

Advising Farm and Food Business Start Ups

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I. Regulatory Issues

a. Food Safety

i. On-farm Produce Production and Processing: FSMA: Produce Rule and Preventive Controls Rule

Passed into law in 2011 with the rules finalized in 2015, the Food Safety Modernization Act (FSMA) is the most salient food safety concern for many farms. The process of determining if and when the Produce Rule and Preventive Controls for Human Food and Animal Feed Rules apply can be relatively straightforward. See the flowcharts available from Farm Commons and the National Sustainable Agriculture Coalition for more information. Enforcement and interpretation of these rules is much less certain. Attorneys can stay on top of developments by visiting the FDA's FSMA resources and archive. See 21 C.F.R. pts. 112, 117.

ii. Processing/Manufacturing

Food companies that are manufacturing and/or processing food are generally required to comply with the Food Safety Modernization Act's Preventive Controls for Human Food Rule (PCFHR). The PCFHR updates current good manufacturing practice standards and adds a new requirement that companies develop a food safety plan (similar to a Hazard Analysis and Critical Control Point (HACCP) plan). There are modified requirements for certain smaller-businesses that are selling primarily into local and regional markets. See 21 C.F.R. pt. 117.

Food holding, manufacturing, and processing is regulated by state law, with the bulk of the rules falling under a set of regulations called the food code. Although not all food codes are titled as such, most are modeled after the U.S. Food Code, which is published every four years by the Food and Drug Administration (FDA). The 2013 Food Code is the most recent edition at the time of writing. Attorneys should also review state and local jurisdiction rules for additional food processing and manufacturing regulations. For example, rules governing festival-style concessions such as popcorn and cotton candy are often covered under agriculture rather than food processing or manufacturing rules.

b. Cottage Food Laws

Cottage food laws create an exemption from the standard food code regulations for some producers under some circumstances. Several questions need answers when examining a state's cottage food laws:

- What products are allowed?
- How much product may be sold?
- Where may the product be sold?
- What permits must be secured or processes must be followed?

Cottage food laws vary widely. What may be allowed in one state might be prohibited in another. Under Washington's cottage food law, "standardized jams" as defined in the federal regulations, are allowed. Under the Code of Federal Regulations, standardized jam is five parts fruit to two parts sugar. Some low-sugar jams would not meet this definition. The same goes for pickles, baked goods, and more. Refrigerator pickles may not be "pickles," and pumpkin pie, may not be a "baked good" under certain state cottage food laws.

Other states focus more on the business size, rather than product type. In Florida, as long as the total sales of all products are under \$15,000 per year and several other requirements are met, producers may sell a wide variety of products. Cottage food laws may require that producers use only ingredients produced in a certified facility, which means a farmer couldn't use her own dried apples in a granola bar, for example, if dried apples are not allowed per the cottage food law.

Regulatory Resources

- Rachel Armstrong & Erin Hannum, *Whether and When Farms Must Comply with FSMA: Flowchart* (2016).

- National Sustainable Agriculture Coalition, Am I Affected by New Food Safety Rules Under Food Safety Modernization Act? Flowchart for Farmers and Food Businesses. (2016)
- See also National Sustainable Agriculture Coalition's blog for regular detailed updates on the Produce Rule and PCHFR.
- Food Law & Policy Clinic of Harvard Law School, Cottage Food Laws in the United States (August 2013) www.chlpi.org/wp-content/uploads/2013/12/FINAL_Cottage-Food-Laws-Report_2013.pdf.
- Find the U.S. Food Code and links to each state's version of the food code and associated regulations at the FDA's Food Code web page: www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/

2. Advertising/Marketing/Labeling

Federal laws regulate specific health claims in a couple of different ways, and these laws apply to everyone - cottage food producers included. A farm or food company may be interested in pointing out that a product (or an ingredient in it) reduces the risk of a disease or condition. For claims like these, the federal Food and Drug Administration must specifically authorize the statement being made, which the agency does after reviewing all the evidence regarding the claim. The FDA maintains a list of approved health claims that manufacturers may use with no other approval required. Manufacturers and industry groups can advocate for approval of new claims in a few different ways. But, petitioning for new health claims requires more time and effort than most start up farm or food companies have to spend. Instead, most start up farm or food companies will want to stick with the list of pre-approved claims at the FDA's website.

Farm and food companies might want to use another kind of health claim: the claim of improved function. These are claims that a specific product or ingredient will improve the overall health or function of the body. A classic example is, "calcium builds strong bones." In short, the FDA will only allow statements related to health or function if there is substantial evidence that the claim is true. "Substantial evidence" can be hard to assess, difficult to measure, and open to interpretation. Producers hoping to make these kinds of claims should consult with an attorney to make sure the evidence will be viewed as substantial in the eyes of the FDA.

Rather than make a specific health-related claim, producers might be interested in highlighting specific nutrient characteristics of their product. These include claims such as "high in Vitamin C." Any time a product announces that it has "more" of or is "high" in a nutrient, it must meet the specific percentage of the daily recommended allowance of that specific nutrient. Anyone making these claims will need to check the recommended allowances and know the percentage daily value of the nutrient in their specific product. Also, if the product makes a claim, it must carry a nutrition label on the product to back up the claim. Many small farm or food companies are otherwise exempt from having to include nutrition labels on their products; making a claim cancels out that exemption.

If a farm or food company wishes to use the word organic or put the USDA organic label on the product, the business must understand organic regulations. If the company is a farm that is already certified organic for the production of crops and livestock and is seeking certification for farm-processed product, the business will need additional certification as a handler. Becoming certified as a handler is necessary even if the farm is only repacking product or doing light processing such as halving melons or making carrot sticks. Food companies including retailers and manufacturers must be certified as a handler to use the organic label.

The certification process for is designed to verify that organic ingredients and processes are protected from non-organic ones. Inspectors will look at ingredient inventories and tracking, where products are stored, the equipment used and cleaning methods adopted, and processing agents used, among other factors. See 7 U.S.C. 6501-6522 and 7 C.F.R. pt. 205.

In addition to the federal rules above, state laws generally set out detailed rules for food labels in terms of the precise placement of product name, weight/count, and manufacturer, among other details. Generally, all processed, wrapped or packaged products (even tomatoes placed in a closed ziplock bag) must have a label. The label usually must comply with the state's relevant food product labeling rules.

Advertising/Marketing/Labeling Resources

See the FDA's Guidance For Industry: A Food Labeling Guide

3. Trademarks

Trademark law is based around the concept of first use, meaning the person or entity to use the mark first in commerce has the exclusive right to use the mark in that particular manner. Registering with the state can provide evidence of first use in the event another user attempts to sue for use of a mark. It also creates a public record of the mark. This public record should appear in a trademark clearance search performed by potential users, putting any prospective user on notice that the mark is already being used.

State registration is the process of filing registration paper work and submitting a fee to the appropriate state agency. This type of registration provides extra protection for the trademark within the state in which the mark is registered. While state registration does not bestow as many rights on the mark owner as federal registration, this registration should provide enough protection for farm and food companies who only intend to sell products within a particular state. State registration provides more benefits to the mark owner than common law rights, but costs less than federal registration. While federal registration can cost \$325 per mark and classification, state registration generally only costs about \$50 per mark and classification (some state's fees are only \$10).

State registration maybe the perfect option for farm and food companies who only plan on selling their products locally or within a particular state. It also may prove to be more economical for those only wishing to sell products in a couple of states, but not looking to sell nationwide.

Farm and food start up companies envisioning expanding their business to encompass multiple states or the nation might pursue federal trademark registration. Federal registration provides peace of mind to business owners, who can be confident that expansion won't be curtailed by other users of the same or similar mark. Federal registration provides nationwide protection of a business's mark. A farm selling products in a large geographical area or the entire country has a lot to gain from federal trademark registration.

Federal registration provides a variety of benefits that are unavailable through common law protection and state registration. The first benefit is a legal presumption as the owner of the mark. Federal registration also allows the owner of the mark to pursue statutory damages in trademark infringement suits. In many actions damages are awarded to a party based on the degree of harm that the party suffers. However, in certain types of lawsuits including trademark infringement the degree of harm is impractical, if not impossible to determine. In this instance lawmakers provide guidelines within the statute to ensure that those who have been harmed receive just compensation. For trademark infringement this can include the opportunity to recover the infringer's profits, damages sustained by the party harmed, as well as attorney's fees. Courts also have the ability to award the harmed party with up to three times the amount of actual damages. Federal registration can provide greater compensation in the event a mark is infringed.

IP-Trademarks Resources

United States Patent and Trademark Office
www.uspto.gov/

4. Employment Law

a. Creative Work Programs: Interns, Worker Shares, and WOOFers

Farm and food business start ups are sometimes attracted to the perceived payroll cost savings from working with interns, volunteers, and other unpaid workforce options. Farms have become especially creative in leveraging the public's burgeoning interest in food and farming by creating unique volunteer and work-for-food arrangements. Community Supported Agriculture farms often have a "work-share" program which allows the customer to receive a free or reduced price in exchange for time spent working on the farm. Other farms offer food or lodging to vacationers/travelers in exchange for day labor. Internships also hold special significance for emerging farm businesses and farmer-entrepreneurs. According to a survey from the National Young Farmers' Coalition, 45% of beginning farmers cited internships as key to their success in farming.

Although these unique work arrangements can minimize payroll costs for start up operations, they are legally risky. The federal Department of Labor recently clarified its position, publishing stringent criteria for an internship to be considered outside the Fair Labor Standards Act (FLSA). These criteria have received court deference to varying degrees and internship law is in a state of flux. The legal context of volunteers in a for profit enterprise is more certain- these “volunteers” fit the definition of employees in most circumstances. A lack of state or federal enforcement (California notwithstanding) hinders public knowledge of the fact.

b. Farm/non-farm dichotomy in minimum wage, overtime, and workers’ compensation

Under the FLSA, a farm that uses fewer than 500 man days in each calendar quarter of the previous year is not required to pay at least the federal minimum wage during the current year. One man day is when one worker performs at least one hour of labor. This is easiest to explain by example. Let’s say a farm had one person perform one hour of labor yesterday. Yesterday, the farm had one man day. Now, let’s say that same farm has two people working for one hour each today. Today, the farm has two man days. Tomorrow, the farm plans to have two people working for four hours each. Tomorrow, the farm will still have two man days. This is because as long as an employee works at least one hour of labor in a day one man day is earned. Even if the worker works for more than one hour, it still counted as one man day. To calculate man days, a farm needs to track the number of people who worked each day and for how long they worked. The farmer should total of all man days in each calendar quarter of the previous year. If the number of man days in any quarter exceeded 500, the farm owes at least the federal minimum wage this year.

This federal exemption comes with a huge caveat. The exemption is only available for farm labor. Agricultural labor has a detailed and precise definition. Generally speaking, if the labor is not related to the production of crops and livestock, it may not be agricultural labor. To provide just a few examples, employees who perform labor related to agritourism, value-added production, processing of farm products, farmers market sales, educational events, and more may be doing non-farm labor. Non-farm labor is not exempt from federal minimum wage. When an employee performs non-farm labor in a workweek, the federal exemption from minimum wage is lost for the entire week. The farmer would need to pay the employee at least the minimum wage for each hour worked in that week, not just the hours spent on the non-farm labor. For example, if a farm employee spends two hours processing and selling salsa, that may be considered non-farm labor. If the employee worked a total of 42 hours that week with the other 40 spent weeding and planting crops, the employee would need to be paid at least the federal minimum wage for all 42 hours.

The FLSA also exempts agricultural labor from overtime rules. For the purposes of overtime, the definition of agricultural labor is more broad than for minimum wage. All in all, farms wishing to pay less than the federal minimum wage or avoid overtime need to understand the complex implications of doing so. In addition to determining legal obligations, detailed timesheets and task tracking are necessary to enable compliance.

This distinction between agricultural and non-agricultural labor generally also applies to state minimum wage and overtime laws that create an exception for agricultural labor. State minimum wage law may define agricultural labor differently than federal law. Some states have found the federal definitions persuasive.

Determining if a farm is required to carry workers’ compensation is not an easy task, either. Farm businesses in many states are eligible for an exception from the obligation to carry workers’ compensation. For example, the state of Wisconsin allows farms to hire up to six employees (under specific circumstances) before requiring workers’ compensation. Other states have a narrow exemption such as requiring the purchase as soon as total farm payroll exceeds a few thousand dollars. Just as with federal minimum wage and overtime, exemptions for farms are often limited to farm tasks, only. If a farm hosts non-farm activities like agritourism, education, or processing, the rules may change. Some states may require workers’ compensation insurance immediately when employees work on a non-farm activity, while other states may require it only if the non-farm activities exceed 50% of tasks assigned, for example.

Employment Law Resources

Many, detailed federal and state-specific farm employment law resources are available at www.farmcommons.org/resources

5. Agritourism and Food Service

a. Gray areas in public/private events

Start up farm and food companies are applying their creativity to address food processing and manufacturing regulations. From hosting events for farm “members” to selling tickets to a dinner in one’s living room, entrepreneurs are finding creative ways to reach a broader audience for their product without complying with detailed food code regulations.

Many state food codes allow clubs to serve food without carrying a food establishment permit. In all states, individuals who host parties for friends are not required to prepare the food in a certified kitchen. Determining when an innovative food service operation is a club, a private event, or a public event subject to permitting is no easy task. Generally, a club is an organization with restrictive membership criteria and common group activities. If anyone can buy a ticket to a dinner club, with no restrictions, and there is no other common events or purpose for the club, regulators will likely find it’s a club in name only. The same goes for a private party. If a farm hosts an evening meal for \$12 and calls it a party, regulators would point out that we generally host parties for only people we know, and we don’t charge our friends to attend. This can quickly get complicated, however. What if a farm offers a free light meal to employees or sets out snacks during a meeting of CSA members? This is a very uncertain area of law. Naturally, entrepreneurs are quite reticent to call the local health department and ask. Attorney assistance can help assess risk in this challenging area of innovation.

b. Tax Issues

Start up farm and food companies may have complex sales tax concerns. Businesses selling raw agricultural products are often exempt from sales tax. But the exemption may not extend to anything cut, cooked, prepared, or mixed. Selling salad kits is especially complex because the rules are often unclear about combinations of still-raw agricultural products. Other sales tax exemptions, such as those for food items, depend on whether the food is sold for immediate consumption (often defined as food sold with plastic utensils) or whether it is intended to be eaten at home. As for hot meals, some municipalities and/or states collect tax on them and some do not.

Agritourism and Food Service Resources

- Rachel Armstrong, Host Safer, More Legally Secure Farm Events (2014)
- Rachel Armstrong, Adding Value to Farm Products: The legal issues (2014)
- Rachel Armstrong and Lisa Kivirist, Come & Get It: What you need to know to serve food on your farm (2015)

6. Liability and Insurance

a. Crop damage and livestock loss

Most crop and livestock insurance originates at the United States Department of Agriculture (USDA). The USDA Risk Management Agency (RMA) works with the Federal Crop Insurance Corporation to craft federally subsidized crop insurance policies. Farmers buy the policies through private insurance companies, who also service those policies for farmers.

i. Whole Farm Revenue Protection

Beginning in 2015, RMA made a new insurance policy available that offers protection for diverse crop and livestock production under a single policy called the Whole Farm Revenue Protection (WFRP) policy. WFRP is unique because it insures the farm’s established revenue from crops and livestock. This means that farmers who sell into organic and specialty markets can insure the actual revenue they earn selling into those valuable markets, rather than insuring the product at its much lower commodity value. WFRP covers up to 85% of a farm’s lost revenue if the farm produces at least three different commodity types.

WFRP insurance is available for crops, livestock, and greenhouse products so long as the latter two categories comprise less than 35% of the farm’s revenue. The protection covers a wide variety of naturally caused losses such as hail, disease, or flooding. Most farmers say that WFRP is quite affordable. RMA’s online cost estimator (easily found through an internet search for “WFRP premium estimator”) is available to help farmers assess the potential premium for their crops. To use a quick example, if a farmer wished to protect \$35,000 of annual revenue from her vegetables and \$15,000 from her beef, she might expect to pay slightly more than \$2,000 for a WFRP policy (based on the estimator as of the time of writing).

Not all farmers will be eligible to purchase a WFRP policy. Of the greatest significance beginning and diversified audience, farmers must have at least five consecutive years of farm tax history. The farm's tax returns will form the basis of the operation's insured revenue. For farmers who are eligible, the process requires submitting an application in early spring, a farm history report, a report of the farm's projected operations for the year, and a report of the farm's actual production and planting for the year, in summary.

Farmers with a WFRP policy must follow specific procedures in the event of a loss. The notice of a loss needs to be submitted within 72 hours. Then, the farmer must file the farm's taxes for the year in which the loss was suffered. After the farmer's taxes are submitted, he or she has 60 days in which to submit a claim for the loss. Expenses the farm predicted but did not incur as a result of the crop or livestock lost may reduce the total payment made to the farmer.

Farmers wishing to purchase a WFRP policy should contact a local insurance agent that sells crop insurance. A list is available at the RMA website.

ii. Multi-Peril Crop Insurance (MPCI):

MPCI policies are available only for specific commodities grown in specific counties in the United States. Livestock producers may receive protection from price declines in the commodity market through Livestock Gross Margin or Livestock Risk Protection policies.

iii. Noninsured Crop Disaster Assistance Program (NAP):

NAP will cover up to 55% of the average market price for crops lost due to natural causes. However, the total crop loss must exceed 50% before payment is available. Although NAP benefits are lean, it is very affordable at \$250 per crop. Beginning and limited resource farmers may apply for a waiver, as well. NAP is sold through the Farm Service Agency, unlike other crop insurance policies.

b. Property damage

Most entrepreneurs are familiar with property insurance. Property insurance generally covers damage to property from weather events, theft, or vandalism. Property insurance policies can also cover losses from equipment breakdown or loss of electrical power. The property covered can include buildings, equipment, machinery, and even seeds or livestock. Specific buildings or elements of buildings can be excluded from coverage such as roof damage from a hailstorm or an unused outbuilding.

c. Injuries to guests or customers

Farm and food business start ups generally turn to insurance agents for information about liability concerns. Diversified farms can have complex issues, and the assistance of an attorney may be helpful.

The liability insurance generally packaged with a farm property policy will cover injuries that occur on the farm to guests or customers at the site for a farm purpose, only. This coverage is generally quite narrow. First, it must be on the farm. If a guest is injured at a farmers' market or CSA drop-site, that may not be covered. Second, the injury must be related to a farm purpose. Although a farm purpose seems encompassing, injuries from education activities, agritourism, value-added production or the like are usually not covered. Most farm liability policies cover injuries relating to the production and marketing of crops or livestock, only. For example, an injured customer, supplier, or guest might all be covered.

If a farmer is hosting festivals, holding education events, making value-added products, offering agritourism, or doing anything else not related directly to the production and marketing of crops or livestock, the farmer will likely need additional coverage. Different insurance companies offer different options. Endorsements are often used where farmers are hosting only a few non-farm activities. If the activity is an event such as a fall festival, an event endorsement might be the most efficient choice. If the activity is a non-farm business venture such as a series of educational classes or a new processing venture, but is still quite modest in scale, a business endorsement may be fine. As farmers scale up, a commercial line usually becomes a more attractive option. Commercial coverage addresses a broader range of non-farm activities without regard to frequency, as compared to a farm liability policy

without commercial coverage. Commercial lines of insurance can take the form of separate policies or be bundled into the farm liability policy.

CSA drop sites can be a bit trickier. CSA is still not as common as farmers' market sales. Endorsements to cover drop-sites are not generally available. In this case, the insurance agent may offer a CSA farmer a commercial line of insurance. Although that sounds more expensive, it can be a good deal. Commercial coverage is broad, covering off-farm and non-farm activities, too. Many CSAs host educational events, festivals, and other activities on their farm. Commercial insurance might be an efficient choice for a diverse, expanding operation.

CSA farmers may be able to cover injuries at some drop sites without changing their own insurance program. If the drop site is a business, the business may be able to add the CSA program to its own insurance coverage. To do this, the business owners would likely need to go to their own insurance agent and ask that the farm be added as an "additional insured" under the business' current commercial policy. Naturally, this might raise the businesses' insurance costs, which they may or may not be willing to incur.

Farmers need to be sure they have insurance coverage for u-pick activities. Many farm liability policies require a special u-pick endorsement for these situations. Without the endorsement, a farmer may not have coverage for u-pick, even though injuries to other farm visitors are covered. Letting folks out into the orchard and fields on their own increases the chances that someone will get injured so this is especially important.

d. Injuries to employees

Farm and food business start ups generally manage the risk of injuries to employees through workers' compensation. The majority of states require workers' compensation early in the life of the business, so things can be quite straightforward for food businesses.

Farms not required to carry workers' compensation should pay special attention to coverage for employee injuries. An employee not covered by workers' compensation could sue the farmer for negligently causing the injury. Some farmers who are not required to buy workers' compensation choose to purchase it, anyway. If workers' compensation is available, the injured employee cannot choose to sue the farmer for the injury. The person's only option is to take the compensation provided by workers' compensation. This can relieve farmers of stress and unpredictability.

If a farmer does not have to purchase workers' compensation, he or she may have a couple of options for insuring employee injuries. Some insurance companies will offer limited employee coverage in their standard farm liability policies. More commonly, farmers may purchase a commercial line of insurance with coverage for seasonal and temporary farm employees. Insuring full-time, permanent farm employees can be a challenge. The market for these policies is small (as farm businesses decline in numbers and fewer still have full-time, year-round help); some farmers will find that workers' compensation is their only option.

e. Farmer and business partner injuries

Especially in the vulnerable, early stages of a start up food or farm business, injury to a business owner can be devastating. Insurance can protect against some of the financial risks of an injury. A personal health insurance policy is required for all individuals via the Affordable Care Act. But, special attention to the policy terms is necessary. Some personal health insurance plans will exclude coverage for an injury incurred while the person works in his or her own business. Farming and food businesses can be hazardous. If a personal insurance plan doesn't cover an entrepreneur while they work, it's not a cost-effective purchase. When it comes to lost income from an injury, entrepreneurs might consider disability insurance. Available for both short-term and long-term disabilities, this insurance can replace a portion of the income insured persons would otherwise be earning. Disability insurance varies widely between companies; business owners need to pay close attention to the specific terms when selecting the best policy for their needs.

Liability and Insurance Resources

- Rachel Armstrong & Laura Fisher, *Managing the Sustainable Farm's Risks with Insurance: Navigating Common Options* (2015).