans getting mega-doses (and health effects) from their wells⁹, a safe level needs to be established via regulation. Early notices from the EPA under the Safe Drinking Water Act on PFAS set the limit for one PFAS compound, PFOA, at 0.004 parts per trillion (ppt) or 4 parts per quadrillion. Experts in testing confirmed for me that this low level is not testable may be one of technology-forcing (merely advisory, influential in state policy and litigation).

Testing and Containing/Remediating PFAS

The EPA in late 2022 proposed listing four PFAS under RCRA and those PFAS will soon be automatically listed as “hazardous substances” under CERCLA (the Superfund law). Various lobby groups pressed the EPA for years to list the worst of the class of PFAS as hazardous substances under CERCLA.

The U.S. Environmental Protection Agency is offering funding for projects to assess potential impacts of PFAS on water quality in U.S. agriculture. EPA wants to know where PFAS occurs, ends up, and moves in rural water. PFAS treatment methods are also needed for small drinking water and wastewater systems including biosolids.

PFAS contamination has shut down two dairy farms in Maine and prompted recall of vegetables and grains from store shelves. One high-profile PFAS recall involved smoked clams in cans.¹⁰ The agriculture community is bracing for more cases, however, as the Maine embarks on one of the nation's most

aggressive testing campaigns. Michigan has looked for PFAS, but other states are slow to conduct necessary searches for contamination,

With any luck, farms using biosolids containing PFAS will be given a waiver under “de minimis” rules applicable to CERCLA. Concerns remain about the potential liability of farms near PFAS hotspots whose well water is also contaminated with PFAS. These farms may encounter cleanup demands at the state and federal level.

How to Avoid a Major Public Health Crisis

New regulations ban AFFF, packaging and other uses of PFAS. For necessary uses of PFAS, an industry take-back approach should be implemented for those products.

The high-tech industry may serve as a model for how to handle PFAS. The author served as environmental counsel to the semiconductor lithography laser industry in the 1990s. California authorities questioned the disposal of the laser's waste gas scrubber in landfills; ‘fluoride salts’ were not federally regulated as hazardous waste but fell into California's system for ecological toxins that federal regulation missed (also, the Material Safety Data Sheet (“MSDS”) showed “ecotoxicity”).

Since bioassays confirmed the fluoride salts killed fish, a ‘take back’ program was established for their lasers to reuse scrubbers while putting their waste into containment. This containment process in a New Jersey facility was audited regularly.

⁶ [Kevin Miller, More than 50 Maine farms impacted by PFAS, but state officials see ‘glimmer of hope’ \(Feb. 1, 2023\)](#)

⁷ [Hardwick v. 3M Co., No. 2:18-cv-01185 \(S.D. Ohio 2018\) ¶ 91.](#)

⁸ [See, e.g., James P. Ray, PFAS Litigation: Just Getting Started? There is no indication that PFAS-related litigation will slow down anytime soon.](#)

⁹ [PFAS found in 20 additional Muskegon-area drinking water wells, MLive \(Jan. 3, 2019\)](#)

¹⁰ [Trisha Calvo, Bumble Bee Canned Smoked Clams Recalled Because of Dangerous PFAS Chemicals, Consumer Reports \(July 7, 2022\)](#)

This industry process could also provide evidence of negligence for other industries that do not take similar steps. In terms of publicity over the risks of PFAS exposure, the litigation arising in 2000 over PFAS surely provided grounds for industry stewardship, which was slow in coming.¹¹

The EPA invited eight major leading PFAS manufacturing companies in 2006 to join in a global stewardship program to reduce PFAS use with two goals: (1) Reduce PFAS by 95% from a year 2000 baseline by 2010, in both facility emissions and product content levels of these chemicals. (2) Eliminate PFAS from emissions and products by 2015.

Participating companies each: (1) Submitted baseline data on emissions and product content by October 2006, (2) Reported annual progress toward goals for U.S. and global operations, (3) Submitted final reports in early 2016, and (4) Agreed to cooperate with EPA to establish scientifically credible analytical standards and laboratory methods to ensure comparable reporting. All public documents from the PFOA Stewardship Program are available in EPA Docket EPA-HQ-OPPT-2006-0621. Fact Sheet: 2010/2015 PFOA Stewardship Program, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/fact-sheet-20102015-pfoa-stewardship-program>

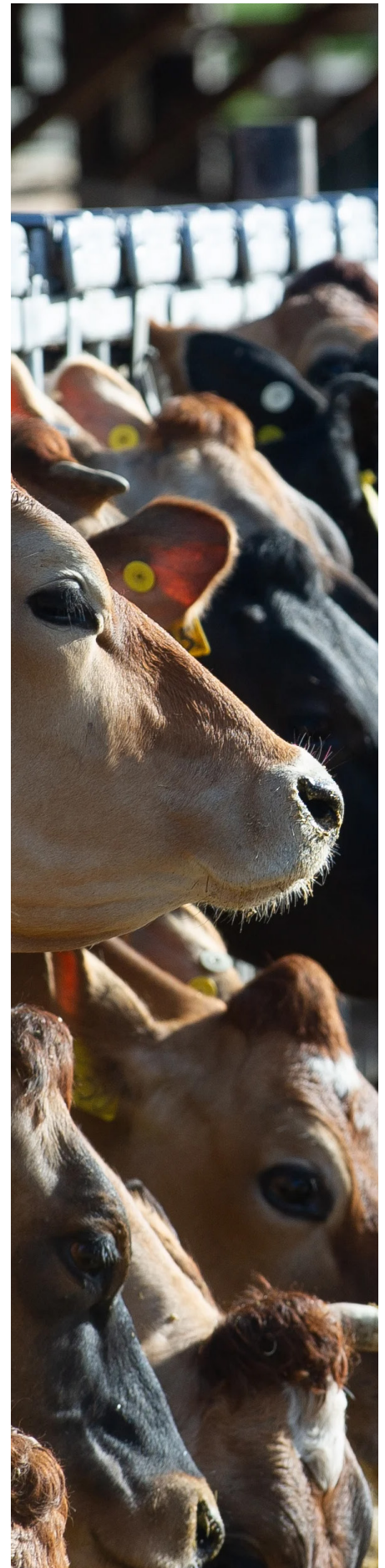
While there are other consumer products with non-substitutable application of PFAS inputs, for example, some fluoridated medicines, medical devices and high-tech applications (e.g. fluoride lasers in semiconductor lithography), there is no reason for excessive exposure of the production process or distribution to their consumer. Given human consumption, this would be a minimal addition of PFAS to the sewer system and end up in biosolids.

If a company has no substitution option, then product takeback as occurred with these laser companies, with containment on disposal to avoid exposure to the environment. This clearly should be sufficient to manage the risks for necessary products who need PFAS to be created, like some medical devices and all computer chips using laser lithography.

Conclusion

While hindsight is 20/20, the lesson of the high-tech industry in the 1990s might have helped to prevent the widespread release of PFAS. Instead of treading carefully in the face of known product toxicity, companies selling AFFF and other known pollution sources (e.g., landfill or POTW-bound products) were acting recklessly and will be paying the price in coming litigation and other economic impacts of remediating PFAS. The impact to our global food supply and U.S. agriculture is now being assessed – it will be a significant impact, but the reach of Superfund and other laws remain uncertain. They may fall short of requiring remediation of millions of acres of farmland. As more farming states follow the example set by Maine and Michigan, we will start to understand the scope of this PFAS problem.

¹¹ [The Devil They Knew PFAS Contamination and the Need for Corporate Accountability, Part II House Hearing, 116 Congress, \(2019\)](#)



Solutions for Heirs Property Owners

by

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I. Introduction

Heirs property has become an important topic in agriculture. The most recent Farm Bill addressed heirs property, and state legislatures have begun to pass laws to address the topic. This outline briefly describes heirs property and the problems that heirs property creates. The article touches on the Uniform Partition of Heirs Property (UPHPA), and the Farm Bill provisions are discussed. Some ways to prevent your farm client from falling into the heirs property trap and to address heirs property issues are discussed.

II. Overview of Heirs Property

The terms “heirs property,” “heirs’ property,” “heir property,” and “land in heirs” all describe a form of ownership where at least some of the owners have acquired the property through inheritance.¹ Often numerous and related owners hold the property as tenants in common.² Heirs property proves particularly prevalent in African American and Native American communities³, as well as low-income areas of Appalachia.⁴

As the property continues to pass from generation to generation, the number of owners multiply. The large numbers of owners make a division of the property amongst the cotenants more difficult and agreement on the use of the land more unlikely. Heirs property is likely to be unused and neglected.

Heirs property presents concerns related to economic issues and vulnerability issues. Economically, owners of heirs property cannot obtain financing for improvements and thereby cannot build wealth.⁵ Unclear title and the high transaction costs of partition sales also present challenges. For example, “a significant percentage” of poor property owners in New Orleans impacted by Hurricane Katrina were unable to qualify for government aid due to merchantable title problems.⁶

The owners of heirs property are also vulnerable to being involuntarily dispossessed from their land through a partition suit. The UPHPA primarily addresses the partition concern. Approved and recommended for enactment in all states by the National Conference

of Commissioners on Uniform State Laws in 2010,⁷ “[t]he purpose of the [UPHPA] is to ameliorate, to the extent feasible, the adverse consequences of a partition action when there are some cotenants who wish, for various reasons, to retain possession of some or all of the land, and other cotenants who would like the property to be sold.”⁸

For heirs property owners seeking to farm the land, there can be obstacles to farming, including lack of access to credit and prohibitions on participating in USDA programs. For example, because heirs property owners often cannot demonstrate proof of ownership or proof of control of land, no USDA Farm Number will be issued. Without a Farm Number, many different USDA programs are inaccessible.

III. Heirs Property and Farming

In 2018, the Farm Bill attempted to address some of the issues associated with heirs property and farming. The bill included provisions for establishing a farm number¹, as well as a relending program to assist with purchasing or consolidating property ownership.

As previously mentioned, many heirs property farms do not have a USDA Farm Number and, therefore cannot qualify for farm programs. In response, the 2018 Farm Bill authorized alternatives for heirs owners to establish a Farm Number.⁹ As a result, today, “[o]perators on heirs property who cannot provide owner verification, or a lease agreement, may provide alternative documents to substantiate they are in general control of the farming operation”¹⁰ and be issued a USDA Farm Number. Whether a state has adopted the Uniform Partition of Heirs Property Act (UPHPA) determines which type(s) of alternative documents are acceptable.¹¹ While the goal of these new standards for issuing farm numbers is presumably to aid farmers of heirs property to qualify for USDA programs, a quick review of the rule indicates an irony -- those heirs property owners and farm operators in UPHPA states have a heavier burden to prove eligibility for a farm number than those heirs property owners and farm operators in non-UPHPA states.

In states that have adopted the UPHPA, an operator can use: (i) a court order verifying the land meets the definition of heirs property as defined in the UPHPA, or (ii) a certification from the local recorder of deeds that the recorded owner of the land is deceased and at least one heir has initiated a procedure to retitle the land.¹²

In states that have not adopted the UPHPA, an operator can use: (i) a tenancy-in-common agreement, approved by a majority of the owners, that gives the individual the right to manage and control a portion or all of the land; (ii) tax returns for the previous five years showing the individual has an undivided farming interest; (iii) self-certification that the individual has control of the land for purposes of operating a farm or ranch; or (iv) any other documentation acceptable by the FSA county office that establishes that the individual has general control of the farming operation including, but not limited to, any of the following: (1) affidavit from an owner stating that the individual has control of the land, (2) a limited power of attorney giving the individual control of the land, (3) canceled checks and or receipts for rent payments and/or operating expenses.¹³

The burden of obtaining a court order or a certification from a local recorder of deeds appears to be much higher than the options available to those farmers of heirs property land in non-UPHPA states. An operator in a non-UPHPA state can merely offer an affidavit setting out the facts associated with the heirs property ownership and the operation of the land. But, in order to obtain a court order in a UPHPA state, some type of active civil matter, e.g., a trespass to try title action, a partition suit, or some other state court proceeding to clear title, would need to be initiated in order to obtain any kind of court order with respect to the ownership of the property.

The 2018 Farm Bill also included provisions to address funding for heirs property owners who have agreed to a buyout but have no immediate funding source.¹⁴ The bill authorized the Heirs Property Relending Program, an effort to assist heirs owners to buy out fractional interest holders and attempt to clear up heirs title issues.

The program's basic design consists of loans from USDA to "eligible lenders," who then relend the funds to heirs property holders.¹⁵ Heirs can then use the funds to purchase other undivided interest owners' property interests, and pay for costs to establish a succession

plan. In order to qualify for the loan dollars, an applicant must show it is an heirs owner that:

- (1) holds an undivided ownership interest in a farm
- (2) has the authority to incur debt and to resolve ownership and succession of a farm owned by multiple owners;
- (3) is a family member or heir-at-law related by blood or marriage to the previous owner of the property; and
- (4) agrees to complete a succession plan as a condition of the loan.¹⁶

There are limitations on the use of the loan funds: heirs may not use funds for any land improvement, development purpose, acquisition or repair of buildings, acquisition of personal property, payment of operating costs, payment of finders' fees, or similar costs.¹⁷ But, FSA has indicated that if one co-owner uses the loan dollars to buy out all of the other heirs interest, the remaining sole owner could then sell the farmland, so long as the FSA loan was repaid.¹⁸ Is this what the Farm Bill authors intended, that heirs property loan dollars are being used to take farmland out of production?

IV. Solutions to Heirs Property

As is often the case, prevention proves to be much easier than the cure with respect to heirs property. For the practitioner presented with property that has not been probated for decades with dozens, hundreds, or thousands of heirs, clearing title may take years and entail hundreds of thousands of dollars in legal fees. On the other hand, a few relatively simple steps can prevent heirs property issues from arising in the first place.

To avoid or mitigate heirs property issues, practitioners should:

- (1) Encourage clients to plan.

Many parents instinctively wish to leave the farm to the kids equally. That path may cause a number of issues, so practitioners should urge parents to "pick one" child, or to set up a business structure with business agreements to accomplish family goals and to avoid deadlock due to a multitude of owners.

¹ B. James Deaton, *A Review and Assessment of the Heirs Property Issue in the United States*, 46 J. ECON. ISSUES 615, 615-616 (2012).

² *Id.*

³ *North American Meat Institute v. Becerra*, 420 F. Supp. 3d 1014 (C.D. Cal. 2019)

⁴ B. James Deaton, Jamie Baxter & Carolyn S. Bratt, *Examining the Consequences and Character of 'Heir Property.'* 68 *ECOLOGICAL ECON.* 2344, 2344-2345 (2009) (citing Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 *N.W. L. REV.* 505 (2001); J. F. Dyer, *Heir Property: Legal and Cultural Dimensions of Collective Landownership*, *ALA. AGR. EXP. STA. BULL.* (2007); J. A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 *WISC. L. REV.* 733 (2003). *Id.* at 2345 (citing B. James Deaton, *Land in Heir's: Building a Hypothesis Concerning Tenancy in Common and the Persistence of Poverty in Central Appalachia*, 11 (1-2) *J. APPALACHIAN STUD.* 83 (2005) (hereinafter Deaton, *Land in Heir's*); B. James Deaton, *Intestate Succession and Heirs Property: Implications for Future Research for the Persistence of Poverty in Central Appalachia*, 41 *J. ECON. ISSUES* 927 (2007) (hereinafter Deaton, *Intestate Succession and Heirs Property*)

⁵ Craig H. Baab, *Heir Property: A Constraint for Planners, An Opportunity for Communities: The Legacy of Steve Larkin*, *PLAN. & ENVTL. L.*, Nov. 2011, at 3, 10.

⁶ *UNIF. PARTITION OF HEIRS PROP. ACT* prefatory note at 6 (2010), http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf.

⁷ *UNIF. PARTITION OF HEIRS PROP. ACT* (2010), http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf.

⁸ *Id.* prefatory note at 8.

⁹ See 7.U.S.C. § 1936c.

¹⁰ <https://www.farmers.gov/working-with-us/heirs-property-eligibility>

(2) Don't kick the can down the road.

Heirs property issues that are difficult today become impossible in the future. Address the issues as soon as possible to minimize cost and difficulty.

(3) Carefully draft and corroborate affidavits of heirship.

Verify the affidavits of heirship with as many people as possible. Consider having multiple people file affidavits of heirship to strengthen the clarity of title. Clarify exactly what elements of heirship that each affiant can verify. Finally, review the affidavit with the affiant and ensure that the affiant understands and possesses sufficient knowledge to sign.

(4) Ask a lot of questions of a lot of different people.

Cast a wide net when gathering information. Sometimes the first or tenth person that you talk to is not the key person. Try to locate the family historian. A family tree can be extremely helpful but must be verified.

(5) Identify and remember who you represent.

As always, identify your client at the beginning of the process and document the representation with an engagement letter. Remember who you represent and make required disclosures when contacting others.

(6) Utilize resources, databases and non-attorneys.

Information can be gleaned from a number of different sources. Non-attorneys can provide assistance at a lower cost, and often with more expertise in that particular area than an attorney. Utilize these sources.

(7) Be practical, and help clients be practical.

The cost of clearing title in many heirs property situations can far exceed the value of the property. While various groups continue to seek better and more cost-effective solutions, you need to help your client today. How much can your client afford to pay? Are pro bono resources available? How much risk can your client assume?

¹¹ See Guidance for Heirs Property Operators to Participate in Farm Service Agency (FSA) programs, USDA-FSA Fact Sheet, March 2022, available at <https://www.farmers.gov/sites/default/files/2022-03/fsa-guidance-for-heirs-property-operators-to-participate-in-farm-service-agency-fsa-programs.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ <https://www.calt.iastate.edu/article/problem-heirs-property>

¹⁵ *Id.*

¹⁶ <https://www.bakerdonelson.com/heirs-property-releanding-program-represents-substantial-investment-in-resolution-of-heir-property-issues>. 7 CFR part 769; 7 U.S.C. § 1936c

¹⁷ 7 CFR § 769.155.

¹⁸ E-mail correspondence with Senior Loan Officer, USDA-FSA regarding status of program, August 17, 2022.



State Trends in Agriculture Labor Laws

by Austin C. Vincent

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I. Introduction

During the Great Depression, our nation saw an incredible overhaul of our general labor laws that applied to millions of employees under the Fair Labor Standards Act of 1938.¹ This broad-sweeping legislation mainly guaranteed minimum wage and set a 40-hour overtime threshold for most employees. However, this federal legislation exempted agricultural employers from these requirements.

We have seen a recent trend in many states removing agricultural employees from federal exemptions and adding additional labor regulations. This article describes the changes throughout the United States concerning state-specific changes to labor laws directly related to agricultural employers and employees.

II. States with Agricultural Labor Laws Changes

While agriculture has largely been exempted due to its seasonal and variant nature, an effort to change this started in California in the 1970s. However, most of the changes have occurred in the last decade. These states include California, Colorado, Hawaii, Maine, Maryland, Minnesota, New York, Oregon, and Washington. Below we further explore the specific changes and general issues and discuss some of the details from a few of the states. While these measures have picked up steam in many states, the federal government has also considered some of the issues as well.

III. Areas of Changed

A. Overtime

Changes in overtime law are likely the most impactful to the agricultural industry, as the variable work times and unexpected changes in weather and other circumstances make planning work difficult. Removing FLSA exemptions for overtime is one of the most common issues for states to change.

Generally, when a state has implemented the change in overtime thresholds, these changes are implemented over a period of five to ten years. Typically, the threshold decreases in a tiered fashion. This tiered schedule typically starts with a higher baseline weekly and/or daily overtime threshold—e.g. 60 hours per week, 12 hours per day—and decreases each year until it meets the goal threshold. Some states have set a final threshold of 60 hours per week², while others have implemented a threshold of 48 hours per week³; however, some states are moving to 40 hours per week, whether that is through rule or law⁴. Additionally, some states differentiate when overtime pay must be paid 1.5 times regular pay and when 2 times regular pay is required.⁵

Time Period	(a) Highly Seasonal Employers	(b) Non-Highly Seasonal Employers	(c) Small Employers (seasonal or not)
Until 11/1/22	[No requirements]		
11/1/22-12/31/23	60 hours		
2024	56 hours for up to 22 peak weeks;	54 hours	56 hours
2025 -	48 hours otherwise	48 hours	[No separate rule for small employers; apply (a) or (b)]

Effective date for employers with 26 or more employees:	Effective date for employers with 25 or fewer employees	Overtime (1.5x regular rate of pay) required after the following hours per day / hours per workweek:
Jan. 1, 2019	Jan. 1, 2022	9.5 / 55
Jan. 1, 2020	Jan. 1, 2023	9 / 50
Jan. 1, 2021	Jan. 1, 2024	8.5 / 45
Jan. 1, 2022*	Jan. 1, 2025*	8 / 40

Some states further differentiate the implementation of thresholds for different producers based on size or type and provide limited exemptions. The implementation can either differentiate based on the number of employees⁶, the financial size of the operations, or the nature of the operation. Some states require quicker implementation for larger producers, while others have different overtime thresholds for large and small operations. There is also an important distinction based on the nature of an operation. This nuance provides operations that are “highly seasonal” a different threshold during the seasonal times, such as planting and harvesting. “Highly seasonal employers” are defined as agricultural employers that have at least twice as many employees for a certain peak period in the calendar year as the rest of the year. The peak period, or “peak weeks,” is generally a number of weeks that can cover the season from planting to harvest, or be more limited to only cover one. During this peak period, the overtime threshold is lifted to a higher threshold. Additionally, states commonly allow producers to break the peak weeks into 2 or 3 periods.⁷ Another provision exempts family members and certain salaried employees from the overtime threshold regulations.

¹ 29 USCS, Ch. 8

² Maryland (Md. Code Ann., Lab. & Empl. §3-420(c))

³ Colorado (7 CCR 1103-1); Minnesota (Minn. Stat. Ann. § 177.23 Subd. 7(2))

⁴ Hawaii (Haw. Rev. Stat. § 387-3(e)); New York (N.Y. Lab. Law § 163-a); Oregon (H.B. 4002, Ore. Laws 115 (2022)); Washington (Wash. Rev. Code Ann. § 49.46.130)

⁵ California requires overtime pay at 1.5 times regular pay after 8 hours per day and 40 hours per week. 2 times the regular pay is required after 12 hours per day.

⁶ Colorado (7 CCR 1103-1)

⁷ California (Cal. Lab. Code §§ 860; 862)

Litigation spurred policy changes in Washington state. The overtime threshold discussion began after a Washington Supreme Court ruling in *Martinez-Cuevas v. Deruyter Bros. Dairy, Inc.*¹⁰ The Washington Supreme Court found that exempting dairy workers from state worker protections violated the privileges or immunity clause of the State Constitution and required retroactive backpay for the violation.¹¹ Thus, with both the concern that backpay would bankrupt the dairy industry and that other agricultural industries would face significant backpay issues, the Washington state agriculture industry worked with the state legislature to set an overtime threshold and prevent backpay requirements.

B. Minimum Wage

The minimum wage is another common issue that is typically found in many state legislative proposals.¹² However, in many states, the minimum wage is not as impactful as overtime because many agricultural producers are paying their employees above minimum wage due to competition with other industries—such as oil and gas and trucking—for employees. Many states throughout the U.S. are moving to a \$15 per hour minimum wage. Some exemptions exist for salary-based employees and livestock range workers¹³ (typically found in the West).

C. Collective Bargaining

Labor activists have long pushed for collective bargaining provisions at the state and federal levels. These policies typically include the right to organize and join a union¹⁴, anti-retaliation protections¹⁵, and administrative complaint mechanisms. Additionally, some states limit when unions can strike and picket and prohibit secondary boycotts on producers during labor disputes.¹⁶

D. Property Access

A concerning trend in agricultural labor laws includes requiring employers to provide access to union representatives or labor advocates to the employer's private property for the purpose of meeting with employees during breaks or other work times.¹⁷ This began in California with the creation of the Access Regulation in the Agricultural Labor Relations Act of 1975.¹⁸ The Access Regulation enabled a labor organization to access an agricultural employer's property for up to four 30-day periods each year, simply by filing a notice of intention to take access with a regional office of the California Agricultural Labor Relations Board and providing proof of service on the agricultural employer. These regulations do not allow employers to interfere with the employee's ability to meet with the labor advocates in any way.

Recently, in *Cedar Point Nursery v. Hassid*, the U.S. Supreme Court found the California Access Regulation to be a takings violation under the fifth amendment of the U.S. Constitution.¹⁹ Not long after the *Cedar Point* decision, the Colorado legislature passed an access provision.²⁰ However, the Colorado provision has been challenged in *Talbott's Mountain Gold v. Polis*.²¹

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E. Heat Illness Protection

Many western states have adopted labor condition regulations because of employee health concerns with high temperatures, air quality concerns, and environmental exposure because of employee health concerns with high temperatures, air quality concerns, and environmental exposure. These labor condition regulations include heat illness safety procedures, water provisions, and shade regulations. The heat illness safety procedures require employers to implement training for supervisors and employees; communication availability; monitoring and receiving reports of heat illness or injury; response to possible heat illness or injury; emergency response; and preventative measures.²²

The agriculture labor condition rules implement water availability and shade requirements for employers to provide at certain trigger points. These regulations are triggered at certain temperatures or when the work requires certain clothing combined with a temperature.

More stringent regulations are imposed when increased risk conditions occur. These increased risk conditions include a higher temperature, poor air quality, long days working over 12 hours, heavy clothing or gear required, and acclimatization of a new employee.²³

⁸ *Id.*

⁹ *Colorado* (7 CCR 1103-1.2.3.2(A)(1)(a))

¹⁰ 196 Wash. 2d 506 (2020)

¹¹ *Id.*

¹² *California* (Cal. Lab. Code § 1182.12; Cal. Code Regs. tit. 8, § 11080, 11130, 11140); *Colorado* (C.R.S. 8-6-101.5(1)(a)); *Hawaii* (Haw. Rev. Stat. § 387-1); *Maryland* (Md. Labor and Employment Code Ann. §§ 3-403; 3-413); *Minnesota* (Minn. Stat. § 177.23, subd. 7(1)-(4)); *New York* (N.Y. Lab. Law §§ 670 – 683); *Oregon* (Or. Rev. Stat. Ann. § 653.020); *Washington* (Wash. Rev. Code Ann. § 49.46.010 (3)(a)).

Finally, a key distinction in these regulations centers on whether the regulation uses “provide” or “encourage.” “Provide” would be a lower standard for the employer to meet when seeking to comply with labor regulations. When the regulation requires employers to “provide” water, shade, and breaks, they must simply provide water for the employee to drink, a shaded area for the employer to use, and allotted time for breaks; however, employers are not required to mandate that employees take the water, use the shaded area, or take a break. Alternatively, “encourage” would be a higher standard. When the regulation requires the employers to “encourage” drinking water, using shade, and taking breaks, the employer must actively encourage and persuade the employee to drink the water, sit in the shaded area, or take a break. No clear guidance exists on best practices to comply with “encourage” regulations; thus, risk-averse employers lean towards mandating employees to drink water, use shade, and take breaks.

F. Conclusion

The agricultural industry has largely operated without complex labor regulations. However, the implementation of labor regulations has proven to be onerous for agricultural employers in the states currently implementing their recent laws and regulations changes. A sudden change in labor regulations can prove incredibly challenging for agricultural operations of any size. Agricultural attorneys must be aware of these changes, understand how to navigate these complex regulations, and advise their clients on best practices when planning for compliance.

¹³ *Colorado* (7 CCR 1103-1.2.4.9)

¹⁴ *California* (Cal. Lab. Code § 1152); *Colorado* (C.R.S. 8-3-104); *New York* (*Hernandez v. State of N.Y.*, 99 N.Y.S.3d 795 (2019); *N.Y. Lab. Law* § 701(2)(b); § 702-b); *Oregon* (*Or. Rev. Stat. Ann.* § 662.810); *Washington* (*Wash. Rev. Code Ann.* §§ 49.30, 32, 36)

¹⁵ *Colorado* (C.R.S. 8-2-206); *New York* (*N.Y. Lab. Law* § 702-b)

¹⁶ *Oregon* (*Or. Rev. Stat. Ann.* § 662.810)

¹⁷ *California* (Cal. Code Regs., tit. 8, § 20900(e))

¹⁸ *Id.*

¹⁹ 923 F. 3d 524.

²⁰ *Colorado* (C.R.S. 8-13.5-202(b), (c))

²¹ 1:2022cv01537

²² *California* (Cal. Code Regs. tit. 8, § 3395); *Colorado* (7 CCR 1103-15); *Minnesota* (*Minn. R.* 5205.0110); *Washington* (*Wash. Admin. Code* § 296-62-095)

²³ *Id.*



Pesticide Regulation: Updates on Glyphosate and Other Emerging Issues

by Brigit Rollins

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Pesticide regulation and litigation can be a fast-paced world, with new developments occurring frequently. This article provides an overview of three pesticide law issues that have emerged over the past few years: (1) failure to warn and Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) preemption; (2) the withdrawal of glyphosate interim registration; and, (3) Endangered Species Act (“ESA”) compliance under FIFRA. Each of these issues has the potential to impact pesticide use and regulation going forward.

Failure to Warn & FIFRA Preemption

Plaintiffs who file pesticide injury lawsuits claiming that exposure to a particular pesticide has caused a physical injury tend to file similar claims. One of the most common claims in these types of lawsuits is failure to warn.

Failure to warn is a type of civil tort that is frequently raised in products liability cases. Typically, to succeed on a failure to warn claim, a plaintiff must prove two things. First, the plaintiff must show that the manufacturer did not adequately warn consumers about a particular risk. Second, the plaintiff must show that the risk was either known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time the product was manufactured and distributed. Failure to warn claims have become commonplace in pesticide injury lawsuits, with juries often, though not always, ruling in favor of the plaintiffs.

As pesticide injury lawsuits have grown more numerous in recent years, a question has emerged as to whether these state law failure to warn claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). FIFRA is the primary federal statute regulating pesticide use in the United States. Under FIFRA, a pesticide may not be legally sold or used until it has been registered by the Environmental Protection Agency (“EPA”) and has an approved label. While FIFRA grants states the authority to “regulate the sale or use of any federally registered pesticide,” it also prohibits states from adopting “any requirements for labeling or packaging in addition to or different from” those required under FIFRA. 7 U.S.C. § 136v(a), (b). In other words, while states may

adopt requirements affecting pesticide sale and usage, they may not adopt regulations that would change the text of a registered pesticide label.

Defendant pesticide manufacturers in pesticide injury lawsuits argue that plaintiffs’ state law failure to warn claims are preempted by FIFRA because to avoid liability under those claims, the defendants would need to add additional warnings to registered pesticide labels. The argument asserts that doing so would amount to a state law imposing a label requirement that is either in addition to or different from a federally registered label.

Plaintiffs have argued that the failure to warn claims are not preempted by FIFRA because of the statute’s prohibitions against misbranding. Under FIFRA, it is unlawful to sell or distribute any pesticide that is “misbranded.” 7 U.S.C. § 136j(a)(1)(E). A pesticide is considered misbranded if “the labeling does not contain a warning or caution statement which may be necessary [...] to protect health and the environment[.]” 7 U.S.C. § 136(q)(1)(G). The plaintiffs assert that their failure to warn claims are not preempted by FIFRA because if a pesticide manufacturer failed to warn consumers about the health risks of using their pesticides, then the pesticide was misbranded and should not have been sold. According to the plaintiffs, the failure to warn claims are “parallel” with FIFRA’s misbranding prohibitions.

Currently, the Ninth and Eleventh Circuit Courts of Appeal have both heard cases on failure to warn and FIFRA preemption. In *Hardeman v. Monsanto Co.*, No. 19-16636 (9th Cir. 2021), the Ninth Circuit ruled that the failure to warn claims were not preempted by FIFRA. Although the defendant appealed the case to the United States Supreme Court, the Court declined to take up the issue. Similarly, the Eleventh Circuit in *Carson v. Monsanto Co.*, No. 21-10994 (11th Cir. 2022) concluded that the plaintiff’s failure to warn claims were not preempted. However, in December 2022, the Eleventh Circuit agreed to rehear the case en banc. Should this result in a circuit split, it is possible that the Supreme Court may decide to take up the issue. Whatever the outcome, this issue has broad implications for pesticide injury lawsuits.

EPA Withdraws Glyphosate Interim Registration

Last September, EPA announced that it had withdrawn all portions of its interim registration review decision for the pesticide glyphosate. A final registration review decision is currently not expected until 2026.

After a pesticide is registered under FIFRA, EPA is required to review the registration every fifteen years to ensure that the pesticide still meets FIFRA standards for use. Because registration review is a lengthy process, EPA may issue an interim registration review decision before formally completing review. The interim decision may impose new mitigation measures or identify additional data that EPA needs to complete the registration review.

EPA began its registration review of glyphosate in 2009. In 2017, EPA issued a paper as part of the review concluding that glyphosate was “not likely” to cause cancer in humans. In 2020, EPA published an interim registration review for glyphosate. Along with announcing new mitigation measures for glyphosate, the interim decision affirmed that the “not likely” conclusion from the 2017 paper was now final.

Following the release of the 2020 glyphosate interim registration decision, several environmental groups filed suit. The plaintiffs argued that EPA violated FIFRA by failing to support its finding that glyphosate is not likely to cause cancer in humans, and that EPA had violated the Endangered Species Act (“ESA”) by failing to satisfy the ESA’s consultation requirements when it issued the glyphosate interim decision. Ultimately, the court sided with the plaintiffs, finding that EPA had not based its conclusion that glyphosate was not carcinogenic to humans on substantial evidence, and that EPA had failed to meet ESA requirements when issuing the interim registration review decision for glyphosate. Accordingly, the court sent the decision back to EPA for review which it was directed to complete by October 1, 2022.

Following the court’s decision, EPA petitioned for release from the October 1 deadline, claiming that a thorough review could not be completed by that date.

The court denied this request, prompting EPA to pull its interim registration decision for glyphosate.

Although pulling the interim registration decision does not affect the availability of any glyphosate products currently on the market, it does mean that the finalized registration decision for glyphosate will take longer than EPA anticipated. It is currently unclear what the final registration decision will look like, or if that decision will face additional legal challenges.

FIFRA & the ESA: New Policy Approach

In 2022, EPA announced that it was adopting a new policy for carrying out ESA Section 7 consultations when taking action under FIFRA.

Section 7 of the ESA directs all federal agencies to ensure that their actions will not jeopardize listed species or designated critical habitat. If an agency finds that its action “may affect” a listed species, then the ESA requires that agency to engage in consultation with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service to determine how much of an effect the action will have and what, if any, mitigation measures can be adopted. When EPA is carrying out an action pursuant to FIFRA, it is carrying out an agency action and must satisfy ESA consultation requirements. However, according to EPA the agency has had trouble meeting its ESA obligations when carrying out FIFRA actions. That lack of ESA compliance has resulted in a slew of lawsuits brought against EPA by environmental interest groups challenging pesticide registrations for their failure to satisfy ESA requirements. These lawsuits make pesticide labels vulnerable to court vacatur, and often result in court-mandated deadlines for EPA to come into ESA compliance.

In an effort to better satisfy its ESA requirements and create pesticide labels better able to withstand judicial review, the EPA in 2022 launched a new policy for bringing its FIFRA actions into ESA compliance. Under the new policy, outlined in a workplan released by EPA in April 2022 and updated the following November, EPA is adopting a variety of strategies to help it meet its ESA responsibilities earlier in the process for most of its FIFRA actions. One of those strategies involves moving away from developing mitigation measures on a pesticide-by-pesticide approach. Instead, EPA will develop mitigation measures for a pesticide group to address the particular taxon of species most likely to be adversely affected by the pesticides in that group. Additionally, EPA is exploring mitigation measures that would address the effects of pesticides on listed species in a specific geographic area. For example, under this

approach EPA would evaluate Hawaii as a whole, instead of on a pesticide-by-pesticide or species-by-species approach.

Currently, EPA is carrying out different pilot projects to test out its new approach. EPA expects the pilot programs to expand into 2023 and 2024, with regular outreach sessions scheduled to receive from the public. Going forward, it is likely that this program will result in additional mitigation measures being added to pesticide labels.

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