



Proposed Changes for Child Labor in Agriculture

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Background

On September 2, 2011, the Department of Labor (“DOL”) published proposed regulations¹ (click [here](#) to view) that, if finalized, would remove some of the exemptions that have allowed children to work on agricultural operations for decades. As agriculture has changed over the past fifty years there has been a decrease in the overall need for labor due to mechanization, although this does not hold true for all commodities. The DOL cites this increase in mechanization and the use of agricultural chemicals as two of the driving factors behind the proposed regulations stating that the safety issues are more prevalent in agriculture than in almost any other area, except mining and construction.²

Currently, employers of youth working in agricultural settings are exempt from a number of labor provisions ranging from the number of hours that youth can work to the types of activities that they may engage in.³ The proposed regulations set forth by the DOL deal directly with those types of activities that youth may engage in while working in an agricultural setting. Two of the restrictions, called Agricultural Hazardous Occupation Orders (Ag H.O.s), are brand new and forbid youth under the age of eighteen from working in grain elevators and the like and a new prohibition preventing youth from using electronic communications equipment while operating certain power-driven equipment.⁴ Other changes expand or are meant to clarify existing regulations.⁵ It is also important to note that many youth will not be regulated by these regulations if they fall under the Parental Exemption.⁶ To understand the applicability of the new and revised regulations it is important to first look at the Parental Exemption to see whether they qualify for the exemption and then to look to the proposed regulations.

Parental Exemption

¹ Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations-Civil Money Penalties, 76 Fed. Reg. 54836 (proposed Sept. 2, 2011).

² *Id.* at 54839.

³ *Id.* at 54837.

⁴ *Id.* at 54837.

⁵ *Id.* at 54859.

⁶ *Id.* at 54841.

It is important to keep in mind that the changes would not affect situations where the child in question falls under the “parental exemption.”⁷ Under the parental exemption, children under age 16 may work in what the DOL classifies as hazardous “agricultural occupations” so long as they are the children of parents that exclusively own or operate a farm.⁸ The DOL acknowledges that “[n]one of the provisions proposed in this notice of proposed rulemaking in any way change or diminish the statutory child labor parental exemption in agricultural employment contained in FLSA section 13(c)(1).”⁹ This is because the parental exemption is not a regulation written by the DOL, but language in a statute passed by Congress. That statute, the Fair Labor Standards Act, is binding on the DOL both for enforcement and for rulemaking purposes. However, the protections that this exemption offers can be easily lost. An example that was given in the proposed rules considers children working on their grandparents’ farms.¹⁰

Suppose there are two sets of grandparents that own farms and one set has their grandchildren living next to them and the other has their grandchildren living far away. The grandparents whose grandchildren live close have them come over occasionally to help out on the farm and then send them back to their parents at night while the other grandparents have their grandchildren stay with them during the summer. Under the DOL’s interpretation of the parental exemption the grandparents whose grandchildren live close by would not be exempt under the parental exemption and would be liable for child labor violations if they employed children in violation of the proposed regulations if they are finalized. The other grandparents whose children live far away would be acting as parents during the summer and would be protected by the exemption.

Additionally, there are other ways to lose the parental exemption, even if the parents or those standing in the place of parents have ownership or control over the farm. One way to lose the exemption would be if the farm is owned through a business entity, unless the entity is wholly owned and operated by the children’s parents or those that are standing in the place of parents.¹¹ If there are any other owners, such as an elder sibling that is working their way into the family farm or the grandparent who initially built the agricultural business, then the exemption would be lost and possible liability would ensue. For these reasons it is critical for family farming operations to look closely at their farming operation to see if the parental exemption would apply to their operation.

The Proposed Changes

⁷ Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations-Civil Money Penalties, *supra* note 1, at 54841.

⁸ 29 U.S.C.A. § 213 - (2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

⁹ Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations-Civil Money Penalties, *supra* note 1, at 54841.

¹⁰ *Id.*

¹¹ *Id.*

According to the DOL, “[t]he agricultural revolution of the past thirty years has mechanized the farm and increased the use of chemicals. Today the farm has many, if not more, hazards than industry.”¹² The Department of Labor argues that because agriculture is now such a high-risk occupation, the risk to children has risen as well, and therefore, the prohibitions in place for non-agricultural child workers should be extended to agricultural employees as well.

The first of the changes is that laborers under the age of eighteen would be prohibited from working in “farm-product raw materials wholesale trade industries.”¹³ While the term is broad, the main purpose behind this provision is to prevent youths from working in grain elevators and at livestock auction markets. The DOL specifies that this would be a blanket prohibition including “establishments primarily engaged in the buying and/or selling of grain (such as corn, wheat, oats, barley, and unpolished rice); dry beans; soy beans, and other inedible beans.”¹⁴ The prohibition regarding livestock auction markets would apply not just to cattle, but to hogs, sheep, and goats as well.¹⁵

Another change would be a prohibition on the use of “electronic devices while operating power-driven machinery.”¹⁶ Once again the terms “electronic devices” and “power-driven machinery” are given broad meaning. “Electronic devices” covers phones, computers and other devices that are capable of accessing the internet or to facilitate electronic communication with another device. It would include the programming of a GPS device while the machinery is in motion, but would not include using the device that is secured in a commercially designed holder and programmed before moving the vehicle.¹⁷ It would also not preclude the use of radios and iPods. “Power-driven machinery” would include not just typical motorized vehicles (such as tractors, trucks and forklifts) but it would also include powered hand tools such as machine tools and shearing machines.¹⁸

A third proposal would forbid those under the age of sixteen from “operating power-driven equipment other than agricultural tractors” unless they are a “qualified student learner.”¹⁹ Perhaps the broadest of the proposed regulations, this amendment would eliminate the current regulation that lists specific prohibited equipment (such as powered posthole diggers and chainsaws) and would replace it with the phrase “operating power-driven equipment.”²⁰

This proposal would be governed by two important, and expansive, definitions. “Operating” would include more than just using the equipment. It would also include “tending, setting up, adjusting, moving, cleaning, oiling, repairing, feeding (whether directly or by conveyor) of the equipment, riding on the equipment as a passenger or helper; or connecting or disconnecting an implement or any of its parts ... or starting, stopping, or any other activity involving physical

¹² Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations-Civil Money Penalties, *supra* note 1, at 54839.

¹³ *Id.* at 54845.

¹⁴ *Id.* at 54846.

¹⁵ *Id.*

¹⁶ *Id.* at 54848.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 54856.

²⁰ *Id.* at 54855.

contact associated with the operation or maintenance of the equipment.”²¹ This essentially forbids almost every form of physical contact with what the DOL defines as “power-driven equipment.” This leads the second definition that is important to consider, the definition of “power-driven equipment.” The proposed definition would cover “all machines, equipment, implements, vehicles, and/or devices operated by any power source other than human hand or foot power, except for office machines and agricultural tractors.”²² This would include contact with equipment that is not currently connected to a power source, but that would require power of some form (wind, electricity, fossil fuels, batteries, animals, or water) to operate.²³ Also included in the prohibition are lawn mowers and lawn tractors, so even seemingly benign tasks like mowing the yard on a farm would be forbidden to those under sixteen years of age since the exemption allowing youth to use tractors under twenty horse power would be removed.²⁴

Another change in the child labor regulations deals with youth around livestock. Currently, the DOL states that youth are not permitted to work in a yard, pen or stall occupied by a bull, boar, stud horse used for breeding purposes; and a sow with suckling pigs, or a cow with a newborn calf that still has its umbilical cord attached.²⁵ There are several changes that the DOL wishes to make to this section. The first change would be to add bison over six months of age to the existing list of animals and to remove the “breeding purposes” requirement so that it would prohibit youth under age sixteen from working with “intact (not castrated) male equine, porcine, bovine, or bison over six months of age.”²⁶ Based on the wording of the proposed rules it is not clear whether it prohibits interaction with all of these animals that are over six months of age or whether the six month requirement only applies to bison. A second change would be the prohibition against youth herding animals either by horseback or through using some form of motorized vehicle.²⁷ The final, and perhaps the most expansive change relating to animal agriculture, is the prohibition against allowing youth to “engage or assist in any animal husbandry practices that inflict pain upon the animal and/or are likely to result in unpredictable animal behavior.”²⁸ Examples that the DOL have given include branding, breeding, dehorning, vaccinating, castrating, treating sick or injured animals; handling animals with known dangerous behaviors; poultry catching or herding animals on horseback.²⁹ The specified animals and practices in this section would curtail the vast majority of interactions between children and livestock unless they fall under the parental exception provision discussed earlier.

The last group of proposed regulatory changes would deal with several miscellaneous issues and minor changes regarding various hazardous operations. The restriction preventing youth under sixteen from handling timber with a butt diameter over six inches would be changed to remove

²¹ Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations-Civil Money Penalties, *supra* note 1, at 54856.

²² *Id.*

²³ *Id.* at 54857.

²⁴ In the comments for the proposed regulations the DOL states that those under the age of 16 have been forbidden from running equipment such as lawn mowers for the past fifty years in nonagricultural businesses. *Id.* at 54856.

²⁵ Dep’t of Labor, Child Labor Requirements in Agricultural Occupations Under the Fair Labor Standards Act (Child Labor Bulletin 102), Revised June 2007, <http://www.dol.gov/whd/regs/compliance/childlabor102.pdf>.

²⁶ Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations-Civil Money Penalties, *supra* note 1, at 54859.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

the six inch exception.³⁰ Likewise, the prohibition of youth working from a ladder or scaffold over twenty feet tall would be expanded to include roofs, silos, grain bins, windmills, towers and equipment over six feet tall.³¹ Youth under age sixteen would be prevented entirely from working inside a fruit, forage, or grain storage silo and manure pits would be added to this restriction.³² The handling of agricultural chemicals classified under FIFRA Categories One and Two would be updated to current EPA standards.³³ The proposed rule would also ban youth employment in tobacco production or curing.³⁴ And finally, the DOL is considering the adoption of a new Ag H.O. that would deal with employment in agriculture under adverse conditions, which would primarily be geared towards temperature in the working environment.³⁵

Conclusion

The changes being proposed are certainly broad, but, if finalized in their current form, the number of operations that will be required to adapt to the proposed regulations if they are finalized in their current form, according to the DOL, will be relatively low. According to the statistics referenced in the proposed regulations, the DOL estimates that the number of youths working in agriculture under the age of sixteen is less than 15,000 in the entire country.³⁶

What will be more important is for families to recognize the situations that would remove a child from the parental exception provision and subject them to the DOJ regulations (both the proposed changes and the current regulations). This will require families to look closely at their situation and realize that their qualification for the exemption may change depending upon business decisions that they make. In the meantime, this is something that farm families should be aware of if they have children working on their farm.

For more information about labor laws as they relate to agriculture please visit the [Labor Reading Room](#) at the National Agricultural Law Center as well as the [U.S. Agricultural & Food Law and Policy Blog](#).

³⁰ Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations-Civil Money Penalties, *supra* note 1, at 54869.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 54865.

³⁵ *Id.*

³⁶ *Id.* at 54842.