

# LEGAL RESOURCE

Federal and State Laws  
Applying to Agricultural Workers



United States Department of Agriculture  
National Agricultural Library

# ACKNOWLEDGEMENTS

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This resource, a white paper detailing the federal and state laws applicable to agricultural workers, is intended to provide valuable information for advocates, workers, and producers. Although the state law researched here is Vermont, the interplay between state and federal law is generally applicable to other states. Consequently, this resource may serve as a valuable research template for other states. The laws applicable to agricultural workers can be confusing for both workers and farmers. More resources like this are needed to help farmers comply with housing and employment legal requirements and for workers to understand their rights.

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# INTRODUCTION

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This white paper provides an overview of federal and Vermont State laws establishing housing and employment protections for agricultural workers—including dairy workers—on non-exempt farms. This paper first outlines the basic federal requirements for agricultural housing and employment in the Fair Labor Standards Act, Migrant and Seasonal Agricultural Worker Protection Act, and Occupational Safety and Health Act, and highlights the exemptions provided for family farms and small farms.<sup>1</sup> This paper next describes Vermont laws related to housing health and safety, landlord tenant relationships, compensation, and minimum wage requirements, among other topics. A table summarizing the federal laws covered in this memorandum is included in Appendix A.

**The content in this paper is for informational purposes only and does not constitute legal advice. Individuals with legal issues related to agricultural housing or employment should consult an attorney with subject matter expertise and licensure in the appropriate jurisdiction.**

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1 There are a number of additional federal laws that may affect farmworker housing and employment conditions or guarantee protections to workers that are outside the scope of this paper. These include, among others, the Federal Insecticide, Fungicide, and Rodenticide Act; the Fair Housing Act; the Family Medical Leave Act; Title VII of the Civil Rights Act; and the Immigration Reform and Control Act.

# FEDERAL LAW

## FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act of 1938 (FLSA)<sup>2</sup> establishes employment protections for covered employees who are engaged in interstate commerce or in the production of goods for interstate commerce, or who are employed by enterprises that are so engaged. The Act is administered by the Wage and Hour Division of the United States Department of Labor.<sup>3</sup> This section first describes the FLSA's general applicability and basic minimum wage, equal pay, maximum hour, child labor, and recordkeeping and notice requirements, and its protections for nursing mothers. This section then describes the exemptions from those requirements for employees engaged in agriculture. Finally, this section briefly outlines the FLSA's enforcement provisions.

### General Applicability – Enterprise Coverage and Individual Coverage

With certain exceptions, the FLSA's basic requirements apply in two different ways, commonly known as **enterprise coverage** and **individual coverage**.

Pursuant to the **enterprise coverage** provisions, the FLSA applies to each employee who is employed in an enterprise (1) that has any “employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person,” and (2) “whose annual gross volume

of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated).”<sup>4</sup>

Pursuant to the **individual coverage** provisions, an employee of an enterprise that does not meet the \$500,000 annual gross volume threshold is nevertheless covered by the FLSA “in any workweek” when that employee is individually “engaged in commerce or in the production of goods for commerce.”<sup>5</sup> For both types of coverage, “commerce” is defined as interstate commerce—specifically, “trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.”<sup>6</sup>

To summarize, enterprise coverage extends the FLSA's protections to all employees of a larger enterprise so long as at least one employee in that enterprise is engaged in interstate commerce or the production of goods for interstate commerce. In contrast,



2 29 U.S.C. §§ 201-219 (2012).

3 29 U.S.C. § 204 (2012); U.S. Dep't of Labor, Employment Law Guide, <https://webapps.dol.gov/elaws/elg/minwage.htm> (accessed Jan. 22, 2018).

4 29 U.S.C. §§ 203(s)(1)(A), 206(a), 207(a)(1) (2012).

5 29 U.S.C. §§ 206(a), 207(a)(1).

6 29 U.S.C. § 203(b) (2012).

individual coverage extends the FLSA's protections to an employee in any enterprise, regardless of sales or business volume, so long as that specific employee is engaged in interstate commerce or the production of goods for interstate commerce.

**Immigration status** does not affect these general rules of applicability. Although the FLSA does not expressly address this issue and the United States Supreme Court has not spoken on it,<sup>7</sup> a number of federal courts have held that the FLSA's protections apply to both citizens and noncitizens and whether an employee has legal immigration status is irrelevant.<sup>8</sup> Further, since the FLSA was enacted, the Department of Labor has consistently taken the position that the Act applies to undocumented workers and has enforced its provisions without regard to immigration status.<sup>9</sup>

As noted above, there are a number of exemptions from the general enterprise coverage and individual coverage rules. The exemptions applicable to employees engaged in agriculture are discussed in section 3 below.

## Basic Requirements

The FLSA's minimum wage, equal pay, maximum hour, nursing mother break time, child labor, and recordkeeping requirements, which are described in turn below, establish basic protections for covered, non-exempt employees nationally. Further, pursuant to the FLSA's savings clause, states and local municipalities may enact more stringent wage, hour, and child labor laws.<sup>10</sup> In other words, the FLSA does not preempt states and municipalities from enacting laws establishing a higher minimum wage or a lower maximum workweek than the federal standard, and in fact expressly permits them to do so.

### [ Minimum Wage Requirements ]

The FLSA requires an employer to pay every covered employee a **minimum wage of not less than \$7.25 per hour**,<sup>11</sup> except that an employer may pay an employee who is less than twenty years old a minimum wage of not less than \$4.25 an hour "during the first 90 consecutive calendar days after such employee is initially employed."<sup>12</sup> The "[w]age paid to any employee includes the reasonable cost,

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7 The Court has spoken only on the applicability of the National Labor Relations Act (NLRA) to undocumented workers. Specifically, in *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*, the Court held that the National Labor Relations Board could not award back pay to an undocumented worker, even though the worker had been unlawfully terminated in violation of the NLRA, because construing the Act to allow such an award would conflict with federal immigration policy as expressed in the Immigration Reform and Control Act of 1986. 535 U.S. 137, 151 (2002). Numerous federal courts and the Department of Labor have taken the position that *Hoffman* does not mean that undocumented workers lack rights under labor laws not addressed in that decision—namely, the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act. See *infra* notes 8-9.

8 *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927 (8th Cir. 2013) (holding that "unauthorized aliens may sue under the FLSA . . . to recover statutory damages for work actually performed"); *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988) (holding that undocumented workers were "employees" within the meaning of the FLSA and were therefore entitled to institute a civil action pursuant to the Act for unpaid wages and liquidated damages); *In re Reyes*, 814 F.2d 168 (5th Cir. 1987) ("[I]t is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant."); *Colon v. Major Perry Street Corp.*, 987 F. Supp. 2d 451 (S.D.N.Y. 2013) ("The statutory analysis of FLSA and a review of the relevant precedents support the conclusion that, despite recent developments under the NLRA, undocumented workers are still entitled to retrospective backpay under FLSA.").

9 *Lucas*, 721 F.3d at 935-36 & n.6 (collecting cases); U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division (2008), <https://www.dol.gov/whd/regs/compliance/whdfs48.htm>.

10 29 U.S.C. § 218(a) (2012).

11 29 U.S.C. § 206(a)(1) (2012).

12 29 U.S.C. § 206(g)(1) (2012).

as determined by the Administrator [of the Wage and Hour Division], to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.”<sup>13</sup> The minimum wage standard applies to an employee “employed in agriculture,” unless a specific exemption applies.<sup>14</sup>

**Men and women who perform the same job with the same level of skill, effort, and responsibility are entitled to the same compensation.**

The Department of Labor has issued guidance explaining that in calculating the hours subject to the minimum wage requirement, an employer generally must include time a covered employee spent waiting during a shift, and extra hours worked at the end of a shift to complete a task if the employer knew or should have known that the extra work was being performed.<sup>15</sup>

### [ Equal Pay Requirements ]

The FLSA prohibits wage discrimination based on sex—i.e., the Act guarantees equal pay for equal work.<sup>16</sup> Specifically, no employer with employees subject to the minimum wage requirement “shall discriminate, within any establishment in which

such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.”<sup>17</sup>

Thus, men and women who perform the same job with the same level of skill, effort, and responsibility are entitled to the same compensation, and any differences in compensation must be based on valid, business-related factors such as seniority or merit.<sup>18</sup>

### [ Maximum Hour Requirements ]

The FLSA generally prohibits an employer from employing a covered employee “for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”<sup>19</sup> In other words, unless otherwise exempted, a covered employee must receive overtime pay for hours worked in excess of forty in a workweek at a rate not less than time and one-half of that employee’s regular pay

13 29 U.S.C. § 203(m) (2012); see 29 C.F.R. §§ 531.3, 531.29 (2016).

14 29 U.S.C. § 206(a)(4) (2012); 29 C.F.R. § 780.102 (2016).

15 See 29 C.F.R. §§ 785.11-785.15 (2016).

16 29 U.S.C. § 206(d)(1) (2012). This subsection was added by the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

17 *Id.*

18 See *id.*; 29 C.F.R. § 1620.13 (2016).

19 29 U.S.C. § 207(a)(1) (2012).

rate.<sup>20</sup> An employee who is paid on the basis of a piece rate may agree with his employer before performance of work in excess of forty hours that he or she will be paid for those hours “at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours.”<sup>21</sup> “The piece rate will be regarded as bona fide if it is the rate actually paid for work performed during the nonovertime hours and if it is sufficient to yield at least the minimum wage per hour.”<sup>22</sup>

### [ Protections for Nursing Mothers ]

The FLSA requires each covered employer to provide “a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.”<sup>23</sup> A covered employer must also provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”<sup>24</sup> Breaks provided for expressing breast milk may be unpaid.<sup>25</sup> Additionally, the FLSA’s requirements related to nursing mothers do not apply to “[a]n employer that employs less than 50 employees . . . if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.”<sup>26</sup>

### [ Child Labor Requirements ]

In general, the FLSA prohibits an employer from employing any covered employee—i.e., any employee who is individually engaged in the production of goods for interstate commerce or is employed by an enterprise that is so engaged—in conditions that qualify as “oppressive child labor.”<sup>27</sup>

The definition of “oppressive child labor” has three strands. First, “[o]ppressive child labor’ means a condition of employment under which . . . any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation.”<sup>28</sup> In other words, the FLSA sets the **basic minimum age for employment at sixteen**, except that a parent or guardian may employ his or her own child who is under the age of sixteen in any occupation other than manufacturing, mining, or one deemed hazardous by the Secretary of Labor.

Second, “[o]ppressive child labor means a condition of employment . . . under which any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the

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20 U.S. Department of Labor, Wage and Hour Division, Fact Sheet #23: Overtime Pay Requirements of the FLSA (2008), <https://www.dol.gov/whd/regs/compliance/whdfs23.pdf>.

21 29 U.S.C. § 207(g)(1) (2012); 29 C.F.R. §§ 778.111, 778.418 (2016).

22 29 C.F.R. § 778.418 (2016).

23 29 U.S.C. § 207(r)(1)(A) (2012). The protections for nursing mothers were added by the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119

24 29 U.S.C. § 207(r)(1)(B) (2012).

25 29 U.S.C. § 207(r)(2) (2012).

26 29 U.S.C. § 207(r)(3) (2012).

27 29 U.S.C. § 212(c) (2012).

28 29 U.S.C. § 203(l)(1) (2012) (emphasis added); 29 C.F.R. § 570.2(a)(1) (2016).





employment of children between such ages or detrimental to their health or well-being.”<sup>29</sup> Thus, **the minimum age for employment in hazardous occupations is eighteen.**

Third and finally, the FLSA directs the Secretary of Labor to “provide by regulation or by order that the employment of employees **between the ages of fourteen and sixteen years in occupations other than manufacturing and mining** shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.”<sup>30</sup>

Based on this direction, the Department of Labor has promulgated a regulation with an exhaustive list of occupations that do not constitute oppressive child labor when performed by persons who are fourteen or fifteen years of age, including, among others, office or clerical work, cashiering, lifeguarding, and tutoring.<sup>31</sup> Occupations that are not expressly listed in the regulation are prohibited “oppressive child labor.”<sup>32</sup>

## [ Recordkeeping and Notice Requirements ]

The FLSA requires an employer to keep certain records for each covered, non-exempt worker.<sup>33</sup> For example, every employer must maintain and preserve for three years<sup>34</sup> payroll records containing the following information for each employee subject to the Act’s minimum wage and overtime pay requirements:

- the employee’s full name, social security number, address, birthdate (if less than nineteen years of age), sex, and occupation; the hours worked each day and total hours worked each workweek;
- the basis on which the employee’s wages are paid (i.e., monetary amount per hour, day, or piece) and the regular hourly pay rate;
- the total daily or weekly straight time earnings and the total overtime earnings for the workweek;
- all additions to or deductions from the employee’s wages; and
- the total wages paid each pay period, the date of payment, and the pay period covered by the payment.<sup>35</sup>

29 29 U.S.C. § 203(l)(2) (2012); 29 C.F.R. § 570.2(a)(1)(ii) (2016).

30 29 U.S.C. § 203(l)(2) (2012) (boldface added).

31 29 C.F.R. § 570.34 (2016).

32 See 29 C.F.R. § 570.33 (2016).

33 See 29 U.S.C. § 211(c) (2012) (directing the Administrator of the Wage and Hour Division to prescribe by regulation the employment records to be kept by employers subject to the FLSA); 29 C.F.R. § 516.1(a) (2016) (“[E]very employer subject to any provisions of the Fair Labor Standards Act of 1938 . . . is required to maintain records containing the information and data required by [regulation].”).

34 29 C.F.R. § 516.5(a) (2016).

35 29 C.F.R. § 516.2(a) (2016).

Every employer employing any employee subject to the Act's minimum wage requirements must also "post and keep posted a notice explaining the Act . . . in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy."<sup>36</sup> An employer of employees exempt from the Act's overtime pay provisions "may alter or modify the poster with a legible notation to show that the overtime provisions do not apply."<sup>37</sup>

## Exemptions Applicable to Agriculture

There are several exemptions from the FLSA's general requirements applicable to "any employee employed in agriculture." The exemptions "are to be narrowly construed against the employer seeking to exert them and their application limited to those who come plainly and unmistakably within their terms and spirit."<sup>38</sup> This section first discusses the FLSA's definition of "agriculture," and then outlines how employees whose work falls within that definition do not benefit from the FLSA's basic overtime pay, minimum wage, child labor, and recordkeeping protections. The agricultural exemptions described here are not exhaustive; rather, this paper discusses only the predominant exemptions that may be relevant to migrant dairy workers in Vermont.<sup>39</sup>

## [ Agriculture—Defined ]

The definition of "agriculture" for purposes of the FLSA has two strands—" [o]ne has relation to the **primary meaning** of agriculture; the other gives to the term a somewhat broader **secondary meaning** for purposes of the Act."<sup>40</sup>

The **primary meaning** of "agriculture" is "farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . , the raising of livestock, bees, fur-bearing animals, or poultry."<sup>41</sup>

The **secondary meaning** of "agriculture" includes "any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."<sup>42</sup>

Determining the exact scope of the secondary meaning of agriculture—and thus the scope of the FLSA's agricultural exemptions—has been particularly vexatious for employers, workers, regulators, and the courts.<sup>43</sup> It is clear, however, that to come within the secondary definition an activity must be both (1) performed either by a farmer or on a farm; and (2) incidental to or in conjunction with farming operations.<sup>44</sup> In determining

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36 29 C.F.R. § 516.4 (2016).

37 29 C.F.R. § 516.4 (2016).

38 29 C.F.R. § 780.2 (2016).

39 For example, this paper does not discuss the exemptions from minimum wage and maximum hour protections that exist for agricultural employees who are the immediate family members of their employers, see 29 U.S.C. § 213(a)(6)(B); local hand harvest laborers who commute daily from their personal residence, are paid on a piece-rate basis in traditionally piece-rated occupations, and were engaged in agriculture less than thirteen weeks during the preceding calendar year, see id. § 213(a)(6)(C); non-local minors sixteen years of age or under who are hand harvesters, paid on a piece-rate basis in traditionally piece-rated occupations, employed on the same farm as their parent, and paid the same piece rate as those over 16, see id. § 213(a)(6)(D); and employees principally engaged in the range production of livestock, see id. § 213(a)(6)(E).

40 29 C.F.R. § 780.105 (2016) (boldface added).

41 29 U.S.C. § 203(f) (2012) (emphasis added).

42 29 U.S.C. § 203(f) (2012) (emphasis added).

43 See Autumn L. Canny, *Lost in a Loophole: The Fair Labor Standards Act's Exemption of Agricultural Workers From Overtime Compensation Protection*, 10 Drake J. Agric. L. 355, 371-80 (2005).

44 See *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 763 (1949).

whether an activity is “incidental to or in conjunction with such farming operations” a court may consider factors including (1) the size of the ordinary farming operations relative to the challenged activities; (2) the type of product resulting from the operation in question; (3) the investment in the challenged operation relative to the ordinary farming activities; (4) the time spent performing the challenged activity relative to ordinary farming; (5) the extent to which ordinary farmworkers engaged in the challenged activity; (6) the degree of separation by the employer between the various operations; and (7) the degree of industrialization.<sup>45</sup>

For example, with respect to dairying, an employee of a company that installs and repairs dairy cooling and storage equipment **on a farm** may be considered to be engaged in secondary agriculture and may therefore be exempt from the FLSA’s minimum wage and overtime pay protections.<sup>46</sup> Conversely, if a farm produces and processes its own milk, but also processes and distributes milk and dairy products from other farms, its processing activities may be outside the scope of secondary agriculture, and any employees engaged in those processing activities may therefore be entitled to minimum wage and overtime pay pursuant to the FLSA.<sup>47</sup>

### [ Overtime Pay and Nursing Mother Exemptions ]

The FLSA’s maximum hour requirements do not apply to “any employee employed in agriculture.”<sup>48</sup> This exemption applies to all agricultural employees, regardless of how many total employees work on the farm.<sup>49</sup> Thus, agricultural workers are not entitled to overtime pay for hours worked in excess of forty in a workweek. Likewise, the provision requiring reasonable break times for nursing mothers does not apply to “any employee employed in agriculture.”<sup>50</sup>

### [ Minimum Wage and Equal Pay Exemptions ]

The FLSA’s minimum wage requirements do not apply to “any employee employed in agriculture . . . if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor.”<sup>51</sup> A “man-day” is “any day during which an employee performs any agricultural labor for not less than one hour.”<sup>52</sup> In practice, “500 man-days is approximately the equivalent of seven employees employed full-time in a calendar quarter. However, a farmer who hires temporary or part-time employees during part of the year, such as the harvesting season, may exceed the man-day test even though he may have only two or three full-time employees.”<sup>53</sup> Accordingly, employees who are engaged in “agriculture,” as that term is defined, and who are employed

45 See *Maneja v. Waialua Agric. Co., Ltd.*, 349 U.S. 254, 264-65 (1955).

46 See *Tipton v. Associated Milk Producers, Inc.*, 398 F. Supp. 743, 746-47 (N.D. Tex. 1975).

47 See *Brennan v. Gustafson’s Dairy, Inc.*, 382 F. Supp. 964, 967-68 (M.D. Fla. 1974).

48 29 U.S.C. § 213(b)(12) (2012).

49 There is a separate exemption from the maximum hour requirements that applies specifically to employees on small farms that used fewer than 500 “man-days” of agricultural labor in any quarter of the preceding year. See 29 U.S.C. § 213(a)(6) (2012). This, however, appears to be redundant with the broader exception from those same requirements for “any employee employed in agriculture.” 29 U.S.C. § 213(b)(12) (2012); see also United States Department of Labor, Wage and Hour Division, Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA), <https://www.dol.gov/whd/regs/compliance/whdfs12.htm> (revised 2008) (“Employees who are employed in agriculture as that term is defined in the Act are exempt from the overtime pay provisions. They do not have to be paid time and one half their regular rates of pay for hours worked in excess of forty per week.”).

50 29 U.S.C. §§ 207(r), 213(b)(12) (2012).

51 29 U.S.C. § 213(a)(6) (2012).

52 29 U.S.C. § 203(u) (2012).

53 29 C.F.R. § 780.305 (2016).

by small farms—generally, those with fewer than seven full-time employees—are not entitled to the federal minimum wage of \$7.25 per hour.<sup>54</sup> Further, an employer who does not have any employees subject to the minimum wage requirement is also exempt from the Act’s equal pay provision prohibiting sex-based wage discrimination.<sup>55</sup>

### [ Child Labor Exemptions ]

The FLSA sets the minimum age for employment in agriculture at sixteen if either (1) the employment takes place during school hours for the district in which the employed minor lives, or (2) the agricultural occupation is one that the Secretary of Labor determines to be particularly hazardous,<sup>56</sup> except that a parent or guardian may employ his or her own child in a hazardous agricultural occupation on a farm that the parent or guardian owns or operates.<sup>57</sup> Thus, although parents or guardians are generally prohibited from employing their children under sixteen in hazardous occupations,<sup>58</sup> they may do so if the hazardous employment falls within the definition of “agriculture.”

Additionally, the FLSA sets the minimum age for employment in agriculture at fourteen if the employment takes place outside of school hours for the school district in which the employed minor lives.<sup>59</sup> “However, (1) a minor 12 or 13 years of age may be so employed with written consent of his parent

The FLSA sets the minimum age for employment in agriculture at fourteen if the employment takes place outside of school hours for the school district in which the employed minor lives.

or person standing in place of his parent, or may work on a farm where such parent or person is also employed, and (2) a minor under 12 years of age may be employed by his parent or by a person standing in place of his parent on a farm owned or operated by such parent or person, or may be employed with consent of such parent or person on a farm where all employees are exempt from the minimum wage provisions.”<sup>60</sup>

### [ Recordkeeping Exemptions ]

An employer need not maintain payroll records for “employees engaged in agriculture” who are at least eighteen years of age and who are exempt from the FLSA’s minimum wage and overtime pay exemptions, so long as that employer “did not use more than 500 man-days of agricultural labor in any quarter of the preceding calendar year.”<sup>61</sup> As noted above, “500 man-days is approximately the equivalent of seven employees employed full-time in a calendar quarter.”<sup>62</sup>

54 See 29 U.S.C. § 206(a)(1).

55 29 U.S.C. § 206(d)(1) (2012).

56 The Secretary of Labor has determined that the following agricultural occupations, among others, are hazardous for children below sixteen years of age: “[o]perating a tractor over 20 PTO horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor”; “[w]orking on a farm in a yard, pen, or stall occupied by a . . . cow with a newborn calf (with umbilical cord present)”; “[w]orking inside . . . [a]n upright silo within 2 weeks after silage has been added or when a top unloading device is in operating position[,] . . . [a] manure pit[,] or . . . [a] horizontal silo while operating a tractor for packing purposes.” 29 C.F.R. § 570.71(a) (2012).

57 29 U.S.C. § 213(c)(2) (2012); 29 C.F.R. § 570.2(b) (2016).

58 29 U.S.C. § 203(l)(1) (2012); 29 C.F.R. § 570.2(a)(1) (2016).

59 29 U.S.C. § 213(c)(1)(C) (2012); 29 C.F.R. § 570.2(b) (2016).

60 29 C.F.R. § 570.2(b) (2016); see 29 U.S.C. § 213(c)(1)(A)-(B) (2012).

61 29 C.F.R. § 516.33(a) (2016).

62 29 C.F.R. § 780.305 (2016).

However, if “it can reasonably be anticipated that more than 500 man-days of agricultural labor will be used in at least one calendar quarter of the current calendar year,” the employer must comply with the basic payroll record requirements, and must also use “symbols or other identifications separately designating those employees who are (i) [m]embers of the employer’s immediate family . . . , (ii) [h]and harvest laborers . . . , and (iii) [e]mployees principally engaged in the production of livestock.”<sup>63</sup> Such an employer must also maintain records of the number of man-days worked each week or each month for each employee other than members of the employer’s immediate family.<sup>64</sup>

Finally, “[e]very employer (other than parents or guardians standing in the place of parents employing their own child or a child in their custody) who employs in agriculture any minor under 18 years of age on days when school is in session or on any day if the minor is employed in an occupation found to be hazardous by the Secretary shall maintain and preserve records containing the following data with respect to each and every such minor so employed: (1) [n]ame in full, (2) [p]lace where the minor lives while employed . . . , [and] (3) date of birth.”<sup>65</sup>

## Enforcement of the FLSA

Civil claims based on a violation of the FLSA’s wage and hour requirements may be enforced in three ways.<sup>66</sup> First, an employee may initiate a private lawsuit against his or her employer for unpaid wages or overtime compensation plus “an additional equal amount as liquidated damages.”<sup>67</sup> An employer found to be liable for the violation must also pay the plaintiff reasonable attorney fees and costs.<sup>68</sup> Second, the Secretary of Labor may bring an action against an employer on behalf of an employee seeking the same remedies.<sup>69</sup> Third, the Secretary of Labor “is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees.”<sup>70</sup>

Additionally, the FLSA’s child labor provisions may be enforced in an administrative proceeding.<sup>71</sup> A person found to have violated any such provision will be liable for civil monetary penalties.<sup>72</sup>

Finally, the FLSA’s minimum wage, maximum hour, child labor, and recordkeeping requirements may each be enforced through criminal prosecution.<sup>73</sup> Specifically, “[a]ny person who willfully violates any of the provisions [just mentioned] shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.”<sup>74</sup>

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63 29 C.F.R. § 516.33(b) (2016).

64 29 C.F.R. § 516.33(b) (2016).

65 29 C.F.R. § 516.33(f) (2016).

66 See 29 U.S.C. § 216 (2012).

67 *Id.* § 216(b).

68 *Id.*

69 *Id.* § 216(c).

70 *Id.*

71 *Id.* § 216(e).

72 *Id.*

73 See 29 U.S.C. §§ 215(a)(2), (4), (5) & 216(a) (2016).

74 *Id.* § 216(a).

## MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

The Migrant and Seasonal Agricultural Worker Protection Act (AWPA)<sup>75</sup> establishes basic protections related to housing and employment for covered migrant and seasonal agricultural workers.<sup>76</sup> These protections work in conjunction with, and do not displace, those created by the FLSA. This section first identifies to whom the AWPA applies. This section then describes the AWPA's (a) housing requirements, and (b) employment requirements for non-exempt farms.

### Applicability of the AWPA

The AWPA applies only to certain agricultural employers, agricultural associations, farm labor contractors, and agricultural workers, as further described below.

#### [ Covered Employers and Exceptions ]

"Agricultural employers," "agricultural associations," and "farm labor contractors" are subject to the AWPA unless specifically exempted. These terms are defined as follows:

**AGRICULTURAL EMPLOYER:** "The term 'agricultural employer' means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker."<sup>77</sup>



**AGRICULTURAL ASSOCIATION:** "The term 'agricultural association' means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker."<sup>78</sup>

**FARM LABOR CONTRACTOR:** "The term 'farm labor contractor' means any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity."<sup>79</sup> In turn, "farm labor contracting activity" means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker."<sup>80</sup>

There are two broad exemptions from the AWPA's requirements: the "family business exemption," and the "small business exemption."

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- 75 Migrant and Seasonal Agricultural Worker Protection Act of 1983, Pub. L. No. 97-470, 69 Stat. 2583 (codified as amended at 29 U.S.C. §§1801-1872 (2012)). In practice, the Migrant and Seasonal Worker Protection Act is abbreviated as either "AWPA" or "MSPA," rather than "MSAWPA."
- 76 29 U.S.C. § 1801 ("It is the purpose of this chapter to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this chapter; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.").
- 77 29 U.S.C. § 1802(2).
- 78 *Id.* § 1802(1).
- 79 *Id.* § 1802(7).
- 80 *Id.* § 1802(6).

**FAMILY BUSINESS EXEMPTION:** The AWPAs do not apply to “[a]ny individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, which is owned or operated exclusively by such individual or an immediate family member of such individual, if such activities are performed only for such operation and exclusively by such individual or an immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes.”<sup>81</sup> In other words, if the hiring or employment of migrant or seasonal agricultural workers is conducted exclusively by a farm owner or his or her immediate family member, and the farm owner or immediate family member does not hire or employ migrant or seasonal agricultural workers for any outside business, then the farmer is exempt from the AWPAs.

**SMALL BUSINESS EXEMPTION:** The AWPAs do not apply to “[a]ny person, other than a farm labor contractor, for whom the man-days exemption for agricultural labor provided under section 13(a)(6)(A) of the Fair Labor Standards Act of 1938 . . . is applicable.”<sup>82</sup> In other words, a farm employer is exempt from the AWPAs if he or she did not use more than 500 man-days of agricultural labor during any calendar quarter in the previous year,<sup>83</sup> where a “man-day” is defined as a day in which an employee, other than an immediate family member, performs any agricultural labor for an hour or more.<sup>84</sup>

Accordingly, migrant and seasonal agricultural workers on family farms and small farms do not benefit from the AWPAs’ protections.

## [ Covered Workers ]

Both “migrant agricultural workers” and “seasonal agricultural workers” who are engaged in “agricultural employment” are entitled to protections under the AWPAs. With limited exceptions, these terms are defined as follows:

**MIGRANT AGRICULTURAL WORKER:** “[T]he term ‘migrant agricultural worker’ means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.”<sup>85</sup>

**SEASONAL AGRICULTURAL WORKER:** The term “seasonal agricultural worker” means an individual who is not a migrant agricultural worker and “who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence . . . when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or . . . when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or cause to be transported, to or from the place of employment by means of a day-haul operation.”<sup>86</sup>

The primary difference between a “migrant agricultural worker” and a “seasonal agricultural worker” is therefore whether the worker is required to be away from his or her permanent home overnight.

For purposes of both definitions, the term “agricultural employment” means “employment in any service or activity” included within the definitions of “agriculture”

81 *Id.* § 1803(a)(1).

82 *Id.* § 1803(a)(2).

83 29 U.S.C. § 213(a)(6)(A) (2012).

84 29 U.S.C. § 203(e)(3), (u) (2012).

85 *Id.* § 1802(8)(A) (emphasis added).

86 *Id.* § 1802(10)(A), (B)(i) (emphasis added).

and “agricultural labor” under the FLSA and the Internal Revenue Code, respectively.<sup>87</sup> Additionally, “agricultural employment” includes “the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.”<sup>88</sup> The AWPA thus covers a broader scope of agricultural activities than the FLSA. Specifically, the FLSA limits the term “agriculture” to traditional farming activities and secondary activities performed by a farmer or on a farm in conjunction with the operations of that particular farm.<sup>89</sup> Conversely, the AWPA regards the processing of any agricultural commodities as “agricultural employment” regardless of whether the activities take place on a farm or whether the commodities were produced by a different operation.

Notably, the general definitions of “migrant agricultural worker” and “seasonal agricultural



worker” expressly exclude (1) “any immediate family member of an agricultural employer or a farm labor contractor,” and (2) “any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States” pursuant to a temporary work visa, such as an H-2A visa.<sup>90</sup> Thus, workers who participate in temporary work visa programs are not protected by the AWPA. As with the FLSA, however, all other noncitizens, **including undocumented workers**, are covered by the Act.<sup>91</sup>

87 *Id.* § 1802(3); see also 26 U.S.C. § 3121(g) (2012) (defining “agricultural labor” for purposes of the Internal Revenue Code to mean, among other things, “all service performed . . . on a farm . . . in connection with the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state”); 29 U.S.C. § 203(f)(2012) (stating that for purposes of the FLSA, “[a]griculture” includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market”).

88 *Id.* § 1802(3); see also 26 U.S.C. § 3121(g) (2012) (defining “agricultural labor” for purposes of the Internal Revenue Code to mean, among other things, “all service performed . . . on a farm . . . in connection with the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state”); 29 U.S.C. § 203(f)(2012) (stating that for purposes of the FLSA, “[a]griculture” includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market”).

89 29 U.S.C. § 203(f).

90 *Id.* §§ 1802(8)(B), 1802(10)(B). The H-2A temporary agricultural guest worker program—a part of the Immigration and Nationality Act—authorizes foreign-born workers to enter the United States to perform agricultural labor. See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) (2012).

91 See *Escobar v. Baker*, 814 F. Supp. 1491, 1498 (1993) (concluding that the AWPA offers protections to both documented and undocumented workers, and collecting cases); U.S. Dep’t of Labor, Wage & Hour Div., Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division (2008), <https://www.dol.gov/whd/regs/compliance/whdfs48.htm>; Susan A. Schneider, Notes on the Migrant and Seasonal Agricultural Worker Protection Act, 2001 Ark. L. Notes 57, 58 (2001).



## Basic Requirements Under the AWPA

### [ Housing Protections ]

The AWPA includes two types of housing protections for migrant agricultural workers: **safety and health protections**, and **notice requirements related to housing terms and conditions**. Note that the housing protections included in the AWPA apply only to “migrant agricultural workers,” and do not apply to “seasonal agricultural workers” who by definition are “not required to be absent overnight from [their] permanent place of residence.”<sup>92</sup>

First, with regard to **housing safety and health**, “each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.”<sup>93</sup> This requirement does not apply “to any person who, in the ordinary course of that person’s business, regularly provides housing on a commercial basis to the general public and who provides housing to migrant agricultural workers of the same character and on the same or comparable terms and conditions as is provided to the general public.”<sup>94</sup>

In most circumstances, the applicable federal housing standard is the one promulgated

by the Occupational Safety and Health Administration (OSHA) related to “temporary labor camps.”<sup>95</sup> The OSHA temporary labor camp standard is enforceable under the AWPA regardless of whether the housing is also subject to inspection pursuant to the Occupational Health and Safety Act.<sup>96</sup> The standard is described in detail in section I.C below, and includes provisions to prevent overcrowding and to ensure building safety, adequate water supply, and sufficient toilet, laundry, and bathing facilities.<sup>97</sup> Additionally, farms that are subject to the housing safety and health requirement must not allow migrant agricultural workers to occupy farmer-owned housing “unless a State or local health authority or other appropriate agency has certified that the facility or property meets applicable safety and health standards.”<sup>98</sup> The certification must be posted at the site and must be retained for three years and made available for review during any Department of Labor inspection.<sup>99</sup>

Second, with regard to **notice of housing terms**, “[e]ach farm labor contractor, agricultural employer, and agricultural association which provides housing for any migrant agricultural worker shall post in a conspicuous place or present to such worker a statement of the terms and conditions, if any, of occupancy of such housing.”<sup>100</sup> The written statement must include the following information: the name and address of the farm labor contractor, agricultural association, or

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92 29 U.S.C. § 1802(10)(A), (B)(i).

93 29 U.S.C. § 1823(a) (2012) (emphasis added).

94 29 U.S.C. § 1823(c) (2012).

95 Pursuant to 29 C.F.R. § 500.132(a)(1) (2016), the OSHA “temporary labor camps” standard applies to all housing that was under construction as of April 3, 1980. See 29 C.F.R. § 1910.142 (2016) (temporary labor camps standard). Housing that was completed or under construction prior to that date may choose to comply with either the OSHA temporary labor camps standard or the housing standards promulgated by the Employment and Training Administration, which were originally promulgated for employers obtaining migrant workers through the U.S. Employment Service. See 29 C.F.R. § 500.132(a)(2) (2016).

96 29 C.F.R. § 500.132(a)(1).

97 29 C.F.R. § 1910.142 (2016).

98 29 U.S.C. § 1823(b)(1) (2012).

99 *Id.*

100 29 U.S.C. § 1821(c) (2012).

agricultural employer providing the housing; the name and address of the person in charge of the housing; who may live at the housing; the charges for the housing and utilities; the meals to be provided and the charges for them; and any other charges or conditions of occupancy.<sup>101</sup> The information must “be provided in English or, as necessary and reasonable, in Spanish or other language common to migrant agricultural workers who are not fluent or literate in English.”<sup>102</sup>

## [ Employment Protections ]

The AWPA establishes three primary types of employment protections for migrant and seasonal agricultural workers: **information and recordkeeping** protections, **wage and working arrangement** protections, and **transportation** protections.

The **information and recordkeeping protections** under the AWPA are intended to increase agricultural workers’ understanding of the terms of their employment and their legal rights. Covered employers are prohibited from knowingly providing false or misleading information related to the terms or conditions of employment.<sup>103</sup> The information and recordkeeping protections include the following, among others:

**DISCLOSURE REQUIREMENTS UPON HIRING:** Each farm labor contractor, agricultural employer, and agricultural association must disclose in writing the terms of the working arrangement to any migrant agricultural worker at the time he or she is recruited, and to any seasonal agricultural worker when an offer of employment is made.<sup>104</sup>

The written statement must include, among other things, the wages to paid; the period of employment; the transportation or housing to be provided, if any; and whether state workers’ compensation insurance is provided.<sup>105</sup> The written statement must “be provided in English or, as necessary and reasonable, in Spanish or other language common to migrant agricultural workers who are not fluent or literate in English.”<sup>106</sup>

**POSTING REQUIREMENTS:** “Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant [or seasonal] agricultural worker shall, at the place of employment, post in a conspicuous place a poster provided by the Secretary [of Labor] setting forth the rights and protections afforded such workers under [the AWPA], including the right of a migrant [or seasonal] agricultural worker to have, upon request, a written statement provided by the farm labor contractor, agricultural employer, or agricultural association, of the [terms of the working arrangement] that were required to be disclosed upon hiring]. Such employer shall provide upon request, a written statement of [those terms of the working arrangement].”<sup>107</sup>

**PAYROLL RECORD AND STATEMENT REQUIREMENTS:** Each farm labor contractor, agricultural employer, and agricultural association that employs any migrant or seasonal agricultural worker must make, keep, and preserve for three years records for each such worker of the basis on which wages are paid; the number of piecework units earned, if any; the number of hours worked; the total pay period earnings; the specific sums withheld and the purpose of the withholdings; and

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101 29 C.F.R. § 500.75(f) (2016).

102 29 U.S.C. §§ 1821(g), 1831(f) (2012).

103 29 U.S.C. §§ 1821(f), 1831(e) (2012).

104 29 U.S.C. §§ 1821(a), 1831(a) (2012).

105 *Id.*

106 29 U.S.C. §§ 1821(g), 1831(f) (2012).

107 29 U.S.C. §§ 1821(b), 1831(b) (2012).

the net pay.<sup>108</sup> Each farm labor contractor, agricultural employer, and agricultural association must also “provide to each such worker for each pay period, an itemized written statement of [this] information.”<sup>109</sup>

The **wage and working arrangement protections** include the following, among others:

**PAYMENT OF WAGES:** “Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant [or seasonal] agricultural worker shall pay the wages owed to such worker when due.”<sup>110</sup> Thus, if an employer is required to pay a worker the federal minimum wage under the FLSA, the failure to do so would violate both the FLSA and the AWPA.

**PURCHASE OF GOODS OR SERVICES:** “No farm labor contractor, agricultural employer, or agricultural association shall require any migrant [or seasonal] agricultural worker to purchase any goods or services solely from such farm labor contractor, agricultural employer, or agricultural association.”<sup>111</sup>

**TERMS OF WORKING ARRANGEMENT:** “No farm labor contractor, agricultural employer, or agricultural association shall, without justification, violate the terms of any working arrangement made by that contractor, employer, or association with any migrant [or seasonal] agricultural worker.”<sup>112</sup>

Finally, if a covered employer provides **transportation** to workers, the vehicles must be safe and properly insured.<sup>113</sup> Specifically, the vehicles must comply with Department of Labor regulations and other federal and



state safety standards, each driver of such vehicles must have a valid driver’s license, and an insurance policy or liability bond must be in effect.<sup>114</sup> These transportation safety requirements do not apply “to the transportation of any migrant or seasonal agricultural worker on a tractor, combine, harvester, picker, or other similar machinery and equipment while such worker is actually engaged in the planting, cultivating, or harvesting of any agricultural commodity or the care of livestock or poultry.”<sup>115</sup>

### Enforcement of the AWPA

A person who violates the AWPA may be liable for both criminal and administrative sanctions. Specifically, with respect to criminal sanctions, a person who willfully and knowingly violates the AWPA “shall be fined not more than \$1,000 or sentenced to prison for a term not to exceed one year, or both. Upon conviction

108 29 U.S.C. §§ 1821(d)(1), 1831(c)(1) (2012).

109 29 U.S.C. § 1821(d)(2) (2012).

110 29 U.S.C. §§ 1822(a), 1832(a) (2012).

111 29 U.S.C. §§ 1822(b), 1832(b) (2012).

112 29 U.S.C. §§ 1822(c), 1832(c) (2012).

113 29 U.S.C. § 1841 (2012).

114 *Id.* § 1841(b)(1).

115 *Id.* § 1841(a)(2).

for any subsequent violation of [the AWPA], the defendant shall be fined not more than \$10,000 or sentenced to prison for a term not to exceed three years, or both.”<sup>116</sup> With respect to administrative sanctions, any person who violates the AWPA “may be assessed a civil money penalty of not more than \$1,000 for each violation,” after receiving notice of the assessment and an opportunity to be heard.<sup>117</sup>

The Wage and Hour Division within the United States Department of Labor enforces the AWPA.<sup>118</sup> In addition to seeking criminal and administrative sanctions, the Wage and Hour Division may initiate a lawsuit for temporary or permanent injunctive relief if the Secretary determines that the AWPA has been violated.<sup>119</sup> Further, any worker aggrieved by a violation of the AWPA may initiate a civil action in federal district court seeking damages or other equitable relief.<sup>120</sup> Employers are prohibited from discriminating or retaliating against any worker who files a complaint or institutes or participates in any judicial or administrative proceeding to enforce the AWPA.<sup>121</sup>

## OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act (OSH Act)<sup>122</sup> is the nation’s preeminent workplace health and safety law. The Act is implemented

and enforced by the Occupational Safety and Health Administration (OSHA) within the Department of Labor, except in limited circumstances where OSHA has delegated its enforcement authority to a separate agency.<sup>123</sup> This section first discusses the scope of coverage under the OSH Act and exemptions for small farms. This section then addresses the Act’s general duty clause and specific standards for agricultural operations, namely standards covering temporary labor camps, field sanitation, tractor roll-over protections, guarding of farm field equipment, and hazard communication.<sup>124</sup> Finally, this section briefly addresses the OSH Act’s inspection and anti-retaliation provisions.

### General Coverage and Exemptions Under the OSH Act

In general, the OSH Act applies to each “employer” with one or more employees, other than government employers.<sup>125</sup> An “employer” is any “person engaged in a business affecting commerce.”<sup>126</sup> As with the FLSA and the AWPA, however, the OSH Act exempts family farms and small farms from its general coverage.

Specifically, “[a]ny person engaged in an agricultural activity employing one or more

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116 29 U.S.C. § 1851 (2012).

117 29 U.S.C. § 1853(a), (b) (2012).

118 United States Department of Labor, *Wages and Hours Worked: Worker Protections in Agriculture*, <https://webapps.dol.gov/elaws/elg/AWPA.htm> (accessed December 14, 2018).

119 29 U.S.C. § 1852(a) (2012).

120 29 U.S.C. § 1854(a), (c) (2012).

121 29 U.S.C. § 1855(a) (2012).

122 29 U.S.C. §§ 651-678 (2012).

123 For example, OSHA has delegated authority to the Employment Standards Administration within the Department of Labor to conduct inspections and issue citations for field sanitation and most temporary labor camps. See Occupational Safety & Health Admin., U.S. Dep’t of Labor, *Field Operations Manual*, CPL-02-00-160 at 7-13 (2016), [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-00-160.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-160.pdf).

124 Additional standards related to agriculture are outside the scope of this paper, including regulations governing anhydrous ammonia storage, cadmium usage, and logging operations. See Jack Runyan, U.S. Department of Agriculture, Economic Research Serv., *Federal Laws and Regulations Affecting Farm Safety* (2001), available at [http://nasdonline.org/static\\_content/documents/1833/d001777.pdf](http://nasdonline.org/static_content/documents/1833/d001777.pdf).

125 29 U.S.C. § 652(5) (defining “employer”); see also *id.* § 654 (requiring “employers” to comply with standards promulgated pursuant to the Act). The Act establishes a separate safety and health program for federal employees. See *id.* § 668.

126 29 U.S.C. § 652; 29 C.F.R. § 1975.3(5) (2016).

OSHA has issued guidance defining a “farming operation” as “any operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations.”

employees comes within the definition of an employer under the Act, and therefore, is covered by its provisions. However, members of the immediate family of the farm employer are not regarded as employees for the purposes of this definition.”<sup>127</sup>

Accordingly, a farmer who employs only his or her immediate family members is not required to comply with the health and safety standards promulgated by OSHA.

Additionally, Congress has consistently included riders in Department of Labor appropriations bills that prohibit the expenditure of appropriated funds to enforce OSHA standards at “farming operations” that (1) have had ten or fewer employees at all times during the previous twelve months, and (2) have not had an active temporary labor camp during the previous twelve months.<sup>128</sup> OSHA has issued guidance defining a “farming operation” as “any operation involved in the growing or harvesting of crops, the raising

of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations.”<sup>129</sup> Family members of an employer are not included in determining whether that employer has had ten or fewer employees.<sup>130</sup> In sum, a farm is subject to the OSH Act only if (1) it has had more than ten employees on any single day in the previous year, or (2) it has maintained a temporary labor camp at any time in the previous year. A farm that does not satisfy either of these conditions is exempt.

### General Duty Clause

Under the OSH Act, every non-exempt employer has a general duty to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”<sup>131</sup> OSHA is authorized to issue a citation to enforce this general duty, even where the working condition that is the basis for the citation is not covered by a specific standard.<sup>132</sup>

### OSHA Standards Applicable to Agricultural Operations

The OSH Act directs the Secretary of Labor to promulgate standards that are “reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”<sup>133</sup> This broad mandate to promulgate occupational safety and health standards is limited by a provision that bars

127 29 C.F.R. § 1975.4(b)(2) (2016).

128 OSHA Directive CPL 02-00-051, Enforcement Exceptions and Limitations Under the Appropriations Act (revised Jan. 10, 2017), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=1519#APPA](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1519#APPA).

129 *Id.*

130 OSHA Directive CPL 02-00-051, Enforcement Exceptions and Limitations Under the Appropriations Act (revised Jan. 10, 2017), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=1519#APPA](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1519#APPA).

131 29 U.S.C. § 654.

132 29 U.S.C. § 658; Occupational Safety & Health Admin., U.S. Dep’t of Labor, Field Operations Manual, CPL-02-00-160 at 10-4 (2016), [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-00-160.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-160.pdf).

133 29 U.S.C. §§ 652(8), 655.

OSHA from regulating working conditions that are already addressed by a separate statute enforced by a federal or state agency.<sup>134</sup> For example, because pesticides are regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which is enforced by the Environmental Protection Agency, OSHA is precluded from promulgating regulations to directly protect agricultural workers from pesticide exposure.<sup>135</sup>

There are two types of OSHA standards applicable to “agricultural operations.”<sup>136</sup> First, OSHA has specified by regulation that agricultural operations are subject to certain general industry standards.<sup>137</sup> These include the temporary labor camp and hazard communication standards addressed below.<sup>138</sup> Agricultural operations are exempt from those general industry standards not specifically identified in the regulation.<sup>139</sup> Second, OSHA has promulgated special standards that apply only to agricultural operations, including standards for field sanitation, tractor roll-over protection structures, and guarding of farm equipment.<sup>140</sup>

Note that OSHA regulations do not expressly define “agricultural operation.” As noted above, however, OSHA guidance defines a “farming operation” as “any operation involved in the growing or harvesting of

crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations.”<sup>141</sup> Additionally, the Occupational Safety and Health Review Commission has stated that in determining whether an employer engages in an “agricultural operation” it will examine “the specific task that exposed [a] worker to the alleged noncomplying condition for which the employer was cited” and will consider “whether the task is part of, or integrally related to an agricultural operation.”<sup>142</sup> Based on this standard, the Commission has determined that post-harvest activities that take place in facilities located away from where the produce is grown do not qualify for the “agricultural operations” exemption from the general industry standards.<sup>143</sup>

### [ Temporary Labor Camps ]

OSHA’s temporary labor camp standard<sup>144</sup> “applies to job related housing that is provided by the employer on a temporary basis for workers not at a permanent location. This kind of housing is most commonly used in agriculture where migrant laborers from other geographical areas move temporarily into employer provided housing at crop harvesting time.”<sup>145</sup> Housing comes within the scope of OSHA regulation “only when a close

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134 *Id.* § 653(b)(1).

135 See *Cnty. Action v. Brennan*, 520 F.2d 1161, 1166 (D.C. Cir. 1975); Joan D. Flocks, *The Environmental and Social Injustice of Farmworker Pesticide Exposure*, 19 *Geo. J. on Poverty L. & Pol’y* 255, 265 (2012); Randy S. Rabinowitz & Mark M. Hagar, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 *Cornell Int’l L.J.* 373, 377 (2000).

136 See 29 C.F.R. § 1928.1 (2016).

137 29 C.F.R. § 1928.21(a) (2016).

138 *Id.*

139 29 C.F.R. § 1928.21(b) (2016).

140 29 C.F.R. §§ 1928.51, 1928.57, 1928.110 (2010).

141 OSHA Directive CPL 02-00-051, Enforcement Exceptions and Limitations Under the Appropriations Act (revised Jan. 10, 2017), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=1519#APPA](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1519#APPA).

142 *J.C. Watson Co.*, 22 BNA OSHC 1235 (No. 05-0175 & 05-0176, 2008).

143 *Id.*

144 29 C.F.R. § 1910.142 (2016).

145 Memorandum of Deputy Dir. Bruce Hillenbrand to Regional Admin. Gilbert J. Saulter, Request for Clarification of the Applicability of 29 CFR 1910.142 (July 23, 1981), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=18958](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=18958).

relationship exists between the housing and the employment, namely, when housing is a condition of employment.”<sup>146</sup> Additionally, as noted in section I.B above, the temporary labor camp standard applies to each employer subject to the AWPA who provides housing to migrant agricultural workers, regardless of whether that employer is also subject to inspection under the OSH Act.<sup>147</sup>

Agricultural operations that maintain temporary labor camps must comply with the following requirements, among others:

**SITE:** The site of the camp must be adequately drained, sufficient in size to prevent overcrowding of necessary structures, and maintained in a clean and sanitary condition free from refuse.<sup>148</sup>

**SHELTER:** Every shelter in the camp must be constructed to protect against the elements; rooms used for sleeping must contain at least fifty square feet of floor space for each occupant and possess at least a seven-foot ceiling; beds or other sleeping facilities must be provided; floors must be constructed of wood, asphalt, or concrete; living quarters must have windows that can be opened for ventilation; and if cooking facilities are used in common, stoves must be provided in an enclosed and screened shelter at a rate of one stove per ten persons or two families.<sup>149</sup>

**WATER SUPPLY:** An adequate water supply must be provided in each camp for drinking, cooking, bathing, and laundry purposes.<sup>150</sup>

**TOILET FACILITIES:** Toilet facilities adequate for the capacity of the camp must be provided.<sup>151</sup> Each toilet room must be accessible without passing through any sleeping room, must have a window to provide adequate ventilation, and must be cleaned at least daily and have an adequate supply of toilet paper.<sup>152</sup> If toilet rooms are shared, such as in multifamily and barracks type facilities, separate toilet rooms must be provided for each sex.<sup>153</sup>

**LAUNDRY, HANDWASHING, AND BATHING FACILITIES:** Laundry, handwashing, and bathing facilities must be provided at specified ratios; the floors of such facilities must be smooth and impervious to moisture; an adequate supply of hot water must be supplied for bathing and laundry purposes; and buildings housing such services must be capable of maintaining a temperature of at least 70 degrees Fahrenheit during cold weather.<sup>154</sup>

**REFUSE AND PEST CONTROL:** Garbage containers must be provided that are fly-tight, rodent-tight, and impervious, and must be kept clean. Additionally, effective measures must be taken to prevent insect or pest infestation in the camp.<sup>155</sup>

### [ Field Sanitation ]

The field sanitation standard applies to any “agricultural establishment”—i.e., “a business operation that uses paid employees in the production of food, fiber, or other materials such as seed, seedlings, plants,

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146 *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1511 (11th Cir. 1993) (discussing *Frank Diehl Farms v. Sec’y of Labor*, 696 F.2d 1325 (11th Cir. 1983)).

147 29 U.S.C. § 1823(a) (2012); 29 C.F.R. § 500.132(a)(1) (2016).

148 29 C.F.R. § 1910.142(a).

149 29 C.F.R. § 1910.142(b).

150 29 C.F.R. § 1910.142(c).

151 29 C.F.R. § 1910.142(d).

152 *Id.*

153 *Id.*

154 29 C.F.R. § 1910.142(f).

155 29 C.F.R. § 1910.142(h), (j).



or parts of plants”—that has eleven or more employees “engaged on any given day in hand labor operations in the field.”<sup>156</sup> “Hand labor operations” are “agricultural activities or agricultural operations performed by hand or with hand tools” such as “hand-cultivation, hand-weeding, hand-planting and hand-harvesting of vegetables, nuts, fruits, seedlings or other crops, including mushrooms, and the hand packing of produce into containers, whether done on the ground, on a moving machine or in a temporary packing shed located in the field.”<sup>157</sup> However, “[h]and-labor does not include such activities as logging operations, the care or feeding of livestock, or hand-labor operations in permanent structures (e.g., canning facilities or packing houses).”<sup>158</sup> Dairy workers in Vermont are unlikely to be engaged in “hand labor operations.” Nevertheless, information about the field sanitation standard is included in this paper to provide a comprehensive account of the protections for agricultural workers in the OSH Act.

Pursuant to the field sanitation standard, every “agricultural employer,” including any person who owns or operates an “agricultural establishment,” any person who contracts with such a person and “exercises

substantial control over production,” and any person who “[r]ecruits or supervises employees or is responsible for the management and condition of an agricultural establishment,”<sup>159</sup> must provide the following for employees engaged in hand labor:

**POTABLE DRINKING WATER** placed in locations readily accessible to all employees.<sup>160</sup>

**ONE TOILET FACILITY** and **one handwashing facility** for every twenty employees or fraction thereof, unless the employees perform field work for a period of three hours or less. Toilet facilities shall be located within a one-quarter-mile walk of the employee’s place of work in the field and “shall be adequately ventilated, appropriately screened, have self-closing doors that can be closed and latched from the inside and shall be constructed to insure privacy.”<sup>161</sup>

All drinking water, toilet, and handwashing facilities must be maintained in a clean and sanitary condition consistent with appropriate public health practices.<sup>162</sup> Additionally, agricultural employers must notify each employee about the location of the facilities and the importance of good hygiene practices “to minimize exposure to the hazards in the field of heat, communicable diseases, retention of urine and agrichemical residues.”<sup>163</sup>

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156 29 C.F.R. § 1928.110(a)-(b) (2016).

157 29 C.F.R. § 1928.110(b).

158 *Id.*

159 *Id.*

160 29 C.F.R. § 1928.110(c)(1) (2016).

161 29 C.F.R. § 1928.110(c)(2) (2016).

162 29 C.F.R. § 1928.110(c)(3) (2016).

163 29 C.F.R. § 1928.110(c)(4) (2016).



## [ Other Standards ]

In addition to the temporary labor camp and field sanitation standards addressed above, agricultural operations are subject to the following additional requirements:

**TRACTOR ROLL-OVER PROTECTION STRUCTURES:** Every tractor with more than twenty engine horsepower operated by an employee must have a roll-over protective structure (ROPS) and a seatbelt that meets appropriate design standards. Additionally, an employer must ensure that each employee uses a seatbelt while the tractor is moving and tightens the seatbelt sufficiently to confine the employee to the area protected by the ROPS.<sup>164</sup>

**GUARDING OF FARM FIELD EQUIPMENT:** OSHA requires agricultural employers to protect employees from hazards created by moving machinery parts, such as tractors and implements or stationary equipment used in materials handling.<sup>165</sup> Protection may be provided by (1) installing a guard or shield—i.e., a barrier designed to protect against employee contact with the hazard; or (2) guarding by location—i.e., placing the equipment in a location where employees will not inadvertently come into contact with it during operation.<sup>166</sup> Where these options are not feasible, an employer must use a guardrail or fence.<sup>167</sup> Employers must also instruct employees at least annually about the safe operation and servicing of covered equipment.<sup>168</sup>

**HAZARD COMMUNICATION:** OSHA's hazard communication standard is intended to ensure

that employers and employees are informed about safety and health hazards of chemicals they may encounter in the workplace and appropriate protective measures.<sup>169</sup> The standard requires covered employers to communicate information to employees about chemicals to which they are exposed through a hazard communication program, labels and health warnings, safety data sheets, and information and training.<sup>170</sup> Of note for agricultural operations, the standard does not require the labeling of pesticides subject to regulation under FIFRA because, as noted above, the OSH Act precludes regulation of any working condition within the purview of a separate statute.<sup>171</sup>

## OSHA Inspection and Anti-Retaliation Provisions

The OSH Act authorizes the Department of Labor to conduct inspections and issue citations to enforce alleged violations of the general duty clause and the occupational health and safety standards.<sup>172</sup> Employees must be given an opportunity to accompany a Department of Labor representative during an inspection.<sup>173</sup> Additionally, “[a]ny employees . . . who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger.”<sup>174</sup> The OSH Act prohibits employers from retaliating against employees for exercising their rights under the Act to participate in or request inspections or to otherwise participate in enforcement proceedings.<sup>175</sup>

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164 29 C.F.R. § 1928.51(a)-(b) (2016).

165 29 C.F.R. § 1928.57(a)(1) (2016).

166 29 C.F.R. § 1928.57(5), (7), (9) (2016).

167 *Id.* § 1928.57(7).

168 29 C.F.R. § 1928.57(6) (2016).

169 29 C.F.R. § 1910.1200(a) (2016).

170 29 C.F.R. § 1910.1200(b)(1) (2016).

171 29 C.F.R. § 1910.1200(b)(5)(i) (2016).

172 29 U.S.C. §§ 657(a), 658(a) (2012).

173 29 U.S.C. § 657(e) (2012).

174 29 U.S.C. § 657(f)(1) (2012).

175 29 U.S.C. § 660(c) (2012).

# VERMONT LAW

This section addresses in turn the housing and employment protections for agricultural workers provided under Vermont State law.



## HOUSING PROTECTIONS

### Landlord-Tenant Relationships

#### [ Rental Agreements ]

A written rental agreement is not required under Vermont law. Rather, “all agreements, written or oral, embodying terms and conditions concerning the use and occupancy of a dwelling unit and premises,” are valid rental agreements.<sup>176</sup> The following obligations of landlords and tenants are implied by statute

in every rental agreement.<sup>177</sup> Any language in an agreement that purports to deny these obligations is void and unenforceable.<sup>178</sup>

**TENANT’S OBLIGATION TO PAY RENT:** A tenant is obligated to pay rent “without demand or notice at the time and place agreed upon by the parties.”<sup>179</sup> “‘Rent’ means all consideration to be made to or for the benefit of the landlord under the rental agreement, not including security deposits.”<sup>180</sup> Rent therefore may include amounts deducted from a worker’s wages for housing.

**TENANT’S OBLIGATION REGARDING MAINTENANCE AND USE:** A tenant must not cause or contribute to a dwelling unit’s noncompliance with applicable building health and safety regulations, must not disturb other tenants’ peaceful enjoyment of the premises, and must not deliberately or negligently destroy any part of the premises.<sup>181</sup>

**LANDLORD’S WARRANTY OF HABITABILITY:** “In any residential rental agreement, the landlord shall be deemed to covenant and warrant to deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean, and fit for human habitation and which comply with the requirements of applicable building, housing, and health regulations.”<sup>182</sup> The implied warranty of habitability includes the obligation to ensure that a dwelling unit has heating facilities capable of providing sufficient heat, and to supply an adequate amount of water.<sup>183</sup>

176 Vt. Stat. Ann. tit. 9, § 4451(8) (2017).  
177 Vt. Stat. Ann. tit. 9, § 4453 (2017).  
178 Vt. Stat. Ann. tit. 9, § 4454 (2017).  
179 Vt. Stat. Ann. tit. 9, § 4455 (2017).  
180 Vt. Stat. Ann. tit. 9, § 4451(7) (2017).  
181 Vt. Stat. Ann. tit. 9, § 4456 (2017).  
182 Vt. Stat. Ann. tit. 9, § 4457(a) (2017).  
183 Vt. Stat. Ann. tit. 9, § 4457(b) (2017).

## [ Access and Right to Privacy ]

Your landlord may enter your home in three circumstances: (1) if you **consent**, which you must do unless you have reasonable grounds not to; (2) if he or she gives you **at least 48 hours advance notice**, the visit occurs between 9:00 A.M. and 9:00 P.M., and the purpose of the visit is to inspect the premises, make repairs or improvements, supply agreed services, or show the unit to new renters or buyers; or (3) if he or she has a reasonable belief that there is imminent danger to a person or to property.<sup>184</sup>

## [ Termination of Tenancy ]

A landlord may terminate a tenancy only in accordance with proper procedures; it is unlawful for a landlord to willfully disrupt a tenant's utility service or deny a tenant access to his or her housing and possessions.<sup>185</sup> More specifically, for a landlord to lawfully terminate a tenancy, he or she must provide advance written notice to a tenant. The type and amount of notice depends on whether there is a written or oral agreement to pay rent, and whether housing is provided as a benefit of farm employment.<sup>186</sup>

Additionally, a tenant has a right to terminate a tenancy by providing actual notice to the landlord at least one rental period before the date of termination, unless inconsistent with a written rental agreement.<sup>187</sup>

## Housing Health and Safety

Vermont's Rental Housing Health Code "protect[s] the health, safety and well-being of the occupants of rental housing" and "establishes minimal health and habitability standards for such housing."<sup>188</sup> Dwelling units subject to the code are specifically defined to include "housing provided as a benefit of farm employment."<sup>189</sup> The health and habitability standards require, among other things, that each dwelling unit be safe, clean, fit for human living, and consistent with applicable building and health codes;<sup>190</sup> have sufficient bathroom facilities,<sup>191</sup> an adequate supply of hot and cold potable water,<sup>192</sup> and working heaters;<sup>193</sup> and be adequately maintained so that it is free of pests and insects.<sup>194</sup>

## EMPLOYMENT PROTECTIONS

### Employers' Liability and Workers' Compensation

Each employee of a farm with an aggregate payroll of \$10,000 or more is entitled to compensation from his or her employer or the employer's workers' compensation carrier for "personal injury arising out of and in the course of employment."<sup>195</sup> "An employer shall not withhold any wages from an employee for the employee's absence from work for treatment of a work injury or to attend a medical examination related to a work injury."<sup>196</sup>

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184 Vt. Stat. Ann. tit. 9, § 4460 (2017).

185 Vt. Stat. Ann. tit. 9, § 4463 (2017).

186 Vt. Stat. Ann. tit. 9, §§ 4467, 4469a(c) (2017).

187 Vt. Stat. Ann. tit. 9, § 4457(a) (2017).

188 Agency of Human Serv., Dep't of Health, Rental Housing Health Code, 13-031 Vt. Code R. § 13-140-031-2.0 (2017), available at [http://www.healthvermont.gov/sites/default/files/REG\\_Rental\\_Housing\\_Code.pdf](http://www.healthvermont.gov/sites/default/files/REG_Rental_Housing_Code.pdf).

189 13-031 Vt. Code R. § 13-140-031-4.2 (2017); see Vt. Stat. Ann. tit. 9, § 4469a(a)(3) (2017)..

190 Vt. Stat. Ann. tit. 9, § 4457(a) (2017); 13-031 Vt. Code R. § 13-140-031-10.1.

191 13-031 Vt. Code R. §§ 13-140-031-5.2.1, 13-140-031-5.4.2, 13-140-031-5.4.3, and 13-140-031-8.1.4.

192 13-031 Vt. Code R. § 13-140-031-5.4.

193 Vt. Stat. Ann. tit. 9, § 4457© (2017); 13-031 Vt. Code R. § 13-140-031-7.1 to 7.5.

194 13-031 Vt. Code R. § 13-140-031-6.1.

195 Vt. Stat. Ann. tit. 21, §§ 601(3), (14)(C) & 618(a)(1) (2017).

196 Vt. Stat. Ann. tit. 21, § 640(c) (2017).

## Short-Term Family Leave, Unpaid Leave, and Earned Sick Time

An agricultural employee is entitled to short-term family leave; long-term family and parental leave; earned sick time; and breaks as follows.

**SHORT-TERM FAMILY LEAVE:** An agricultural employee is entitled to take “unpaid leave not to exceed four hours in any 30-day period and not to exceed 24 hours in any 12-month period” to attend the school-related activities of his or her child; to take children and other family members to doctors’ appointments and appointments for other professional services; and to respond to a family medical emergency.<sup>197</sup> “An employee shall make a reasonable attempt to schedule appointments for which leave may be taken under this section outside of regular work hours. In order to take leave under this section, an employee shall provide the employer with the earliest possible notice, but in no case later than seven days, before leave is to be taken except in the case of an emergency.”<sup>198</sup>

**PARENTAL LEAVE:** An employee of an agricultural operation that employs ten or more individuals for an average of thirty hours per week is entitled to take unpaid parental leave for a period not to exceed twelve weeks per year for the birth of the employee’s child or the initial placement of a child sixteen years of age or younger with the employee for the purposes of adoption.<sup>199</sup>

**FAMILY LEAVE:** An employee of an agricultural operations that employs fifteen or more employees for an average of thirty hours per week is entitled to take unpaid family



PHOTO BY CALEB KENNIA

leave for a period not to exceed twelve weeks per year “for the serious illness of the employee or the employee’s child, stepchild or ward of the employee who lives with the employee, foster child, parent, spouse, or parent of the employee’s spouse.”<sup>200</sup>

**EARNED SICK TIME:** An agricultural employee “shall accrue not less than one hour of earned sick time for every 52 hours worked,” and may use the sick time after a one-year discretionary waiting period if the employee is ill or injured; to obtain health care; to care for a sick family member; to arrange services or care for a family member who is a victim of domestic violence, sexual assault, or stalking; or to care for a family member when the school or care facility that the family usually attends is closed.<sup>201</sup> Compensation for the earned sick time must be equal to the greater of either the employee’s normal wage, or the Vermont minimum wage.<sup>202</sup>

197 Vt. Stat. Ann. tit. 21, § 472a(a) (2017).

198 Vt. Stat. Ann. tit. 21, § 472a(b) (2017).

199 Vt. Stat. Ann. tit. 21, §§ 471(4), 472(a)(1) (2017).

200 Vt. Stat. Ann. tit. 21, §§ 471(3), 472(a)(2) (2017).

201 Vt. Stat. Ann. tit. 21, §§ 481, 482(a), 483(a) (2017).

202 Vt. Stat. Ann. tit. 21, § 482(d)(1) (2017).

**BREAKS:** “An employer shall provide an employee with reasonable opportunities during work periods to eat and to use toilet facilities in order to protect the health and hygiene of the employee.”<sup>203</sup> Additionally, an employer shall provide each employee who is a nursing mother (1) “reasonable time, either compensated or uncompensated, throughout the day to express breast milk for her nursing child,” and (2) an appropriate private space for such activities that is not a bathroom stall.<sup>204</sup> An employer may be exempted from this requirement if compliance would “substantially disrupt the employer’s operations.”<sup>205</sup>

### Employment Discrimination

Each employer is prohibited from discriminating “against any individual because of race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity,

place of birth, or age or against a qualified individual with a disability.”<sup>206</sup> Additionally, an employer may not retaliate against an employee who has opposed unlawful discrimination or lodged a complaint.<sup>207</sup>

### Minimum Wage, Overtime Pay, and Recordkeeping Requirements

Agricultural employees are exempt from Vermont’s minimum wage and overtime pay requirements.<sup>208</sup> An agricultural employee is, however, entitled to weekly payment of wages “in lawful money or checks,” unless his or her employer has provided adequate notice of a biweekly or semimonthly schedule.<sup>209</sup> Additionally, agricultural employers are not required to maintain records of hours worked and wages paid for agricultural employees.<sup>210</sup>

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203 Vt. Stat. Ann. tit. 21, § 304 (2017).

204 Vt. Stat. Ann. tit. 21, § 305(a) (2017).

205 Vt. Stat. Ann. tit. 21, § 305(b) (2017).

206 Vt. Stat. Ann. tit. 21, § 495(a)(1) (2017).

207 Vt. Stat. Ann. tit. 21, § 495(a)(8) (2017).

208 Vt. Stat. Ann. tit. 21, § 383(2)(A), 384(a)-(b) (2017).

209 Vt. Stat. Ann. tit. 21, § 342(a)(1)-(2) (2017).

210 Vt. Stat. Ann. tit. 21, § 383(2)(A), 393 (2017).

# APPENDIX

## SUMMARY OF MAJOR FEDERAL LAWS

### Fair Labor Standards Act

Covered Employees	Exempt Employees	Housing	Employment
<ul style="list-style-type: none"> <li>▶ An employee of an enterprise (1) that has any employees engaged in interstate commerce or in the production of goods for interstate commerce, and (2) whose annual gross volume of sales or business is \$500,000 or more</li> <li>▶ An employee of any enterprise, regardless of sales or business volume, so long as that employee is individually engaged in interstate commerce or the production of goods for interstate commerce</li> </ul>	<p>An employee engaged in “agriculture” (i.e., traditional farming activities and activities conducted on a farm as an incident to or in conjunction with such activities) is exempt from the FLSA’s overtime pay protections, and is exempt from the FLSA’s minimum wage protections if the farm employer had fewer than approximately seven full-time employees in each calendar quarter of the previous year</p>	<p>- N/A -</p>	<ul style="list-style-type: none"> <li>▶ Each covered, non-exempt employee is entitled to (1) a minimum wage of not less than \$7.25 per hour; and (2) for each hour worked in excess of forty in a workweek, payment at a rate not less than one and one-half times the regular rate at which that employee is employed</li> <li>▶ Every employer of a covered, non-exempt employee is required to maintain and preserve for three years payroll records for each employee with information including hours worked, deductions, and wages paid</li> <li>▶ An employer is prohibited from employing a covered employee in conditions that qualify as “oppressive child labor,” as that term is defined in the Act</li> </ul>

## SUMMARY OF MAJOR FEDERAL LAWS

### Migrant and Seasonal Agricultural Worker Protection Act

Covered Employers	Covered Workers	Housing	Employment
<ul style="list-style-type: none"> <li>▶ A farm owner or operator that used more than 500-man days of agricultural labor in at least one calendar quarter of the previous year, unless the farm owner or his or her immediate family member solely handles hiring for his or her own farm</li> <li>▶ An association of farmers</li> <li>▶ A farm labor contractor</li> </ul>	<p>A worker engaged in seasonal or temporary agricultural employment who (1) is not an immediate family member of his or her agricultural employer, and (2) does not participate in a temporary work visa program</p>	<p>A covered employer who provides housing to a migrant worker—i.e., a temporary or seasonal worker who is required to be absent overnight from his or her permanent home—must satisfy the following requirements:</p> <ul style="list-style-type: none"> <li>▶ The housing must comply with federal and state health and safety standards</li> <li>▶ The covered employer must provide notice to the worker of the housing terms and conditions in a language that the worker can understand</li> </ul>	<p>A covered employer who recruits or hires any covered migrant or seasonal worker must:</p> <ul style="list-style-type: none"> <li>▶ Disclose to each worker in writing the terms of employment, including the wages to be paid, the period of employment, and whether housing will be provided</li> <li>▶ Comply with the terms of the employment agreement</li> <li>▶ Post information about workers' rights under the MSPA at the worksite</li> <li>▶ Maintain for three years records of the hours worked and wages paid to each covered worker</li> <li>▶ Pay all wages owed to each worker when due, and provide each covered worker with an itemized statement of earnings and deductions</li> </ul>

## SUMMARY OF MAJOR FEDERAL LAWS

### Occupational Safety and Health Act

Covered Employers	Exempt Employers	Housing	Employment
<ul style="list-style-type: none"> <li>▶ Any employer engaged in commerce who has one or more employees who are not the employer's immediate family members</li> </ul>	<ul style="list-style-type: none"> <li>▶ Government employers</li> <li>▶ Agricultural employers that (1) have had ten or fewer employees at all times during the previous twelve months, and (2) have not had an active temporary labor camp at any time during the previous twelve months</li> </ul>	<ul style="list-style-type: none"> <li>▶ Employers that provide housing on a temporary basis as a condition of employment (i.e., temporary labor camps) must comply with provisions to prevent overcrowding and to ensure safe and sanitary conditions, and must provide adequate water and sleeping, toilet, laundry, bathroom, and hand washing facilities</li> </ul>	<ul style="list-style-type: none"> <li>▶ Non-exempt agricultural employers that use hand-laborers in the field must provide adequate drinking water and toilet and hand washing facilities located near the location of the work</li> <li>▶ Non-exempt agricultural employers must ensure that tractors used by employees have appropriate rollover protection structures</li> <li>▶ Non-exempt agricultural employers must protect employees from hazards associated with moving machinery parts and chemicals used in the workplace</li> </ul>