

ABOUT LAW FOR FOOD: Law for Food, LLP, supports farmers, food businesses, and the sustainable economy by providing effective, affordable legal counsel on issues important to small businesses. With offices in Connecticut and Vermont, Law for Food is an innovative regional legal practice with a vision for New England's local economies.

THE SPECTER OF APPRENTICESHIPS ON THE FARM

Farmers offer time-honored apprenticeships, or on-farm "work-stay" opportunities, which are:

- a way to pass along important farming skills,
- provide farm labor that many farmers consider a primary reason for offering apprenticeships,
- dependent on the nature of the relationship between the farmer and apprentice, which is one of:
 - mutual respect and understanding,
 - a work-trade arrangement, where a laborer may receive any combination of "alternative" compensation, for example a stipend, room and board, produce, the education and training received.

Apprenticeship programs bring with them a range of challenges, most of which may be addressed by clearly memorializing the arrangement in writing, establishing:

- Length or term of the apprenticeship,
- Room and board, cooking arrangements, and work schedule,
- Sustainable agricultural practices to be taught and expected to be carried out, along with the general goal or farmer's responsibilities, perhaps to provide a diversified perspective of farming, from infrastructure, marketing, and distribution, alongside production,
- Clear expectations of the internship, for example that long stretches of hard physical labor may and are likely to take place, and, finally,
- Compensation: be up front about wages and what the intern will be charged, if charged at all, for room, board, and education. The rates must reflect local rates, although education rates are flexible.

The same laws may apply to apprentices/ interns/ whatever you happen to call them as other employees. The most frequently used standard defines an employee as someone who follows the usual path of an employee and, for economic purposes, is dependent on the business served. For example, the federal DOL established a working definition of an intern, versus an employee; it's a 6-part test:

1. The training is similar to what would take place at a vocational school,
2. The training is for the benefit of the student/ apprentice/ intern/ etc.,
3. Trainees do not displace regular employees,
4. Business derives no immediate advantage from job description, terms dictating the internship,
5. Trainees are not necessarily entitled to a job at the end of the term, and
6. Business and trainees clearly understand the terms and conditions of the underlying agreement, for example that the trainees are not entitled to wages for the time spent in training.

The law generally views on-farm mentors as employers and their "apprentices" as employees, because the business usually derives an immediate benefit from the efforts of the intern. To avoid certain employment requirements, such as paying minimum wage, filling out an I-9, etc. businesses sometimes

designate their labor as “independent contractors.” These too are for the most part negatively defined, this time by a 7-part “totality of the circumstances” test:

1. Not an integral part of the business – for farms, consider agricultural vs. non-agricultural labor,
2. Not a permanent, or long-term, relationship,
3. Not dependent on the business’s facilities and equipment,
4. Not closely directed by the business,
5. Not shielded from liability and loss,
6. Not dependent on business for initiative, judgment, or foresight, and
7. Not part of the same business organization and operation as business.

Primarily, the federal and state laws and regulations that affect farm employers, and sometimes unexpectedly, small-farm mentors, include:

- Immigration Reform and Control Act (“IRCA”), which applies in some form or another to all employers and imposes penalties upon employers who knowingly hire or knowingly continue to employ individuals not authorized to work in the U.S;
- Fair Labor Standards Act (“FLSA”), federal and/ or state, which protects workers from exploitation and guarantees minimum wage, overtime pay, and sets recordkeeping requirements and child labor protections;
- Migrant and Seasonal Agricultural Worker Protection Act (“MSAWPA”), which governs disclosure requirements and employee housing, may apply if:
 - o Apprentice does not return to their permanent residence at night, and
 - o Apprentice works 500 or more Man-days, a day in which an employee performs at least one hour’s worth of “agricultural labor,” in any calendar quarter of the previous year. This applies also to FLSA;
 - o FLSA and MSAWPA share the 500 Man-day threshold; also, they share the definition of agricultural labor, which can generally be read to inform additional statutory workplace requirements and exemptions. Agricultural labor is defined by primary and secondary agricultural activities. In short,
 1. Primary: farming in all of its branches, from cultivation and tillage, to dairying and raising livestock or bees.
 2. Secondary: incident to or in conjunction with farming operation, performed by a farmer on a farm.
- Occupational Safety and Health Act (“OSHA”), which establishes a general duty to furnish employment safe from recognizable hazards. Exempt from inspection but not from the general duty usually includes, although it varies by state, agricultural operations with ten or fewer employees in the previous 12 months. Its basic requirements include:
 - o Housing requirements,
 - o Sanitation requirements, for example potable drinking water, clean hand-washing facilities and toilet,
 - o Protective measures for particular on the farm safety concerns.
- Workers’ Compensation, which is administered at the state level, generally the State Department of Labor, covers workplace injuries and represents the exclusive remedy of covered employees. An exemption to agricultural employer exists for those whose annual aggregate payroll is less than \$10,000.
- Payroll Taxes, federal and state, which includes, on the federal end, at least, income tax withholding, Social Security, Medicare.

- The threshold for application of payroll taxes on agricultural employers is \$150 or more in cash wages to a single employee, or who pay \$2,500 or more in annual cash wages.
- Also included are federal-state unemployment tax, and, possibly, self-employment tax.
- State unemployment insurance applies generally, although it varies by state, to agricultural employers who employ 10 or more individuals in each of 20 calendar weeks of preceding or current year, or who paid cash wages of \$20,000 or more to agricultural employees.
- Federal Family Medical Leave Act (“FMLA”), which applies to employers with 50 or more employees for 20 or more weeks.
 - Eligible employees include those employed by the same employer one year for an average of 30 hours per week.
 - 12 weeks unpaid leave in 12 month period, including job protection and continuation of benefits, in case of
 - Childbirth or newborn care;
 - Adoption;
 - Serious health condition of employee or immediate family member;
 - Military service of immediate family member.

Regulatory compliance is expensive for small farms, regardless of whether the subject matter is employment, food safety, licensing, etc. Laws and regulations seem to be made specifically with economies of scale in mind. We need to figure out how to keep the costs of regulatory compliance down, without sacrificing cash in the form of penalties for non-compliance, or employee and consumer safety. With employment on the mind, what can we do in this area to minimize costs without breaking the law?

- More obviously, if impossible to legally designate the apprentice as something different from employee, keep below the exemptions.
 - Below 500 Man-hours, exempt from minimum wage, overtime and certain recordkeeping requirements.
 - Keep in mind, however, the importance of requirements, especially those that are good business practices in the first place, such as recordkeeping and, under certain circumstances, maintaining worker compensation coverage.
- Less obviously, businesses/ their owners need to be creative, honest, and forthright with the apprentices.
 - In reference to the beginning of this presentation, clear expectations are the foundation of a successful apprenticeship arrangement, as is the case with any contract: Put it in writing.
 - Lease Arrangements, as a potential solution to certain arrangements: only limited to the extent, so long the contract is within statutory parameters, as the ability to express, in writing, expectations.