

Food Sales at Agritourism Operations: Legal Issues

Factsheet

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Thinking about selling food at your agritourism operation? Offering food products is a good way to attract people to the farm and increase business revenues, but selling food also raises legal issues. Whether you want to sell fresh produce, cottage foods or baked goods, or prepare and serve food on-site, there are legal risks and requirements that may come into play. Consider these important questions about food sales:

- Do zoning laws allow you to conduct food sales?
- What food safety laws apply to your foods?
- Do you need a food sales license?
- What if someone gets sick from your food product?
- Must you collect sales tax on the food items?

The answers to these questions depend upon your state and local laws. The following information should help you start to find the answers to your questions, but be sure to locate the specific laws in your state and locality and seek legal guidance from an attorney in your state.

Zoning laws

Does the law allow you to conduct food sales on your property? If your community is zoned, your zoning laws should address whether selling food at your property is a permissible activity. Typically, a zoning resolution or ordinance for a community designates different zoning “districts” and determines the “permissible uses” or “conditional uses” that may occur on land parcels within each zoning district. Different types of food sales can fall under different types of uses. For example, produce sales on a farm might be a “farm market” or “grocery” use, while preparing

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individual food items on the farm might be designated as a “restaurant” or “food service” use. Some zoning resolutions also treat “agritourism” as a type of land use and define permissible activities within the definition of agritourism. The classifications and definitions will vary from state to state and community to community.

Check your local zoning resolution to identify what zoning district your land is in and review the provisions for permitted uses, making sure that you understand how the zoning resolution defines your proposed food sales activity. Your food activity might fall in the “conditional use” category. This means that you must seek approval of the activity by the local board of zoning officials and the board may place conditions upon your activity if approved. An activity that is not a permitted or conditional use is a prohibited use for the zoning district. Typically, a request to rezone the property as a different type of zoning district is the only remedy for converting a prohibited use into a permitted use.

Note that some states have state laws that could affect whether food sales are permissible. For example, Ohio’s “agricultural exemption” from local zoning includes “agritourism” activities. The law prevents local governments from enacting zoning regulations that prohibit agritourism activities.¹ Because of the uniqueness and complexity of zoning laws, it can be very helpful to talk with your local zoning officer or a land use attorney to fully understand how zoning law affects your property. For more information about agritourism and zoning, see our other fact sheet in this series on “Agritourism Activities and Zoning.”

Food safety and licensing laws

Are there food safety standards you must follow? Do you need a license for your proposed food sales activity? Food safety and licensing laws go hand in hand in aiming to ensure safe handling of food and reduce risks of contamination incidents. The specific standards and licensing requirements that apply to your situation will depend upon the type of food you’ll be selling and your role in preparing the food for sale. Obtaining a license usually involves submitting an application and passing an inspection that verifies your compliance with food safety regulations. State laws vary, but here are examples of foods that may require you to obtain a license and comply with food safety standards:

- Foods prepared and served on-site in individual servings, such as sandwiches, hot dogs, pizza, soups, and full meals.
- Potentially hazardous foods processed on site and packaged for sale, such as salsas, pickles, cheesecakes and other foods that are acidified or require temperature control.
- Eggs, meats and dairy items, but note that many states exempt eggs and certain meats from licensing requirements if the items are raised and processed on the farm where sold.

Some food sales situations don't require a license or compliance with food safety standards, or may be subject to minimal requirements. Examples of these include:

- “Cottage foods” prepared in a residential kitchen, which typically includes jams, jellies, baked goods and other non-potentially hazardous foods that don't require temperature control. State “cottage food” laws vary tremendously by state, so be sure to understand your state law. View the National Agricultural Law Center's compilation of state cottage food laws at <https://nationalaglawcenter.org/state-compilations/>.
- Mobile units and “food trucks” owned and operated by another party. Typically, the party that owns the mobile unit is the party that is subject to licensing and food safety requirements.
- Fresh, unprocessed produce direct from the farm, but note that you may be subject to the Produce Safety Rule of the Food Safety Modernization Act, which establishes production practices for growing and handling the produce. Smaller produce growers can be exempt from this rule. A tool to help determine if you are exempt from the rule is available at <https://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM472499.pdf>.

As with zoning, food licensing and food safety requirements vary by state and can be complex. Take care to obtain and understand the laws that apply in your state and locality. Legal assistance can be critical to ensuring compliance.

Product liability laws

If someone gets sick from food served at your agritourism operation, will you be liable? Food product liability is a serious concern for those who produce or sell food. One in six people every year experience a food borne illness, with 128,000 needing hospitalization and 3,000 dying from the illness.² Many factors would determine a liability outcome, but it's possible that an agritourism operation could be liable for selling food that causes illness or death.

All states have product liability laws that address liability for harm caused by “products,” which encompasses food products. Generally, a producer or seller of a food product can be liable if someone is harmed because the product is “defective.” A food product that is contaminated or unsafe could be deemed “defective.” If the harmed party can prove that the food was contaminated, such as by carrying a virus or bacteria like E. Coli, Listeria, Norovirus or Salmonella, both the party that manufactured the food and the party selling the food can be liable for the harm the food caused.

There are many ways to reduce the risk of food product liability, however. The main causes of foodborne diseases are improper storage and preparation of food and food ingredients, cross-contamination, and improper hygiene by food handlers.³ Proper handling and storage is critical to food safety success, and compliance with food safety regulations can ensure that you're reducing your risks of improper handling and storage. Carefully and constantly train employees to know and carry out proper handling practices. States and industries offer many food safety training programs, some required

and some voluntary. Cleanliness of food areas is also important, and implementing a regular “deep cleaning” schedule can be a strong risk management practice.

Agritourism operations with farm animals also face the risk that of transmitting diseases from animals to humans, referred to as “zoonotic disease transmission.” Food consumption at the agritourism operation is one way to transmit zoonotic disease transmission. To reduce this risk, keep food areas as far as possible away from animal areas, prohibit food consumption in animal areas, and provide handwashing stations at the exits from animal areas. For more information on zoonotic diseases, see our other fact sheet in this series, “Farm Animals and People: Liability Issues for Agritourism.”

Product liability insurance is a necessary tool for addressing product liability risk. Agritourism operations should review their food operations with insurance carriers and ensure that all food activities have sufficient insurance coverage.

Sales tax laws

Must you collect sales tax on food items you sell? The answer to this question is entirely dependent upon state and local tax laws. Nearly all states that have a sales tax also have unique laws for food sales. These laws can vary based upon the type of food item and where the purchaser consumes the food. For example, many states exempt products of the farm sold by the farmer who raised them from sales tax.⁴ Thirty seven states exempt most “grocery sales,” or food purchased for home consumption, from the state sales tax.⁵ Some laws exempt the sale of food for consumption off the premises where sold from sales tax but require sales tax collection on food consumed on the premises of the seller.⁶ Certain candies, beverages or heated foods might not fall under the sales tax exemption for food⁷ and a local government may have a different requirement for food sales than the state law.⁸

The variations and complexities in state and local sales tax laws for food highlight the importance of obtaining sound tax advice. Before engaging in food sales, understand which food items are subject to sales tax. If the operation will be selling foods that require the collection of sales tax, you’ll need to follow state and local provisions for establishing a sales tax accounting, reporting and payment system. The state and local agencies that oversee taxation typically offer useful resources and guidance on sales taxes, and accountants and similar professionals can be helpful in ensuring sales tax compliance.

Pulling it all together

If you’ve read this publication then you’ve taken an important step toward addressing the legal issues that come with selling food at an agritourism operation. The following checklist may help you pull it all together and continue through your next steps. As you move forward, be sure to meet with your attorney, insurance provider and accountant to confirm your understanding of the laws and legal issues and review your legal compliance and risk management plans for your food sales endeavors.

Food Sales at Agritourism Operations: A Checklist for Agritourism Businesses

This checklist is not exclusive, but serves as a starting point for organizing and considering the legal issues that food sales raise for agritourism operations.

1. Understand how zoning laws affect your food sales.

- If you are in a state that has zoning exemptions or exceptions that apply to agriculture or agritourism, locate the law and ensure that your proposed activity falls under its provisions.
- If you are in an area that is subject to zoning but is not covered by an exemption from zoning, locate your local zoning resolution and identify your zoning district. Determine if your type of food sales is a “permitted” or “permissible” or other type of use that is allowed to take place in your district, a “conditional use” that requires approval of the activity by the local board of zoning officials, or a prohibited use that could only occur through a rezoning of the property or a similar special action.
- Talk with your local zoning officials to fully understand how your state and local zoning laws and exemptions affect your proposed food sales activities.

2. Understand how food safety and food licensing laws affect your food sales.

- If the food items you want to sell are “cottage foods” such as baked goods, jams and other non-potentially hazardous foods, determine how your state cottage food law affects you. Find your state cottage food law at <https://nationalaglawcenter.org/state-compilations/>.
- If your foods are not subject to a cottage food law, determine whether you must obtain a food sales license from your local or state agency in order to sell the food items.
- If you are growing the produce you are selling, determine whether you are subject to or exempt from the Food Safety Modernization Act. Refer to this information from the FDA: <https://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM472499.pdf>
- Identify the food safety regulations and practices required for preparing and selling your food, and generate a plan for implementing the practices.

3. Understand how product liability laws affect your food sales

- Locate and review information about your state product liability laws and food sales.
- Train employees to know and carry out proper food handling practices.
- Develop a regular cleaning and “deep cleaning” schedule for your food areas.
- If you also have farm animals, develop a plan to keep food areas away from animal areas, prohibit food consumption in animal areas, and provide handwashing stations.
- Review product liability options with your insurance provider and obtain adequate insurance coverage for your food sales activities.

4. Understand how sales tax laws affect your food sales.

- Determine whether you must collect state and local sales tax for the types of foods you want to sell in the location you’ll be selling the foods.
- Refer to your local and state taxing agencies for information and explanations of the laws and the exemptions that apply to different types of food and to foods raised by the seller.

5. Consult with your professionals to confirm your understanding and plans for moving forward.

References and Resources

Frank J. Cavico, et al, “Restaurant Liability for Contaminated Food and Beverages Pursuant to Negligence, Warranty, and Strict Liability Laws,” GLOBAL J. OF SOC. SCIENCES STUDIES. 3.(2):63-100 (2017).

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Stephen R. Miller, A Coordinated Approach to Food Safety and Land Use Law at the Urban Fringe, 41 AM. J. L. & MED. 422 (2015).

Denis W. Stearns, “An Introduction to Product Liability Law,” MARLER CLARK, LLP (2001), <https://marlerclark.com/pdfs/intro-product-liability-law.pdf>.

¹ Ohio Revised Code § 303.21(C)(4)(for counties) and Ohio Revised Code § 519.21(C)(4) (for townships).

² Estimates of Foodborne Illness in the United States, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 8, 2014), <https://www.cdc.gov/foodborneburden/>.

³ John Aloysius Cogan Jr., The Uneasy Case for Food Safety Liability Insurance, 81 BROOK. L. REV. 1495 (2016), <http://brooklynworks.brooklaw.edu/blr/vol81/iss4/9>.

⁴ See, e.g., Tennessee Code § 67-6-301 and Virginia Code § 58.1-1707 (which limits the sales tax exemption to sales under \$1,000).

⁵ Eric Figuero and Samantha Waxman, Which States Tax the Sale of Food for Home Consumption in 2017? CTR. ON BUDGET AND POL. PRIORITIES (Mar. 1, 2017), <https://www.cbpp.org/research/state-budget-and-tax/which-states-tax-the-sale-of-food-for-home-consumption-in-2017>.

⁶ Ohio Revised Code § 5739.02 (B)(2).

⁷ New York doesn't exempt heated foods, candies, soft drinks and similar beverages from the sales tax. See Listings of Taxable and Exempt Foods and Beverages Sold by Food Stores and Similar Establishments, TB-ST-525, NEW YORK STATE DEPT. OF TAXATION AND FINANCE TAXPAYER GUIDANCE DIV. (April , 2011), https://www.tax.ny.gov/pdf/tg_bulletins/sales/b11_525s.pdf.

⁸ In Georgia, for example, all food items are subject to local sales taxes but some food items are not subject to state sales taxes. Resource Guide for Direct-to-Consumer Sales and Agritourism Operations, Sales & Property Taxes, Georgia Farm Bureau (Aug. 2016). http://georgiaagritourism.starchapter.com/images/downloads/Resources/agritourism_tax_resource_guide_1.pdf.

See our other Factsheets in this series for more resources on legal issues in agritourism.

Agritourism Immunity Laws in the United States

Factsheet

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Agritourism offers a growing business opportunity for farmers and ranchers. According to the 2012 U.S. Census of Agriculture, the number of farms and ranches receiving income from agritourism grew from 23,350 in 2007 to 33,161 in 2012 and more than 4,500 of those operations had gross receipts of over \$25,000 from agritourism.¹ Entertaining visitors is an increasingly popular source of revenue for farms and ranches today.

Running an agritourism business is not without its challenges, however. One primary concern is the possibility that a visitor will be hurt while on the farm. The types of experiences that guests desire from a farm or ranch are inherently risky, such as picking produce, feeding livestock, climbing on straw bales, engaging in recreational activities, and riding on wagons, tractors and horses. If a visitor suffers harm while voluntarily engaging in risky agritourism activities, should the farmer or rancher be liable for that harm?

State legislatures have addressed this liability question by enacting agritourism immunity laws that protect agritourism businesses from liability in certain situations. While it is always imperative for farmers and ranchers to use best management practices to reduce the risk that a participant will be injured, these laws can manage the risk of financial

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responsibility for harm to visitors who choose to engage in agritourism activities. Before venturing into the business of agritourism, it's important for a farmer or rancher to know whether a state has an agritourism immunity law and if so, how to ensure compliance with the statute. In this fact sheet, we review agritourism immunity laws in the U.S. and explain different approaches and key provisions in the laws.

States with immunity laws for agritourism

In 2004, Kansas became the first state to enact a liability protection law for farmers and ranchers that offer agritourism activities on their land. Many states followed suit, and the 31 states listed below now have an immunity law that can shield an agritourism business from liability for visitor injuries in certain circumstances. To read a state's specific law, visit our compilation of States' Agritourism Statutes at <http://nationalaglawcenter.org/state-compilations/agritourism/>.

States with agritourism immunity laws for agritourism businesses		
Alabama	Maine	Oregon
Alaska	Minnesota	South Carolina
Arkansas	Mississippi	Tennessee
Colorado	Missouri	Texas
Florida	Montana	Utah
Georgia	Nebraska	Virginia
Idaho	New York	Washington
Indiana	North Carolina	West Virginia
Kansas	North Dakota	Wisconsin
Kentucky	Ohio	
Louisiana	Oklahoma	

Who is protected? Defining "agritourism"

Each state law provides a definition for "agritourism," or "agritourism activities" that clarifies who the law aims to safeguard from liability for visitor injuries. An agritourism operator will not receive the statute's benefits unless it meets the definitions. Common elements in the definitions of "agritourism" or "agritourism activity" include:

- The agritourism activity takes place on a "farm" or "ranch" that is "working," "commercial," or engaged in "agricultural production."
- The producer may or may not receive compensation for an agritourism activity.
- The agritourism activity is for educational, recreational or entertainment purposes, with some states also including historic or cultural purposes.
- A handful of states provide examples of agritourism such as educational programs, hospitality services, guided and self-guided tours, bed and breakfast accommodations, petting

zoos, farm festivals, corn mazes, harvest-your-own operations, hayrides, barn parties, horseback riding, fee fishing and camping.

Missouri's Agritourism Promotion Act presents a typical example of a definition of an "agritourism activity:"

(1) "Agritourism activity", any activity which allows members of the general public for recreational, entertainment, or educational purposes to view or enjoy rural activities, including but not limited to farming activities, ranching activities, or historic, cultural, or natural attractions. An activity may be an agritourism activity whether or not the participant pays to participate in the activity. An activity is not an agritourism activity if the participant is paid to participate in the activity.²

Louisiana takes a unique approach to defining agritourism activities. The State Commissioner of Agriculture and Forestry publishes an annual list of activities that the commissioner has defined as agritourism activities when the activities are conducted on an agricultural operation. The current list contains 32 types of activities.³

Immunity applies to "inherent risks" of agritourism

Most of the state laws extend immunity if a visitor's harm results from an "inherent risk" of an agritourism activity. The purpose of the "inherent risk" approach is to relieve an operator from liability for the naturally occurring risks of an activity over which an operator has little or no control. The laws are fairly consistent in presenting a list of "inherent risks" that addresses land surfaces, vegetation, animals, equipment, and the visitor's own behavior, as illustrated by Kansas's Agritourism Promotion Act:

"Inherent risks..." means those dangers or conditions which are an integral part of such agritourism activity including, but not limited to, certain hazards such as surface and subsurface conditions; natural conditions of land, vegetation, and waters; the behavior of wild or domestic animals; and ordinary dangers of structures or equipment ordinarily used in farming or ranching operations. "Inherent risks of a registered agritourism activity" also includes the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to follow instructions given by the registered agritourism operator or failing to exercise reasonable caution while engaging in the registered agritourism activity.⁴

Only a handful of states define "inherent risks" more broadly than Kansas. Florida's law applies to "any of the inherent risks of agritourism activities,"⁵ Ohio includes "the possibility of contracting illness resulting from physical contact with animals, animal feed, animal waste, or surfaces contaminated by animal waste"⁶ and Maine includes "the depositing of manure."⁷

Exceptions to immunity

Each agritourism immunity statute also lays out exceptions to its grant of immunity. If a visitor's harm arises from one of the exceptions, the agritourism operator loses the law's protection and could be liable for the harm. Types of exceptions vary from state-to-state. Most common are those found in the Oklahoma Agritourism Activities Liability Limitations Act:

Nothing in [this law] prevents or limits the liability of an agritourism professional if the agritourism professional does any one or more of the following: 1. Commits an act or omission that constitutes negligence or willful or wanton disregard for the safety of the participant, and that act or omission proximately causes injury, damage, or death to the participant; 2. Has actual knowledge or reasonably should have known of a dangerous condition on the land, facilities, or equipment used in the activity or the dangerous propensity of a particular animal used in such activity and does not make the danger known to the participant, and the danger proximately causes injury, damage, or death to the participant.⁸

A number of states include additional exceptions to immunity. Alabama will not prevent liability if the agritourism operator "fails to properly train or improperly or inadequately trains an employee who is actively involved in the agritourism activity and an act or omission of the employee proximately causes injury, sickness, damage, or death of the participant"⁹ or "fails to vaccinate, or quarantine sick domestic or domesticated animals in accordance with applicable animal health statutes and regulations."¹⁰ In Washington, an agritourism provider is not protected by the statute if the provider "permits minor participants to use facilities or engage in agritourism activities that are not reasonably appropriate for their age."¹¹ Oregon will not grant immunity if an operator "provides equipment to the participant and fails to make reasonable inspection of the equipment, and that failure is a cause of the injury to the participant"¹² or "fails to make reasonable inspection of the property on which the agritourism activity occurs, and that failure is a cause of the injury to the participant."¹³ Many states also remove immunity if the agritourism provider did meet the law's affirmative requirements, as explained below.

Affirmative requirements for the agritourism operator

A majority of the states establish affirmative actions the provider must take to qualify for immunity. An agritourism operator who fails to complete a state's affirmative requirements will lose the liability protection afforded by the immunity law. Most common is the requirement for operators to provide notices to agritourism visitors or include notices in agritourism contracts. In several states, agritourism operations must register or have an approved operation plan. We review these requirements below.

Requirements for notices on signs and in contracts

The 28 states listed below require operators to post and maintain warning signs that notify visitors of the agritourism immunity law’s liability protection and/or the inherent risks of agritourism activities. A dozen states also direct agritourism operators to include the notice in written contracts or agreements. Most statutes provide the exact language the sign or contract must contain as well as specifications for the size of font and locations of signs, although the level of detail for the notice varies among the states.

Laws that require business to provide notices		
	<i>On posted signs</i>	<i>In contracts</i>
Alabama	✓	
Arkansas	✓	✓*
Colorado	✓	
Florida	✓	✓
Georgia	✓	
Idaho	✓	✓
Indiana	✓	✓
Kansas	✓	✓
Kentucky	✓**	✓
Louisiana	✓	
Maine	✓**	
Minnesota	✓	
Mississippi	✓	✓
Missouri	✓	✓
Nebraska	✓	
New York	✓	
North Carolina	✓	✓
North Dakota	✓	✓
Ohio	✓	
Oklahoma	✓	✓
Oregon	✓	✓
South Carolina	✓	✓
Tennessee	✓	✓
Texas	✓	✓
Utah	✓	
Virginia	✓	
Washington	✓	✓
West Virginia	✓	✓
Wisconsin	✓	
* In contracts with agritourism participant only. Arkansas 2-11-107.		
** May post a sign or obtain a signed release indicating that participant has received written notice. K.S.A. 247-809(a) and 7 M.R.S.A § 253.		

Idaho provides an example of a simple notice requirement, which must state “WARNING Under Idaho law, there are risks associated with agritourism, which could lead to injury or death. You are assuming these risks. Section 6-3004, Idaho Code.”¹⁴ A more detailed notice requirement is in Wisconsin’s statute, which states that a sign must contain the following notice in black lettering, each letter a minimum of one inch in height, on a white background:

Notice: A person who observes or participates in an agricultural tourism activity on this property assumes the risks inherent in the agricultural tourism activity. Risks inherent in the agricultural tourism activity may include conditions on the land, the unpredictable behavior of farm animals, the ordinary dangers associated with equipment used in farming operations, and the potential that a participant in the agricultural tourism activity may act in a negligent way that may contribute to injury or death. The agricultural tourism provider is not liable for the injury or death of a person involved in an agricultural tourism activity resulting from those inherent risks.¹⁵

Requirements for registration and operation plans

As the first state to enact an agritourism immunity law, Kansas included a registration process for agritourism operations within its statute. While registration is permissive, only those agritourism locations that have registered can receive the law’s liability protection. The Kansas statute provides the following:

Any person who is engaged in the business of providing one or more agritourism activities may register with the secretary of wildlife, parks and tourism. The registration shall contain all of the following: (1) Information describing the agritourism activity which the person conducts or intends to conduct. (2) Information describing the location where the person conducts or intends to conduct such agritourism activity.¹⁶

Agritourism operators in Kansas that register also benefit from promotion and publicity by the State. Only a handful of states have followed the Kansas registration approach, as indicated in the chart below.

States with agritourism registration provisions
Georgia
Kansas
Louisiana
Mississippi
Missouri
North Dakota

In addition to registration provisions, Louisiana’s law includes a certification process that requires agritourism professionals to submit a plan of operation for agritourism activities if they seek to utilize the law’s immunity provisions. Components of the plan include a listing of agritourism activities,

identification of activity risks and plans for minimizing the risks, and locations of warning signs. Applicants must submit the plan to the Louisiana Extension Service for approval and update the plan every five years or whenever adding a new activity.¹⁷

What about waivers?

A written waiver or release of liability form is the traditional tool for addressing liability for voluntary engagement in risk-based activities like those involved in agritourism. The waiver serves as the participant's recognition that he or she is assuming the risk of the activity. It contains a promise by the participant to release the activity provider from any liability if the participant suffers harm due to the provider's ordinary negligence or the inherent risks of the activity.

A state immunity law can negate the need for an agritourism business to require that customers sign a waiver before participating in an agritourism activity. If the state immunity law covers all of an agritourism business's risky activities then the business may not need to utilize written waivers. However, if the business offers additional activities that the immunity law might not include within its liability protections, the agritourism business might need to use a written waiver for those activities that might not be covered by the law. Note, too, that an insurance provider or attorney might encourage an agritourism client to utilize waivers as a risk management tool even if the state has an agritourism immunity law.

Several agritourism immunity laws specifically refer to the immunity law's relationship with waivers. Montana's Recreation Responsibility Act states that the law does not prohibit the use of a written waiver or release, requires that a waiver contain certain language, and allows that a waiver may still be challenged on legal grounds.¹⁸ Texas, Kentucky and Maine grant liability protection to a provider who either posts a warning sign or obtains a signed written agreement stating that the participant received a warning of the inherent risks of an activity.¹⁹

Other laws that can provide agritourism immunity

In addition to immunity laws that specifically target agritourism businesses, other laws could address an agritourism liability situation. A farmer or rancher may be able to receive liability protection through these other types of immunity statutes, which can be especially important if the farmer or rancher's state does not have an agritourism immunity statute. In those situations, agritourism businesses should assess how other liability protection laws in the State might apply to its activities.

Recreational user immunity statutes

All fifty states have a recreational user statute that provides landowners with immunity from liability for harm that happens to people who are on the property for recreational purposes. States adopted these laws to encourage property owners to open up their lands to others for recreational activities. In

exchange for opening their lands, property owners are shielded from liability for injuries that recreational entrants incur while on the property. Recreational pursuits often include activities like hiking, fishing, swimming, camping, snowmobiling, and sometimes hunting; however, what qualifies will depend upon the language of a state's statute. Note, however, that many recreational user statutes do not allow a fee or consideration to be charged for the activity. With this limitation, an agritourism operation will only benefit from the statute if the person was injured while engaging in an agritourism activity that was free of charge.

Michigan's recreational user law provides an example of this type of law:

Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.²⁰

Some states have added agritourism activities into a preexisting recreational user law rather than creating a separate agritourism immunity law. Alaska, for example, recently amended its recreational user immunity statute to include "farm touring" as an activity covered by the law. "Farm touring" means "briefly visiting a farm to observe or experience aspects of raising, growing, producing, cultivating, harvesting, or processing an agricultural product as a tourist, without receiving pay."²¹ The law applies to all activities, including those conducted for a fee.

For more information on state recreational user statutes, see our compilation at <http://nationalaglawcenter.org/state-compilations/recreational-use/>.

"U-pick" immunity laws

"U-pick" immunity statutes offer liability protection in a few narrow circumstances. The laws, also known as "you-pick," "pick-your-own" and "you-pick-your-own" laws, generally apply only to people entering onto a farmer's land for the purpose of purchasing or picking fresh fruits and vegetables directly from the field. The immunity will protect the landowner from legal liability for any injuries to a customer that occurs while purchasing or picking from the land. Importantly for tenants and lessees, the immunities often apply to whoever is in possession and control of the land, not just the landowner.

Pennsylvania, for example, does not have an agritourism immunity law but does have a "u-pick" law that covers a range of activities, as follows:

(a) No cause of action shall arise against the owner, tenant or lessee of land or premises for injuries to any person, other than an employee or contractor of the owner, tenant or lessee, who is on the land or premises for the purpose of picking and purchasing

agricultural or farm products at a farm or “u-pick” operation, unless the person's injuries were caused by a condition which involved an unreasonable risk of harm and all of the following apply: (1) The owner, tenant or lessee knew or had reason to know of the condition or risk. (2) The owner, tenant or lessee failed to exercise reasonable care to make the condition safe or to warn the person of the condition or risk.

(b) As used in this section, the term “agricultural or farm products” means the natural products of the farm, nursery, grove, orchard, vineyard, garden and apiary, including, but not limited to, trees and firewood.²²

Many states have exceptions for when the landowner knew about a dangerous condition, failed to adequately warn a customer about the condition, and failed to adequately make the condition safe. Adequacy is tested by a reasonableness standard that looks at the facts of the situation to determine whether an action meets society’s expectations of what a reasonable person in the same situation would do.

Equine immunity laws

For harm sustained while engaging in activities with horses and other equine, an agritourism operator in a state without an agritourism immunity law might be able to utilize the State’s “equine activity” law. The State of Illinois illustrates how this type of law shifts the risk of harm from equine to the participant:

Each participant who engages in an equine activity expressly assumes the risk of and legal responsibility for injury, loss, or damage to the participant or the participant's property that results from participating in an equine activity, except in specific situations as set forth in Section 20, when the equine activity sponsor or equine professional may be held responsible.²³

As with the Illinois equine activity law, equine activity statutes often contain several exceptions or instances for which the provider will be liable. Exceptions often include providing faulty equipment or tack, failing to assess the participant’s ability to engage in the equine activity, failing to warn of known dangerous conditions of the land, and willfully or intentionally injuring participants. Most of the laws also require the business to post a warning sign that notifies participants of the risks of being around equine and the immunity for harm provided by the law.

Refer to the Animal Legal & Historical Center for a compilation of state equine activity laws at <https://www.animallaw.info/content/map-equine-activity-liability-statutes>.

Using an agritourism immunity law

The existence of an agritourism immunity law doesn't automatically guarantee an agritourism business of liability protection for visitor injuries. In addition to meeting the definitions, eligibility requirements and affirmative actions that a statute may contain, an agritourism business must raise the immunity statute if an injury situation results in litigation. Many states have specific requirements for using the law's immunity protection. For example, Washington's statute states:

In any action for damages against an agritourism professional for agritourism activity, the agritourism professional must plead the affirmative defense of assumption of the risk of agritourism activity by the participant.²⁴

Utah's law directs the court to undergo a comparative negligence analysis to determine if the harmed person disregarded warnings or misused animals or equipment.²⁵ These laws illustrate the importance of properly using the agritourism immunity statute.

Agritourism and immunity laws: next steps for agritourism businesses

Learning about agritourism immunity laws in the United States is an important first step for farmers and ranchers pursuing or planning to operate an agritourism business. In the following checklist, we provide considerations to make when examining agritourism liability in a specific state. We also provide several additional resources on agritourism liability. Our hope is that utilizing the checklist and resources will enable farmers and ranchers to continue on a path toward optimal agritourism liability risk management.

See our other Factsheets in this series for more resources on legal issues in agritourism.

Agritourism and Immunity Laws: A Checklist for Agritourism Businesses

Agritourism operators may use this checklist as a tool to understand how a state's immunity laws impact the agritourism business. The checklist is not exclusive, but serves as a starting point in considering liability protection laws. We encourage an agritourism business to confer with its attorney and insurance provider for individual guidance on liability protection.

1. **Determine if your state has an agritourism immunity law.** Refer to our state compilation of laws at <http://nationalaglawcenter.org/state-compilations/agritourism/>. If your state does not have an agritourism immunity law, determine if there a recreational user statute, "U-pick" statute, or equine activity act that could apply to your situation.
2. **Review the law to understand how it applies to your agritourism situation.**
 - Who does the law protect from liability? Identify the eligibility requirements for the type of provider or activity that the law will protect, such as the purpose of the activity and whether the activity must be conducted on a commercial or working farm. You will not receive the law's protections if you or your agritourism activities do not meet these requirements.
 - What types of risks does the law apply to? Understand how the law defines "inherent risks" or the risks that receive liability protection. Determine if there are other risks in your agritourism activities that are not covered, such as the risk of contracting an illness from an animal, and take additional precautions for those risks, such as keeping customers away from animals.
 - What are the exceptions to immunity? Determine whether the law will not give liability protection for certain behaviors or situations, such as failing to properly train employees or failing to make a reasonable inspection of property or equipment. Take additional precautions to ensure that a situation on your business does not become an exception to immunity.
 - What affirmative requirements does the law contain? Does the law require you to post a warning sign, include warnings in your contracts, register with the State, develop an operating plan, or take any other steps? Comply with the requirements and document the actions you have taken for compliance.
3. **Consult with your professionals to confirm your understanding of the law and determine if you should still use a written waiver or release of liability.** Meet with your attorney and insurance provider to review all of the activities that you offer, how the immunity laws apply to your business, and the extent of your insurance coverage. Ask your professional team if you should also use written waivers to further protect you from liability.

Additional Resources

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⁷ 7 M.R.S.A. §251(5)(B).

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⁹ Ala. Code 1975 § 6-5-347(c)(2).

¹⁰ Ala. Code 1975 § 6-5-347(c)(4).

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¹² O.R.S. § 60.673(2)(d).

¹³ O.R.S. § 60.673(2)(e).

¹⁴ I.C. § 6-3005(2).

¹⁵ W.S.A. 895.524(2)(a)(2).

¹⁶ K.S.A. 32-1433(a).

¹⁷ LSA R.S. 9:2795.5; LSA A.C. 7:XLV.105.

¹⁸ MCA 27-1-753(3).

¹⁹ V.T.C.A § 75a.004; KRS § 247-809(a); 7 M.R.S.A § 253(3).

²⁰ MCLS § 324.73301.

²¹ AS § 09.65.290(e)(3).

²² 42 P.S. § 8339.

²³ 745 I.L.C.S. 47/1.

²⁴ West’s RCWA 4.24.832 (c).

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Agritourism and Insurance

Insurance considerations for agritourism operators

Factsheet

Series: 2019



The National Agricultural Law Center is the nation's leading source for timely, authoritative and objective agricultural and food law research and information.



National Agricultural Library

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Offering agritourism activities is a fun way to teach people about agriculture or to increase a farm or ranch's income. But agritourism exposes an operator to different and additional types of liability risk. Because of this risk, a farmer or rancher must carefully consider insurance needs and ensure adequate insurance coverage.

What is agritourism insurance?

Farmers and ranchers obtain property liability insurance to cover the costs of a legal liability incident if someone is harmed on the property. Agritourism insurance refers to a customized rider that adds or amends liability coverage above and beyond a farm or ranch's general property insurance policy.

Why do agritourism activities require additional insurance?

While farm or ranch property liability insurance policies cover a wide range of risks, they often don't include the different types of risks that are involved in agritourism. That is, there is no coverage unless the landowner has added a specific agritourism rider to the general policy. That's because agritourism activities are not typical farming activities and involve participants who may have little familiarity or experience with being on a farm. And the activities themselves—wagon rides, horseback rides, petting zoos, hunting, fishing, corn mazes, bouncy houses—present a higher likelihood of harm than many ordinary activities. While those who engage in agritourism activities voluntarily choose to do so,

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injuries can still happen even when an agritourism operator takes all precautions to protect the participants from harm.

Farmers and ranchers who host food concessions or directly market their meat, produce, baked goods or cottage foods to agritourism visitors are also engaging in higher risk product liability activities that are not common to many farming operations. For this reason, the possibility of a farm visitor contracting a foodborne illness is not usually addressed in a general farm liability policy. Covering the higher risk activities associated with agritourism activities and providing foods requires specific policy riders and additional insurance premiums.

When is agritourism insurance recommended?

A farmer or rancher who offers agritourism activities, whether or not for pay, should consider agritourism insurance. Each state defines agritourism differently; however, there are a number of activities generally considered “agritourism” that a landowner will want to ensure are covered by his or her policy, including:

- You-pick operations (pumpkins, apples, strawberries, sweet corn, asparagus, etc.)
- Hay wagon rides
- Corn mazes
- Petting zoos
- Horseback riding and pony rides
- Birdwatching
- Cut-your-own Christmas tree farms
- Camping sites
- Hunting and fishing
- Agricultural education and school tours
- Living history farms
- Farmers market events
- Food stands (produce and baked goods)
- Vineyard tours and wine tastings
- Cidery or brewery tours and tastings

As an agritourism operation grows, the business may add non-traditional agricultural activities that the business operator should make sure are covered by insurance. These include:

- Food and beverage service
- Wedding and event barns
- Farm bed and breakfasts
- Zip lines
- Climbing walls
- Inflatables
- Slides
- Ropes courses
- Paintball courses
- Archery
- Exercising with animals (“goat yoga”)
- Festivals
- Mechanical rides
- All-Terrain Vehicle or golf cart rentals
- Haunted houses
- “Zombie hunting” with paintball guns or tomato launchers
- Any activities that use firearms or weapons
- Any activities conducted on or in water
- Any activities conducted near an open flame

How do agritourism immunity laws affect liability and insurance?

Different types of immunity laws can shield agritourism operations from certain liabilities, such as an “agritourism immunity law”, a “recreational user statute”, a “u-pick statute” or an “equine activity act.” Even in states that have them, immunity laws don’t offer absolute liability protection for the operator. The immunity laws typically only provide liability protection for specific activities or harm resulting from “inherent risks” of certain activities. An agritourism operator can be responsible in other instances, such as if the harm resulted from something that is not an “inherent risk,” if the owner or an employee acts with negligence or recklessness, or if the operator fails to meet the requirements of the statute. Additionally, a state’s immunity statute might have restrictions and eligibility requirements, such as extending immunity only for agritourism on a “commercial” farm or ranch or providing immunity only for those who don’t charge a fee or financially benefit from the activity. See our factsheet on “Agritourism Immunity Laws in the United States” for more information. Ultimately, it is wise to consult an attorney and insurance agent to examine how applicable immunity statutes can reduce risk when determining the extent of coverage necessary for an agritourism operation.

How much will agritourism insurance cost?

The cost of a policy will depend upon a number of factors. These factors and their importance vary by insurance company, and each company has its own risk tolerance. An insurance agent will have to assess the risks at an agritourism operation, and is likely to consider:

- Types of activities offered.
- Number of activities offered.
- Attendance numbers.
- Risks inherent in the land.
- Precautions and management practices taken to minimize risk of injury.
- Compliance with laws, regulations, and industry best practices.
- Strength of a state’s agritourism immunity law.

Further, the cost of a policy will depend upon whether the agritourism operator wishes to insure for legal defense costs, property and merchandise used for the agritourism operation, loss of income, and other business related expenses. The final cost of a policy will be the policyholder’s decision, as caps may be placed on coverage to reduce the cost of the premium. A policyholder will want to independently assess the risks posed by his or her agritourism operation, and determine his or her own risk tolerance.

How does a farm or ranch obtain agritourism insurance?

Obtaining agritourism insurance coverage might require a farmer or rancher to shop around. The number of insurance companies offering agritourism insurance has increased over the past few years, making the market more competitive. However, not all insurance companies provide coverage for all types of agritourism activities. A farmer or rancher can always start by talking to the insurance agent and reading the current insurance policy to see what is covered.

If shopping around, look for a company that provides coverage for all of the operation's needs, is in sound financial strength, and is respected by other agritourism operators. Then select a reputable agent from the identified company who has experience with agritourism and is willing to invest time in getting to know the landowner and understanding the agritourism operation. Work with the agent to tailor the agritourism rider to reflect the types of agritourism activities offered.

What are recommended best practices for maintaining insurance coverage?

Insurance is a tool that few people wish to use but that most people maintain in the event it is needed. If an accident happens at an agritourism farm, the operator will want to know that the liabilities will be covered by insurance. Here are some tips on maintaining both your insurance coverage and your peace of mind:

- Always stay current on premium payments.
- Understand the limits of the policy.
- Stay in contact with the insurance agent.
- Regularly inspect the operation, and have the insurance agent do so as well.
- Consult with the insurance agent, and update the policy, when adding new activities to the farm.

Agritourism and insurance: next steps for agritourism operators

Learning about agritourism and insurance is an important first step for farmers and ranchers who want to host agritourism activities on their properties. In the following checklist, we provide considerations for examining agritourism insurance options. We also provide several additional resources on agritourism insurance. Our hope is that utilizing the checklist and resources will enable farmers and ranchers to continue on a path toward optimal agritourism liability risk management.

See our other Factsheets in this series for more resources on legal issues in agritourism.

Agritourism and Insurance: A Checklist

Agritourism operators may use this checklist as a tool to make sure that common insurance questions are answered, or at least considered, in the planning process. The list is not exclusive, but serves as a starting point in considering the types of insurance and how much insurance is necessary for the agritourism operation.

1. **Find an agritourism insurance provider.** Agritourism insurance is becoming increasingly common but not all insurance companies cover all agritourism activities, nor do all insurance agents have experience in working with agritourism clients. Some questions to ask before signing a policy include:
 - What experience do you and your company have with insuring agritourism?
 - What is your company's A.B. Best Rating? This is a measure of financial strength.
 - What would happen in ____ situation? Run through hypotheticals with the agent.

2. **Assess insurance needs for all activities.** Review every type of agritourism activity with your insurance provider, assess the risks and coverage options for each activity, and understand whether there are exceptions, limits, or exclusions that could affect coverage for an activity. Specifically, an agritourism operator will want to know:
 - Are all of the activities provided at my agritourism operation covered by this policy?
 - What are the property or liability exclusions or limits in my agritourism policy?

3. **Create emergency response plans and training programs.** Even when all precautions are taken for safety, accidents and emergencies still occur. The harm that results from these accidents can be minimized by having a response plan in place that addresses what to do in the event of an accident or emergency, and by training staff to use the plan.

4. **Regularly inspect and review the agritourism operation.**
 - Do regular inspections of the property to look for dangerous conditions that might be caused by human action, or simply inherent to the property, even if your state has an agritourism immunity statute.
 - Advise your agent of any new or discontinued agritourism activities on the operation.
 - Do an annual walk-through of the property with your insurance agent.

5. **Keep adequate records.** Document all safety measures taken to demonstrate that the agritourism operation took all reasonable precautions. Document the presence and servicing of all safety equipment, trainings, improvements to make the premises and activities safe, injuries and emergencies, and all other things that your insurance agent requires a record of or recommends.
 - Does your applicable state immunity law require you to post a warning sign? If so, document that it is posted as required under the law.

References and Resources

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Note: The websites for many state Farm Bureaus and insurance companies contain additional helpful resources for agritourism operators. The National Agricultural Law Center and The Ohio State University are not sponsored by any state Farm Bureaus or insurance companies, nor do they endorse or recommend any particular insurer.

Agritourism Activities and Zoning

Examples from around the country

Factsheet

Series: 2019

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From corn mazes to wedding barns, entertaining people on the farm with “agritourism” activities is an increasingly popular business opportunity for farmers and ranchers. But agritourism activities tend to look different from traditional agricultural production activities, raising questions about whether and how to regulate agritourism activities through zoning. For this reason, agritourism businesses can encounter obstacles with zoning, as evidenced by two surveys in which 13% and 50% of the agritourism operators reported difficulties with zoning.¹ Some state and local governments have responded to these challenges by enacting zoning laws and regulations that specifically address agritourism. We highlight several examples from around the country below, which offer different approaches to resolving the challenges presented by agritourism and zoning.

Zoning and agricultural land uses

The zoning power allows a local government to regulate land uses within its territory and set standards for the development of land parcels. Zoning typically establishes separate zoning districts for residential, commercial, industrial, and agricultural uses. Of these district designations, the purposes of agricultural districts can be the most varied. Purposes may range from protection of agriculture and agricultural soils, to reducing the impacts of agricultural activities on other properties, to serving as a “catch all” for land uses that would not fit in any other district.²

Some states preempt a local government’s ability to use zoning to completely prohibit agricultural activities, while others allow a

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local government to regulate which types of agricultural land uses can exist in a zoning district. For either approach, the purpose of the zoning district and the definition of “agriculture” are important. Whether a district aims to protect or contain agricultural land uses, if and how a zoning law defines agriculture, and whether a zoning regulation distinguishes between different types of agricultural activities play critical roles in determining the impact of zoning on the existence and location of “agriculture.”

How does “agritourism” relate to “agriculture”?

From a zoning perspective, the challenge with agritourism is defining whether and how it fits into state laws and local zoning regulations for agriculture. Is agritourism agriculture? Is it tourism? Is it a commercial activity? Does it have characteristics of more than one definition or zoning district? Does the locality want to encourage or discourage agricultural diversification and agritourism development? These uncertainties, combined with the growth of the agritourism industry, have led many state and local governments to and clarify how their zoning laws apply to agritourism with specific definitions, exemptions and conditions for agritourism land uses. We provide examples of four different approaches below: exempting agritourism land uses from zoning regulation, using an overlay district to address agritourism activities, establishing agricultural tourism zones, and addressing agricultural rentals halls as separate land uses.

Examples from the states

Ohio: The Agritourism Zoning Exemption

Ohio law confers zoning authority on its counties and townships, but at the same time strictly limits these jurisdictions from prohibiting the use of land for agriculture or requiring zoning certificates for buildings incident to the agricultural purpose of the land on which they are located.³ This legal protection also extends to “farm markets,”⁴ buildings used primarily for vinting and selling wine,⁵ and as of 2016, to “agritourism.”⁶ Three statutory definitions clarify the types of land uses that qualify for the agritourism exemption. The activity must fit within the definition of “agritourism” and must take place on a “farm” that is devoted to “agricultural production,” as follows:

“*Agritourism*” is “an agriculturally related educational, entertainment, historical, cultural, or recreational activity, including you-pick operations or farm markets, conducted on a farm that allows or invites members of the general public to observe, participate in. or enjoy that activity.”⁷

A “*farm*” is “land that is composed of tracts, lots, or parcels totaling not less than ten acres devoted to agricultural production or totaling less than ten acres devoted to agricultural production if the land produces an average yearly gross income of at least twenty-five hundred dollars from agricultural production.”⁸

“*Agricultural production*” means “commercial aquaculture, algaculture meaning the farming of algae, apiculture, animal husbandry, or poultry husbandry; the production for a commercial

purpose of timber, field crops, tobacco, fruits, vegetables, nursery stock, ornamental shrubs, ornamental trees, flowers, or sod; the growth of timber for a noncommercial purpose if the land on which the timber is grown is contiguous to or part of a parcel of land under common ownership that is otherwise devoted exclusively to agricultural use; or any combination of such husbandry, production, or growth; and includes the processing, drying, storage, and marketing of agricultural products when those activities are conducted in conjunction with such husbandry, production, or growth.”⁹

While local zoning regulations can’t prohibit agritourism activities that meet the definition of agritourism, Ohio law does allow limited zoning authority over several factors related to agritourism land uses. When necessary to promote the public health and safety, counties and townships may impose zoning requirements on agritourism operations for:

- Size of structures used primarily for agritourism
- Size of parking areas, but this does not include the power to require improvements like paving
- Setback building lines for structures used primarily for agritourism
- Egress or ingress¹⁰

Cass County, Nebraska: Agritourism Overlay Districts

The zoning code issued by Cass County, Nebraska creates an overlay district for agritourism that may apply to lands zoned as Agriculture, Transitional Agriculture, or Recreational/Agriculture.¹¹ An overlay district is not a separate district, but rather one that adds specific pre-determined requirements to a zoning designation that still applies to the land. For example, while a use might be a conditional use in the underlying zone that would require a normal zoning review and permit, if the requirements are met for the overlay district, the use could be a permitted use that would not require as lengthy of a review.

The stated intent of the agritourism overlay district captures the challenges and opportunities presented by agritourism and provides strong guidance for other communities dealing with agritourism and zoning:

INTENT: Cass County Agritourism implementation states that to be successful depends upon the quality of the natural and built environments. Cass County's distinct character and quality resources provide the foundation for developing appropriate types of authentic tourism products that would ensure the county remains a unique and competitive destination in the future. Therefore, any tourism venture or experience which would be permitted in the agriculture and rural areas of the county must be directly related to the supporting primary agricultural use of the farm by interpreting the agricultural heritage of the county and providing a distinctly Cass County experience. This overlay district is intended for the Agriculture, Trans Agriculture and Rec/Agriculture Districts. Based on that foundation, certain types of uses are more appropriate than others in an agricultural or related zoning district because of the direct nexus to experiencing Cass County's agricultural heritage. Other uses that do not meet this basic threshold

or are not incidental to the primary agricultural use should not be permitted uses. In other words, in the agritourism related uses identified below, the visitor to the attraction, event or experience must leave the enterprise with a better understanding and appreciation of Cass County agricultural heritage, processes and culture. Benefits include: 1. Enhancing the economic viability of the farm and providing onsite employment opportunities. 2. Generating additional income or off season income 3. Interacting and educating locals and visitors about the importance of farming in Cass County 4. Increasing awareness of local agricultural products 5. Developing a new consumer market niche.¹²

In Cass County, the overlay district creates an expedited permitting process whereby an agritourism operator with land in one of the required zones may apply for “over the counter” permits. The resolution states that “agritourism as it is most broadly defined involves any agriculture based operation or activity that brings visitors to a farm, ranch or acreage.” The zoning code distinguishes between “minor over the counter permits” and “major over the counter permits” for agritourism. Minor permits involve a “walk-in, first come first served, case-by case” review “without the necessity of public notice or public hearing.”¹³ Major permits require a conditional use permit obtained through a notice and hearing procedure.¹⁴

Minor over the counter permits are available for agritourism activities such as camping sites, farmers markets, pumpkin patches, vineyards, Christmas tree farms, corn mazes, and other activities that are traditional agritourism activities or involve little food processing. Their inclusion in the overlay district provides these activities with a reduced burden to obtaining a permit, but still allows a local official to ensure that the activity is being conducted in a safe manner.¹⁵

Major over the counter permits still require a conditional use permitting process with a notice and hearing procedure. Activities in this category include bed and breakfasts, food manufacturing and sale, candle making and sale, small animal husbandry operations, antique dealers, wineries, and “other.” Most of these activities would require a conditional use permit even without the overlay district. Specifying them in the overlay districts provides clarity that these activities are not eligible for the expedited process for minor over the counter permits.¹⁶

Forsyth County, North Carolina: Agricultural Tourism Zones

Rather than use an overlay district, Forsyth County and the City of Winston-Salem, North Carolina allows landowners to apply as an independent Agricultural Tourism Zone. An independent zone means that a property owner would have to seek a zoning change, which generally requires a notice and hearing process. One benefit of an independent zone includes the clarity of having one streamlined set of rules as opposed to having to reconcile an underlying zone with an overlay district. However, the process to change the zone could be more intensive than a minor permitting process allowed through an overlay district.

Forsyth County’s Agricultural Tourism Zone does not apply to land uses defined as “agritourism” by the State of North Carolina’s agritourism immunity law,¹⁷ but does include such other land uses that fit within the zoning resolution’s definition of “agricultural tourism,” which means:

“Any recreational, educational, entertainment, or limited business activity operated in association with and located on the same zoning lot as a Voluntary Agricultural District. Agricultural Tourism includes, but is not limited to the following uses: restaurant (without drive through service), retail store, weddings, bed and breakfast.”¹⁸

The resolution limits Agricultural Tourism Zones to lots over 20 acres that are designated as a “Voluntary Agricultural District” through a separate program administered by Forsyth County.¹⁹ The Agricultural Tourism Zone establishes standards for building setbacks, maximum seating capacities and floor areas in buildings, parking areas, and outdoor special events.²⁰ The resolution does not apply landscape and streetyard requirements for Agricultural Tourism Zones,²¹ but does require building code compliance.²²

Tippecanoe County, Indiana: Agricultural Rental Halls

The popularity of on-farm weddings has created perhaps the most difficult quandary for agritourism operators and zoning officials: navigating the different concerns of barns used for events versus barns used for agricultural production. Some jurisdictions have chosen to address “wedding barns” separately as a specific land use, as Tippecanoe County, Indiana did in 2013. Its zoning code defines an “agricultural rental hall” as:

“An establishment (either with or without an outdoor component) where private parties, weddings, and/or receptions limited to attendance by invitation or reservation are held. Additionally, hosting public events, open to the public without the requirement of an invitation or reservation, at which entertainment is provided as the main attraction, may also be part of such business. [...]”²³

The ordinance allows agricultural rental halls as a “use permitted by right” in General Business Zones, and as a “use permitted by special exception” requiring Board of Zoning Appeals approval in two agricultural districts: Agricultural Zones and Agricultural and Wooded Zones.²⁴ In a General Business Zone agricultural rental halls may serve food made on the premises but only food prepared by an off-premises caterer may be served in the two agricultural zoning districts.²⁵ Additionally, agricultural rental halls in the agricultural districts may host no more than four public events per calendar year.²⁶ The ordinance also contains provisions for the size of parking areas, and in the rural zones requires grass or gravel overflow parking of sufficient size to accommodate all vehicles.²⁷

The county’s zoning code does not otherwise regulate agritourism activities. Without special designations, other agritourism activities would require a normal permit if such activities do not fall under the permitted use lists of the applicable zone for the agritourism operation.

Agritourism and zoning: insights

The above examples generate several insights that may be helpful to agritourism operations and local governments seeking solutions for addressing agritourism as a land use. An important first step is to assess the different types of activities that “agritourism” could bring to the community. Does the existing agricultural zoning district address these uses, or is there need for additional zoning provisions that clarify how agritourism activities fit within the zoning resolution? If changes are necessary, consider the following:

- If the goal is little or no zoning oversight over agritourism activities, an agricultural exemption could be an appropriate solution.
- An “umbrella” approach would encompass all agritourism activities that fit within a definition of agritourism, such as in Ohio’s example. Conversely, a categorization approach could address agritourism land uses separately based on type or intensity of use, such as in Cass County’s overlay district and Tippecanoe County’s “agricultural rental hall” use classification.
- If differentiating between agritourism land uses, consider whether the zoning approval procedures should also vary, such as in Cass County’s major/minor permits approach.
- Our examples suggest that parking areas, building sizes, and setbacks from property lines are common concerns raised by agritourism land uses.
- Tippecanoe’s “agricultural rental hall” designation encourages higher intensity wedding/event facilities to locate in general business zones while reserving the agricultural zones for lesser intensity wedding/event facilities.

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⁷ *Id.* § 901.80(A)(2).

⁸ *Id.* § 901.80(A)(4).

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¹⁰ *Id.* § 303.21(C)(4)(for counties) and § 519.21(C)(4) (for townships).

¹¹ Cass County Zoning Regulations Reprint June 2017 § 5.17.

¹² *Id.*

¹³ *Id.* § 3.02.

¹⁴ *Id.*

¹⁵ *Id.* § 5.17(A).

¹⁶ *Id.* § 5.17(B).

¹⁷ *Id.* § 5.17(H) states that “Agritourism Uses as Defined in the North Carolina General Statutes Agritourism uses as referenced in NCGS 106-581.1 and defined in North Carolina General Statute 99E-30 shall not be subject to the requirements of Section B.2-5.5.1.” NCGS 99E-30 defines “agritourism activity” as any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions. An activity is an agritourism activity whether or not the participant paid to participate in the activity. “Agritourism activity” includes an activity involving any animal exhibition at an agricultural fair licensed by the Commissioner of Agriculture pursuant to G.S. 106-520.3 .

¹⁸ Unified Development Ordinances of Winston-Salem/Forsyth County, North Carolina, Ch. A, Art. II

¹⁹ *Id.* § 2-5.5.1(A). According to Forsyth County, the purpose of the county’s “Voluntary Agricultural District” ordinance is “to promote the preservation of farmland in Forsyth County so that development and growth will be accompanied by protection of farms from non–farm development and other negative impacts on properly managed farms, recognizing the importance of agriculture to the economic and cultural life of the county.

Forsyth County’s Voluntary Agricultural District Program enhances the identity of the agricultural community by encouraging the voluntary preservation and protection of farmland from non-farm development.” “Voluntary Agricultural District (VAD),” FORSYTH COUNTY, NORTH CAROLINA, <https://www.forsyth.cc/CES/Conservation/VAD.aspx> (last accessed Jan. 27, 2019).

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²⁴ *Id.* § 3-2.

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See our other Factsheets in this series for more resources on legal issues in agritourism.

Farm Animals and People: Liability Issues for Agritourism

Factsheet

Series: 2019

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The National Agricultural Law Center is the nation's leading source for timely, authoritative and objective agricultural and food law research and information.



National Agricultural Library

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Who can resist the appeal of a goat, a calf, or a baby pig? Farm animals can be a valuable attraction for an agritourism operation. But having people and animals on the farm creates liability risks. Whether feeding, riding, petting, observing, or just being near farm animals, visitors could be harmed and agritourism operators could be liable for that harm. Understanding farm animal liability risks and utilizing tools to reduce those risks can help reduce both the possibility of visitor injuries and legal liability for the agritourism operator.

Negligence and legal duties for property visitors

Laws in every state establish legal duties that require landowners to keep visitors safe from harm on the property. These legal duties arise from premises liability laws made by our courts and also from various state statutes. Premises liability laws require landowners to take reasonable actions to protect visitors from foreseeable risks that could harm them. Some states command an even higher legal duty if the visitor is a customer, and require a landowner to protect a customer from unknown dangers in addition to those risks that are foreseeable to the owner. Legal duties for landowners can also derive from state and local statutes and regulations that call for specific actions a property owner must take in certain circumstances.

Whether a legal duty derives from court-made law or specific statutes and regulations, a visitor who suffers harm because the property owner violated the legal duty may be able to allocate liability to the property owner. Negligence is the typical legal theory for doing so. A negligence cause of action would assert that a property owner failed to meet the mandated legal duty,

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which caused the visitor's harm. If the visitor can prove that the landowner violated a legal duty that he or she had to the visitor and that the breach of that duty caused harm to the visitor, the landowner could be deemed negligent. A finding of negligence would make the landowner liable for the resulting harm suffered by the visitor.

Farm animals and premises liability law

Imagine the many foreseeable risks of allowing agritourism visitors to be around farm animals. A person could be stepped on, pushed over, thrown from, pinned, kicked, scratched, or bitten by an animal. Another increasingly common way a visitor can be injured is by getting an infection from an animal, referred to as zoonotic disease transmission. These dangers and risks to visitors posed by farm animals translate into legal duties for agritourism operators. According to premises liability law, an operator has the legal duty to take reasonable actions to protect visitors from the risks of being around farm animals. Reasonable actions can include removing or repairing dangerous conditions, keeping visitors away from them, or warning visitors of the dangers. If a visitor is harmed because an operator failed to take such actions, the operator could be subject to liability through a negligence claim.

Farm animals and statutory laws

An agritourism operator could also be negligent if his or her failure to meet a legal duty assigned in a statute or regulation caused harm to a property visitor. A variety of laws and regulations can relate to protecting people from the dangers of farm animals. The laws vary from state-to-state, so it's important to identify the precise laws that apply in a particular state. Two types of laws are most common: livestock containment laws and sanitation laws.

Livestock containment statutes

All but a handful of states have laws that require owners of livestock to contain or "fence in" their livestock. If an animal escapes its enclosure and causes harm to visitors or others' property, an owner could be liable for the harm. Most of these state laws don't create automatic liability for the livestock owner but instead require a harmed party to prove that the owner negligently breached the legal duty to contain livestock, such as by leaving gates open or failing to maintain good fences or stalls.

In the agritourism setting, livestock containment laws establish a statutory legal duty for operators to properly contain their animals. This duty could include using best management practices to build fences, gates, stalls and doors that are capable of containing livestock. Some state or local laws might also mandate particular types of enclosures or fences, such as requiring that fences be constructed according to Natural Resources Conservation Service Conservation Practice Standard Code 382. In addition to proper construction, an operator's legal duty would include inspection and maintenance of enclosures and regular monitoring to ensure that animals are in their enclosures.

Hand sanitation statutes

State hand sanitation laws establish hand washing facilities and education in order to prevent zoonotic disease transmission, a growing liability risk for agritourism operations. Zoonotic diseases occur when humans pick up animal germs by touching animals or surfaces contaminated by animals then transferring the germs to their mouths.¹ This accidental ingestion of animal germs can cause infections and diseases that may lead to illness or death, such as an e-coli infection from animal manure that led to permanent dialysis for a young child in Minnesota and a \$7.5 million judgment against the agritourism operation that hosted the child.²

Despite the high danger of zoonotic disease transmission from human-animal interactions, only seven states have hand sanitation laws that could reduce this risk. Of those, only the laws of New Jersey, New York, Pennsylvania and Washington could apply to agritourism operators, as the other laws apply only to fairs and public shows or exhibitions.³ While the sanitation laws vary from state-to-state, they generally address the placement of hand washing stations near animal contact exhibits. Some also require the operator to provide education for visitors about zoonotic disease transmission and how to properly wash hands and avoid contact with animal germs. Such requirements create statutory legal duties for agritourism operators, and an operator could be liable for harm to a visitor who contracts a zoonotic disease because the operator did not fulfill his or her legal duty to provide the required sanitation station or educational information.

Management practices and legal duties

There are many management practices that can help an agritourism operator meet his or her legal duties to keep visitors safe from farm animal dangers. Common sense suggests many of these practices, but it is also wise to refer to experts for recommended “best management practices” and industry standards. Don’t forget that state laws could also require an operator to follow certain practices. Following the steps below to identify and implement management practices can reduce the risk of a farm animal liability incident.

1. Assess the types of animal-human interactions that occur on the operation and the potential dangers visitors face from being near farm animals.
2. Identify required and recommended management practices that address each type of animal-human interaction or potential danger. See the chart below, and refer to specific laws and academic and industry experts in agritourism, farm animals, and farm safety.
3. Include emergency response planning that addresses what to do if there is an accident or emergency involving farm animals and people.
4. Develop and document standard operating procedures that implement the required and recommended practices.
5. Train all employees on how to correctly follow the standard operating procedures.
6. Continuously assess the property to ensure that practices are in place.

7. Maintain records of standard operating procedures, employee training protocols, and any actions taken to implement management practices. Records can include written materials as well as photographs and videos.

The following chart provides examples of management practices that address farm animal-human interactions. This is not a complete list. To finalize a list for a particular agritourism operation, refer to specific state laws and additional resources from experts such as those listed at the end of this publication.

Examples of Management Practices for Farm Animal-Human Interactions

<i>Farm animal danger</i>	<i>Examples of practices to keep visitors safe</i>
Being stepped on, pushed over, pinned, kicked, scratched or bitten by an animal.	<ul style="list-style-type: none"> • Construct and maintain fences that are capable of containing the specific types of animals. • Place barriers between visitors and animals and utilize locking mechanisms on doors and gates. • Allow animal contact only through barriers. • Regularly inspect all animals, fences, enclosures and gates. • Supervise all animal-human interactions. • Remove animals that have a history of negative interactions with people.
Falling off or being thrown from an animal, or falling off equipment pulled by or attached to an animal.	<ul style="list-style-type: none"> • Provide proper instruction on handling or riding an animal. • Match inexperienced or young visitors with animals that have a history of good behavior and interactions with people. • Regularly inspect and maintain equipment. • Train employees to follow standard operating procedures and best management practices.
Ingesting germs from direct animal contact.	<ul style="list-style-type: none"> • Select lower risk animals for direct contact such as rabbits, pigs and horses. • Prevent human contact with higher risk animals such as poultry, pre-weaned calves and young lambs or goats. • Provide hand washing stations with running water, soap, and towels (required by state sanitation laws in some states). • Provide instructions on how to wash hands properly (required by state sanitation laws in some states).
Ingesting germs from contaminated surfaces, objects or foods.	<ul style="list-style-type: none"> • Continuously manage manure and prevent human contact with manure areas. • Regularly inspect and disinfect surfaces in animal areas that visitors might touch, such as railings and barriers. • Provide a transition area between animal areas and non-animal areas and do not allow toys, baby bottles, strollers, food, beverages or similar items beyond the transitional area. • Place food service or eating areas far from animal areas. • Provide handwashing stations and instructions in food areas, as stated above.

Immunity statutes can protect operators

An immunity law can change the outcome of a negligence claim against an agritourism operator. An immunity law removes the operator's legal duty to keep visitors safe in certain situations that carry inherent risks. Immunity laws assume that a person knows that certain activities have inherent risks that a landowner can't completely control. If a visitor voluntarily engages in an inherently risky activity and suffers harm, the immunity law shifts responsibility for that harm to the injured person rather than the landowner.

Because agritourism activities carry many inherent risks, a number of states have enacted "agritourism immunity laws" to protect agritourism operators from liability for certain risks. One common provision in these laws is to identify "the behavior of domestic and wild animals" as an inherent risk of being on an agritourism farm. This type of provision could prevent an operator from being liable if an animal steps on, bites, or otherwise behaves in a way that causes harm to a visitor. Note, however, that only a few of the agritourism immunity laws might address the transmission of farm animal diseases. Only Ohio's law specifically mentions illnesses from animals,⁴ while Maine's law includes harm from "the depositing of manure,"⁵ and Florida protects an operator from "any of the inherent risks of agritourism,"⁶ which might address farm animal diseases.

"Equine activity laws" might also provide immunity for agritourism farms that have horses, donkeys, and similar equine. These laws shift the risk of being harmed by an equine's unpredictable behavior to the participant in an equine activity, but don't protect operators who provide faulty equipment or tack or fail to assess a participant's ability to engage in the equine activity. "Recreational user statutes" might also protect agritourism operators from harm to visitors who engage in certain recreational activities on the farm. Be aware that many recreational user statutes apply only if the landowner does not receive a fee or benefit for the activity, so a state's law might not extend to a commercial agritourism operation.

For each of these different types of immunity laws, an operator must meet the requirements of the law in order to receive the immunity. For example, most agritourism laws require the operator to post a warning sign that notifies visitors of inherent risks of agritourism activities and that the law protects the operator from liability. Failing to meet an immunity law's requirements can disqualify an operator from immunity.

It's very important for an agritourism operator to know which immunity laws apply to the operator and to understand the requirements of each applicable law. For more information on immunity laws, refer to our Fact Sheet on "Agritourism Immunity Laws in the United States," available on the National Agricultural Law Center website at <http://nationalaglawcenter.org/>.

What about waivers?

A written waiver or release of liability form is the traditional tool for addressing liability for voluntary engagement in risk-based activities like those involved in being around farm animals. The waiver serves as the participant's recognition that he or she is assuming the risk of the activity. It contains a promise by the participant to release the activity provider from any liability if the participant suffers harm due to the provider's ordinary negligence or the inherent risks of the activity.

The types of immunity laws described above can negate the need for an agritourism operator to require that customers sign a waiver before participating in an agritourism activity. If the state immunity law covers all farm animal risks then the business may not need to utilize written waivers. However, if the operation offers additional activities that the immunity law might not include within its liability protections, the agritourism business might need to use a written waiver for those activities that might not be covered by the law. Also, an insurance provider or attorney might encourage an agritourism client to utilize waivers as a risk management tool even if the state has an agritourism immunity law. Note, however, that state laws can have very specific requirements for waivers and a court might not enforce a waiver that does not meet the legal requirements. For this reason, an agritourism operator who wants to utilize waivers should consult with an attorney to determine whether a waiver is applicable to the situation and should have the attorney draft the instrument.

Insurance: an important tool for managing risk

Insurance is a valuable tool for addressing the potential that an agritourism operator will be liable for harm to a visitor. An agritourism operator who offers agritourism activities, whether or not for pay, should have adequate insurance to address all agritourism activities conducted on the operation. Because many farm general liability policies don't include agritourism activities, however, an agritourism operator may have to obtain a customized rider that adds or amends liability coverage above and beyond a farm or ranch's general policy. It is important to review all farm animal activities to ensure that the policy covers each one. If coverage is not available or is very costly, an agritourism operator might want to reconsider whether to offer the farm animal activity. For more information on agritourism insurance, refer to our Fact Sheet on "Agritourism and Insurance," available on the National Agricultural Law Center website at <http://nationalaglawcenter.org/>.

Reduce the risk of farm animal liability

The following checklist provides a summary of important steps to follow in order to reduce the risk of liability for harm caused by farm animals on the agritourism operation. Be sure to confer with an attorney and insurance provider for individual guidance on liability protection.

Reducing Liability for Farm Animals and People: A Checklist

Agritourism operators may use this checklist as a starting point to help ensure careful consideration of the liability issues that arise from farm animal-human interactions, and should also confer with an attorney and insurance provider for individual guidance on liability protection.

1. **Identify your legal duties for protecting visitors from farm animals.** Identifying your legal duties requires that you understand:
 - Your state's premises liability laws, which defines the legal duties you have for different types of visitors on your operation.
 - Additional state or local laws that specifically address farm animals, such as livestock containment laws and sanitation statutes.
2. **Implement management practices that address your legal duties.** Refer to our chart above and other resources from experts in agritourism, farm animals, and farm safety to identify required and recommended management practices for your operation.
 - Develop standard operating procedures to implement the identified practices.
 - Include emergency response plans that lay out procedures to follow in case there is an accident from animal-human interaction.
 - Train all employees on your management practices and response plan and how to correctly follow standard operating procedures.
 - Maintain records of your standard operating procedures, employee training protocols, response planning, and other actions taken to implement best management practices.
3. **Utilize applicable immunity laws in your state and determine whether you should also utilize waivers.** Identify the immunity laws that apply to your farm animal activities and understand how to qualify for and utilize the laws, and consult with an attorney to determine if you should use waivers and if necessary, to draft your waivers.
4. **Assess liability insurance needs.** Review your farm animal activities with your insurance provider and ensure adequate liability insurance coverage for each activity.
5. **Regularly review, inspect and assess your farm animal activities.**
 - Conduct regular inspections of the property to ensure that you are properly addressing your legal duties for farm animal situations.
 - Stay up-to-date on best practices for managing animal-human interactions.
 - Before adding new activities involving farm animals on your operation, conduct a risk analysis by assessing your legal duties, required management practices and insurance coverage options. If the risk of liability is too high, reconsider whether to offer the new activity.

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See our other Factsheets in this series for more resources on legal issues in agritourism.