



The Feed

Recent Developments in Ag Law & Policy

The Feed highlights recent legal developments affecting agriculture, with issues released twice a month.

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Growing Careers:
Planning for Success in Starting and Maintaining an
Agricultural Law Student Association
September 11, 2024, Noon EDT

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Pesticides: Labeling. Eleven states have filed a petition with the Environmental Protection Agency (EPA) asking the agency to adopt a new pesticide labeling rule to “clarify ambiguity” around misbranding under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Specifically, the states have asked EPA to issue a rule that would declare any state-law pesticide labeling requirements inconsistent with EPA’s findings and conclusions on human health effects, such as a pesticide’s likelihood to cause cancer or birth defects, to constitute misbranding under FIFRA. This request comes as a response to increased litigation from plaintiffs who have filed lawsuits in state court claiming that a pesticide manufacturer failed to warn them about a health risk involved with using a particular pesticide product. In particular, the petition cited glyphosate as an example of a pesticide that has been the focus of thousands of lawsuits in recent years filed by plaintiffs who claim that the manufacturer failed to warn them of the pesticide’s cancer risks despite the fact that the EPA-approved label for glyphosate does not include a cancer warning. To read the petition, click **here**. To learn more from NALC about state-law failure to warn claims raised in pesticide lawsuits, click **here**.

Pesticides: Preemption. In a ruling issued on August 15, the Third Circuit Court of Appeals split from the Ninth and Eleventh Circuits by concluding that FIFRA preempts the state law failure to warn claims typically raised by plaintiffs in pesticide injury lawsuits. The ruling stems from a case filed by two plaintiffs who alleged that exposure to glyphosate caused them to develop cancer, and that the manufacturer had failed to warn them of the risk. In its decision, the Third Circuit concluded that FIFRA preempted the failure to warn claim, finding that the statute’s provision preventing states from adding language to a pesticide label that is “different from or in addition to” the federally approved label preempted the state law claim. Both the Ninth and Eleventh Circuit Courts of Appeal have ruled the opposite in recent years, finding that the state law claims are not preempted. A split in the circuits increases the chance that the United States Supreme Court may choose to hear this issue. To learn more about the Third Circuit’s decision, click **here** to read NALC article “Third Circuit Rules Failure to Warn Claims Preempted by FIFRA.”

Pesticides: Herbicide Strategy. EPA has released the final version of its Herbicide Strategy, a policy introducing additional application restrictions to herbicide labels in order to protect species listed as threatened or endangered under the Endangered Species Act. The draft version, released last year, focused on mitigation actions that would reduce spray drift and runoff, and included a “menu” of mitigation activities that farmers could use to achieve the necessary amount of runoff reduction when applying different pesticides. While the menu was intended to give farmers more choices, many criticized it for being difficult to implement. In the final Strategy, EPA states that it has made policy “easier to understand” by identifying singular activities that, taken on their own, would satisfy runoff reduction requirements. **According to EPA**, the Strategy will not be implemented across all herbicides at once, but instead will be used to create labels for new active ingredients and to assist mandatory review of already registered herbicides. To view the final Strategy, click **here**. To learn more about the draft Strategy, click **here** to read NALC article “EPA Draft Herbicide Strategy Open for Comment.”

Labor. A group of farmworkers have filed suit in a New Jersey state court to force the state to raise the minimum hourly wage for farmworkers. Currently, the minimum hourly wage for farmworkers in New Jersey is \$12 per hour, with no overtime pay — three dollars less than the hourly wage for non-farmworkers. The complaint alleges the difference in hourly wage rates disproportionately harms racial and ethnic minorities because most New Jersey farmworkers are Latino. Consequently, the complaint argues the hourly wage rates violate farmworker’s equal protection rights. To read the complaint, click **here**. To learn more about labor issues generally, click **here** to visit NALC’s Labor reading room.

“Misleading” Labeling. The D.C. Circuit Court of Appeals upheld the dismissal of an animal rights group’s lawsuit challenging approval of a label for Perdue Farms chicken including imagery of chickens outside a barn. In a unanimous decision, the D.C. panel held that Animal Legal Defense Fund (ALDF) failed to show that its members faced future injury, a requirement of having standing to sue. The suit began in 2021 when the ALDF sued USDA for its decision to approve the labeling of Perdue’s “Fresh Line” chicken products which depicted chickens living in an open pasture. The ALDF claimed this labeling was misleading, as in reality the chickens used by Perdue lived in “overcrowded warehouses.”

The D.C. Circuit upheld the decision of the lower court, which reasoned that the ALDF could not demonstrate a risk of future injury, as the group would not be deceived again by the same label in the future. Click [here](#) to read the D.C. Circuit's opinion.

Concentrated Animal Feeding Operations. Two farmers in Eureka, Wisconsin, filed a lawsuit to strike down an ordinance regulating concentrated animal feeding operations (CAFOs). The ordinance in question regulates CAFOs housing at least 1,750 swine or 500 dairy cows, which are then required to apply for a permit and submit detailed operations plans. The challenged ordinance also requires regulated CAFOs to set aside money for cleanups and pay an annual permit fee. Plaintiffs claim that Wisconsin law preempts local authorities from establishing regulations more strict than those passed down by the state, unless they can prove they are necessary to protect public health and safety. This case could have broad implications for the State of Wisconsin, as a judgment against Eureka could invalidate the operating ordinances of a variety of municipalities. To read the complaint, click [here](#).

Import Litigation. The D.C. Court of Appeals has issued a ruling in a case concerning a \$1 million fine imposed on the internet retailer Amazon by USDA under the Plant Protection Act and the Animal Health Protection Act. Both laws allow USDA to penalize importers who "aid, abet, cause, or induce" the unlawful importation of plant and animal products. USDA imposed the fine after a string of instances between March 2015 and March 2016 when U.S. Customs and Border Protection agents seized packages containing plant and animal products sent by foreign entities to Amazon fulfillment centers in the U.S.. In challenging the fine before the D.C. Circuit, a key factor was whether Amazon had met the requirements to be considered "aiding and abetting" the importation of plant and animal products. Ultimately, the court reasoned that Amazon was merely engaged in a "routine business service" which did not support a finding that, "Amazon consciously and culpably participated in the sellers' unlawful importations." For more information, click [here](#).

Growing Climate Solutions Act. USDA and the Agricultural Marketing Service (AMS), have published a notice in the Federal Register of their intent to establish the Greenhouse Gas Technical Assistance Provider and Third-Party Verifier Program Advisory Council (Council) under the **Growing Climate Solutions Act**. The purpose of the Council is to support the recently established Greenhouse Gas Technical Assistance Provider and Third-Party Verifier Program which works to facilitate the participation of farmers and ranchers in voluntary environmental credit markets. The notice from USDA and AMS serves to solicit nominations for membership on the Council, as well as nominations for a pool of candidates to fill any unexpected vacancies that may arise in the future. For more information, click [here](#). To learn more about the Growing Climate Solutions Act, click [here](#) to view NALC article "Senate Advances Carbon Market Bill."

Cell-Cultured Meat. UPSIDE Foods Inc., of Berkeley, California, is challenging the State of Florida's **ban** on lab-grown meat. UPSIDE argues that the ban, the first of its kind in the nation, is preempted by federal meat and poultry products laws and violates the Commerce Clause of the U.S. Constitution. UPSIDE filed their suit against Florida's agriculture commissioner, attorney general, and four state attorneys. To read the complaint, click [here](#). To learn more about the Florida ban and other cell-cultured meat state laws, click [here](#) to read NALC article "Cell-Cultured Meat Updates: state bans, labeling requirements, and regulatory clarifications."

Food Labeling. The United States District Court for the Northern District of Illinois recently dismissed a proposed class action complaint against the Kroger retail chain. The complaint alleged that Kroger had engaged in misleading labeling on one of its products. Specifically, the plaintiff alleged Kroger misled customers into believing its "farm fresh eggs" came from free-roaming hens, while in reality they came from caged hens. The judge granted Kroger's motion to dismiss the complaint, holding that the plaintiff's definition of "farm fresh" did not align with the expectations of a reasonable consumer. To read the order, click [here](#). To learn more about food labeling generally, click [here](#) to visit NALC's Food Labeling reading room.

Sodium Reduction. FDA has released draft guidance on its second round of voluntary sodium reduction targets in packaged and prepared foods. As part of the **White House National Strategy on Hunger, Nutrition and Health** to reduce diet-related diseases by 2030, the draft guidance contains suggested sodium levels for 163 foods that are commonly prepared and processed in restaurants and other service establishments. Comments on the proposed guidance will be accepted until November 14th. To read the draft or make a formal comment, click [here](#). To learn more about the White House National Strategy on Hunger, Nutrition and Health, click [here](#) to read NALC article "Focus on Food: the Proposed 'Healthy' Rule and the White House Conference."

Cottage Food. Illinois Governor J.B. Pritzker signed **SB 2617**, an update to cottage food provisions, into law. The update expands both licensing requirements for cottage food producers and locations for cottage food sales. In Illinois, cottage food producers are required to be licensed through their local health department; however, not all counties have health departments able to issue the required license. With the enactment of SB 2617, cottage food operations are able to register with a neighboring county health department to fulfill the licensing requirement. Additionally, the update will allow cottage food to be sold at mobile farmer's markets. To learn more about other updates to state cottage food laws, click [here](#) to read NALC article "Update on Cottage Food Laws – 2024 Proposed Legislation."

Right to Repair. In the **2024 Democratic Party Platform** highlighted during this week's Democratic National Committee convention, Democrats have focused on right to repair, saying that Democrats will work to provide farmers the ability to repair their agricultural equipment. Over the last few years, various Democrat-led states including Minnesota, the home state of vice presidential nominee Governor Tim Walz, have passed these types of laws. While most of those laws have been limited to personal electronics such as phones and laptops, the Democratic Party Platform indicates that Democrats intend to expand their focus on right to repair to include agriculture.

- Webinar opportunity (September 18): **Ross Pifer**, Director, Penn State Center for Agricultural and Shale Law will present "Right to Repair and Agriculture." To register, click [here](#).

FSIS Salmonella Rule. The USDA's Food Safety Inspection Service (FSIS) is extending the comment period on its Proposed *Salmonella* Framework for Raw Poultry Products until November 7, 2024. The proposed framework, published on August 7, 2024, declared Salmonella an adulterant in certain poultry products contaminated with certain levels and serotypes of the bacteria. The extended

comment period comes after requests from industry associations, and public comments can be made [here](#). To learn more about the proposed framework, click [here](#) to read NALC article "FSIS Proposed *Salmonella* Framework for Raw Poultry Products."

Pathways to Practice. A growing number of states are experimenting with **alternative pathways** to the practice of law. For many states, this is an opportunity to encourage law school graduates to practice in rural areas that are underrepresented. According to the **American Bar Association**, there are 54 counties in the U.S. that have no lawyers and 1,300 counties that have less than one lawyer per 1,000 residents. With the creation of alternative pathways to licensure, law schools have a unique opportunity to encourage students to consider rural practice and prepare them for the agricultural issues they are likely to face.

- Webinar Opportunity (September 11): Harrison Pittman, Director of the National Agricultural Law Center, Regan O'Donnell, J.D. Candidate at the University of North Dakota School of Law, Caitlin Klingenberg, Vermeer Corporation, and Austin C. Vincent, Kansas Department of Agriculture will present "Growing Careers: Planning for Success in Starting and Maintaining an Agricultural Law Student Association." To register, click [here](#).

Antitrust. The supermarket chain Kroger has filed a lawsuit against the Federal Trade Commission (FTC), alleging that the agency violated the United States Constitution by using an in-house administrative tribunal to challenge Kroger's merger with fellow supermarket chain Albertsons. Administrative law judges have been a common way of resolving enforcement actions for various federal agencies for years, but this summer's Supreme Court ruling in the landmark case *Jarksey v. SEC* has opened the door to reduce the role of administrative law judges after the Court concluded that the Security and Exchange Commission's use of such judges to resolve certain enforcement actions was unconstitutional. Kroger's lawsuit has the potential to impact antitrust enforcement actions across the board, including recent efforts to address antitrust concerns in the meatpacking industry. To view the complaint filed by Kroger, click [here](#). To learn more about the *Jarksey* ruling, click [here](#) to read NALC article "Fifth Circuit Rules SEC Administrative Proceedings Unconstitutional."

Senate Hearing. On August 15, the United States Senate Committee on Appropriations; Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, held a field hearing titled, "Perspectives on the Future of Agriculture Research and Technology." NALC Director Harrison Pittman testified during the hearing on legal issues including federal research and promotion programs, pesticide litigation and regulation, foreign investment in U.S. agriculture, and theft of ag research and technology. To learn more about the hearing, click [here](#).

NALC Launching Stakeholder Survey on Sept. 3



On September 3, we will launch the NALC National Stakeholder Survey. Your input is very valuable as it will be a primary tool used to help us strategically plan how best to fulfill our mission as the nation's leading source of agricultural and food law research and information in 2025 and beyond. The anonymous survey should take less than five to ten minutes to complete. We will make the survey available through a variety of avenues, including news releases, media announcements, the NALC website, and social media. The survey will run through October 16. We hope you will participate as well as share with your network.

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