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LEGAL DISCLAIMERS

This Guide is not intended as legal advice. It is not intended to, and cannot substitute for, sound legal advice from a competent, licensed attorney. Rather, it is meant to help readers understand the many issues that must be considered when establishing and operating a direct farm business. There is more to farming than just growing crops and selling to customers. The authors' hope is that this Guide will illustrate the legal issues that direct farm entrepreneurs must consider and then guide them towards experts and additional resources that will set their direct farm businesses on a track towards success.

The legal information provided by this Guide is a general overview of the many laws and regulations that may be applicable to a direct farm business. The reader should never assume that the information contained herein applies to his or her specific situation without consulting a competent attorney in his or her home state. Further, though the authors have made every effort to ensure the accuracy of the information in this Guide, they cannot guarantee that all of it is correct. Laws, regulations, and guidelines can change at any time, and the status of laws and regulations in the future cannot be predicted with any certainty. Therefore, every user of this Guide should at all times independently ensure that the legal information is up-to-date before using it in any way.

Any URLs provided herein are purely for the convenience of the user, and the authors of this guide disclaim any liability for the content of the referenced websites.

Finally, any opinions, findings and conclusions, or recommendations expressed in this Guide are those of the authors and do not necessarily reflect the view of the funding organizations.

INTRODUCTION

If you are reading this Guide, then you are probably well aware of the growing interest in local foods. Consumers seek out local producers for a variety of reasons: Some believe that locally-grown food is healthier, safer and tastier. Others hope that local farmers are more invested in the community and stewardship of the land. And many people buy locally because they want to learn more about where their food comes from and make connections with the people who produce it.



Although consumer demand is the primary motivation for expanded local food networks, national leaders, in an era of bioterrorism threats and increased energy costs, have recognized that direct farm businesses can play a critical role in local and regional food security plans. For example, the Federal Farmer-to-Consumer Direct Marketing Act (7 U.S.C. Chapter 63) recognizes the importance of direct farm businesses by funding state direct marketing assistance programs and directing a yearly survey to determine what methods of direct farm marketing are being used.

Direct farm businesses can meet these demands while increasing profitability for farmers and local producers. Selling directly to consumers increases the farmer's share of the consumer's food dollar, which often goes predominantly to brokers and processors in conventional food supply systems. Furthermore, building a connection with customers and the community can make farming a more enjoyable and rewarding experience.

However, managing a successful direct farm business can be difficult due to a labyrinthine set of laws and regulations. These rules touch upon nearly every action a producer might take, from the obvious (such as paying taxes or hiring employees) to the unexpected (such as designing livestock barns). Adding to the complexity, direct farm business rules are implemented and enforced by more than a dozen local, state, and federal government authorities that each have their own (sometimes overlapping) requirements. Just figuring out who to contact about a particular law or regulation can sometimes be a daunting task. Therefore, the authors developed this Guide to help clarify some of the most important rules pertaining to direct farm businesses and to provide guidance on how and where to find correct information about them. The goal of this Guide is to foster a more vibrant direct farm business environment – not only for the farmers who bring locally-grown food to markets within their communities, but also for the consumers who buy that food.

The introductory section of this Guide is divided into four sections, each of which offers some basic information that should be helpful in understanding the other chapters of this Guide. These first four sections provide the general rules, but in some cases exceptions to those rules will apply. As noted below, farmers who are considering starting (or expanding) a direct farm business should consult with an attorney to ensure full compliance with all applicable rules and regulations.

USING THIS GUIDE

This Guide is divided into two primary sections. Section I outlines rules that apply to all farming operations, regardless of agricultural product and marketing strategy. Section II is organized according to agricultural products. Whether the reader starts with Section I or Section II does not matter, but it is important to consider the information from both sections when constructing a business plan. Following are a few additional notes about the guide.

Legal-eze: Because this Guide attempts to explain the law, the authors must use terms that have precise meaning to lawyers. Some common English words have a legal meaning that is different or more exact than the common usage, and others are phrases based in Latin. For the reader's convenience, there is a glossary of terms at the back of the guide. For further reference, Law.com's **legal dictionary**¹ is a useful website with explanations of many common legal terms.

Internet Links: Throughout this Guide, the authors have provided links to websites that provide additional information and resources. These online resources are highlighted in bold text; for ease of reading, the website URLs are provided in footnotes to the bolded terms. Internet links and resources do not always remain in one place, but the supporting documents referenced in this Guide are public, and a simple Google search on key terms can in some cases locate a broken link or its updated version or location.

Statutes and Regulations: References to specific statutes or regulations are accompanied by citations in parentheses so that the reader can look up the exact language of the text. Citations are also a helpful starting point for searching the Internet for more information or contacting the regulatory agency or an attorney. Below is an explanation of the most common citation formats and websites where the statutes and regulations can be obtained. In most cases, the first number is the Title, and the numbers following the code's name are chapters or subsections.

U.S.C. § ### are federal laws – otherwise collectively known as the U.S. Code. They can easily be accessed at www.gpoaccess.gov (official site) or at www.law.cornell.edu/uscode/ (Cornell University). Three of the most common federal statutes cited in this book are the Tax Code, which is in Title 26; the Food, Drug, and Cosmetic Act, which is in Title 21; and Agriculture, which is in Title 7.

¹ www.dictionary.law.com

C.F.R. ### are regulations implemented by federal agencies. IRS regulations are in Title 26 and FDA regulations are in Title 21. Department of Agriculture regulations are divided between Title 7 and Title 9. Selected CFR titles are available online at <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html>

C.R.S. ##-##-### are Colorado laws. The numbers following the C.R.S. direct you to the title, article, and section number of the revised statutory code. The statutes are available online at <http://www.lexisnexis.com/hottopics/colorado/>

CCR ###-# is the Colorado administrative rules and regulations. The number preceeding 'CCR' is the volume number of the publication. The numbers that follow indicate the administrative department, the agency or division, and the regulation number. For example, if the regulation reads 8 CCR 1203-22, the 1203 indicates a regulation from the Plant Industry Division within the Department of Agriculture, with 12 denoting the Department of Agriculture and 03 denoting the Plant Industry Division. Thus, 8 CCR 1203-22 is the twenty second regulation within the Plant Industry Division of the Department of Agriculture. Colorado administrative rules and regulations are available online at <http://www.sos.state.co.us/CCR/Welcome.do>

Finally, the University of Denver's **Colorado Law Project website**² can serve as a useful resource for researching Colorado Laws, and provides a video tutorial on using the Colorado Revised Statutes.

Federal vs. State Law: Federal and state law do not always impose the same requirements, and often one establishes stricter standards. Always comply with the strictest standards – the existence of a more lenient law does not excuse non-compliance with the other government's standards.

Checklists and Further Resources: At the end of each chapter there is a short checklist of the important issues to consider and/or information on additional resources.

OVERVIEW OF ADMINISTRATIVE AGENCIES

Before delving into the specifics of the laws and regulations, it may be useful to have a basic understanding of the state-federal regulatory system and which agencies have authority over what operations. The Constitution gives the U.S. Congress power to regulate any goods traveling in interstate commerce (i.e., goods that cross state lines). The U.S. Supreme Court has interpreted this to include regulatory power over activities that *affect* goods traveling in interstate commerce, even if those activities might take place completely within state lines.³ In

² <http://www.law.du.edu/index.php/the-colorado-law-project>

³ Perhaps the most striking example of this idea is *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the Supreme Court held that a farmer who was growing wheat solely for his own private consumption was nonetheless subject to congressional regulation because the intrastate growth of wheat, viewed in the aggregate, had a "substantial economic effect" upon interstate commerce.

addition, however, the Constitution allocates to the states the power to regulate everything not exclusively reserved for the federal government or protected by the Constitution. Therefore, states can impose additional regulations on items within their borders that are already subject to federal regulations, as well as regulate items and activities over which the federal government does not have authority. The one limit on this allocation of power is that federal law is supreme over state law, so if the federal law contradicts or is inconsistent with a state law, the federal law controls.

Federal Agency Rulemaking

When Congress appoints a federal agency to implement rules, it is delegating congressional authority. Therefore, properly implemented regulations have the same authority as a statute written by Congress. “Properly implemented” means that the agency has promulgated the rules according to the Administrative Procedure Act (5 U.S.C. §§ 551 *et seq.*), which outlines procedures for agency operation. The most common type of rulemaking procedure is notice and comment rulemaking, in which the agency issues a notice of proposed rulemaking in the Federal Register, receives comments from the public, and issues a final rule that takes into consideration the public’s comments. The less common form of rulemaking is known as formal rulemaking, which requires a trial-like procedure with hearings, testimony, and final decisions made on the record. Whether developed through notice and comment or formal rulemaking, all final agency rules are published in the Code of Federal Regulations (CFR).

Agencies also use guidance documents to establish policies that help the agency interpret and apply its own rules. These documents are also often called policy guides, technical information bulletins, or interpretive manuals. If not established through notice and comment or formal rule making, policies set forth in guidance documents are not binding upon the agency. Nonetheless, they help to guide and inform much of agency procedure, and many courts consider them to be persuasive evidence when determining the legitimacy or scope of an agency action.

State Rulemaking

Colorado has a comparable Administrative Procedure Act (C.R.S. 24-4-101 *et seq.*). The Act imposes the notice and comment rulemaking procedure, with notice provided to those interested, the attorney general, the secretary of state’s office as registrar of rules, and the Department of Regulatory Agencies. Proposed regulations and regulatory changes with comments can be found at the **Colorado Register website**.⁴ Final rules are codified by the department and agency or division and make up the Code of Colorado Regulations. As noted above, federal laws often overlap with Colorado laws on the same subject. For example, although the United States Congress has Constitutional authority to regulate all foods that affect interstate commerce, the Food, Drug, and Cosmetic Act gives the Food and Drug

⁴ <http://www.sos.state.co.us/CCR/RegisterHome.do>

Administration (FDA) authority only over foods shipped in interstate commerce (21 U.S.C. § 331). However, Colorado regulates all food – including food produced and sold entirely *within* the state - under its own Colorado Food and Drug Act (C.R.S. 25-5-401 *et seq.*). Often, federal standards are incorporated as Colorado law.

One exception to this jurisdictional division based on inter- vs. intra-state food sales pertains to product labeling. Congress has exercised its power over all foods affecting interstate commerce by giving FDA the exclusive authority to regulate labeling of packaged foods (21 U.S.C. § 343-1); subject to certain exceptions, states may only impose additional requirements that do not contradict the federal rules.

THE FOOD AND DRUG ADMINISTRATION’S FOOD CODE

Every four years, the FDA publishes the FDA Food Code, which is a model regulation for state and local officials to use in regulating food retail and food service establishments. The Code’s purpose is to provide regulators with a scientifically sound legal basis for regulating the food industry. States are not required to adopt the Food Code, but a significant number of states nonetheless incorporate it nearly verbatim into their regulations. Colorado has in large part adopted the Food Code of 2001, though it does differ from the federal model language on a few points, noted later in this guide (6 CCR 1010-2). The adoption of the Food Code has several important ramifications for producers in Colorado.

First, FDA publishes many guidance manuals and standards for interpreting and applying the Food Code, as well as the scientific rationale for the rules the Code proposes. Therefore, if a Colorado inspector, operating under the rules of the Colorado Department of Agriculture, requires a particular material or process for production, the mandate likely has roots in the FDA’s standards. Looking to the FDA’s model rule may help the producer understand the purpose of the requirement or work with the inspector to reach an alternative solution that meets the food safety standards state inspectors strive for.

The second consequence of the Food Code’s near-universal adoption is that producers may find it easier to sell products out-of-state. All of Colorado’s neighbors have adopted some version of the Food Code. Because the Food Code standardizes the rules, complying with Colorado’s rules brings a producer very close to satisfying both federal and neighboring states’ food safety rules. To be sure, some additional steps (or inspection certificates) may be necessary in order to sell products across state lines, but most producers who are in compliance with Colorado’s requirements should find the rules for other jurisdictions to be relatively familiar and easy to comply with.

COLORADO REGULATORY AGENCIES

Numerous Colorado agencies regulate agricultural production and marketing - topics which individual chapters of this Guide cover in more detail. Generally, the Colorado Department of

Public Health and Environment (CDPHE) issues rules that apply to all food sales in Colorado, while the Colorado Department of Agriculture (CDOA) regulates specific food products.

Adulterated Food

The Colorado Pure Food and Drug Law prohibits the sale of adulterated food (C.R.S. 25-5-410). Colorado has adopted much of the federal FDCA definition of “Adulterated.” The definition is extensive, and includes poisonous, deleterious, or insanitary substances that may render the food injurious to health (21 U.S.C. §342; C.R.S. 25-5-410). Further, the CDPHE regulations require all food sold at retail or food service establishments to be from sources that comply with all applicable food safety and labeling laws (6 CCR 1010-2). This means all food sold at a retail food establishment in Colorado must come from an inspected and licensed facility. The Colorado Cottage Foods Act, discussed below, excludes certain foods that are sold directly to consumers, so long as those foods are non-potentially hazardous and meet the legal requirements outlined in the statute (C.R.S. 25-4-1614).

Construction and Sanitation of Food Processing Facilities

In addition to oversight of food content and labeling, the CDPHE also has the authority to regulate the construction and sanitation of food production and processing facilities under the Colorado Retail Food Establishment Rules and Regulations (6 CCR 1010-2).

CDPHE inspectors certify facility compliance subject to general regulations concerning the construction, equipment, and processes for producing food (6 CCR 1010-2). These regulations mandate surface sanitization, vermin control, sewage disposal, adequate clean water, sanitary facilities for employees, and adequate sanitation principles and processes. The regulations are necessarily vague because they apply to a variety of production facilities, and inspectors will interpret each regulation based on its applicability to a particular operation.

Food Processing Requirements

Processors and wholesalers must comply with requirements that are specific to the type of food processed, in addition to general regulatory provisions Colorado has adopted from a federal scheme designed to ensure sanitation and quality control in food wholesale and processing plants (6 CCR 1010-21; 21 C.F.R. 110). CDPHE bases these requirements on the unique health and safety risks inherent to each food, and many times, decisions on adequacy are made by local regulators or individual inspectors. CDPHE communicates guidance to its inspectors through training and technical bulletins, which are guidance documents that facilitate consistent interpretation and application of the regulations, but are not binding rules. Therefore, an individual inspector’s or local office’s interpretation of the applicability of rules to unique facts may differ. In any case, inspectors cannot allow a facility to fall *below* the general standards established in the regulations.

Although CDPHE is the primary agency regulating direct-to-consumer sales of food in Colorado, additional agencies have significant regulatory authority over the food supply chain. The following chart summarizes the agency activities.

AGENCY OVERSIGHT OF DIRECT FARM BUSINESS ACTIVITIES

ACTIVITY	FEDERAL AGENCY	STATE AGENCY
Environmental permitting	Environmental Protection Agency (EPA)	Colorado Department of Public Health and Environment (CDPHE)
Employee relations	Occupational Safety and Health Administration (OSHA)	Colorado Department of Labor and Employment (CDLE)
Taxes	Internal Revenue Service (IRS)	Colorado Department of Revenue (CDOR)
Animal welfare	United States Department of Agriculture (USDA), Animal and Plant Health Inspection Service	Colorado Department of Agriculture (CDOA)
Meat, poultry, & eggs	USDA Food Inspection Safety Services, for all products shipped across state lines	Colorado Department of Public Health and Environment (CDPHE), in conjunction with Colorado Department of Agriculture (CDOA), for all products produced and sold entirely within Colorado
Food other than meat, poultry, & eggs	Food and Drug Administration (FDA), for products shipped across state lines and labeling of <i>all</i> foods	Colorado Department of Public Health and Environment for all food produced and sold in Colorado
Organics	USDA Agricultural Marketing Service (AMS)	Colorado Department of Agriculture

Cottage Food Laws

Cottage food laws refer to legislation that provides exemptions from state public health regulations that otherwise would require the production of food in a state-approved and inspected facility. The purpose of these laws is to encourage the local food industry within a state. Colorado has a cottage food law, enacted in 2012 and amended in 2013, that excludes from regulation and licensing requirements food operators that prepare food that is not potentially hazardous and is prepared for sale or use at farmers' markets and roadside stands, so long as the producer participates in a food safety course and earns less than \$5,000 annually from each exempt food product he sells (C.R.S. 25-4-1614). Importantly, this economic limitation only applies to each eligible food product (*i.e.* apple preserves). Additionally, uncut, fresh fruits and vegetables are exempt from an annual food license, however, once produce is cut or altered from its natural state it is then considered processed food, and subject to licensing requirements.

Colorado distinguishes between commercial and home processed food. Commercial processors must meet all the rules and licensing requirements of the Colorado Retail and Wholesale Food Establishment Rules and Regulations. Food products made by commercial producers may be sold in commercial establishments in Colorado, such as restaurants and retail stores. On the other hand, home processed foods that are not potentially hazardous can be sold from the private home, farmers' markets, and roadside stands. Non-potentially hazardous food includes any food that does not require time or temperature control to limit pathogenic microorganism growth or toxin formation (C.R.S. 25-4-1602(12)). In Colorado, non-potentially hazardous foods are limited to spices, teas, dehydrated produce, nuts, seeds, honey, jams, jellies, preserves, fruit butter, and baked goods, including candies (C.R.S. 25-4-1614(2)(b)). Home processed foods must be properly labeled, including the name of the product, ingredient listing, the processor's contact information, and a disclaimer about where the food was processed (C.R.S. 25-4-1614(3)(a)(V)). In addition, home processed foods cannot be sold in retail stores. For more information, consult the **CDPHE brochure**⁵ designed to inform cottage food producers of the requirements of the cottage food law.

⁵CDPHE, *Colorado Cottage Foods Act Becomes Law*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadvalue1=inline%3B+filename%3D%22Cottage+Foods+Brochure.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251853551512&ssbinary=true>

SECTION I: FARMING OPERATIONS



CHAPTER 1: STRUCTURING THE BUSINESS

There are many types of direct farm businesses, such as farmers' markets, roadside stands, U-pick operations, agri-tourism businesses, Community Supported Agriculture (CSAs), mail order/Internet sites, and delivery service to homes, restaurants, schools, or institutions.

A direct farm business may consist of one of these types, or a combination. For example, a farmer might sell products at the farmers' market on Saturday and to a CSA during the week. Or a farmer could run a U-pick pumpkin farm, a roadside stand that sells foods made from pumpkins, and a bed and breakfast. But in any case, *the type of direct farm business selected triggers different legal considerations*. These considerations are covered within the different chapter topics throughout this Guide.

I. PLANNING THE DIRECT FARM BUSINESS

A. Feasibility Studies and Business Plans

The first step in the process of establishing a direct farm business is *planning*. It's a mistake to rush into a direct farm business without first determining the nature of the business and what it will cost to establish it. Begin by asking: "Is the business I am proposing feasible?" The Colorado Small Business Development Center (COSBDC) provides **low- or no-cost resources**⁶ for starting a small business, including help developing and conducting a *feasibility study*.



The second step in the planning process is to develop a written business plan. The main advantage to writing out a business plan is that it will force farmers to think carefully about each aspect of their proposed business. It will also help identify weaknesses in strategy and flag areas in which additional help and expertise may be needed. The COSBDC offers helpful information about the business plan on their website.⁷

Additional business planning resources are listed on the following page.

⁶ available at <http://www.coloradosbdc.org/starting-your-business>

⁷ available at <http://www.coloradosbdc.org/resources/resource-guide/business-plan>

Business Planning Resources

1. **Beginningfarmers.org** offers a variety of resources on all aspects of starting a local farm business, including business and marketing plans.

→ <http://www.beginningfarmers.org/farm-business-planning/>

2. Business planning assistance is available from the **Colorado Small Business Development Center**

→ <http://www.coloradosbdc.org/starting-your-business>

3. The **Colorado Business Resource Guide** contains an abundance of helpful information for those starting a small business in Colorado.

→ <http://www.denverchamber.org/pubs/BizGuide/flipviewerxpress.html>

4. **Colorado Business Express** builds a custom resource guide through their website outlining the necessary steps to bring a new business idea into fruition. This resource is especially helpful for finding the appropriate paperwork to register your business with the proper officials.

→ <https://www.colorado.gov/apps/jboss/cbe//start-business.xhtml>

5. **The Legal Guide to Direct Farm Marketing**, published by The National Sustainable Agriculture Information Center, through the Appropriate Technology Transfer for Rural Areas (ATTRA) program, details several direct farm business alternatives (including case studies) and provides resources for further reference.

→ <http://attra.ncat.org/publication.html>

6. A particularly useful resource is the **Marketmaker™** website, which brings together agricultural supply chain partners. It specifically helps direct farm marketers by improving knowledge of where food consumers are located and how they make food-related purchasing decisions. The site provides searchable and map-able demographic, consumption, and census data that a producer can use to identify potential markets. Producers can also list themselves for free on Marketmaker, thereby becoming part of a searchable database that individual consumers, retailers, and restaurants use to find suppliers.

→ co.marketmaker.uiuc.edu

7. **How to Direct Market Farm Products on the Internet**, a 50-page guide published by the Agricultural Marketing Branch of the USDA in 2002, contains valuable information on the advantages of Internet marketing, advice on how to conduct market research and develop a marketing plan, and how to set up and market a website. The appendix contains examples of actual direct farm marketers on the Internet.

→ www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3101222

II. WHAT BUSINESS ENTITY SHOULD YOU CHOOSE?

One of the first steps in establishing any business is deciding the business entity – that is, the formal legal structure under which the business will operate. Typical farm business entities include the sole proprietorship, partnership or limited partnership, corporation (for-profit or nonprofit), S corporation, limited liability company (LLC), and cooperative.

Although this section touches on the tax implications of business form choice, the subject is discussed in more detail in the “Taxation” chapter of this Guide. Because the law treats certain forms of businesses differently than others, *the following generalized information should not be considered a substitute for consulting with a qualified attorney and/or accountant prior to choosing a business form.* Consulting with a professional is important because the entity selected affects potential tax and legal liabilities, as well as business succession and estate planning. In addition, each form varies as to setup cost and complexity.

For those interested in learning more detail about entity choices for the farm business, the National Agricultural Law Center at the University of Arkansas published *An Overview of Organizational and Ownership Options Available to Agricultural Enterprises*. The article is divided into two sections. **Part I**⁸ covers general partnerships, limited partnerships, limited liability partnerships, and limited liability limited partnerships. **Part II**⁹ covers limited liability companies, corporations, and cooperatives. Although not specifically aimed at direct farm businesses in Colorado, and therefore not a substitute for advice from legal counsel in Colorado, the overview is nonetheless helpful in understanding the legal and tax implications of the various business entities.

Colorado has also developed a guide entitled **The Colorado Business Resource Guide**¹⁰ that offers information about picking the right business entity for your operation. This Guide covers different aspects of starting a business, including the advantages and disadvantage of each business entity; however, it is not a substitute for legal advice from an attorney.

A. Sole Proprietorships

The sole proprietorship is a business owned and operated by one individual.¹¹ The majority of farms are owned as sole proprietorships, as they are easily formed and administered. In Colorado there are no filing requirements because no entity is technically created, the business and the owner are one in the same. If a sole proprietorship operates under an assumed name (e.g., John Doe operates a direct farm business using the name "Green Acres" instead of "John Doe's Farm"), the business may register the trade name with the secretary of state by filling out

⁸ http://www.nationalaglawcenter.org/assets/articles/goforth_ownership1.pdf

⁹ http://www.nationalaglawcenter.org/assets/articles/goforth_ownership2.pdf

¹⁰ Available online at <http://www.denverchamber.org/pubs/BizGuide/flipviewerxpress.html>

¹¹ As an exception to the “one individual” rule, spouses may co-own a sole proprietorship. This can impact filing and paying taxes, but otherwise makes little difference. An alternative arrangement would be a partnership, discussed below.

a **trade name application**¹² with the Colorado Secretary of State. A sole proprietorship must also register with the Colorado Department of Revenue for tax purposes.

Under a sole proprietorship, the law treats the owner and the business as one and the same. This makes the owner personally responsible for the *legal* and *tax* liabilities of the business. Therefore, a creditor of the business can force the owner to sell personal assets in order to pay the debts and obligations of the business; on the other hand, assets from the business may be used to satisfy personal debts (an action normally prohibited in most other business entities). Additionally, the individual owner is taxed personally on the profits generated by the sole proprietorship, which makes filing taxes somewhat easier.

B. Corporations

The Colorado Business Corporation Act governs the formation and operation of corporations in Colorado (C.R.S. 7-101 *et seq.*). The structure of a corporation can be complicated, but basically, a corporation consists of two separate parts: A *board of directors* and *shareholders*. Shareholders finance the corporation's existence by purchasing stock in it; each stock share represents an ownership stake in the corporation, though individual shareholders typically have no say in the day-to-day operations of the corporation. Rather, shareholders elect a board of directors, which is responsible for making all decisions related to the corporation's affairs. As a result of their position, members of the board of directors owe certain *fiduciary duties* to the corporation. A corporation is formed by filing articles of incorporation with the Colorado Secretary of State.¹³ The articles of incorporation dictate the management of the corporation's affairs and outline the issuance of shares to shareholders.

The corporate form is advantageous in some respects: The corporation is a separate legal entity from its owners (shareholders), who are therefore not personally liable for the corporation's liabilities and debts. On the other hand, incorporation is time-consuming and expensive due to the paperwork and filings required by the statute. Further, there are many statutory and administrative formalities that *must* be followed when operating the corporation. Owners who fail to follow these formalities may lose their personal liability protection. Finally, corporations are subject to "double taxation" - the government taxes the corporation on its profits and the owners/shareholders pay individual income tax on profits distributed as dividends.

The Internal Revenue Service Code classifies corporations as either "Subchapter C corporations" or "Subchapter S corporations." The IRS considers all corporations C corporations unless shareholders elect S corporation status. Electing Subchapter S status with the IRS, if certain requirements are met, may avoid this double taxation problem.

¹² http://www.sos.state.co.us/pubs/business/forms_main.html#TradeNames

¹³ The Colorado Secretary of State has a website for businesses, which is available at <http://www.sos.state.co.us/pubs/business/businessHome.html>. This website provides links to helpful information and forms on forming and filing the articles of incorporation, choosing the corporate name, and more.

S Corporations

S corporations elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes to avoid double taxation. A corporation elects S corporation status with the IRS by filing **Form 2553**.¹⁴ Only after the IRS accepts the registration may the corporation file its taxes as an S corporation. Although avoiding double taxation is appealing, an S corporation can be difficult to establish due to many restrictions. S corporations can have no more than 100 shareholders and all must agree to the S corporation status. All shareholders must be U.S. citizens or resident aliens and only individuals, estates, certain exempt organizations, and certain trusts can be shareholders. The S corporation must be a U.S. company. Finally, an S corporation may have only one class of stock with limitations on the type of income that holders of that stock receive. Despite these limitations, the smaller scale of many direct farm businesses may make S corporations an attractive option.

Close Corporations

Close corporations are a form of corporation in which the stock is “closely held” by only a few individuals or families and is rarely, if ever, purchased or sold. The Colorado Business Corporation Act (C.R.S. 7-101-101 *et seq.*) allows for the establishment of a closely held corporation by incorporating limitations on buying and selling shares into the articles of incorporation. Closely held corporations are designed to avoid some of the formalities of regular corporations while continuing to protect individual owners from liability. Therefore, the close corporation may be a desirable option for stable businesses owned and operated by a few individuals, perhaps family members, instead of public shareholders.

C. Partnerships

A *partnership* (also known as a *general partnership*) is an association of two or more persons who combine their labor, skill and/or property to carry on as co-owners of a business for profit. The Revised Uniform Partnership Act (1997) governs the formation of partnerships in Colorado (C.R.S. 7-64-101 *et seq.*). There are no formal requirements for formation of a partnership, and one may be formed by default if more than one person is carrying on a business. The entity itself is not taxed; instead, tax liability passes through to the individual partners in pro rata shares.

One key difference between a corporation and a partnership is that in a partnership, each partner/shareholder is an agent of the business and thus has the authority to enter into binding obligations (such as contracts and other business transactions) on behalf of the partnership. Moreover, all partners are *personally liable jointly and severally* for the debts and obligations of the partnership. This means that if the partnership lacks the assets to pay its debts, creditors may

¹⁴ The form is available online at <http://www.irs.gov/pub/irs-pdf/f2553.pdf>. Further instructions are available at <http://www.irs.gov/pub/irs-pdf/i2553.pdf>.

force the partners to pay the partnership's debts out of their personal assets. If one partner has no personal property, creditors can force the other partners to personally pay the full debts of the partnership. Another disadvantage is that if one partner leaves the partnership, the partnership might automatically dissolve, depending on the circumstances of the partner's departure. In addition, partnership shares are not freely transferable and create special concerns for both business succession and estate planning. Despite these limitations, general partnerships are a common form of business organization, especially among family members, due to their simplicity and tax status. From a liability perspective, however, specialized forms of partnership, discussed below, may be more desirable.

Registered Limited Liability Partnerships

The formation of a **registered limited liability partnership** (RLLP) is governed by C.R.S. 7-64-1001 through 1010. The benefit of an RLLP is that all general partners are shielded from *personal* liability for the debts and obligations of the partnership, regardless as to how the debt or obligation is created. The *partnership* remains jointly and severally liable, however, for a partner's wrongful act or omission, or other actionable conduct, so long as the partner is acting in the ordinary course of business of the partnership or with authority of the partnership. This liability shield for partners is one important benefit of the RLLP over the general partnership form.

To form a RLLP, partners must file a statement of registration as a RLLP with the **Colorado Secretary of State**.¹⁵ A renewal statement must be filed each year. Although not overly burdensome, the filing and fee requirements are one of the downsides to pursuing an RLLP business form. Nonetheless, this may be a small upfront price to pay for the potential advantages of liability protection.

Limited Partnerships

The **limited partnership** (LP) addresses the problem of exposure of the partners to unlimited personal liability by separating the partnership into two classes: general partners, who remain personally liable for the partnership's obligations, and limited partners, who possess the same personal liability protection as the shareholders of a corporation. Although limited partners are shielded from personal liability, the *partnership* remains liable for the actions of a general partner's wrongful act or omission, or other actionable conduct.

The Colorado Uniform Limited Partnership Act of 1981 (C.R.S. 7-61-101 *et seq.*) governs the formation of limited partnerships in Colorado. Among the requirements for formation and

¹⁵ Instructions are available at http://www.sos.state.co.us/pubs/business/helpFiles/REG_LL_P_HELP.html

operation of an LP are filing a certificate and annual reports with the **Colorado Secretary of State**.¹⁶

One of the benefits of an LP is that limited partners may deduct their losses for taxation purposes up to the extent of their investment - an advantage not available to shareholders of corporations. Limited partnership interests also are freely transferable, but are subject to filing requirements and fees.

Limited Liability Limited Partnerships

The **limited liability limited partnership** (LLLP) is another business entity authorized by the Colorado Uniform Limited Partnership Act (C.R.S. 7-60-144). Unlike in a LP, the general partners in a LLLP are not personally liable for obligations of the partnership solely because they are general partners. The liabilities of the LLLP are the partnership's alone - similar to a corporation.

The LLLP must file **the same certificate**¹⁷ with the Colorado Secretary of State as an LP, but must amend the certificate to reflect that all partners have voted to form an LLLP. Furthermore, each partner must consent to the filing of the business as an LLLP.

Limited Liability Companies (LLC)

The Colorado Limited Liability Company Act governs the establishment and operation of LLCs in Colorado (C.R.S. 7-80-101 *et seq.*). A LLC enjoys the benefits of both the LP and a corporation. Members of a LLC enjoy limited liability against claims and debts of the LLC and the favorable pass-through tax treatment of an LP. Yet they have more management flexibility because they can elect to manage the corporation themselves or designate managers through the articles of organization.

To form a LLC, written articles of organization that specify the name of the LLC must be filed with the **Colorado Secretary of State**.¹⁸ A LLC does not have any limitations on the potential number of investors.

LLCs, LLLPs, and LLPs are all very similar in that they provide three main advantages: liability shields for owners and managers, beneficial tax status, and flexible management options. They differ primarily as to how they are created. Depending on the specifics of the direct farm business, one model may offer greater benefits than the others. Therefore, it is important to speak with an attorney or a tax specialist when deciding which business form to use.

¹⁶ Instructions are available at http://www.sos.state.co.us/pubs/business/helpFiles/CERT_LP_HELP.html

¹⁷ Instructions are available at http://www.sos.state.co.us/pubs/business/helpFiles/CERT_LP_HELP.html

¹⁸ http://www.sos.state.co.us/pubs/business/forms_main.html#LLC

D. Cooperatives

A cooperative is a user-owned and controlled business that generates benefits for its users and distributes these benefits to each member based on amount of usage. Common reasons for forming agricultural cooperatives include improved marketing or access to markets and increased efficiency in delivering to markets.

In Colorado, The Colorado Cooperative Act governs the formation and operation of an agricultural cooperative (C.R.S. 7-56-101 *et seq.*). The Act requires an agricultural cooperative to be an association of persons engaged in the production of agricultural products as a nonprofit cooperative association. The association may engage in cooperative activity in connection with a broad array of activities, including producing, marketing, or selling agricultural products; harvesting, preserving, drying, processing, canning, packing, handling, shipping and storing agricultural products; manufacturing, selling or supplying the machinery; equipment or supplies in relation to these activities; financing of these activities; and providing business and education services for bona fide producers. The cooperative may only admit members, or issue capital stock to, those persons engaged in the production of agricultural products and/or cooperative associations. Finally, there are some very detailed rules restricting how and why profits can be distributed. An attorney familiar with cooperatives can provide specific details.

Cooperatives can be complex to establish and operate because they require coordinating numerous individuals. Moreover, there are several legal documents necessary to running an effective cooperative, including an organization agreement securing financial commitments and patronage, articles of organization to be filed with the **Secretary of State**,¹⁹ bylaws governing the management of the cooperative, marketing agreements between the cooperative and its members, and membership applications. The details of operating a cooperative are beyond the scope of this Guide, but several online publications provide good general information on establishing a cooperative, including the legal aspects of the operation:

- USDA/Rural Business Cooperative Service, *Cooperative Information Report*,²⁰ September 1996, contains information on how to start a cooperative.
- *The Farmer's Legal Guide to Producer Marketing Associations* ²¹ by Doug O'Brien, Neil D. Hamilton, and Robert Luedeman.
- USDA, *Cooperative Marketing Agreements: Legal Aspects*,²² July 1992.
- USDA/Rural Business Cooperative Service, *Cooperative Information Report 40*,²³ 1990, provides sample legal documents for cooperatives.

¹⁹ Forms are available at http://www.sos.state.co.us/pubs/business/forms_main.html#Article56

²⁰ Available at <http://www.rurdev.usda.gov/rbs/pub/cir7/cir7rpt.htm>

²¹ Available at http://www.nationalaglawcenter.org/assets/articles/obrien_producemarketing_book.pdf

²² Available at <http://www.rurdev.usda.gov/rbs/pub/tr106.pdf>

III. LOOKING TO THE FUTURE: ESTATE PLANNING

Estate planning may not seem like an important component of managing a direct farm business, but it is critical for farmers who wish to keep the farm in the family for future generations. The USDA estimates that 80% of farmers do not have estate plans in place. Without an estate plan, the estate will go through probate court, which means that it may take years to settle the distribution of land and assets among heirs and creditors. Meanwhile, younger generations may not be able to make business decisions or plant the crops necessary to continue the operation. The probate court also applies a set of default rules for distribution that may not be beneficial for the business or the family's wishes: For instance, if the farm has been used to secure equipment, land may be sold off to pay debtors instead of passed down to children, even though there may be other ways to satisfy the debts. The University of Denver Sturm College of Law has published a helpful **resource**,²⁴ which contains useful information on the importance of estate planning and tools available to farm business owners. However, estate planning is a highly personalized process that involves decisions concerning family and wealth distribution. This guide cannot provide comprehensive information on estate planning; rather, business owners are strongly encouraged to contact an attorney to develop an estate plan.

²³ Available at <http://www.rurdev.usda.gov/rbs/pub/cir40/cir40rpt.htm#Articles%2>

²⁴ Available at <http://libguides.law.du.edu/content.php?pid=145282&sid=2118745>

CHAPTER 2 – SETTING UP THE DIRECT FARM BUSINESS

After finalizing a business plan and selecting a business entity through which to operate the direct farm business, the next steps are to:

- finalize a *site* for the direct farm business.
- obtain all necessary *permits, licenses and registrations* required by the State of Colorado and local governments.
- adequately *insure* the operation.

I. SITING

County zoning laws, environmental regulations, and potential nuisance claims are important considerations in choosing where to site a farm and may affect what activities are allowable on the land.

A. County Zoning

Colorado authorizes both counties and local governments to regulate land use by implementing measures to regulate and restrict the location and use of buildings, structures, and land (C.R.S. 30-28-111). In Colorado, the state does not specifically exempt agricultural districts from zoning. Instead, specific zoning regulations are left to individual counties and local governments, meaning some activities will be allowed in one county, but may be prohibited in others. For example, Douglas County does not allow greenhouses larger than one acre in agricultural areas according to County Zoning Resolution 302.06, while Jefferson County has no such limitation.

An additional zoning/siting concern arises when farmland intersects urban areas--a common situation for many direct farm operations due to the proximity to potential consumers. As towns or other urban areas expand, counties or cities may change the land's zoning classifications. For example, towns may annex farmland previously under county jurisdiction and subject the property to municipal zoning. Other land use changes may result when the county itself rezones land due to development pressures. In either situation, governments could rezone productive farmland from "agricultural" to "residential" or "commercial," etc. The existing farm operation would be grandfathered as a "non-conforming use," which would allow the continuation of the farming operation, but could prohibit or restrict future changes or other farm-related businesses such as farm stands or U-pick operations. Some agricultural operations that are situated by urban areas may be exempt from certain nuisance liability and offered some protection from injurious regulation because Colorado is a "Right To Farm State"

(C.R.S. 35-3.5-101). Therefore, it is important to determine the precise zoning classification for the specific property, even if the property has been “farmed” continuously.

In sum, during the planning stage, a careful review of local zoning ordinances is essential. Access to ordinances can be arranged by directly contacting the county clerk, visiting the county website or local library.

B. Impacts on Neighboring Land

Farming operations, whether through production of odors, particulates, or noise can in some circumstances have a significant impact upon the land surrounding a farm. Consequently, when choosing a farm site and planning production and processing activities, direct farm business owners should be aware of the legal issues concerning a farm’s impacts on neighboring land.

Livestock Feedlot Operations

Owners of livestock feedlot operations are to follow the applicable zoning laws of the county where their operation is located. Additionally, the *Feedlot Certification Act* (C.R.S. 35-53.5-101 *et seq.*) imposes additional fees and certification requirements for feedlots where cattle are finished for slaughter. If your operation moves cattle to or from such a feedlot for finishing purposes, your feedlot may need to be certified annually by the Colorado Department of Agriculture (CDOA) (C.R.S. 35-53.5-101). Operations known as confined animal feedlot operations (CAFOs) require additional safeguards because of the environmental risk of waste contamination in nearby bodies of water. Colorado defines a stable or animal feeding operation as a CAFO, and further defines large, medium, and small CAFOs based on the number and species of livestock they house (5 CCR 1002-81).

The size of the proposed facility, calculated by “animal units,” determines the regulations that are applicable to the feedlot operation. Farmers can calculate the number of “animal units” on their farms by using a **worksheet**.²⁵ The CDOA permits and inspects CAFOs, and also subjects non-permitted CAFOs to further regulation according to the Animal Feeding Operations Control Regulation (5 CCR 1002-81).

Fence Law and Branding

Colorado is considered a “fence-out” state, meaning that property owners are responsible for protecting their property from trespassing livestock with a *lawful fence*,²⁶ and cannot recover for damage to personal property by trespassing livestock unless they can show that the animals breached a lawful fence (C.R.S. 35-46-102). Therefore, livestock owners have no inherent legal duty to fence in their livestock. Owners of crop, pasture, and other land are responsible for

²⁵ <http://www.extsoilcrop.colostate.edu/Soils/cnmp/sec1.html>

²⁶ Colorado defines a “lawful fence” as a “well-constructed three barbed wire fence with substantial posts set at a distance of approximately twenty feet apart, and sufficient to turn ordinary horses and cattle, with all gates equally as good as the fence, or any other fence of like efficiency” (C.R.S. 35-46-101).

maintaining a lawful fence to ward off trespassing livestock. Nevertheless, livestock owners are not absolved of responsibility for their livestock roaming at large, as subsequent Colorado statutes have narrowed the fence-out rule. Livestock may not graze in close proximity to incorporated or unincorporated cities, towns, or municipalities, or on roadways (C.R.S. 35-46-102, 105). In most cases it is advisable, as a direct farm business operator, to construct or maintain a lawful fence around the premises.²⁷ Operators should consider consulting an attorney to discuss the risks and potential liability for trespassing animals and the need for a fence.

Nuisance Law

A nuisance involves an unreasonable and substantial interference with one's use or enjoyment of her property (Pub. Serv. Co. v. Van Wyk, 27 P.3d 377, 391 (Colo. 2001)). In order to be liable for nuisance, the perpetrator must have acted intentionally, negligently, or in a way that is particularly dangerous and out of place in its surroundings (*Hoery v. United States*, 64 P.3d 214, 217 (Colo. 2003)). A nuisance can be any interference with one's use and enjoyment of his property so long as that interference is both "substantial" and "unreasonable" (*Public Serv. Co. of Colo. V. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001)). A nuisance may be a strong smell, loud noise, unsightly object, or some other condition causing substantial discomfort, so long as it is something that is perceptible to the senses. Direct farm businesses must be aware of conditions they create that rise to the level of actionable nuisance, particularly those businesses in close proximity to land used for non-agricultural purposes. Courts have found some large livestock facilities to be a "nuisance" due to the presence of strong odors and flies such that neighbors can no longer use their property (e.g., unable to open windows in summer due to odors).

There are two types of nuisance claims: private and public. Private nuisance usually affects a single party or a definite, small number of individuals in the use or enjoyment of private property and infringes upon private rights. Public nuisance generally is a condition affecting a substantial number of people or an entire neighborhood or community, of infringing upon some public right. (*Hoery*, 64 P.3d 214 at 218 n.5) Claims for public nuisance are generally brought by the government instead of an individual, unless some special harm has been suffered by the individual.

Courts frequently balance the interests of both sides in determining liability for nuisance. Courts will also consider whether the complaining party came to the nuisance--that is, whether the condition existed when the complaining party acquired the property. While coming to the nuisance does not bar a nuisance action, it may help determine what, if any, damages are appropriate.

²⁷ CDOA, *Open Range & Fencing*, <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=Agriculture-Main%2FCDAGLayout&cid=1176829292622&pagename=CDAGWrapper>

If a nuisance action is successful, the court may issue a temporary or permanent injunction, including an order shutting down the offending operation. In the alternative, a court may allow the nuisance to continue, but require the offending party to compensate the complaining party. Parties may also seek to permanently enjoin a potential or anticipated nuisance when it clearly appears that a real and immediate nuisance would occur once the facility was to begin operation.

As mentioned earlier in this chapter, the *Colorado Right To Farm Statute* (C.R.S. 35-3.5-101) may protect many farmers from nuisance actions. A farm or ranch operation will not be found to have committed a nuisance if the farm or ranch conforms to generally accepted agricultural management practices and existed before a change in the land use next to the farm or ranch, and the operation would not have been a nuisance before the change in land use. The Act does not protect farmers from liability when they act negligently or operate the farm improperly. It is not clear whether the Act protects expansion of a farm's agricultural activity, or if the protection only applies to the farm as it existed when the surrounding area changed circumstances. Furthermore, courts in other states with similar statutes have sometimes found right to farm laws unconstitutional because the government requires neighboring property owners to bear a burden -- the nuisance -- without compensation.²⁸ Even a farmer who successfully defends against a nuisance suit typically does so at the expense of having had to hire a lawyer. Accordingly, the best defense for direct farm businesses is to operate in a reasonable, non-negligent manner and minimize potential interference with neighboring property.

II. REGISTRATION

A. *Animal Disease Traceability*

To protect the health of U.S. livestock and poultry and the economic well-being of those industries, the USDA's Animal and Plant Health Inspection Service (APHIS) developed the National Animal Identification System (NAIS) to identify and record the movement of livestock, poultry and other farmed animals throughout the United States. Through NAIS, APHIS aimed to achieve a 48-hour trace back of the movements of any diseased or exposed animal in the event of an animal disease outbreak. NAIS consisted of three components: premises registration, animal identification and animal tracing. The program sought to protect livestock and poultry producers by enabling USDA to identify the location of a disease outbreak and which animals were exposed in order to limit the scope of quarantines and animal destruction, while also adequately preventing any further spread. However, it met significant resistance from producers and state departments of agriculture. In February 2010, the USDA announced it

²⁸*Bormann v. Kossuth County*, 584 N.W.2d 309 (Iowa 1998); *Gacke v. Pork Xtra L.L.C.*, 684 N.W. 2d 168 (Iowa, 2004); Neil D. Hamilton, *Right-To-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103 (1998).

would be overhauling the animal disease traceability system to apply only to animals traveling in interstate commerce and to be more flexible and accommodating to states' needs. Therefore, registration requirements of premises and animals for disease tracing are currently in flux. According to USDA press releases, the agency intends to develop a program in collaboration with states and tribal governments, and provide transparency through notice and comment rulemaking. On August 9, 2011, USDA issued a proposed rule to establish general regulations for improving traceability of U.S. livestock moving interstate when animal disease events take place. The proposed rule requires livestock moved interstate to be officially identified and accompanied by an interstate certificate of veterinary inspection. For the most up-to-date information on the status of premises registration requirements, see **USDA's Animal Disease Traceability website**.²⁹

B. FDA Food Facility Registration

The Federal Food, Drug, and Cosmetic Act (FDCA) requires all facilities that hold, pack, manufacture or produce food for animal or human consumption in the U.S. to register with the U.S. Food and Drug Administration (FDA) prior to beginning manufacturing/processing, packing, or holding food (21 U.S.C. § 350d). Facilities that fail to register face civil and/or criminal prosecution. However, many types of direct farm businesses are exempt from registration requirements (21 C.F.R. §1.226).³⁰ Farms, retail facilities, restaurants, nonprofit food facilities, fishing vessels, and operations regulated exclusively by USDA throughout the entire facility (e.g., facilities that handle exclusively meat, poultry, or egg products) are **exempt** from the registration requirement. Whether a direct farm business qualifies for an exemption to the registration requirement depends on the definitions set forth in FDA regulations:

- ***Farm*** (21 C.F.R. § 1.227(b)(3)): A facility in one general physical location devoted to the growing and harvesting of crops, the raising of animals (including seafood), or both. Washing, trimming of outer leaves of, and cooling produce are considered part of harvesting. The term “farm” includes:
 - Facilities that pack or hold food, provided that all food used in such activities is grown, raised, or consumed on that farm or another farm under the same ownership; and,
 - Facilities that manufacture/process food, provided that all food used in such activities *is consumed on that farm* or another farm under the same ownership.

²⁹ <http://www.aphis.usda.gov/traceability/>

³⁰ FDA has published a helpful 16-page guide on facility registration (“What You Need to Know About Registration of Food Facilities”) that explains who must register (including exemptions) and how to register. It is available online at <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/FoodDefense/ucm331959.htm>

- **Restaurant** (21 C.F.R. § 1.227(b)(10)): A facility that prepares and sells food directly to consumers for immediate consumption.
 - “Restaurant” includes entities in which food is provided to humans, such as cafeterias, lunchrooms, cafes, bistros, fast food establishments, food stands, saloons, taverns, bars, lounges, catering facilities, hospital kitchens, day care kitchens, and nursing home kitchens.
 - “Restaurant” also includes pet shelters, kennels, and veterinary facilities in which food is provided to animals.
 - “Restaurant” **does not** include facilities that provide food to interstate conveyances, central kitchens, and other similar facilities that do not prepare and serve food directly to consumers.
- **Retail Food Establishment** (21 C.F.R. § 1.227(b)(11)): A retail food establishment is defined by the statute as “an establishment that sells food products directly to consumers as its primary function. *A retail food establishment may manufacture/process, pack, or hold food if the establishment's primary function is to sell from that establishment food, including food that it manufactures/processes, packs, or holds, directly to consumers* (emphasis added). A retail food establishment's primary function is to sell food directly to consumers if the annual monetary value of sales of food products directly to consumers exceeds the annual monetary value of sales of food products to all other buyers. The term ‘consumers’ does not include businesses. A ‘retail food establishment’ includes grocery stores, convenience stores, and vending machine locations.”

Many questions arise as to whether a facility qualifies for an exemption under these definitions. FDA considers some facilities “mixed-type” that require registration. For example, a maple syrup operation that harvests maple sap and then heats the maple sap into syrup for sale *to a distributor or grocery store* is an example of mixed-type facility that requires registration, because even though taking sap from a tree is harvesting, heating sap into syrup is considered processing. Processing the sap for consumption off the farm removes the facility from the farm exception, and the facility would not qualify for the retail food establishment exception because the final product is not sold directly to consumers. On the other hand, if the farmer sold the sap only at a roadside stand, then it would qualify for the retail food establishment exception because the farmer would be selling directly to consumers.

The FDA has published a **guidance document**³¹ that contains a long list of questions and answers regarding whether an exception to registration applies. **There are also flowcharts at the end of this section that may assist in determining whether a facility is exempt from**

³¹ Available online at <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/FoodDefense/ucm331959.htm>

registration. Businesses that are uncertain whether they must register should contact an attorney or the FDA help line at 1-800-216-7331.

FDA maintains a **webpage**³² that contains step-by-step instructions and tutorials for registering online or by mail. Facilities are required to register only once. However, if information about the facility changes, the facility must update the registration within 60 days of the change. If a facility relocates, it must cancel the existing registration and submit a new registration. If the facility goes out of business or changes ownership, the facility must submit a registration cancellation within 60 days. Cancellations are irreversible. Information on how to update or cancel a registration is available through the same FDA webpage for registering online.

C. Federal and State Environmental Regulations

Farmers might also encounter issues with environmental permits and regulations. Because multiple agencies may have regulatory authority - depending on the environment and possible pollutants involved - environmental permitting is often very complex and individualized. This section provides a brief overview of some of the most common issues; however, it is not comprehensive. Certain federal environmental programs may also apply to agricultural operations, such as the Endangered Species Act and the Safe Drinking Water Act. The EPA has provided brief summaries of its programs on its **website**.³³ While these resources are useful starting points, farm operations should not rely exclusively on websites because they may not cover every potential environmental issue a farmer may encounter.

Finally, the Colorado Department of Public Health and Environment provides compliance assistance to small businesses in their Small Business Environmental Assistance Program. Their **website**³⁴ may be a helpful place to start, but it is probably best to contact the agency directly to determine specific obligations based on the type of direct farm business.

Waste Management

There are multiple laws that require waste management plans, including the Federal Clean Water Act (CWA) (33 U.S.C. § 1541, *et seq.*). The CDPHE, Water Quality Control Division, is responsible for implementing the state's water pollution control program pursuant to C.R.S. 25-8-101. The department offers useful information on regulations as well as compliance assistance at their **website**.³⁵

The Clean Water Act (33 U.S.C. § 1541, *et seq.*) (CWA) requires facilities that house exceptionally large numbers of animals (CAFOs) to obtain permits under the National Pollutant Discharge Elimination System (NPDES). In Colorado, the Water Quality Control Division addresses the

³² <http://www.fda.gov/Food/GuidanceRegulation/FoodFacilityRegistration/ucm2006831.htm>

³³ <http://www.epa.gov/agriculture/agmatrix.pdf>

³⁴ <http://www.colorado.gov/cs/Satellite/CDPHE-AP/CBON/1251596441985>

³⁵ <http://www.colorado.gov/cs/Satellite/CDPHE-WQ/CBON/1251583425927>

handling of animal manure from all animal feeding operations, including CAFO's and housed commercial swine facilities. Information on the program is **available online**.³⁶

Livestock that graze on open lands are a potential source of nonpoint source pollution and subject to the Colorado Nonpoint Source Program.³⁷ This program employs voluntary and incentive methods to reduce nonpoint source pollution. Nonpoint source pollution means the source of the pollution is difficult to determine and can make complying with CWA's requirements difficult on a state. Colorado's Nonpoint Source program incentivizes animal feeding operations who do not meet the regulatory definition of a CAFO to utilize best conservation practices. CAFOs do not fall under the Nonpoint Source program, as they are already regulated under the CWA.

In 2009 there was a petition pending before the EPA to also regulate CAFO air emissions under the Clean Air Act. On January 13, 2011, the EPA completed a two year study of air emissions from poultry, swine and dairy animal feeding operations, which will be used to develop methods for estimating emissions. As of the writing of this Guide, emission estimating methodologies were available for public comment, but no laws have been promulgated. Updates on the status of that petition may be available through the **EPA's website**.³⁸

Wetlands

The federal Clean Water Act also requires landowners to obtain permits from the Army Corps of Engineers (the Corps) to discharge dredge or fill materials into waters of the United States (33 U.S.C. § 1344). Accordingly, a permit may be necessary prior to construction or farming in wetlands. These permits, known as Section 404 permits, are only an issue for new farms – the law has an exception for normal farming, silviculture and ranching activities that are part of an established operation (33 U.S.C. § 1344(f)). However, new farms, or farms resuming operations on land that has been unused for so long that modifications to the hydrological regime are necessary to commence operations, should first determine if a permit is necessary. The Corps defines wetlands as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas” (33 C.F.R. § 328.3). The Omaha District Army Corps of Engineers oversees the state of Colorado. The Omaha District's website maintains a list of useful links for information on wetlands.³⁹

³⁶ <http://www.colorado.gov/cs/Satellite/CDPHE-DEHS/CBON/1251583700602>

³⁷ Find more information at <http://www.npscolorado.com>

³⁸ www.epa.gov

³⁹ <http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Colorado.aspx>

Pesticide Regulation

The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Chapter 6) (FIFRA) requires EPA to approve *all* pesticides sold or distributed in the United States. Upon approval, the pesticides are subject to labeling requirements, and applicators must comply with the use and application restrictions on the labels. Applicators must meet training and certification standards. The FIFRA is also the law that established the worker protection standards discussed in the “Labor and Employment” section of this Guide. The *Colorado Pesticide Applicators’ Act* (C.R.S. 35-10-101 *et seq.*) requires all pesticides in Colorado to be similarly registered with and labeled by the CDOA. The Rules and Regulations Pertaining to the Administration and Enforcement of the Pesticide Applicators’ Act (8 CCR 1203-2) also requires licensing of private and commercial applicators. Only those involved in the business of applying pesticides need to be registered as a commercial applicator. However, any individual who applies pesticides for any agricultural purpose not for hire may be required to carry a private applicator’s license. If you think this may apply to you, the requirements to obtain a private applicator’s license include taking an open book test and paying a fee to the CDOA. For more information, visit the CDOA Application for Private Pesticide Applicator License page.⁴⁰

Environmental Incentive Programs

Numerous state and federal programs provide financial and technical assistance to farmers who practice environmentally conscientious agriculture. These programs generally require the farmer to enroll their lands or sign a contract for a certain number of years. In exchange for implementing certain practices (or sometimes building structures), the farmer receives annual payments or technical assistance from the various agencies. A farmer’s lands will probably need to be approved as eligible for the program (i.e., capable of furthering the program’s purpose or priority goals) and will be subject to inspection to ensure ongoing compliance with the program. Providing detailed explanations of how all the programs work is beyond the scope of this Guide. For more information on the federal programs, visit the **USDA’s Natural Resource Conservation Service’s webpage**.⁴¹ For more information on Colorado-specific programs, visit **USDA’s Natural Resource Conservation Service’s** page for Colorado.⁴²

Direct farm businesses may also wish to participate in the National Organics Program. Under this program, once a farm has been certified as organic, it may place the official USDA Organic label on its products. For more information on Organic certification, see the “Organic Marketing” chapter of this Guide.

Finally, there are emerging markets which allow farmers to obtain payments in exchange for providing ecosystems services (i.e., tangible benefits that people obtain from ecosystems). These

⁴⁰ <https://www.colorado.gov/apps/cda/pesticide/applicator/licensing/welcome.jsf>

⁴¹ <http://www.nrcs.usda.gov/programs/>

⁴² <http://www.co.nrcs.usda.gov>

markets, known as ecosystems services markets or environmental markets, quantify activities, such as reducing emissions or setting aside land as nature preserves, and enable the owner to sell the service or benefit to interested parties. Conservation easements and land trusts - in which landowners agree to set aside parcels of land for conservation or wildlife protection - are examples of ecosystem services markets already in operation. Oftentimes, farmers can gain tax benefits from placing conservation easements on their land or transferring land into a land trust. For more detailed information about ecosystem services and conservation credits, David Anderson's **presentation**⁴³ for the Biodiversity Without Boundaries Conference is a great place to start.

Section 2709 of the Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill) directed the Secretary of Agriculture to "establish technical guidelines that outline science-based methods to measure the environmental services benefits from conservation and land management activities in order to facilitate the participation of farmers, ranchers, and forest landowners in emerging environmental services markets" (16 U.S.C. § 3845). As a result of this legislation, the Department of Agriculture established the Office of Environmental Markets (OEM) in order to help facilitate the creation of market-based approaches to agriculture, rangeland, and forest conservation. The Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) took steps to facilitate landowner participation in emerging markets for ecosystem services and retained the same language as the 2002 Farm Bill. More information on ecosystems services markets is available through the **USDA's Environmental Markets website**.⁴⁴

III. INSURANCE

To best determine the insurance needs of a direct farm business, start with a visit to a qualified insurance agent - preferably one who is familiar with how direct farm businesses operate. Farmers should be prepared to explain their operation in detail, and should request an insurance proposal from the agent that addresses the operation's every risk and potential amount of loss. Businesses may also wish to compare policies from multiple agents. Necessary insurance products may include premises liability (to cover liability for injuries that may occur on the property), workers' compensation, physical damage to business property, product liability, motor vehicle, crop insurance, and some kind of casualty insurance to cover transactions until title passes to the purchaser.

Many of these insurance needs may be incorporated into a basic farm insurance policy. These include losses to the farm dwellings and outbuildings, personal property (including tractors and other equipment), and premises liability arising from some incidental on-farm business operations. Depending upon the scale of the operation and the insurance company, roadside farm stands and U-pick enterprises may or may not be covered under incidental business

⁴³ David G. Anderson, *Credit Markets in Colorado*, https://connect.natureserve.org/files/bwb2012/120425_A4_DAnderson_credit_markets.pdf

⁴⁴ <http://www.fs.fed.us/ecosystems/services/OEM/index.shtml/index.shtml>

operations in the basic farm insurance policy. Agritourism, petting zoos or seasonal farm festival activities generally are not considered incidental farm business operations for insurance purposes and will require specific endorsements. Insurance field agents can review all of these operations in order to implement best management practices that are designed to eliminate or reduce potential risks.

Additionally, farmers must consider their liability for selling produce contaminated with harmful bacterial pathogens. Product liability issues generally are minimal in the commodity agriculture production business, especially when selling products for further processing later in the food supply chain, but this is not always the case. When selling direct to the consumer, however, the risk of product liability increases, as the injurious product may be traced directly to the direct farm business. Many farmers mistakenly believe that their general farm insurance policy will protect them against liability resulting from harmful pathogens (e.g., *Salmonella*; *E. coli*) in raw and unprocessed fruits and vegetables. However, this may not be the case, because general farm insurance policies usually only cover injuries that occur on the farm premises and foodborne illnesses typically occur elsewhere. In some cases, a general commercial liability insurance policy, or even separate product liability coverage, may be required.

Furthermore, once a direct farm business transitions from agricultural commodity to *production* of processed goods, or *direct sales* to consumers of any kind, a basic farm policy may not cover injuries that occur in connection with that processing or sale – even if they occur on the premises insured by the farm policy. Some farm policies define “farming” and “business” separately and exclude any “business” operations – including, in some cases, U-pick operations – from policy coverage. In such a case, insurance coverage would not extend to a patron who trips on a rock in a U-pick parking lot and sues the farm owner for payment of her medical bills. Additionally, an on-farm business with a commercial scale kitchen would not qualify as “incidental” to the farm operation, but rather a commercial undertaking with particular insurance coverage needs.

Due to the variability of insurance coverage and prices depending upon the specific direct farm business, insurance needs and costs should be assessed early in the business planning process. Moreover, bank financing may require insurance expenses to be incorporated as part of the cost structure and profitability models in the business plan. Further, some potential customers (e.g., restaurants, institutional sales, Farmers’ markets) may require proof of adequate insurance before engaging with the direct farm business.

Again, it is important to discuss these issues with an insurance specialist and an attorney to ensure the business owner *and* the direct farm business have the necessary insurance coverage to protect the business assets and minimize personal liability exposure.

IV. CHECKLIST

Have you...

- Considered where you want to **locate** your business? Depending on what type of business (u-pick, agri-tourism, farm stand, etc.) you are considering, this requires:
 - Reviewing applicable county and municipal **zoning laws** in your area;
 - investigating whether any other environmental permits will be required under Colorado and federal environmental laws
- Looked into the **registration and permitting requirements**? Most registration steps are relatively simple, but failure to comply can have significant consequences.
- Informed yourself about **insurance options and costs**? Insurance (or lack thereof if something goes wrong) can represent a significant cost for a small-scale farmer. It should be considered as part of your initial overall business plan and not left as an afterthought.

KEY CONTACT INFORMATION

- **U.S. Food and Drug Administration (registration of food facilities help desk)**

Ph: (800) 216-7331 or (301) 575-0156

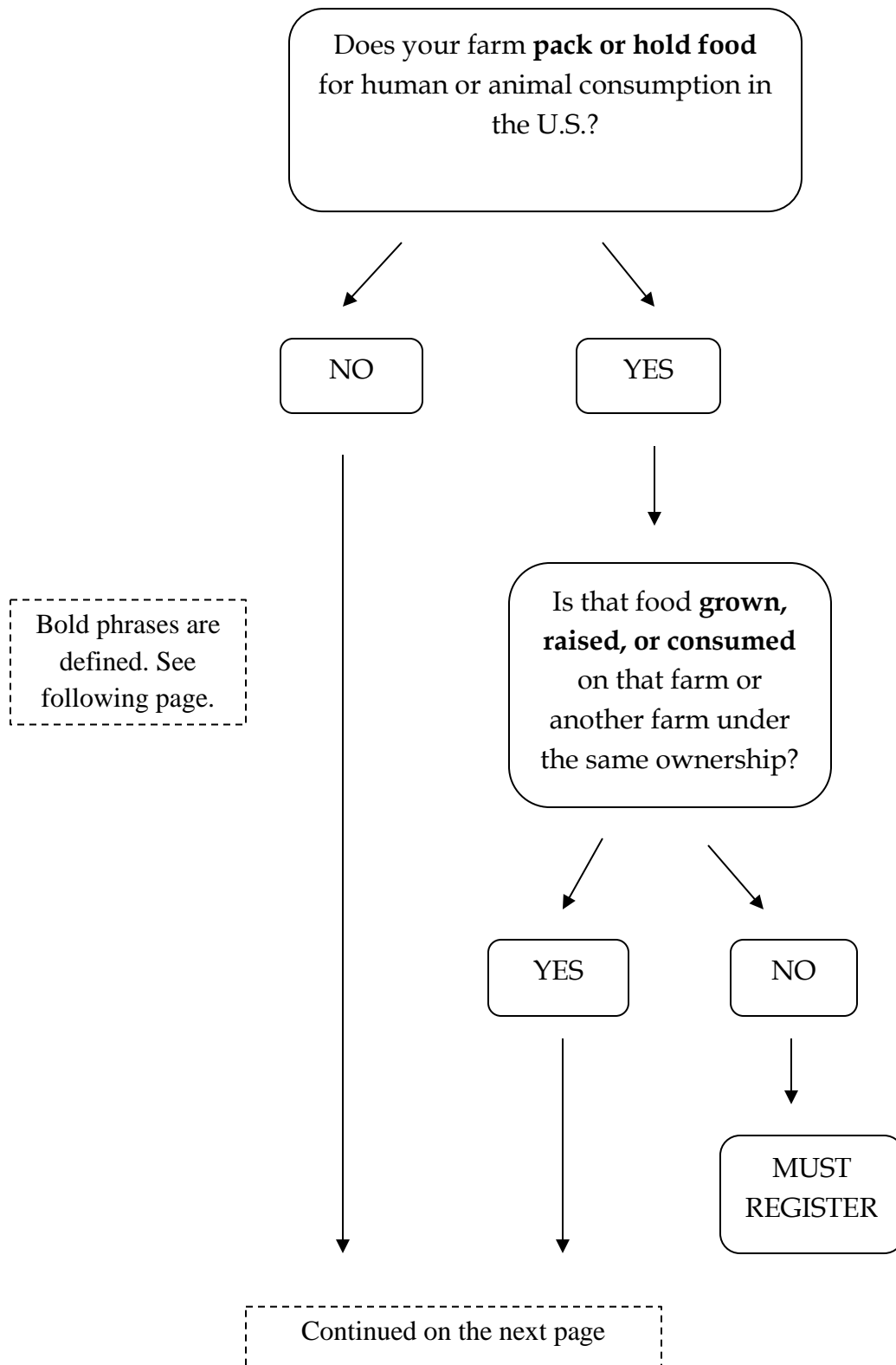
- **Colorado Department of Public Health and Environment**

Ph: (800) 886-7689

For information about animal feeding operations:

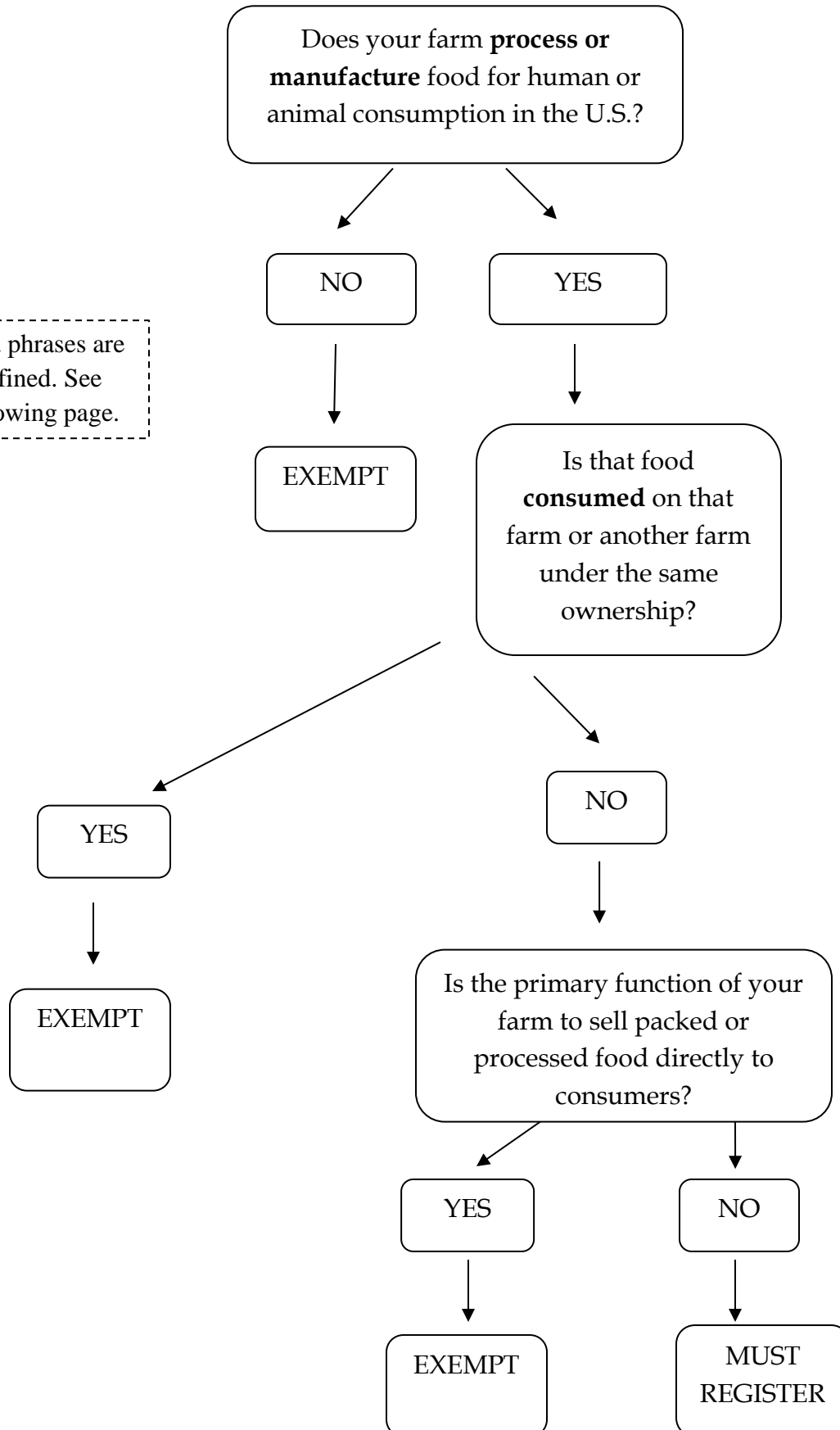
Ph: (303) 692-3530

Email: cdphe.cafo@state.co.us

DO I NEED TO REGISTER MY FARM WITH THE FDA?

Continued from the previous page

Bold phrases are defined. See following page.



Definitions

As used in this flowchart:

Holding means “storage of food. Holding facilities include warehouses, cold storage facilities, storage silos, grain elevators, and liquid storage tanks.” 21 C.F.R. § 1.227(b)(5).

Manufacturing/processing means “making food from one or more ingredients, or synthesizing, preparing, treating, modifying or manipulating food, including food crops or ingredients. Examples of manufacturing/processing activities are cutting, peeling, trimming, washing, waxing, eviscerating, rendering, cooking, baking, freezing, cooling, pasteurizing, homogenizing, mixing, formulating, bottling, milling, grinding, extracting juice, distilling, labeling, or packaging.” 21 C.F.R. § 1.227(b)(6). For purposes of a farm facility, manufacturing/processing does *not* include “[w]ashing, trimming of outer leaves of, and cooling produce.” 21 C.F.R. § 1.227(b)(3).

Packing means, “placing food into a container other than packaging the food.” 21 C.F.R. § 1.227(b)(9).

Packaging, when used as a verb, means, “placing food into a container that directly contacts the food and that the consumer receives.” 21 C.F.R. § 1.227(b)(8).

Selling food directly to consumers as a “primary function”: A retail food establishment’s primary function is to sell food directly to consumers if the annual monetary value of sales of food products directly to consumers exceeds the annual monetary value of sales of food product to all other buyers. 21 C.F.R. § 1.227(b)(11).

CHAPTER 3: MANAGING AND MARKETING THE DIRECT FARM BUSINESS

There are many components to successfully managing a direct farm business. Taxes and employment encompass such significant portions of law that they merit their own chapters in this Guide. However, there are many other management details that this chapter will address. First and foremost, contracts are subject to a myriad of laws, many of which protect farmers



from potential abuses. A direct farm business also needs to have effective marketing in order to reach potential customers and sell the product. This marketing plan may encompass many facets, including Internet marketing, procurement contracts, and valid intellectual property rights. And when a sale is made, the direct farm business must accurately measure its products in order to comply with state law.

I. CONTRACTING

Contracts are an integral part of every business. Contractual agreements can take many forms: some are small cash transactions, while others are detailed documents resulting from lengthy negotiations. Regardless of the type of direct farm business, owners and managers should be familiar with certain basic contract principles that will help them run a smooth operation and protect their business interests.

A. General Contract Law

A contract is an agreement between two or more competent parties to do something in exchange for something of legal value. There are three basic elements of a valid contract: an offer, acceptance, and consideration. An offer is a committed and definite proposal that is sufficiently communicated to others. Acceptance is communicated when a party agrees to the exact proposal in the offer using clear and unequivocal terms. The final requirement, consideration, concerns the subject of the contract. Consideration is an explicitly bargained for benefit or detriment that has legal significance. This could be money, land, crops, or even a promise to provide products or services in the future.

The Uniform Commercial Code (UCC) (C.R.S. 4-1-101 et seq.) is a uniform set of laws adopted in every state in order to facilitate interstate commerce. The American Law Institute develops the UCC and then each state adopts it with minor variations that the state deems necessary for its local needs. The UCC covers a broad array of commerce issues, such as the rights and duties of creditors and debtors, how loans can be transferred between varying parties, and standards for

forming and interpreting leases for goods. Farmers need to be aware of the UCC, especially with regard to sale of goods, because it establishes unique rules for commercial transactions. Specifically, the UCC defines when a contract is formed between two merchants, sets standards for how contract terms are interpreted, provides default terms to cover contractual omissions, and defines what remedies are available if the contract is breached. It is important to note, however, that these UCC rules are the default law that courts will apply if contracting parties do not come to an agreement or fail to include a term in their agreement. Contracting parties are always free to negotiate alternative terms for their contract. Relevant provisions of the UCC are covered in more detail in the following discussion.

Oral Contracts, Written Contracts – Which One?

A contract does not necessarily have to be in writing in order to be binding and enforceable. In fact, many contracts are oral contracts, in which no writing ever exists. Small direct farm sales - for example, most roadside stand cash transactions - are usually oral contracts. When a farmer sets up a stand and communicates the availability of his produce in some way at a certain price, he has made an *offer*. By agreeing to pay the purchase price, the consumer *accepts* the offer, forming an enforceable contract. The *consideration* is the produce the farmer provides and the money the customer pays. The contract is *performed* (and thus complete) when the farmer receives the money and the customer receives the produce. In most cases, oral contracts are binding and enforceable—just like a written contract. There are instances, however, where a contract must be in writing to be enforceable.

As early as the 1600s, people recognized that certain contracts are particularly susceptible to misrepresentation. In response, the English Parliament adopted what is known as the “statute of frauds,” which requires that certain fraud-prone contracts be in writing to be enforceable. Following this English tradition, every state has adopted a version of the statute of frauds. The Colorado Statute of Frauds and the UCC lists a number of circumstances specifically requiring a written contract, but there are three situations most relevant to farmers: First, contracts that will take more than one year to perform, and second, the sale of real property. Additionally, contracts for the sale of goods totaling \$500 or more are required to be in writing (C.R.S. 4-2-201; C.R.S. 38-10; C.R.S. 38-10-112).

Contracts lasting more than a year can present themselves in many different forms. For example, a contract to sell grain could have an execution date that is more than a year away, making it fall within this section of the statute. The statute only applies to contracts that cannot possibly be performed within one year. The mere possibility that a contract will take longer than a year to perform does not force it into the statute. So, for example, a contract to sell the milk of an animal for the rest of its life would not fall within the statute because there is no guarantee that the animal will live longer than one year. Similarly, if the contract is set up in a way that could potentially last more than a year but could also be completed within a year under certain circumstances (for example, a contract to design and build a house), it does not

fall within this provision of the statute of frauds. Many community supported agriculture (CSA) contracts also might fall within this provision of the statute of frauds. For example, an agreement to receive delivery on produce through the end of the next year may or may not fall within the provision based upon the timing and terms of the contract. If the agreement requires taking delivery at a date that is more than one year away, it generally must be in writing.

The statute provides a slightly different rule when merchants are involved. Colorado law defines a merchant as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction...” (C.R.S. 4-2-104). If both parties to a contract are merchants, an oral contract that would otherwise have to be in writing under the statute of frauds is binding if a confirmation of the oral contract is sent in writing within a reasonable time and neither party objects within ten days after the writing is received (C.R.S. 4-2-201(2)). Across the country, states are split on whether farmers are merchants when they market their crops or engage in other activities, such as processing fruits into jellies.⁴⁵ In Colorado, courts may consider farmers to be merchants, based on several factors such as the length of time the farmer has been in the business and the complexity and nature of his prior business dealings (*Colorado-Kansas Grain Co. v. Reifschneider*, 817 P.2d 637 (Colo. App. 1991)).

It may be useful to understand what constitutes a “writing.” To be enforceable, the written document must be signed by the party that has an obligation imposed upon them or by someone who is authorized to sign for them. The party seeking to enforce the contract is not required to have signed it. If a written document omits terms or includes a term that is different from what was actually agreed upon, the contract will usually still be binding. In fact, evidence of the oral agreement usually cannot be offered as evidence to show that the terms of the final written contract were supposed to be something else.

Although it may be difficult to understand when a written contract is technically required and when an oral contract will be enforceable, it is *always* a good business practice to put contracts in writing. Doing so protects legal interests and avoids potential disagreements that can lead to a negative business reputation and possible legal battles. When preparing a written contract, it is important to be thorough and accurate. At a minimum, the contract should contain the identities of the parties, the item(s) contracted for (including quantities and a clear description that includes quality standards), the negotiated price, and time and location of performance. It might also include ways the contract can be cancelled and what remedies each side will have if the other fails to perform. Contradictory oral statements made during negotiations will not typically override the terms contained in a written contract. In sum, taking the time to prepare a well-crafted written document will increase the security of each side’s interest in the contract, reduce the chance of unmet expectations due to ambiguity, and create a tangible record in case

⁴⁵ The Supreme Courts of Illinois and Texas and an Appellate Court of Ohio have held that the farmer who regularly sells his crops is a “merchant” within the meaning of 2-201(2) of the UCC, while the Supreme Courts of South Dakota, Iowa, Kansas, Utah, Wisconsin, Arkansas and Alabama have refused to make this generalization. (*Pierson v. Arnst*, 534 F. Supp. 360, 361 n.1 (D.C. Mont.1982)).

any problems do arise. Regardless of the dollar amount or the time involved in a contract, it is advisable to have an attorney review any important contract before signing it.

Excused Contract Performance

When a party breaks any of the provisions of a contractual agreement, they are considered to be *in breach* of the contract. However, in certain situations, courts may not impose liability for breach of contract. Situations where a party might be excused from performing contractual obligations can be placed into three broad categories. First, if circumstances create a situation where it is impossible to perform the contract, a party may be released from its obligations (“contractual impossibility”). Second, if performance is technically possible, but requiring a party to perform would be extremely unfair under the circumstances, then performance might be excused (“contractual impracticability”). Finally, a party might not be required to perform if the purpose for entering into the contract no longer exists or would no longer be furthered by performance of the contract (“frustration of purpose”).

Contractual Impossibility

The legal doctrine of contractual impossibility results from an unforeseen, unexpected event that occurs after a contract was created but before it was performed, and that makes performance of the contract impossible. This could occur when a particular piece essential to the contract is destroyed, or when a particular essential person to the contract dies or is otherwise incapacitated. The thing destroyed or the person incapacitated must be absolutely necessary to the contract in order for the impossibility doctrine to apply. A small non-essential element being destroyed does not lead to excusing the contract for impossibility. So, for example, if a farmer has a contract to sell a particular animal and the animal dies after the contract is formed, but before the farmer delivers the animal to the purchaser, then both parties would be excused from performing under the contract.

This does not mean that every disaster leads to the escaping of contractual obligations. For example, if a party enters into a contract to sell 100 bushels of corn and, before delivering the harvest, a flood destroys the corn, the farmer is not excused from the contract because of impossibility. This is because the farmer could still purchase corn from another source and use it to fulfill his obligation. Unlike a particular deceased animal, corn is a commodity that can be replaced. The fact that a contract has become more difficult or more expensive to perform is not enough to make it impossible to perform.

Contractual Impracticability

Some courts may have sympathy for parties who find themselves in a position where performance, while not technically impossible, would be *impracticable* – that is, so difficult that requiring it would be unduly harsh. Courts have substantial discretion in deciding whether or not performance should be excused because requiring performance would be impracticable or

extremely unfair. For example, if a farmer contracts with a trucking company to deliver 100 truckloads of crops and all of the company's trucks are subsequently destroyed by fire, it would not be impossible for the trucker to perform, but it may be impractical. The company could purchase a new fleet of trucks and perform the contract, but a judge could find, in his or her discretion, that requiring performance under these circumstances is overly harsh and should be excused.

Frustration of Purpose

A third way that contract performance could be excused is frustration of purpose. Courts may excuse performance when the contract at issue was entered into for a particular underlying purpose, which no longer exists as it did at the time of contract formation. For example, if a farmer contracts to buy feed for his cattle and all the cattle die from disease, the purpose of the contract (feeding the cattle) has been frustrated. It is still possible for the farmer to buy the feed, but he entered into the contract specifically to feed animals that no longer need to be fed. When the reason for the contract no longer exists, the contract may be set aside because of frustration of purpose.

Whether or not a contract performance will be excused is an intensely fact-specific determination. As a practical matter, if problems arise that may lead to a breach or inability to perform the contract, one should first attempt to renegotiate the terms of the agreement with the other party. If negotiations fail, hiring an attorney is the best way to protect oneself and explore legal options.

B. Contract Laws that Protect Farmers

Although contracts are personal and can vary greatly from negotiation to negotiation - even between the same two parties - there are some restrictions, obligations and remedies that federal and Colorado law impose upon certain agricultural contracts.

Congress enacted *The Packers and Stockyards Act* (P&SA) (7 U.S.C. §§ 181-229b) in 1921 to facilitate fair competition in livestock, meat, and poultry markets. The Act prohibits unfair, deceptive, unjustly discriminatory, fraudulent and anti-competitive practices. Livestock dealers are required to register and be bonded to protect producers. The P&SA will not apply to most direct farm businesses because farmers are not subject to the Act when buying livestock for their own purposes or when marketing their own livestock and livestock products. However, the Act's registration and bonding requirements may apply to agricultural cooperatives marketing livestock on their members' behalf. Furthermore, the Act provides several protections for farmers engaged in production contracts. The section on production contracts, below, discusses these in more detail. The Grain Inspection, Packers, and Stockyards

Administration (GIPSA), a sub-agency of the USDA, administers the P&SA. GIPSA has more information on its **website**.⁴⁶

The Perishable Agricultural Commodities Act (PACA) (7 U.S.C. §§ 499 *et seq.*) seeks to ensure fair trading practices for fruits and vegetables by requiring farmers to deliver produce as promised and buyers to pay within a reasonable period of time of receipt. The law requires anyone buying or selling or brokering contracts for more than 2,000 pounds per day or selling more than \$230,000 worth of produce in a year to obtain a PACA license. Farmers who sell only their own produce are not subject to the Act, but cooperative marketing associations that market the qualifying quantities are subject to it. USDA's Agricultural Marketing Service (AMS) enforces the law. If anyone violates the fair marketing requirements of the Act, the other party to the

contract can file a complaint with AMS. More information on licensing and complaints is available through **AMS's website**.⁴⁷

ADDITIONAL RESOURCES: PACA'S PROVISIONS

Farmer's Legal Action Group Handout, available at
<http://www.flaginc.org/topics/pubs/arts/PACAhandout2007.pdf>

National Agricultural Law Center's Overview, available at
<http://www.nationalaglawcenter.org/assets/overviews/perishablecommodities.html>

The law also establishes a trust right to protect farmers who sell fruits and vegetables. If the farmer notifies a buyer that they intend to be covered by the trust, the buyer must hold the produce or any proceeds from the sale of it in trust for the farmer until the buyer has paid for the produce in full. The primary benefit of the trust is to make it easier for farmers to get paid when they file a court action. The trust also puts farmers ahead of other creditors if the buyer goes out of business or declares bankruptcy. Producers who are not subject to the Act can nonetheless obtain a PACA license in order to benefit from the PACA trust protections.

Congress enacted *The Agricultural Fair Practices Act* (7 U.S.C. §§ 2301-2306) in 1967 to protect farmers who belong to cooperatives from retaliation or coercion by handlers who are trying to limit producers' capacity to market and bargain cooperatively. The Act defines handlers as anyone who (1) acquires agricultural products from producers or associations of producers for processing or sale; or (2) grades, packages, handles, stores, or processes agricultural products received from producers or associations of producers; or (3) contracts or negotiates contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acts as an agent or broker for a handler in the performance of any of the above functions (7 U.S.C. § 2302(3)).

⁴⁶ www.gipsa.usda.gov

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<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateG&navID=FileaPACAClaimorApplyforaLicense&rightNav1=FileaPACAClaimorApplyforaLicense&topNav=&leftNav=CommodityAreas&page=PACA&resultType>

The Act prohibits handlers from (1) coercing a producer to join a cooperative, or refusing to deal with a producer for joining a cooperative; (2) discriminating against a producer in price, quantity, quality or other terms due the producer's membership in a cooperative; (3) coercing or intimidating a producer to enter into, breach, or terminate a membership agreement or marketing contract with an association of producers or a handler; (4) attempting to bribe producers to quit or not join cooperatives; (5) making false reports about the activities and finances of a cooperative, and (6) conspiring with anyone else to do any of aforementioned (7 U.S.C. § 2303). If a producer feels a handler has violated the Act, she may bring a civil action for injuries incurred, or she may complain to the Secretary of Agriculture, who can then investigate and report the offender to the Attorney General for prosecution (7 U.S.C. § 2305). If a producer brings a civil action, courts may award attorneys' fees to the prevailing party (meaning that the loser may have to pay the winner's litigation costs) (*id.*). But because the Act requires the USDA to refer enforcement actions to the Department of Justice rather than bringing them directly against violators, it is often not strongly enforced.

C. *Special Contracts*

Production Contracts

Production contracts are contracts in which a company hires a farmer to raise animals or crops for the company using seed or animals, feed, and other inputs that the company supplies. These are usually adhesion contracts that contain unfair provisions based on unequal bargaining

power between the processors and smaller producers. In 2001, sixteen state attorneys general, including Colorado's, responded to the potential issues involved in production contracts by proposing to adopt the Model Producer Protection Act. Although seven states have adopted varying forms of the Model Producer Protection Act, Colorado has not passed the legislation and currently does not offer producers any special protection. Potential issues to be aware of include a confidentiality clause, which may prevent the producer from being able to seek advice from attorneys or other professionals when issues arise; clauses that make payment unfair for the producer; termination clauses that give the processor unilateral termination rights at any time for any reason; and arbitration clauses that require any issues to be resolved in front of a costly and possibly biased arbitrator of the processor's choice.⁴⁸

Federal law does provide some protections for poultry and swine

ADDITIONAL RESOURCES: ***Model Producer Protection Act***

A helpful article on state regulation of production contracts

http://www.nationalaglawcenter.org/assets/articles/peck_contractregulation.pdf

⁴⁸ For a more in depth discussion of potential issues to look out for, see <http://faircontracts.org/issues/farming>

producers entering into production contracts.⁴⁹ First, the 2008 Farm Bill contains a provision that protects poultry and livestock producers from non-disclosure provisions in their production contracts (7 U.S.C. § 229b). Second, the Packers and Stockyards Act (P&SA) generally prohibits poultry dealers and swine contractors from engaging in unfair, unjustly discriminatory or deceptive trade practices (7 U.S.C. § 192). When hiring growers to perform production contracts, the P&SA requires the first page of these contracts to conspicuously disclose whether capital investments are necessary to perform the contract (7 U.S.C. § 197a(b)). The P&SA authorizes the Secretary of Agriculture, through the Grain Inspection, Packers & Stockyards Administration (GIPSA), to institute investigations and compel dealers and contractors to pay damages to injured parties for violations of the Act; producers may also petition GIPSA for an investigation and reparation (7 U.S.C. § 210). Alternatively, the producer may bring a lawsuit against the dealer or contractor in federal court (7 U.S.C. § 209).

GIPSA exercises its authority over swine contracts on a case by case basis; therefore, there are no regulations that specifically address what constitutes unfair, unjustly discriminatory, or deceptive trade practices for swine contracts. However, there are specific GIPSA regulations applicable to poultry production contracts. The rules require poultry dealers to provide the grower with the true written contract on the day they provide the grower with the poultry house specifications (9 C.F.R. § 201.100(a)). This is intended to guard against the practice of inducing producers to take out loans to build production houses, then changing the terms of the promised contract after the producer is in a situation where rejecting the contract might lead to loss of the producer's home or business. The contract terms must include the contract's duration and grounds for termination, all terms relating to the payment (including how feed costs and live weights and slaughter weights will be calculated), and whether a Performance Improvement Plan (a probationary program for growers who fail to meet minimum performance standards) exists and if so, the factors for its application (9 C.F.R. § 201.100(c)). The GIPSA regulation also expands the scope of the anti-non-disclosure rules to allow

⁴⁹ Although much of the federal legislation covered in this Guide does not apply to purely intrastate commerce, the Packers and Stockyards Act likely does, due to the provision which states "for the purpose of this Act . . . a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the live-stock and meat-packing industries..." (7 U.S.C. § 183). In *Stafford v. Wallace*, 258 U.S. 495 (1922), the U.S. Supreme Court held that a wholly intrastate transaction at a stockyard was nonetheless part of the "current of commerce" and therefore fell within the purview of the P&SA. More recently, relying on the Supreme Court's decision in *Stafford v. Wallace*, the U.S. Court of Appeals for the D.C. Circuit interpreted a nearly identical provision in the Perishable Agricultural Commodities Act, 7 U.S.C. § 499(b)(4), ruling that fruit shipped and delivered purely intrastate, but handled by a dealer who commonly ships fruit out of state, had entered the current of commerce. *The Produce Place v. U.S. Dept. of Agriculture*, 91 F.3d 173 (D.C. Cir. 1996). In their analogy, the court stated:

[T]he current of interstate commerce should be thought of as akin to a great river that may be used for both interstate and intrastate shipping; imagine a little raft put into the Mississippi River at Hannibal, Mo., among the big barges bound for Memphis, New Orleans and ports beyond, with St. Louis as the rafter's modest destination. On this view, a shipment of strawberries can enter the current of interstate commerce even if the berries are reserved exclusively for sale and consumption within the state where they were grown.

Id. at 175-176. Under such a standard, a Colorado producer who contracts with an Colorado poultry dealer to raise poultry to be sold exclusively to Colorado consumers *may* not be subject to the Packers and Stockyards Act and GIPSA's regulations. However, given the broad sweep of jurisdiction courts have given the agencies, it would be more reasonable to tailor actions to the assumption that the rules do apply.

producers to consult with other producers who have contracts with the poultry dealer (9 C.F.R. § 201.100(b)).

Requirements and Output Contracts

Requirements and output contracts are two types of agreements that can provide some security to producers as well as those who buy in bulk directly from farmers. The concept behind these agreements is simple: In a requirements contract, the buyer agrees to purchase all of a product that they may require or use from a certain party. Similarly, an output contract is an agreement by a purchaser to sell all of a product that they produce to a particular buyer. Direct farm businesses may find these types of contracts useful when dealing with institutional buyers or restaurants.

Entering into a requirements or output contract is not a green light for producers to simply increase production, knowing that a party is contractually bound to purchase everything that the producer can churn out. The UCC puts some restrictions on these types of contracts. Section 2-306 of the UCC imposes a duty of “good faith” on the parties to the contract (C.R.S. 4-2-306). This means that neither side can demand or produce a quantity that is unreasonably disproportionate to the quantity that was estimated by the parties at the time of contract formation. If the parties failed to make any estimates at the inception of the contract, the UCC restricts quantities to those “normal” or “comparable” to what would ordinarily be required or produced. However, the UCC does not specifically identify how those terms should be defined.

The specific language used in a requirements or output contract can be very important. The contract must use assertive language such as “require,” “need,” “can use,” and so on. Using equivocal language such as “might want to use” or “wish” does not create a binding requirements or output contract. While such language does not prohibit parties from agreeing to deal with one another, it is not sufficiently definite to impose an enforceable duty on the parties. When parties fail to use definite language but act as though they formed a valid requirements or output contract, they are acting under a series of mini-contracts. While such ad-hoc mini-contracts may produce satisfactory results in the short term, producers should realize that indefinite contractual terms may, in the event of a dispute, result in a contract that fails to bind either party to its terms (and is thus unenforceable). However, when drafted carefully, requirements and output contracts can provide some security for parties. Farmers can produce at normal levels with confidence that all of their output will be purchased, and buyers are given some assurance that their needs will be filled. Because of the large volume typically associated with these types of arrangements, parties should be careful when agreeing to terms and should, at a minimum, have an attorney review these documents prior to agreeing to the terms to ensure that they fully understand the obligations and likely outcomes of the contract.

Procurement Contracts

Procurement contracts can be an advantageous way for a direct farm business to make significant sales. The USDA purchases large quantities of commodities through various procurement programs in order to supply food for school lunch programs, prisons, international food aid and other programs. USDA's programs are varied and complex, although they generally consist of some sort of notice of intent to purchase followed by a competitive bidding process. Information for small businesses is compiled by the USDA and **available online**.⁵⁰ The Agricultural Marketing Service (a subsidiary of the USDA) provides commodity-specific information on its **website**.⁵¹

The state of Colorado also administers a procurement program through the State Purchasing Office, as mandated by state law (C.R.S. 24-101-101 *et seq.*). Although all types of products and services are procured through the office, several are agricultural in nature. More information on selling to the state of Colorado is available **online**.⁵²

II. MARKETING

At its core, direct farm business marketing is about informing consumers about product offerings and building a reputation to foster repeat business. Effective marketing techniques can include sales flyers, posters at farmers' markets, roadside signs, and Internet marketing. This guide addresses legal issues pertaining to labeling and advertising, a few specific issues related to the Internet, and basic intellectual property issues that may arise in the context of direct farm businesses.

A. Labeling and Advertising

Labeling is regulated by the Food and Drug Administration (FDA) under the Food, Drug, and Cosmetic Act (21 U.S.C. Chapter 9), which prohibits selling "adulterated" or "misbranded" food. The Federal Trade Commission (FTC) regulates advertising pursuant to the Federal Trade Commission Act (FTCA) (15 U.S.C. §§ 41-58), which prohibits untruthful and deceptive or unfair advertising. Although the line between advertising and labeling is a bit fuzzy, both are subject to consistent rules because the FTC and FDA have a collaborative enforcement arrangement. FTC guidance documents

ADDITIONAL RESOURCES:

Food Labeling

The FDA's Food Labeling Guide details the intricacies of food claims.

<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm064919.htm>

The FTC generally uses the same guidelines for claims made in food advertising.

<http://www.ftc.gov/bcp/policystmt/ad-food.shtm>

⁵⁰ USDA Office of Procurement & Property Management, *Procurement Procedures and Policies*, <http://www.dm.usda.gov/procurement/business/procedure.htm>

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<http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateQ&navID=CommodityPurchasing&leftNav=CommodityPurchasing&page=CommodityPurchasing&acct=AMSPW>

⁵² <http://www.colorado.gov/cs/Satellite/DPA-DFP/DFP/1199264708367>

treat advertising as deceptive if it contains a statement or omits information that is material (that is, important to a consumer's decision-making process) and is likely to mislead consumers. A statement is unfair if it causes or is likely to cause substantial consumer injury that a consumer could not reasonably avoid and that is not outweighed by the benefit to consumers. These laws have implications for several types of claims a direct farm business may wish to make about its products, whether on its labels or in its advertising: Health claims, structure/function claims, and nutrient content claims. Each is briefly addressed below.

Nutrition Labeling

Section 403(q) of the federal Food, Drug, and Cosmetic Act requires that all packaged foods sold at retail bear a nutrition label that includes an ingredients list, nutrition content information, and the name of the food producer. However, the law contains several exemptions designed to benefit small producers – one based on the size of the operation and one based on the volume of a particular food product. The exemptions based on company size apply to retailers with annual gross sales of not more than \$500,000 *or* annual gross food sales to consumers of not more than \$50,000 (21 C.F.R. § 101.9(j)(1)). A farmer who retails their goods under this exemption, does *not* need to file a notice with the Food and Drug Administration before beginning sales. A second exemption for low-volume food products applies if the food producer employs an average of less than 100 full-time equivalent employees and sells fewer than 100,000 units of the particular product in a one-year period (21C.F.R. § 101.9(j)(18)). To claim this exemption, the food producer must annually file a notice with the FDA, *unless* the food producer is (1) not an importer, (2) has fewer than 10 full-time employees, and (3) annually produces less than 10,000 units of the food product. However, in all cases, if the particular product being sold makes a certain health claim, or provides any other nutritional information on the label or in advertising, then the small business exemption *does not* apply.

For more information on nutrition labeling, and to obtain a small business labeling exemption form, visit the **FDA's website**.⁵³ The FDA also publishes a comprehensive **Food Labeling Guide**⁵⁴ that outlines the requirements of the agency's food labeling laws.

The USDA promulgated new rules for the nutrition labeling of meat and poultry. These rules are discussed in Chapter 11 of this Guide, under the Marketing Meat and Poultry Products section.

Allergy Labeling Requirements

The Federal Food Allergen Labeling and Consumer Protection Act of 2004 requires foods that contain, or that are derived from, a "major food allergen" to specifically state that information

⁵³ FDA, *Small Business Nutrition Labeling Exemption Guide*, <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm053857.htm>

⁵⁴ FDA, *Food Labeling Guide*, <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm2006828.htm>

on its label (21 U.S.C. § 343(w)(1)). The Act defines a “major food allergen” as (1) milk, (2) eggs, (3) fish, (4) Crustacean shellfish, (5) tree nuts, (6) wheat, (7) peanuts, or (8) soybeans. The Act states that the allergen information may be conveyed in one of two ways: (1) by printing the word “Contains,” followed by the name of the food source from which the major food allergen is derived, immediately after or adjacent to the list of food ingredients; *or* (2) by placing the common or usual name of the major food allergen in the list of ingredients and following it in parentheses with the name of the food source from which the major food allergen is derived.

The allergen labeling requirement applies to all packaged foods except meat, poultry, and egg products. Raw agricultural commodities (e.g., fruits and vegetables) also are not required to bear allergy labels. Notably, the allergen labeling rules do *not* contain any exemptions for small producers. Therefore, if direct farm businesses produce a product that contains one of the eight major food allergens listed above, it will have to provide an ingredients list for that product and comply with the allergen labeling requirements.

The FDA has published a **Food Allergen Labeling Guide**⁵⁵ that examines the allergen labeling requirements in further detail.

Health Claims

Health claims describe a relationship between the food (or a component of it) and a reduction of the risk of a disease or health-related condition. For instance, a label might claim “low fat diets rich in fiber-containing grain products, fruits, and vegetables may reduce the risk of some types of cancer, a disease associated with many factors.” Producers who wish to place a health claim on a label must first have that claim approved by the FDA. Approved health claims are listed in Appendix C of FDA’s food labeling guide. If a claim is not approved, a food producer can petition the FDA to approve the claim, and must support the petition with sufficient scientific evidence. A label may also contain a *qualified health claim*, which is a health claim supported by emerging scientific evidence that suggests the claim may be valid but is not strong enough to meet the standard necessary to be a health claim. Like health claims, qualified health claims must be preapproved by the FDA through a petition. Failure to obtain pre-approval causes the food to be “misbranded,” and therefore subject to FDA enforcement.

Structure/Function Claims

Structure/function claims describe the role of a nutrient in affecting normal structure or function in humans (for instance, “calcium helps build strong bones”). FDA pre-approval of such claims is not required, but the statements must be truthful and not misleading. For more

⁵⁵ FDA, *Guidance For Industry: Questions and Answers Regarding Food Allergens, Including the Food Allergen Labeling and Consumer Protection Act of 2004 (Edition 4); Final Guidance*, <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Allergens/ucm059116.htm>

information on these types of claims, see the FDA’s **Small Entity Compliance Guide on Structure/Function Claims**.⁵⁶

Nutrient Content Claims

Nutrient content claims characterize the level of a nutrient in a food, such “high in vitamin A;” they also encompass claims such as “low fat” and “light” foods. The FDA prohibits these claims unless specifically approved in FDA’s regulations (21 C.F.R. § 101.13 and subpart D). Raw fruits and vegetables and fish are not required to contain nutritional content labels, but the FDA provides posters for voluntary labeling of their nutritional content.

B. Colorado Domestic Marketing Logos

The Colorado Department of Agriculture offers three logos that help differentiate and identify foods and agricultural products that are grown, raised, or processed in Colorado. These can be valuable tools for Colorado farm businesses or others involved in the food industry who wish to differentiate their products based on locality. Before the logo can be used, producers must join the program by registering online.⁵⁷ Potential benefits to the free membership include use of the logo and artwork, a free monthly newsletter, inclusion in a published online directory, and advertising or marketing opportunities.

Colorado Proud



The Colorado Proud logo may be used to promote fresh produce, herbs, grains, or horticultural products grown in Colorado; livestock raised in Colorado; or value-added food products processed in Colorado. However, foods that are manufactured in a home kitchen under Colorado’s Cottage Foods Act do NOT qualify for the program.

Colorado Organic



⁵⁶ Available at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/DietarySupplements/ucm103340.htm>

⁵⁷ visit www.comarketmaker.com and click on ‘Register’ to join

The Colorado Organic logo may only be used to market Colorado agricultural products that have been certified by a federally accredited organic certification program. This logo does NOT take the place of any labelling standards required by the National Organic Program.

Colorado Cuisine



The Colorado Cuisine logo may be used by restaurants that feature Colorado products on their menu.

For more information about use of the Colorado logos, visit www.coloradoproud.org.

C. Internet Marketing

Many small businesses consider an Internet presence to be an essential part of their business strategy. The Internet and other forms of electronic communication (email or social networking sites such as Facebook) can help direct farm businesses sell to customers who would otherwise be unable to visit the retail operation due to distance, time, or other factors. USDA's Agriculture and Marketing Service (AMS) has published an informative brochure, **How To Direct-Market Farm Products on the Internet**,⁵⁸ that explains many issues related to Internet marketing of farm products. The brochure encourages farm businesses to identify Internet marketing goals (save time, save labor, increase market access, provide customers information) and to research the potential market before setting up a website. Other things to consider are the cost and feasibility of shipping products and loss of personal interaction (which may be precisely what customers are looking for when buying from a direct farm business).

In addition to setting up a webpage or sending customers email, a direct farm business may list itself on some local or national online farm business directories such as **Colorado MarketMaker**⁵⁹ or one of the other resources the Colorado Department of Agriculture makes accessible through their website,⁶⁰ such as the Colorado Farm Fresh Directory. These directories help farmers disseminate information on their products and reach consumers as well as commercial retailers or businesses such as restaurants. Although the Internet's flexibility as a marketing tool makes it an attractive option for direct farm businesses, farmers should be aware of several important legal issues that may arise in the context of doing business on the Internet.

⁵⁸ Available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3101222>

⁵⁹ <http://co.marketmaker.uiuc.edu>

⁶⁰ coloradoagriculture.com

Shipping Products

If the farm's products can be shipped by mail, a website that allows customers to place orders online can be an important aspect of the direct farm business. Sending perishable goods through the mail, however, can be costly and requires careful packaging. If food needs to be shipped cold, the USDA recommends shipping with dry ice, foam coolers, and polyethylene film to provide additional insulation. The package should contain clear labels that say "contains dry ice" and "keep refrigerated," and it should be shipped by the fastest means possible - preferably overnight. The USDA advises consumers to make sure that the food temperature is below 40 degrees Fahrenheit when it arrives. The USDA also provides a helpful **guide of safe handling times**⁶¹ for a large variety of mail-order foods. Keep in mind that shipping food out of state may subject the business to federal laws the operation may not otherwise have to comply with.

The Federal Trade Commission's (FTC) Mail or Telephone Order Merchandise Rule (16 C.F.R. Part 435) also applies to sales made over the Internet. The Rule regulates shipment promises, unexpected delivery delays and customer refunds. To comply with the Rule, a seller must have a reasonable basis for promising shipment within a certain time frame. If online advertising does not specify the shipment period, the seller must have a reasonable basis for believing that they can ship within 30 days. If shipment cannot be made within the promised time period, then the seller must notify the customer of the delay and provide the customer with the option of cancelling the order and receiving a full refund. Sellers who cannot fill an order have the right to cancel, but must notify the customer of the cancellation and refund payment to the customer in full.

Protecting Customers' Personal Information

If a business allows consumers to enter personal information into its website, the FTC requires that the business have a plan to safeguard that information. There are no specific requirements that a business information security plan must follow. Adequate safeguards depend on various factors, such as the size and nature of the business and the amount and type of information collected on the Internet. The FTC maintains a **website**⁶² to assist businesses in complying with consumer protection requirements.

Email Marketing

Emailing a weekly, monthly or annual newsletter avoids the cost and hassle of printing and sending documents via mail. Short email updates concerning revised hours of operation or seasonality may be a convenient way to communicate with customers. All commercial email from a business to a consumer is regulated by the FTC's CAN-SPAM Act (15 U.S.C. § 7701 *et*

⁶¹ Available at <http://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/safe-food-handling/mail-order-food-safety/>

⁶² <http://business.ftc.gov/>

seq.). When sending commercial emails, the “from” and “to” lines and routing information must be accurate and identify who initiated the email, and may not contain deceptive subject lines. The email must give the recipient an opt-out method if they do not wish to receive any more commercial emails from the business. The email must also be identified as an advertisement and include the sender’s valid physical postal address. As a general rule, emails concerning an agreed-upon business transaction or updating the customer on that business relationship are allowed under the Act. Violations of this Act can result in significant fines.

Taxation of Internet Sales

To the extent that internet sales are allowed, determining the taxes owed can be complex. For the most part, however, Colorado direct farm businesses will need to collect state and local sales taxes if an internet sale takes place in Colorado or the product is delivered to a Colorado address. The local tax rate to be applied depends upon where the order is accepted.

A U.S. Supreme Court decision prohibits states from requiring out-of-state retailers to collect and remit the sales tax for the state where the product is delivered if the retailer has no physical presence in the state (*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). Instead, it is the responsibility of consumers within the state to report and remit the taxes they owe in their own state. Therefore, if a Colorado retailer ships merchandise out of state, it does not have to collect and remit the out-of-state sales tax unless the retailer has some physical presence in that state, like an office or a warehouse (C.R.S. 39-26-102 and 1 CCR 201-4). The Colorado Department of Revenue, Division of Taxation has a guide entitled **Consumer Use Tax**⁶³ that helps explain the use tax.

D. Signage

City and County Signage Requirements

Farmers who operate farm-direct-to-consumer businesses such as U-pick operations and produce stands may wish to create signs directing consumers to their place of business. For the most part, Colorado law delegates the power to regulate commercial signage to local government authorities (e.g., cities, townships, and municipalities). Though signage law varies from city to city and county to county, any sign used for commercial purposes (that is, to advertise a place of business) should follow the law of the municipal or county sign code in which the sign is located. Some local units of government do not have sign codes, in which case there would be no restrictions on the sign, *unless* it is within view of a federal aid highway, which usually requires a permit from the state. However, generally speaking, most municipalities and counties do regulate the placement and content of commercial signs other than billboards (which in turn have their own restrictions). For example, some cities in

⁶³ Colorado Department of Revenue, *Consumer Use Tax*, <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=Revenue%2FREVXLayout&cid=1177017542096&pagename=REVXWrapper>

Colorado, such as Golden (Golden, Colo., Code 18.32) require permits for free-standing, commercial signs, while others require no permit whenever the sign falls within maximum size limitations. Arapahoe County, for example, requires no permit or application for signs not over six square feet. (Arapahoe Cnty., Code 12-302(a)) All jurisdictions in Colorado prohibit signs that interfere with public right-of-ways or easements or restrict the view of traffic.

The inconsistency among local regulations reinforces the need to examine the sign code of the city or county in which the business is located prior to putting up signs to advertise a business, and to contact an attorney for additional guidance if necessary. In any case, a city or county sign code that prohibits off-premises directional signs might create difficulty for businesses in rural or isolated areas away from main highways. As a result, the Colorado Department of Transportation (CDOT) offers the Tourist-Oriented Directional Signing Program (TODS), in which CDOT will make, install, and maintain signs at intersections that direct motorists to local, tourist-oriented businesses. (2 CCR 601-7; C.R.S. 43-1-420(3)) To be eligible for the TODS program, a direct farm business must be oriented towards tourism, with the major portion of their business derived from motorists not residing in the immediate area (50 mile radius) of the business or activity, and be located within 1 mile of the proposed sign if within a municipality or within 15 miles of the proposed sign if in a rural area. Eligible “tourist-oriented” businesses include, but are not limited to, guest ranches, farm markets, and farm attractions. Eligible businesses can apply to have 72” x 18” business plaques as well as 36” x 18” “trailblazers.” A plaque and trailblazer costs \$250 annually per direction, and additional trailblazers cost \$120 annually. The CDOT publishes an informative **brochure**⁶⁴ with more information about the TODS program. Interested businesses may also visit the **CDOT TODS website**⁶⁵.

III. INTELLECTUAL PROPERTY

Marketing a business often involves developing and protecting intellectual property (IP). Intellectual property is basically creations of the mind: inventions, literary and artistic works, as well as symbols, names, images, and designs used in commerce. Specific forms of IP protection include trademarks, patents, copyrights, and trade secrets. Each may be important to the direct farm business in that ownership of the intellectual property gives the right to *prevent others* from doing certain activities without permission. These rights are important because they protect the investment the owner has made in developing the IP. Understanding the basics of IP protection will also help the direct farm business avoid having any actions for violations of IP rights brought against them.

A. Trademarks and Trade Names

Trademarks may be the most useful form of IP for the direct farm business. A trademark is used to distinguish *goods and services* from those manufactured or sold by others – it is the

⁶⁴ http://www.coloradodot.info/library/Brochures/TODS_20051206.pdf/view

⁶⁵ <http://www.coloradodot.info/programs/logos-tods.html>

symbol that customers use to identify a product and equate with goodwill. A trademark can be a name, symbol, sound, or color. It is also possible to register the design, packaging, or other element of appearance so long as the element is both nonfunctional and distinctive. This is known as "trade dress." By contrast, trade names are used to identify a person's *business or vocation*. While there may be some overlap between trade names and trademarks, if a name is used only as a trade name it may not be registered with the USPTO. Courts have held, however, that a trade name may have trademark protection if the business adopts a stylized font and other design features that would set the name apart from regular text.

Registration of Trademarks and Trade Names

Mere use of a particular mark makes it a trademark – the mark does not need to be registered in order to establish rights. However, rights may be limited to the geographic region where the unregistered mark has been used if another business subsequently registers an infringing mark. The older, unregistered mark owner will have superior rights in the region where the mark was being used, and the newly registered mark owner will have superior rights in the rest of the state or country. Therefore, registration is beneficial because it gives notice of the claim of ownership throughout the state or nation, so that the owner can challenge someone else's use of the mark anywhere even if he or she is not currently marketing any products in the region. The symbol for trademark, "TM," may be used whenever rights are asserted, but the use of the federal registration symbol, ®, may only be used after a mark is registered with the USPTO (not while the application is pending).

Trademark registration is available at both the state and federal level. To be valid, the trademark must appear on the goods, their container, or on the displays associated with the goods. Federal registration of a trademark is done through the United States Patent and Trademark Office (USPTO). Federal registration can be costly: \$275-\$325 per mark per class of product (for instance, a sheep farmer wishing to trademark both her wool yarn and artisan cheese would have to file two applications because yarns and cheeses are in different classes). The USPTO also recommends hiring an attorney who is familiar with trademark law, because applicants are expected to comply with all procedural and substantive rules. Despite its cost and complexity, federal registration has several benefits. First, it allows the trademark owner to bring suit in federal court (in addition to state court) and to register the trademark with the United States Customs and Border Protection (CBP) in order to stop the importation of infringing goods into the United States. Second, federal registration protects and ensures the legitimacy of the trademark throughout the country. For more information, including a link to the USPTO's searchable trademark database, visit the **USPTO's trademark website**.⁶⁶

State registration is less expensive and cumbersome than the federal system, but it provides protection only within Colorado. Currently it costs \$30 to file a trademark application with the

⁶⁶ <http://www.uspto.gov/trademarks/index.jsp>

state. Application forms can only be submitted online at the **Secretary of State's website**.⁶⁷ Paper applications are no longer accepted. Colorado also provides a **searchable online database**⁶⁸ of all trademarks, trade names, and businesses registered and filed within the state. Federal trademark registration lasts ten years, state registration lasts five years, and both can be renewed so long as the mark is being used in commerce.

In order to be registered and enforceable, trademarks may not be generic or highly descriptive terms and cannot infringe on an existing trademark. A phrase or slogan commonly used to refer to a category of product, or that merely describes or praises the product, is incapable of being distinctive enough to be used as a trademark. For example, an attempt to register the phrase "the best beer in America" as a trademark for Sam Adams Beer was rejected by the USPTO as too descriptive. Similarly, a court rejected the trademark "Beef Stick" because the term merely described the kind of good and did not distinguish the manufacturer (*Hickory Farms v. Snackmasters*, 509 F. Supp. 2d 716 (N.D. Ill. 2007)). The USPTO will use the "likelihood of confusion test" to determine whether an applicant's mark infringes on an already registered mark. The examiner looks at the similarity of the two marks and the commercial relationship of the products to assess whether consumers are likely to be confused about the source of the product. If the USPTO finds likelihood of confusion, an application will be rejected. This is the same test that courts use when a trademark owner brings a suit asserting infringement of a trademark.

Registering a trademark has two primary advantages. First, as a direct farm business builds a reputation with customers, registration guards against others who might wish to capitalize on the business's success by using or closely mimicking the trademark. Secondly, registration protects the business from infringing upon already-existing registered trademarks. If a business is found to be infringing on another's trademark, it will have to stop using the mark, which could confuse customers. It may also have to pay fines, disgorge profits made from use of the infringing mark, and pay the other side's attorney's fees - all of which could be very costly.

B. Patents

A patent grants the inventor the right to exclude others from making, using, or selling a particular invention in the United States or 'importing' the invention into the United States for a limited period, generally 20 years. In the United States, a patent is issued by the USPTO. To obtain a patent, an invention must be *new* - meaning that it was not known or used by others in the United States or "patented or described in a printed publication in a foreign country" - and it cannot be *obvious*. There are different kinds of patents, but the most common farm-related ones are plant patents and patents on genetically modified plants. Plant patents are also available to someone who has invented or discovered and asexually reproduced a distinct and new variety

⁶⁷ <http://www.sos.state.co.us/biz/FileDocTrademark.do>

⁶⁸ <http://www.sos.state.co.us/biz/BusinessEntityCriteriaExt.do?resetTransTyp=Y>

of plant, other than a tuber-propagated plant or a plant found in an uncultivated state. A plant patent precludes others from asexually reproducing or selling or using the patented plant for 20 years from the filing of the patent application. Plant protection certificates, which are not patents but provide patent-like protection for sexually reproduced seeds and tubers, are available for newly developed plant cultivars. The Plant Variety Protection Office of the USDA's Agricultural Marketing Service issues plant protection certificates. If a direct farm business is licensed to use a patented product, such as genetically modified seed, it should rigorously comply with the licensing agreement. Some companies are very aggressive about enforcing their contracts.

Farmers who believe they have a new and non-obvious process or device should contact a patent attorney for assistance in obtaining a patent. The inventor should keep in mind that obtaining a patent can be very costly and time consuming, and that the potential profitability of the device may not justify pursuing a patent. General information on patents and resources for finding a patent attorney are available on the **USPTO's website**.⁶⁹

C. Copyrights

A copyright protects "original works of authorship fixed in any tangible medium of expression." Although literary works come to mind as examples of copyrighted material, copyright protection in the direct farm business context could extend to categories such as pictures and graphics, sound recordings, movies, and other information related to the direct farm business operation. A copyright does not protect actual ideas or methods, but instead gives the owner certain exclusive rights to the way the copyrighted work is *used*. For example, in many circumstances a copyright owner has the exclusive right to reproduce the work, to make derivative works, and to display the work publicly. The owner also has the exclusive right to authorize others to do the same. Pictures of growing crops or a farmers' market used on the direct farm business website or on promotional material would qualify for copyright protection. On the other hand, unpermitted use of another's pictures (perhaps copied from the Internet) could constitute infringement upon the copyrights of another.

A work does not have to be published or even registered with the Copyright Office to gain protection. Copyrights attach once a work is "created" - that is, once it has been fixed in a tangible medium of expression such as a copy or recording. Even so, registration is important for providing a public record of the copyright claim. Registration also provides significant advantages regarding the enforcement of rights in courts and with Customs and Border Protection. Other information on copyrights, including a searchable database of registrations and up-to-date fee information can be found at the United States Copyright Office's **website**.⁷⁰ The site includes a link to step-by-step instructions on obtaining a copyright.

⁶⁹ <http://www.uspto.gov/web/offices/pac/doc/general/index.html#patent>

⁷⁰ <http://www.copyright.gov/>

D. Trade Secrets

A trade secret is information that companies attempt to keep secret in order to give them an advantage over their competitors. Unlike other forms of intellectual property, there is no federal regulation of trade secrets. Even so, most states, including Colorado, have now adopted statutes modeled after the Uniform Trade Secrets Act; Colorado's provisions are codified at C.R.S. 7-74-101 et seq. Enforceability generally relies on showing two things:

1. the information was secretive enough to give a competitive advantage; and
2. measures were taken to keep others from obtaining or using the information.

Although the agriculture community has traditionally shared innovation, there may be certain trade secrets that provide the direct farm business an important commercial advantage that warrants protection. Typical examples could include a list of regular customers built up over time, a special recipe for apple preserves, or a secret fertilizer method for growing the best vegetables. In such cases, the employer should require employees to sign non-disclosure agreements and/or non-compete agreements. A typical non-disclosure agreement includes a definition of the confidential information, any exclusion from confidential information, the

obligations of the employee to not disclose the information, and a time period in which former employees must maintain the secret. There are exclusions on the scope and duration of non-disclosure agreements, so an attorney may be helpful in drafting a proper enforceable agreement.

ADDITIONAL RESOURCES: Standard Weights and Measures

The Colorado Weights and Measures Act of 1983 has adopted two key resources in their entirety from the National Institute of Standards and Technology.

Handbook 44:

<http://www.nist.gov/pml/wmd/pubs/h44-09.cfm>

Handbook 133:

<http://www.nist.gov/pml/wmd/pubs/hb133-05.cfm>

IV. WEIGHTS AND MEASURES

The Colorado Weights and Measures Act of 1983 (C.R.S. 35-14-101 *et seq.*) applies to all sales of commodities within the state. The statute seeks to ensure accurate measurement and delivery of wholesale and retail commodities by establishing standards for how commodities can be measured or weighed and by certifying the accuracy of scales. The Act incorporates several handbooks, mentioned below, from the National Institute of Standards and Technology, making the information in the handbooks binding law in Colorado. Direct farm businesses must make sure that any

instruments and devices used in commerce for weighing and measuring comply with the provisions of this statute.

Commodities in liquid form must be sold by liquid measure or by weight. All other commodities must be sold by weight, by measure of length and area, or by count (C.R.S. 35-14-112).

The **Handbook 44: Specification, Tolerances, and Other Technical Requirements for Weighing & Measuring Devices**⁷¹ provides extensive information on the weights and measures requirements. For example, the standard weight per bushel for agriculture commodities varies depending on the item.

Pre-packaged commodities must identify on the outside of the package (1) the commodity in the package, (2) the net quantity of the contents in terms of weight, measure or count, and (3) the name and the place of business of the source of the commodity if sold elsewhere than on the premises where it was packed. This and much more information can be found in **Handbook 130: Uniform Laws and Regulations in the Areas of Legal Metrology and Engine Fuel Quality**⁷² under the section entitled Uniform Weights and Measures Law.

Handbook 130 also contains information on commercial weighing and measuring devices. Commercial weighing and measuring devices must be marked with the name of the manufacturer and the serial number and must have been issued a Certificate of Conformance by the National Conference on Weights and Measures (NCWM), which signifies that the device complies with the requirements of the National Institute of Standards and Technology's Handbooks. To find out if a device is certified by the NCWM, enter the requested criteria into the **NTEP Certificate Database Search**.⁷³

Inspectors from the CDOA, Inspection and Consumer Services Division may make inspections of commercial weighing and measuring devices at any time in addition to regularly scheduled inspections every year, or more often depending if the agency deems necessary (C.R.S. 35-14-127). The **inspection fees are \$40 per hour**⁷⁴ and the time it takes to inspect a device varies depending on the type of device and distance travelled by the inspector. If the device is found to not be in compliance with the Act, the inspector may order that the device be corrected or confiscated and destroyed. Misrepresentation of weight or quantity, whether intentional or not, may result in substantial fines.⁷⁵

⁷¹ <http://www.nist.gov/pml/wmd/pubs/upload/HB44-09-Combined.pdf>

⁷² <http://www.nist.gov/pml/wmd/pubs/upload/HB130-2009-PDF-FullDoc.pdf>

⁷³ <http://www.ncwm.net/certificates>

⁷⁴ more specific information is available through the CDOA website at http://www.colorado.gov/cs/Satellite/ag_ICSCBON/1251622046405

⁷⁵ CDOA, Division of Inspection & Consumer Services, *Questions & Answers on the Colorado Weights & Measures Law*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadvalue1=inline%3B+filename%3D%22Questions+%26+Answers+on+the+Colorado+Weights+%26+Measures+Law.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822420714&ssbinary=true>

V. CHECKLIST

Have you...

- Addressed contractual issues for your operations? This requires:
 - Understanding terms and consequences of any contracts you have agreed to, both oral and written.
 - Knowing when the law requires you to have a written contract in order to enforce it against the other party.
 - Complying with the formal requirements for the creation of production contracts and requirements/output contracts, if used.
- Developed a marketing plan?
 - Do your current practices comply with FDA and FTC law? Are any methods you are considering likely to create legal problems?
 - Are your products properly labeled?
 - Is your Internet business in compliance with all requirements for shipping products, protecting personal information, email marketing, and taxation of goods?
 - Do you have intellectual property you want to protect? Are you infringing on someone else's intellectual property?
- Arranged for state inspection and approval of your scales and measuring devices?

KEY CONTACT INFORMATION

U.S. Department of Agriculture's Agricultural Marketing Service (Farmers' Markets and Local Food Marketing Program)

Ph: (202) 720-8317

U.S. Patent and Trademark Office (Customer Support Center for patents & trademarks)

Ph: (800) 786-9199

U.S. Copyright Office (general questions)

Ph: (202) 707-5959 or (877) 476-0778 (toll free)

CHAPTER 4: TAXATION

Farm taxation rules are detailed, complex, and subject to frequent change. The general information that follows is not a substitute for consulting with a qualified attorney and/or tax professional.

This chapter is organized by the type of tax for which the direct farm business may be liable, such as income, self-employment and employment, sales, excise, and property taxes. Because each direct farm business requires its own particular tax analysis, a thorough discussion of tax liability is beyond the scope of this Guide. The sections in this chapter provide basic information on types of taxes, forms and sources of additional information, but it is important to contact a tax professional for more detailed guidance.

I. REQUIREMENTS AT SET-UP

A. Federal Registration Requirements

A direct farm business may need to obtain a federal employer identification number (EIN) to identify the business entity. If the answer to any of the following questions is yes,⁷⁶ the operation needs an EIN:

- Does the business have employees?
- Is the business operated as a corporation or a partnership?
- Does the business file any of these tax returns: Employment, Excise, or Alcohol, Tobacco and Firearms?
- Does the business withhold taxes on income, other than wages, paid to a non-resident alien?
- Does the business have a Keogh plan?
- Is the business involved with any of the following types of organizations?
 - Trusts, except certain grantor-owned revocable trusts, IRAs, Exempt Organization Business Income Tax Returns
 - Estates
 - Real estate mortgage investment conduits

⁷⁶ These questions are also on the IRS's website: <http://www.irs.gov/businesses/small/article/0,,id=97872,00.html>

- Non-profit organizations
- Farmers' cooperatives
- Plan administrators

B. Colorado Registration Requirements

All businesses whose total gross sales exceed \$1,000 *or* who make any sales from a location other than the seller's home need to register with the Colorado Department of Revenue Division of Taxation and obtain a license.⁷⁷

If a business hires any employees, it must register with the **Colorado Department of Labor and Employment**.⁷⁸ The Labor and Employment chapter of this Guide covers labor and employment requirements in greater detail.

II. TAXATION OF BUSINESS INCOME

A. Federal Taxation (26 U.S.C. Subtitle A)

As noted above, a thorough discussion of the intricacies of business tax is beyond the scope of this Guide. This is particularly true of business income taxes, in which complex rules specific to each type of entity, base income and any deductions and/or credits depend upon the operations of the particular business.

An excellent place to start any research is *Publication 225: Farmer's Tax Guide*. The guide, published by the IRS, is available through the IRS **Agricultural Tax Center website**.⁷⁹ The guide covers tax issues specific to farming, including records, accounting methods, income and expenses, expenses associated with soil and water conservation, asset basis, depreciation/depletion/amortization, gains and losses, disposition of property, installment sales, casualties/theft/condemnation, self-employment tax, employment tax, excise tax, estimated taxes, filing a return, and where to find help. In addition, the website **www.ruraltax.org** covers a wide range of tax issues relevant to farmers and direct farm businesses, including who is a "farmer" for tax purposes, filing dates and estimated tax payments, self-employment taxes, and others.

For information and publications on the taxation of each type of business entity, as well as necessary forms, go to the online IRS **A-Z Index for Businesses**.⁸⁰

⁷⁷ available from http://www.colorado.gov/cs/Satellite/ag_ICSCBON/1251622046405

⁷⁸ <https://secure.cdle.state.co.us/CR100/#QnA>

⁷⁹ <http://www.irs.gov/pub/irs-pdf/p225.pdf>

⁸⁰ <http://www.irs.gov/businesses/small/article/0,,id=154770,00.html>

Sole Proprietorships

Sole proprietorships file taxes along with the owners' income tax using Form 1040. The IRS considers a sole proprietor as self-employed, and also liable for self-employment tax, estimated taxes, social security and Medicare taxes, income tax withholding (if the business has employees), and federal unemployment tax (FUTA). These taxes are imposed on all employers and discussed in detail in Section 4, below.

ADDITIONAL RESOURCES: Federal Taxation

Partnerships

IRS Publication 541 provides a more detailed overview of federal taxation of partnerships.

<http://www.irs.gov/pub/irs-pdf/p541.pdf>

Corporations

IRS Publication 542 outlines some of the basic tax considerations relevant to corporations.

<http://www.irs.gov/pub/irs-pdf/p542.pdf>

Investment Income

Taxation of investment income is covered in IRS Publication 550.

<http://www.irs.gov/pub/irs-pdf/p550.pdf>

Partnerships

Partnerships file Form 1065 to report earnings, but do not pay taxes. Rather, the tax liability "passes through," meaning that each partner pays taxes on her share of the partnership's earnings as part of her personal income taxes. Accordingly, a partner who owns a 70% share in the business would pay taxes on 70% of the partnership's earnings. Each partner must pay taxes on their share of partnership's earnings, even if no distribution is made. For instance, if the partnership reinvests all of the earnings in expanding the business, partners would still pay taxes on their share of the undistributed earnings. Similarly, partnership losses pass through to individuals and are deductible by the individual up to the partner's basis⁸¹ in the partnership.

Corporations

Corporations pay taxes on their profits (and can deduct a certain amount of their losses). Generally, the corporation must make estimated tax payments throughout the year (using form 1120-W). At the end of the year it makes a final calculation and reports its taxes using Form 1120.

As noted in the introduction, shareholders must pay taxes on the corporate profits distributed to shareholders. Corporations may distribute profits in several ways, such as dividend payments, increased stock ownership, changes in types of stock, etc. The IRS considers all of these distributions as taxable income. Of course, if shareholders work for the corporation, a common situation in small corporations, the shareholder/employee must pay individual income taxes on their wages/salary.

⁸¹ Basis, in simple terms, is the value of any capital and property the partner contributed the partnership, subject to adjustment based on various factors.

S corporations

S corporations, except in limited circumstances, do not pay taxes. Instead, earnings and losses pass through to the shareholders, who pay taxes on these earnings based on their individual income level. The earnings are allocated on a per share, per day basis, with shareholders liable for taxes on these earnings even if there is no cash distribution. An S corporation reports earnings and losses on Form 1120S.

Limited Liability Companies (LLC)

Owners of an LLC may elect to organize as a sole proprietorship, partnership, or corporation. If the LLC has one owner, the IRS automatically will treat the LLC as a sole proprietorship unless the LLC elects treatment as a corporation. Similarly, if the LLC has two or more owners, the IRS automatically will treat the LLC as a partnership unless it elects otherwise. The LLC may elect corporate status using Form 8832. Sole proprietorships or partnerships do not have to file Form 8832 unless they wish to be treated as a corporation.

Single-member/owner sole proprietorship LLCs file an individual tax return (1040, Schedule C, E or F). Multiple-member/owner LLCs file a partnership return (Form 1065). LLCs electing corporate treatment file a corporate return (1120 or 1120S).

Cooperatives

Subchapter T of the Internal Revenue Code governs federal taxation of cooperatives. A cooperative, as a non-profit, typically is not taxed, as any earnings pass through to individual patrons of the cooperative. The cooperative reports profits on Form 1120-C and patrons report income on form 1099-patr. For a primer on the federal taxation of cooperatives, the USDA Rural Development maintains a **website**⁸² that contains many publications related to the taxation of cooperatives, including *Cooperative Information Report 23, The Tax Treatment of Cooperatives*, published by the USDA Rural Development program. *IRS Publication 225: Farm Income* also touches on cooperative reporting of taxes.

B. State Taxation

In addition to federal income taxes, the direct farm business is subject to Colorado business income taxes. The Colorado Income Tax Act (C.R.S. 39-22-101 *et seq.*) and corresponding regulations of the Department of Revenue Division of Taxation (1 CCR 201-2) govern income taxation for Colorado direct farm businesses.

Colorado bases its taxes on federal tax structures, although there may be some variations in taxable income based on differences in allowable deductions and credits. Colorado income tax

⁸² <http://www.rurdev.usda.gov/rbs/pub/legal.htm>

is taxed at a flat rate, but the tax a business will pay varies based on the business structure and allowable deductions and credits.

Corporations

Corporations in Colorado pay income tax at a flat rate of 4.63%. Corporations file form 112.⁸³

S-Corporations do not pay the Colorado income tax, which is paid by the shareholders. If the *S* Corporation has non-resident shareholders, the corporation must ensure those shareholders' payment of tax on their Colorado source income.⁸⁴ *S-Corporations* ensure their non-resident shareholders file income tax with Colorado using one of the same three methods outlined in the *Partnerships* section below.

Partnerships

Like at the federal level, partnerships do not pay an income tax. Instead, their income passes through to the partners pro-rata, with the partners reporting the income on their personal tax returns. However, partnerships and *S* Corporations with nonresident shareholders are required to ensure that those nonresident shareholders pay Colorado income tax on Colorado source income. There are three ways partnerships and *S* Corporations can ensure filing on behalf of their nonresident shareholders.

- **Composite Returns** – The company may file a composite return using form 106.⁸⁵ This simplifies the process by eliminating the need for separate tax returns for each nonresident shareholder. The income tax paid will be 4.63% (C.R.S. 39-22-601(2.5)(d), (5)(d)).
- **Nonresident Partner / Shareholder Agreement** – Each nonresident shareholder may fill out form 0107,⁸⁶ which constitutes an agreement to pay Colorado income tax. The form(s) should be collected by the partnership and submitted attached to form 106, Return of Income (C.R.S. 39-22-601(2.5)(f), (5)(f)).
- **Withholding** – If the nonresident shareholder or partner has neither completed and returned form 0107 nor been included in a composite return, the partnership or *S* corporation must withhold 4.63% income tax on the individual's behalf. Withholdings should be remitted to the state with form 0108⁸⁷ (C.R.S. 39-22-601(2.5)(h), (5)(h)).

⁸³ <http://www.colorado.gov/cms/forms/dor-tax/CY112.pdf>

⁸⁴ Colorado Department of Revenue, Taxpayer Services Division, *FYI – For Your Information: Nonresident Partners and Shareholders of Partnerships and S Corporations*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251618275615&ssbinary=true>

⁸⁵ <http://www.colorado.gov/cms/forms/dor-tax/CY106.pdf>

⁸⁶ <http://www.colorado.gov/cms/forms/dor-tax/CY107108.pdf>

⁸⁷ <http://www.colorado.gov/cms/forms/dor-tax/CY107108.pdf>

Cooperatives

The tax code treats cooperatives as corporations generally as long as the cooperative earns a profit. However, most margins (profits) of most local agricultural cooperatives are passed through to member-patrons, in which case each patron files the distributions they receive from the cooperative business on their individual income tax. However, some cooperatives earn margins from non-patron sources. In those instances, the cooperatives file those margins as taxable income in the same manner as a corporation.

III. EMPLOYMENT AND SELF EMPLOYMENT TAXES

This section provides brief summaries of the taxes employers must withhold. For more comprehensive information, see *IRS Publication 15: Employers Tax Guide*, which contains instructions on the intricacies of withholding federal taxes from employees' wages. *Publication 51: The Agricultural Employer's Tax Guide*, covers common issues that arise in the agricultural context, such as social security numbers (which prove an employee is authorized to work in the United States) versus individual taxpayer identification numbers (which look similar to SSNs, but are given to aliens who *are not* authorized to work in United States). Federal laws governing employment taxation are in Subtitle C of Title 26 of the U.S. Code, with implementing regulations in Part 31 of Title 26 of the Code of Federal Regulations. The Colorado Income Tax Act is located at C.R.S. 39-22-101 *et seq.*

A. If the Direct Farm Business Has Employees

Employers are responsible for withholding and submitting federal and state employment taxes on behalf of their employees. Federal employment taxes to be withheld include the Federal Income Tax and Social Security/Medicare (FICA) taxes; employers must also withhold Colorado income tax.

A direct farm business must open a Colorado Sales Tax Wage Withholding Account by filling out the application using form CR 0100, **available online**.⁸⁸

Employee Income Taxes

Withholding federal income taxes from employees entails obtaining a W-4 form from each employee that indicates what withholding allowances they qualify for and what class (e.g., single or married) they fall into. The employer uses this information to calculate the employee's tax rate using the IRS's withholding tables, which are available in *IRS Publication 15-T*. The IRS bases withholdings on base pay, as well as supplemental wages (such as overtime pay) and fringe benefits (for instance, providing farm employees with fresh produce or other farm products to satisfy their weekly grocery needs). The IRS excludes some fringe benefits, such as the *de minimis* exception that covers small benefits for which it would be inconvenient and

⁸⁸ <https://www.colorado.gov/apps/jboss/cbe/file-manually.xhtml>

unreasonable to have to keep an accounting of (for instance, allowing employees to occasionally take home small quantities of produce). If an employee is a non-resident alien, the employee must register as single (even if married) and the employer must adjust the calculation of the taxable income for each pay period. Some employees may qualify for an exemption from income tax withholding if they did not owe taxes in the previous year and do not expect to owe taxes the next year. Such employees should indicate this on their W-4. Employers must report and remit taxes either bi-weekly or monthly, depending on tax liabilities from previous years. Which form to use (941, 944 or 8901) depends on the amount of taxes deposited.

If an employer must withhold federal taxes, they will also most likely have to withhold Colorado income taxes. Employers must submit a copy of the federal W-4 form to the Colorado Department of Revenue for each employee who is expected to earn more than \$200 per week. These forms should be accompanied by a cover letter stating the employer's name, address, Federal Employer Identification Number, and withholding allowance certificates.⁸⁹ If the employee is not a resident of Colorado, the employer probably also needs to withhold income taxes for the employee's resident state. A direct farm business will need to remit income tax withholdings to the state either seasonally, quarterly, monthly, or weekly depending upon the nature of the business and the amount of withholdings that were collected in the previous calendar year.

Social Security and Medicare Taxes

Social Security and Medicare taxes pay for employees' benefits upon retirement. These taxes are known collectively as Federal Insurance Contributions Act taxes, or "FICA" taxes. Social Security and Medicare taxes have different rates, and the Social Security Tax has a wage base cap--a maximum limit on the wages subject to the Social Security tax. The employee pays the tax from his/her wages, and the employer makes a matching payment. Form 943 is used to file income taxes and FICA taxes withheld for farm workers. Employers deposit these taxes on a weekly or monthly basis, depending on the total taxes reported for a two year lookback period (e.g., the lookback period for 2013 extends to 2011).

Unemployment Insurance Taxes

Almost every employer pays unemployment taxes. Although an employer must pay both federal and state unemployment insurance taxes, paying the Colorado unemployment taxes may allow an employer to receive credit towards some of the federal unemployment tax. The Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.) and the Colorado Employment Security Act (C.R.S. 8-70-101 et. seq.) govern whether agricultural operations must pay an unemployment insurance tax on cash wages paid to employees.

⁸⁹ W4 forms and cover letters should be mailed to Colorado Department of Revenue, Discovery Section, 1375 Sherman Street, Room 634, Denver, CO 80261. Source: *FYI Withholding 5: Colorado Wage Withholding Tax Requirements* <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251802383986&ssbinary=true>

An agricultural operation is considered an employer subject to the federal and state unemployment insurance laws if: during any calendar quarter in the calendar year or preceding calendar year the operation (a) paid wages of \$20,000 or more for agricultural labor, or (b) the farmer employs 10 or more individual employees for some portion of a day during each of 20 different calendar weeks (26 U.S.C. § 3306(a)(2); C.R.S. 8-70-120).

The federal tax is paid using Form 940, with deposits generally required quarterly. The 2012 tax rate was 6.0% of the first \$7,000 paid to each employee, but there is a credit of up to 5.4% for paying state unemployment taxes. *Publication 51: Agricultural Employer's Tax Guide* describes federal unemployment taxes.

A Colorado employer subject to the *Unemployment Security Act* must pay contributions on its taxable payroll, known as premiums, for the entire year that the employer is subject to the tax (C.R.S. 8-76-101). Initially, a new business must register with the Colorado Department of Labor and Employment. Many businesses are able to register online,⁹⁰ but most agricultural businesses must submit form UTL-100⁹¹ either by mail or in person because of the unique nature of agricultural businesses. When quarterly labor reports are made, a payment should be submitted for the corresponding premiums. When a new business begins paying premiums, the premiums will be calculated using a standard rate, depending on the type of industry. After a sufficient number of quarterly premiums have been paid, the business may become eligible for a computed rate based on claims filed.⁹² More information about how premium rates are calculated is available through the Department of Labor and Employment's website.⁹³

B. Farmers Who Are Self-Employed

Many farmers are self-employed. The self-employment tax is a Social Security and Medicare tax paid by persons who work for themselves. Farmers carrying on the direct farm business as a sole proprietor or member of a partnership, or who are otherwise in business for themselves, are "self-employed" and must pay self-employment tax if their earnings are \$400 or more. The self-employment tax rate for 2013 is 15.3% (12.4% for Social Security and 2.9% for Medicare) on the first \$113,700, and 2.9% on any additional income. Income subject to the Social Security Tax is capped, and 50% of the self-employment tax due is deductible from total income on Form 1040. Individuals must report self-employment taxes on Schedule SE. The IRS's *Farmer's Tax Guide*⁹⁴ provides additional details regarding the self-employment tax rules.

⁹⁰ <https://www.colorado.gov/apps/jboss/cbe/>

⁹¹

<http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251819768727&ssbinary=true>

⁹² C.R.S. 8-76-101 *et seq.*

⁹³ <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=CDLE-UnempBenefits%2FCDLELayout&cid=1251588740471&pagename=CDLEWrapper>

⁹⁴ Available online at <http://www.irs.gov/pub/irs-pdf/p225.pdf>

IV. SALES AND SERVICES TAXES

Direct farm businesses that sell food and/or other goods to customers are responsible for collecting state and local sales and services taxes (as discussed below). Direct farm businesses that purchase goods may be responsible for paying sales tax, but in some instances the purchases will be exempt.

A. Sales Tax

Sales tax is levied on a business's receipts from the sale of tangible personal property and services to purchasers for use or consumption. Sales tax is an amount due to the state on each purchase or service made. The vendor must collect the tax and is responsible for remitting the amount to the state (C.R.S. 39-26-105). Sales tax is imposed on a business's receipts from the sale of goods used or consumed by consumers, which the business then imposes on consumers that purchase items for personal use or consumption from a business. Sellers owe sales tax, but they reimburse themselves by collecting the sales tax from the consumer.



The Emergency Retail Sales Tax Act of 1935 (C.R.S. 39-26-101) and Department of Revenue Taxpayer Service Division's Sales and Use Tax regulations (1 CCR 201-4) governs sales taxation in Colorado.

Licensing

All businesses need to apply for a Colorado Sales/Use tax license before starting to sell merchandise in the state (C.R.S. 39-26-103(1)(a)). Application and registration are done online⁹⁵ or by completing Form 0100⁹⁶ by mail or in person. This is the same form direct farm businesses file if they are withholding income tax for employees. Businesses that need to apply for income tax withholding and a sales tax license do not need to submit two separate forms; one properly completed form is adequate for both. Businesses with a permanent retail location, such as a farm shop or an on-farm stand, require a standard license, which costs \$16 every two years. Additionally, there is a one-time \$50 fee. This license fee is refunded as a \$50 credit towards state sales tax that becomes due. Businesses that sell goods at fairs, festivals, or bizaars also may be required to obtain a special event license. The fee for a single special event license is \$8, and the fee for a multiple-event license is \$16. However, the fee for a single event license may be waived for businesses that already have a standard license. In addition, special event

⁹⁵ <https://www.colorado.gov/apps/jboss/cbe/>

⁹⁶ <https://www.colorado.gov/apps/jboss/cbe/file-manually.xhtml>

licenses are not required for events that take place regularly, like swap meets.⁹⁷ If a business sells products at a farmers' market that occurs at the same location every week or every month, it is likely the business does not need a special event license, but the owner should check with the market organizers or an attorney to make sure. The CDOR has a helpful publication entitled **Sales Tax Requirements for Flea Market and Swap Meet Operators**⁹⁸ that may help direct business owners understand the licensing requirements for their farmers' market stand.

Businesses that sell goods or services must purchase a license and pay sales tax, but there are some exemptions that may apply to direct farm business owners. Wholesalers, defined as persons who sell exclusively to retail merchants, jobbers, dealers, or other wholesalers for the purpose of resale are not required to pay the \$50 deposit to obtain a Colorado sale/use tax license (C.R.S. 39-26-103(8)). While this would be applicable to farmers who only sold their goods to stores or similar operations, the direct farm business owner that sells his or her products to the end consumer, such as a Community Supported Agriculture (CSA) operation, U-pick, or roadside stand would need to be licensed. Additionally, entities defined by the tax code as small home businesses are not required to obtain a sales tax license. (C.R.S. 39-26-103(9)(d)) If your business is expected to do less than \$1000 in total sales in its first year and all the sales are made out of your home, you may not need to obtain a license or submit form 0100. You are, however, still expected to pay applicable sales tax by reporting any sales made on your personal income tax form (*Id.*).

Who Pays?

Persons engaged in the business of selling tangible personal property in Colorado to purchasers for use or consumption must pay sales taxes on every retail sale. This tax must be paid on the purchase price paid or charged upon all sales and purchases of tangible personal property at retail, with some exceptions, known as exemptions (C.R.S. 39-26-104).

Several important sales tax exemptions may be relevant to sales made by the direct farm business. The sale of food for domestic home consumption is exempt from taxation (1 CCR 201-4). Foods for domestic home consumption means any substances that are sold for ingestion by humans and are consumed for their taste or nutritional value (7 USCS § 2012; 1 CCR 201-4). There is an important distinction between the sale of foods for domestic home consumption, which are not taxed, and the sale of prepared foods, which are taxed. Prepared foods include any food that is marketed by the seller for immediate consumption of the consumer (1 CCR 201-4). This means most fruit, vegetables, or baked goods that are intended for the consumer to take home and cook with would not be taxed, while prepared meals would be. The Department of

⁹⁷ Colorado Department of Revenue Taxpayer Service Division, *FYI Sales 9: Sales Tax Licenses and Filing Requirements*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251763672554&ssbinary=true>

⁹⁸ <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251763672429&ssbinary=true>

Revenue has published some **guidelines**⁹⁹ to help sellers and consumers determine whether food is considered prepared and subject to tax or for domestic home consumption and exempt from Colorado sales tax.

Other exemptions may also be relevant to the direct farm business owner. Specific agricultural exemptions are useful for when the direct farm business has to purchase goods for the business. Agricultural items that are exempt from Colorado sales tax includes farm tractors and implements of husbandry not licensed for highway use, dairy equipment (C.R.S. 39-26-716), any leased equipment so long as the lessor paid Colorado sales tax upon acquisition of the equipment (C.R.S. 39-26-713), energy used for agricultural or industrial uses including fuel and electricity (C.R.S. 39-26-715), agricultural pesticides (C.R.S. 39-9-101), compounds administered to livestock including any medications, growth regulators, or semen (C.R.S. 39-26-716(2)(d)).

The duty to prove tax-exempt status lies with the purchaser. The vendor is responsible for ensuring that the purchaser is indeed exempt for paying sales tax. If there is a dispute as to the tax exempt status of a purchaser, the vendor should collect the sales tax and the purchaser should pay it.¹⁰⁰ Subsequently, the purchaser may apply for a refund of the sales tax from the state using form DR0137.¹⁰¹ If a purchase is exempt from sales tax because it is a purchase for later resale, the vendor should validate the sales tax account number provided by the purchaser. If the purchase is made by a tax exempt organization, the purchaser is required to show a copy of an exemption certificate to the vendor. If the purchase is over one hundred dollars, it must be made using the exempt organization's check or credit card (C.R.S. 39-26-704).

Computing and Paying the Sales Tax

When a business files for a license, the Department assigns a filing frequency of either monthly, quarterly, or annually. Businesses are required to then file reports and remit the payments to the state (1 CCR 201-4 (26-109)).

The state sales tax rate is 2.9% (C.R.S. 39-26-106). Local governments (townships, counties, cities) may charge additional taxes on sales. Many local governments charge additional sales and use taxes that are collected by the state along with the state sales tax. Other city or county governments known as Home Rule jurisdictions, collect their own sales tax. Accordingly, the direct farm business should contact localities to determine what additional rates may apply and

⁹⁹ Colorado Department of Revenue Taxpayer Service Division, *FYI Sales 4: Taxable and Tax Exempt Sales of Food and Related Items*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251763438986&ssbinary=true>

¹⁰⁰ Colorado Department of Revenue Taxpayer Service Division, *FYI Sales 1: How to Document Sales to Retailers, Tax-Exempt Organizations and Direct Pay Permit Holders*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251757042309&ssbinary=true>

¹⁰¹ <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251794189062&ssbinary=true>

how payment should be remitted. **The sales and use tax rates effective January 2013¹⁰²** are available through the Colorado Department of Revenue's website.

V. EXCISE TAXES

An excise tax is a tax levied on the purchase of a specific good. The most common excise tax that a direct farm business may encounter is the motor fuel excise tax. Under both federal and Colorado statutes, certain uses of fuel, such as farm use, are nontaxable. The user therefore may be able to seek a credit or refund of the excise tax paid for fuel.

A. Federal Fuel Excise Taxes

The Internal Revenue Code (26 U.S.C. §§ 4081 and 4041) and regulations (26 C.F.R. §§ 48.6420-1 and 48.4041-9) govern federal fuel taxation. *IRS Publication 510: Excise Taxes* and *IRS Publication 225: Farmer's Tax Guide* explain fuel excise taxes, as well as which uses of fuel qualify for tax credits and refunds. Fuel used on a farm for farming purposes and fuel used for off-highway business purposes are exempt from excise taxes. Farmers may claim the tax as a credit at the end of the year or obtain quarterly refunds of the tax, depending on how the fuel was used. To substantiate claims, the IRS requires businesses to keep certain records, such as the name and address of the person who sold the fuel.

The term "farm" includes operations such as livestock, dairy, fish, poultry, fruit, fur-bearing animals, and truck farms, orchards, plantations, ranches, nurseries, ranges, and feed yards, as well as greenhouses used primarily for raising agricultural or horticultural commodities. "Farming purposes" include cultivating crops, raising livestock or other animals, operating and maintaining the farm and its equipment, handling and storing raw commodities, and caring for trees if they are a minor part of the overall farm operation. Fuel used for aerial spraying also qualifies for an exemption, including fuel used to travel from the airfield to the farm. Non-farm uses that *are subject to the excise tax* include fuel used off the farm such as on the highway for transportation of livestock, feed, crops or equipment; fuel used in processing, packaging, freezing, or canning operations; and fuel used in processing crude maple sap for syrup or sugar. Taxes paid for fuel used on the farm may be claimed as a tax credit at the end of the year by using Form 4136.

The IRS also exempts fuel used off-highway in a trade, business or income producing activity. This exemption does not apply to fuel used in a highway vehicle registered or required to be registered for use on public highways, including boats. Nontaxable uses in this category include fuels used in stationary machines such as generators, compressors, power saws and similar equipment; fuels used for cleaning purposes; and fuel for forklift trucks, bulldozers, and earthmovers. Some fuels that would not otherwise qualify for the farming exemption may qualify for this exemption - fuel used to boil sap into syrup, for example. A

¹⁰² <http://www.colorado.gov/cms/forms/dor-tax/dri1002.pdf>

business can recoup excise taxes on fuel used off highway for business purposes either by claiming a credit (using Form 4136) or a refund. Taxpayers use Form 8849 and Schedule 1 (which details the federal excise tax rates) to claim a refund of excise taxes paid on fuel used off-highway for business purposes. Taxpayers that pay over \$750 in excise taxes in one quarter can claim a refund at the end of a quarter rather than waiting until the end of the year. Claims not exceeding \$750 in one quarter can carry over to the next quarter, because the amount claimed on Schedule 1 must be at least \$750.

B. Colorado Fuel Excise Taxes

Colorado law provides an exemption from sales tax on purchases of fuel made in Colorado that is not used for powering a motor vehicle on a public highway. If purchased fuel is used for certain purposes, purchasers can apply for a refund from the state. Agricultural purposes qualify for the refund, so long as the equipment is operated off of public highways (C.R.S. 39-27-103(3)(a)). In order to receive a refund, you must first obtain a refund permit and account. To apply for the permit and account, fill out form DR 7189.¹⁰³ When the Colorado Department of Revenue receives and approves the form, they provide the owner with an exemption certificate and information about the percent of excise tax for which the business is entitled to a refund. Refund amounts are determined by the use of the fuel. The Department of Revenue mails a Fuel Tax Refund Claim Form every quarter.¹⁰⁴ The form is pre-printed with the name, and the percentage of the tax the business is entitled to claim. Refund claims cannot be filed more than once per quarter, and refunds cannot be claimed for fuel purchased more than 12 months ago.

VI. PROPERTY TAXES

Direct farm businesses must pay local property taxes each year on real property owned by the business.

The Colorado Property Tax Code (C.R.S. 39-1-101) governs property taxation in Colorado. Property taxes are paid based on the assessed value of the property, and revenue collected remains within the county in which it was collected. The taxes are based on an assessment of the actual value of real and personal property. The assessment on real and personal property is only applied to a portion of the fair market value of the land. The portion that is applied is determined by the tax rate, which varies based on the classification of the property. Generally, agricultural land is taxed at a rate of 13%, and the value is calculated based on the landlord's income over the past ten years (Colorado Constitution, Article X, § 3(1)(a); C.R.S. 39-1-103

¹⁰³ Available online at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251799222726&ssbinary=true>

¹⁰⁴ A copy of Form DR 7118 is available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251754163101&ssbinary=true>

(5)(a)). However, building improvements and atypical land uses are often appraised differently and taxed at a different rate.

The process for determining the actual value of property can be complex, and varies with the type of property being assessed. In some situations, local governments may have additional rates for some types of property. The property owner will receive a property tax bill from the county assessor as soon after January 1 as possible for the preceeding year. For bills of \$25 or less, the bill will be due on April 30. Bills for more than \$25 may be paid in full by April 30, or they may be paid in two equal installments, the first of which must be remitted by the first day of February and the second of which is due by June 15. If a property owner has reason to believe that his or her property was assessed unfairly or would otherwise like to appeal, a notice of appeal of the determination of value of real property should be mailed to the local county assessor no later than June 1, and the assessor will make a decision about the protest by the last working day in June. For more detailed information about how agricultural property is valued and subsequent taxes are assessed, see the **Land Valuation Manual**¹⁰⁵ published by the Colorado Division of Property Taxation. For a more concise overview of the valuation process and information on the right to an appeal, see the *Understanding Property Taxes in Colorado brochure* published by the Department of Local Affairs Division of Property Taxation.¹⁰⁶

¹⁰⁵ Colorado Department of Local Affairs Division of Property Taxation, *Land Valuation Manual*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadvalue1=inline%3B+filename%3D%22ARL+Volume+3+April+2013.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251854161710&ssbinary=true>

¹⁰⁶ Colorado Department of Local Affairs Division of Property Taxation, *Understanding Property Taxes in Colorado*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadvalue1=inline%3B+filename%3D%22Understanding+Property+Taxes+in+Colorado.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251847847682&ssbinary=true>

VII. CHECKLIST

Have you...?

- Obtained an Employer Identification Number from the Internal Revenue Service?
- Obtained the necessary forms and established proper taxing procedures for your business entity?
- Obtained the appropriate forms and established good record keeping procedures for:
 - income, Medicare and social security tax withholdings?
 - filed with the state for unemployment tax registration?
 - collection and remission? Don't forget about local sales taxes on top of the state's!
 - fuel excise tax reimbursements and credits?
- Looked up your land's assessed value and calculated your current property taxes and how changed land uses could alter the tax value? Or contacted the Department of Revenue for assistance in calculating your agricultural land's value?

KEY CONTACT INFORMATION

U.S. Internal Revenue Service (general help)

Ph: (800) 829-1040 (assistance for individuals)

Ph: (800) 829-4933 (assistance for businesses)

To find a local Taxpayer Assistance Center (which offer face-to-face tax assistance), visit <http://www.irs.gov/localcontacts/index.html> (zip code search).

Colorado Department of Revenue, Division of Taxation

Ph: (303) 238-SERV (7378)

To find a local Taxpayer Service Division location, visit <http://www.colorado.gov/cs/Satellite?c=Page&cid=1222771311277&pagename=Revenue%2FREVXLayout>

CHAPTER 5: LABOR AND EMPLOYMENT

Several federal and Colorado laws address labor and employment issues in the agricultural context. This chapter is meant to provide an overview of fair labor standards, migrant and seasonal workers protections, occupational health and safety, workers compensation, and employee liability. These are only some of the employment issues a direct farm business might encounter. The information contained on these pages should not be understood as all-inclusive, and in all situations an attorney should be consulted regarding compliance with labor and employment laws applicable to a specific operation.

I. FAIR LABOR STANDARDS

A. *The Fair Labor Standards Act*

The Fair Labor Standards Act (FLSA) (29 U.S.C. Chapter 8) is the federal law that establishes minimum wages (currently \$7.25, but see Colorado below) and maximum hours worked per week (40 hours, over which amount employees must be paid time and a half), and prohibits employment discrimination and child labor (29 U.S.C. §§ 206; 207; 206; 212, respectively).

However, *there are exceptions to these laws for agricultural employees* (29 U.S.C. § 213; 29 C.F.R Part 780). To qualify for the exceptions, the employee's activity must fall under the Act's definition of agriculture, which is "farming in all its branches and among other things includes the cultivation and tillage of soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities. . . the raising of livestock, bees, fur-bearing animals, or poultry, or any practices (including forestry or lumbering operations) performed by a farmer or on a farm *as incident to or in conjunction with* such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market" (29 U.S.C. § 203(f), emphasis added).

The Department of Labor divides the definition into two branches: primary agriculture and secondary agriculture (29 C.F.R. § 780.105). The primary definition includes farming in all its branches and the specific farming operations enumerated in the definition above (*id.*). These activities always qualify for the agricultural exemption, regardless of the employer's purpose in performing the activities (for instance, a factory owner operates a farm for experimental purposes for the factory) (29 C.F.R. § 780.106). The secondary meaning of "agriculture," which encompasses operations that do not fall within the primary meaning of the term, requires that work be " . . . performed by a farmer or on a farm as an incident to or in conjunction with such [primary agriculture] farming operations . . ." (*id.*). Analysis of whether the work is performed "by a farmer" (29 C.F.R. §§ 780.130-780.133) or "on a farm" (29 C.F.R. §§ 780.134-136) and is "incidental to or in conjunction with" the primary agricultural farming operations (29 C.F.R. §§780.137-780.157) is complex and highly fact specific. If employees are doing work that may be

“incidental or in conjunction with” the primary farming activity, or doing work off the farm, or performing work on another farmer’s products, the employer should consult an attorney or contact the local U.S. Department of Labor’s Wages & Hours division before relying on the agriculture exemption to the FLSA. Contact information is available on the Department of Labor **website**.¹⁰⁷ For more general information, the U.S. Department of Labor maintains an agriculturally oriented **compliance webpage**.¹⁰⁸

Minimum Wage & Overtime Exceptions

Agricultural employees are always exempt from federal *overtime* requirements (29 U.S.C. § 213(b)(12)). The agricultural exemption applies on a workweek basis. An employee who performs any activities that do not qualify under the definition of agriculture would not be exempt from FLSA rules (under the Agricultural Labor Exemption) for that workweek (29 C.F.R. § 780.10). The Act also exempts from the overtime requirements a significant number of agricultural-related activities, including (1) drivers or driver's helpers making local deliveries if the employee is compensated on a per trip basis; (2) agricultural employees who are also employed in affiliated livestock auctioning; (3) employees involved in the processing of maple sap into sugar or syrup; (4) employees engaged in the transportation of fruits or vegetables from the farm to the place of first processing or first marketing within the same state; and (5) employees who transport other employees to any point within the same state for the purpose of harvesting fruits or vegetables (29 U.S.C. §§ 213(b)(11), (13), (15), & (16)).

Agricultural employees (as well as fishing and fish farming employees) are exempt from *both the federal minimum wage and overtime* requirements if any of the following apply (29 U.S.C. § 213(a)):

- the employer did not use more than 500 man-days¹⁰⁹ of labor during any quarter of the preceding year;
- the employee is an immediate family member;
- the employee is a hand laborer paid on a piece-rate basis who commutes from his/her home each day and was not employed in agriculture more than 13 weeks in the preceding year;
- the employee is a family member under the age of 16 working on the same farm as the parent or surrogate parent who is paid on a piece-rate basis and is paid at the same rate as those over 16; OR
- the employee is principally engaged in the production of range livestock.

¹⁰⁷ <http://www.dol.gov/whd/america2.htm#Colorado>

¹⁰⁸ <http://www.dol.gov/compliance/topics/wages-agricultural.htm>

¹⁰⁹ A “man day” is defined as any day where any employee performs agricultural work for at least one hour.

B. Federal Child Labor Laws

Generally, children must be at least 16 years old to work on a farm during school hours (29 C.F.R. § 570.2). During non-school hours, children who are 14 can work on a farm, and 12 and 13-year-olds may work on a farm either with parental consent or when working on the farm with the parent. Children under 12 may only work on their family's farm or on a farm that is exempt under 29 U.S.C. § 213(a)(6) (29 U.S.C. § 213(c)(1)). Children under the age of 16 cannot work in a particularly hazardous agricultural position, except when employed by their parents on a farm that is owned or operated by their parents (29 U.S.C. § 213(c)(2)). Hazardous positions include, but are not limited to, operating large farm machinery, working in enclosed spaces with dangerous animals (studs and new mothers), working from a ladder or scaffold more than 20 feet high, working inside certain spaces such as manure pits, and handling hazardous farm chemicals. The full list is available at 29 C.F.R. § 570.71.



Under very limited circumstances, 10- to 12-year-olds can be employed off of the family farm for hand harvesting, but an employer must apply for a waiver and demonstrate that the industry seeking to employ the children will suffer severe disruption without the child labor (29 U.S.C. § 213(c)(4); 29 C.F.R. §§ 575.1-575.9).

C. The Colorado Minimum Wage Law

The Colorado Minimum Wage Order Number 29 (CWO) (7 CCR 1103-1) sets the minimum wage higher than federal law. The current rate is \$7.78 per hour for persons 18 years of age or older, but an employer can pay 15% less than the minimum wage to unemancipated minors under 18 or those with a certified physical disability (7 CCR 1103-1). Colorado's minimum wage typically increases incrementally each year, as the state constitution mandates that the wage is adjusted annually for inflation (Colorado Constitution, Article XVIII, § 15). The CWO applies to anyone who receives federal minimum wage, as well as the retail and service, commercial support service, food and beverage, and health and medical industries generally. (7 CCR 1103-1(1)) Although the CWO does not apply specifically to employers in the agriculture industry who are exempt from federal minimum wage, many direct farm businesses will be subject to the regulation as part of the retail and service or food and beverage industry. Determining exactly which businesses are covered under the CWO is a complicated matter. To make it even more complex, specific exemptions remove some businesses, although the general

industry may be covered. The Colorado Department of Labor and Employment has more information on its **website**¹¹⁰ that may be helpful.

D. The Colorado Child Labor Law

The Colorado Youth Employment Opportunity Act (CYEOA)(C.R.S. 8-12) has prohibitions similar to the FLSA for agricultural child labor. However, the Colorado standards are generally less protective than the federal standards. When state law differs from federal law, an employer must comply with the more protective standards. Therefore, this Guide does not detail the Colorado child labor rules.

However, for agricultural business in particular, there are some instances where the CYEOA will govern. This is because Colorado *does not* exempt agricultural employment from regulation in the same way that the federal government does (C.R.S. 8-12-104). Generally speaking, if a direct farm business has employees, other than the business owner's own children, the exemption from federal child labor law does not apply to Colorado State law, meaning that the CYEOA regulations must be adhered to. The provisions of the CYEOA are similar to those in the federal law, discussed in section B, above. The key differences between the two are highlighted on the Colorado Department of Labor and Employment's **website**.¹¹¹

II. OCCUPATIONAL HEALTH AND SAFETY

A. Occupational Safety and Health Act

The federal Occupational Safety and Health (OSH) Act (29 U.S.C. Chapter 15) and implementing regulations (29 C.F.R. Parts 1900-2009) establish safety and health standards for agricultural employees. The Act does not cover self-employed persons or farms that employ only the farmer's immediate relatives. The funding appropriations bill for 2012 (as well as appropriations bills for the past 33 years) prohibits the Occupational Safety and Health Administration (OSHA) from spending any funds on enforcement against farms that have fewer than ten employees and have not had a *temporary labor camp* in the previous 12 months (OSHA Directive CPL 02-00-051). This means that the law and regulations technically apply to small farms, but functionally, there is nothing OSHA can do if a small farmer fails to comply with the rules.

In Colorado, the Occupational Health and Safety Surveillance Program serves to monitor workplace injuries, illnesses, and fatalities within Colorado. The information collected helps Colorado implement plans to help make workplaces safer, but the program does not implement or enforce any regulations. Colorado is a federal OSHA state, meaning that it relies completely on the federal government's jurisdiction over private employers. Because of the funding appropriations bill, farms with fewer than 10 employees are technically outside the class of

¹¹⁰ <http://www.colorado.gov/cs/Satellite/CDLE-LaborLaws/CDLE/1251566756224>

¹¹¹ <http://www.colorado.gov/cs/Satellite/CDLE-LaborLaws/CDLE/1251566742206>

employers against whom OSHA can be enforced. However, some direct farm businesses may be subject to enforcement of the regulations even if they have fewer than ten employees, especially if any of the employees perform work outside the scope of normal farm work, such as selling food products at retail or giving tours of a farm.

Even if a direct farm business owner is free from federal enforcement, it is still a good idea to make the workplace a safe environment and use the federal standards as a minimum in order to reduce the risk of workplace injuries.

29 C.F.R. Part 1928 lists most of the OSHA regulations for farms. The regulations require roll-over protective structures for tractors, protective frames and enclosures for wheel-type agricultural tractors, safety mechanisms for farming equipment and provision of bathrooms and hand washing facilities for field sanitation (29 C.F.R. §§ 1928.51, 1928.52-53, 1928.57, and 1928.110, respectively). Part 1928 incorporates some regulations from Part 1910, including requiring that employers maintain minimum standards at temporary labor camps, communicate information to employees on hazardous chemicals, retain DOT markings, placards and labels, store and handle anhydrous ammonia safely, adhere to safety standards in logging operations, attach a “slow moving vehicle” sign on any equipment that travels at less than 25 miles per hour on public roads, and institute monitoring of and controls for employee’s exposure to cadmium (29 C.F.R. §§ 1910.142, 1910.1200, 1910.1201, 1910.111(a)&(b), 1910.266, 1910.145, and 1910.1027, respectively). *Agricultural operations are exempt from all the other provisions of Part 1910, which establishes general operational safety standards* (29 C.F.R. § 1928.21(b)).

However, agricultural employers remain subject to several other important OSHA provisions and regulations pertaining to signs, record keeping, injury reporting, and first aid training. Employers must post signs in the workplace notifying employees of the protections OSHA provides (29 C.F.R. § 1903.2). Employers must keep records of all reportable work-related injuries (29 C.F.R. § 1904.4). An injury qualifies as reportable if it causes death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness, or if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional (29 C.F.R. § 1904.7). Employers who never employ more than 10 employees at any given time do not need to keep OSHA injury and illness records, unless OSHA informs them in writing that they must keep such records (29 C.F.R. § 1904.1). However, these employers must report to OSHA within eight hours if an incident kills an employee or hospitalizes more than three employees (29 C.F.R. § 1094.39). The employer can report via phone by calling a local OSHA office or OSHA’s central line at 1-800-321-OSHA (1-800-321-6742) (*id.*). At the end of every year, employers must review their log of injuries, ensure and certify its accuracy, and provide a report to OSHA (29 C.F.R. § 1904.32). Employers must keep these records for five years (29 C.F.R. § 1904.33).

B. Toxic Substances Disclosure to Employees

Federal OSHA regulations on hazardous communication imposes disclosure requirements on employers (29 C.F.R. § 1910.1200). Employers must maintain information on how to handle and detect dangerous chemicals in the workplace, as well as provide training and information to employees. The regulations do not apply to toxic substances regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Instead, the FIFRA requirements discussed below for labeling/posting apply.

C. Federal Insecticide, Fungicide and Rodenticide Act

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. Chapter 6) requires the U.S. Environmental Protection Agency to regulate the production and use of farm chemicals. As required by the FIFRA, the EPA has promulgated a Worker Protection Standard (WPS) for agricultural pesticides. The standard requires employers to provide safety training and access to information on pesticides used on the farm. Employers must protect workers from exposure during pesticide mixing and application, as well as notify workers and restrict entry to sites after application. Finally, employers must provide adequate soap and water for clean up, and emergency assistance if a worker is injured by a pesticide. The EPA has provided a **WPS compliance manual**¹¹² for employers on its website.

III. MIGRANT/SEASONAL WORKERS

A. The Migrant and Seasonal Agricultural Worker Protection Act

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) (29 U.S.C. Chapter 20) and its regulations (29 C.F.R. Part 500) establish standards for the employment of migrant and seasonal agricultural workers. It also requires employers to make certain disclosures and maintain employment records.

Hiring

Some direct farm businesses use a Farm Labor Contractor (FLC) to obtain migrant or seasonal workers. FLCs recruit, pay, and transport workers to the needed locations. In return, the direct farm business pays the FLC a fee. FLCs must register and obtain a certificate with the United States Department of Labor pursuant to the MSPA (29 C.F.R. §§ 500.1, 500.40). An employee of a registered FLC must obtain a Farm Labor Contractor Employee Certificate of Registration (29 C.F.R. § 500.40). The direct farm business should ensure that it deals only with a registered FLC. The United States Department of Labor maintains a **list of MSPA Ineligible Contractors**¹¹³ that should be checked before doing business with any FLCs.

¹¹² <http://www.epa.gov/oecaagct/htc.html>

¹¹³ http://www.dol.gov/whd/regs/statutes/mspa_debar.htm#.UJPOjVE2f3A

If the owners or employees of a direct farm business recruit their own workers instead of contracting with an FLC, the business need not register as a farm labor contractor if it qualifies as a family or small business (29 C.F.R. § 500.30). Entities qualify for the family business exception if the owner of the farm or immediate family member does the labor contracting (29 C.F.R. § 500.20(a)). If the operation used less than 500 man-days of seasonal or migrant labor during every quarter of the preceding year, it qualifies for the small business exception (29 C.F.R. § 500.30(b)). The regulation defines a “man-day” as any day in which an employee performs agricultural labor for at least one hour.

Wages

Employers must pay migrant and seasonal workers when wages are due, which must be at least every two weeks (29 C.F.R. § 500.81).

Disclosures

FLCs and employers not exempt from the Act must disclose certain information to the employee at the time of recruitment, including (1) the location of the work; (2) wage rates; (3) the type of work involved; (4) the period of employment; (5) any transportation or housing to be provided and how much this will cost the employee; (6) whether workers' compensation or unemployment benefits are provided, and if so, disclosure of the insurance company's information; (7) whether the operation is the target of a strike; and (8) any arrangement whereby the employer is to receive a commission from another establishment for sales made to workers (29 U.S.C. § 1821(a); 29 C.F.R. § 500.75(b)). The employer must display and maintain a poster provided by the Department of Labor outlining employee rights under the MSPA (29 U.S.C. § 1821(b); 29 C.F.R. § 500.75(c)). The employer must provide the terms of employment in writing (29 C.F.R. § 500.75(d)).

Information must be provided to the worker in his/her own language, where necessary and reasonable (29 U.S.C. § 1821(g); 29 C.F.R. § 500.78).

Providing Housing or Transportation

If the employer provides housing, the employer must disclose in writing, or post in a conspicuous place, the terms of such housing (29 U.S.C. § 1821(c); 29 C.F.R. § 500.75(c)). A state or local health authority (or other appropriate entity) must certify that any housing the employer provides complies with federal health and safety standards (29 C.F.R. §§ 500.130, 500.135). Likewise, the employer must insure any transportation provided by the employer complies with vehicle safety standards (29 C.F.R. §§ 500.100, 500.121).

Recordkeeping

Employers must keep individual employee records for the following: (1) the basis on which wages are paid; (2) the number of piecework units earned, if paid on a piecework basis; (3) number of hours worked; (4) total pay period earnings; (5) specific sums withheld and the purpose of each sum withheld; and (6) net pay. Employers must keep the records for three years and *provide all the information to the employee no less often than every two weeks* (29 U.S.C. § 1821(d); 29 C.F.R. § 500.80).

Prohibitions

The MSPA prohibits employers from requiring that migrant or seasonal workers purchase goods or services solely from their employer (29 U.S.C. § 1829(b); 29 C.F.R. § 500.73).

H-2A Visas

If there is a seasonal shortage of domestic agricultural workers, a direct farm business may be able to recruit foreign agricultural workers under the H-2A visa program of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(15)(H)(ii)(a)) and its accompanying regulations (8 C.F.R. § 214.2(h)(5) (Immigration and Naturalization Service regulations) and 20 C.F.R. §§ 655.90-655.215 (Department of Labor Regulations)). The employer must petition for certification to recruit foreign workers and demonstrate a shortage of domestic workers. If certified, the employer must comply with several requirements, including ongoing recruiting of domestic workers and providing housing, meals and transportation to recruited foreign workers. The MSPA does not apply to workers employed under the H-2A visa program, but H-2A employers must comply with all other federal laws such as the FLSA and OHSA.

The Department of Labor maintains a **website**¹¹⁴ that provides step-by-step instructions on how the H-2A program works, including links to forms.

B. Unpaid Interns

For many small farms, hiring unpaid interns is a common practice. They provide much needed labor, and the intern benefits by receiving valuable mentoring and experience. However, if the intern is doing work on the farm that contributes to the farm's profitability, he or she is an employee and the farm business must take care to comply with applicable employment laws. If a farm qualifies for the minimum wage exception delineated above (employing fewer than 500 man-days per quarter and outside of the retail and service, commercial support service, food and beverage, and health and medical industries), the federal and Colorado rules set no minimum wage, thereby allowing employers not to pay interns.

¹¹⁴ <http://www.foreignlaborcert.doleta.gov/h-2a.cfm>

Federal law authorizes employers to employ student-learners at less than minimum wage if they meet the applicable requirements and obtain a license prior to employing the student learner. The student-learner, in addition to being at least 16 years old, must be currently receiving instruction in an accredited school, college or university and be employed by the direct farm business on a part-time basis pursuant to a bona fide vocational training program (29 C.F.R. Part 520). The employer must pay the student-learner at least 75% of the applicable FLSA minimum wage. It is generally difficult for farms to qualify to employ student learners at sub-minimum wages.

If interns are not being paid, the farm should nonetheless have them clock in and out as if they were paid employees. The farm should also keep meticulous records of their unpaid interns, including names, employment dates, and duration of service. If a disgruntled intern complains to the Department of Labor, and the farm becomes the subject of an investigation, it is important to have a paper trail documenting the farm's compliance with the laws. Even if an internship is exempt from the minimum wage requirements, the farm is not exempt from complying with the other employment laws: For instance, OSHA and FIFRA rules still apply, housing and transportation must meet minimum standards, and workers' compensation (see discussion below) is necessary if the farm employs more than 400 man-days per quarter. Farms employing paid and unpaid employees must count the unpaid employees' man-days toward the 400 for workers' compensation purposes.

Direct farm businesses should take great care to ensure that they are indeed exempt from minimum wage laws before hiring unpaid interns in an employment-like role. Under the FLSA, interns are exempt from minimum wage requirements only if they are trainees and thus do not have an employment relationship with the employer. Since the DOL defines employment very broadly, most interns are considered to have an employment relationship. The DOL gives employers six specific criteria that must be met in order for an intern to be considered strictly a trainee.¹¹⁵

Making an internship a positive experience for the farmer and the intern requires more than simply expecting the intern to show up and work. It requires carefully recruiting and selecting interns mentally and physically prepared for the nature of the work and developing a realistic plan for what and how they will learn. The New England Small Farms Institute publishes two guides that can assist in hiring interns and ensuring positive experiences. *Cultivating a New Crop of Farmers – Is On-Farm Mentoring Right for You and Your Farm? A Decision Making Workbook*, for \$20, contains worksheets covering all aspects of mentoring. *The On-Farm Mentor's Guide – Practical Approaches to Teaching on the Farm*, for \$35, provides more detailed guidance. The publications are available through **NESFI's website**.¹¹⁶

¹¹⁵ <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>

¹¹⁶ <http://www.smallfarm.org/main/bookstore/publications/>

One of the best ways to ensure a positive experience is to develop an internship agreement that outlines the hours and work expected, the housing provided (if any), food and fresh produce arrangements, and what mentoring the farmer will provide. Both the farmer and the intern should sign the agreement. Clearly defined expectations at the outset will help prevent conflicts, or worse yet, an intern who abandons the farm mid-season. It will also be beneficial to the farmer to have a clearly delineated agreement in case of a Department of Labor audit or inspection.

IV. EMPLOYEE INJURIES

If a farming operation hires employees, the owner must take into consideration the risk that an employee may be injured. An employer should (and *must*, in circumstances governed by OSHA) take affirmative measures to ensure a safe workplace. If accident-prevention measures fail, employers may be liable for an employee's injury. Employers may also be liable if one of their employees commits a tort (an injury or other legal wrong) against a fellow employee or third party. This section discusses the employer's liability exposure resulting from an injured employee and the employer's potential liability arising from a situation in which an employee injures a third party.

If an employee of a direct farm business is injured, the injured employee can seek compensation in *one* of two ways-- a claim under the Workers' Compensation Act of Colorado or a common law action for tort. An employee may only seek damages through tort if the injury is not subject to workers' compensation (C.R.S. 8-41-104).

A. Workers' Compensation

The Workers' Compensation Act of Colorado (C.R.S. 8-40-101 *et seq.*) and the Workers' Compensation Rules of Procedure (7 CCR 1101-3) require almost all employers to obtain workers' compensation insurance to cover medical treatment and lost pay owed to employees injured on the job, regardless of fault. The Colorado Division of Workers' Compensation has a fee schedule for payment of medical treatment and caps the daily disability pay (7 CCR 1101-3, Rule 18). In exchange, the Act bars employees from suing employers under tort law. This ban protects employers from the courts' unpredictability and absence of limits on compensation awards.

There are no exemptions for agricultural operations under the worker's compensation rules, meaning that agricultural enterprises need to be covered (C.R.S. 8-40-101 *et seq.*). However, if a business hires an independent contractor to perform labor, the contractual relationship does not require the business to obtain workers' compensation insurance (C.R.S. 8-44-107). Additionally, a sole proprietor or corporate officer may elect not to obtain insurance for themselves (C.R.S. 8-

41-202). A sole proprietorship, corporation, or business who contracts for labor should file a **form**¹¹⁷ rejecting the coverage.

If a court holds that a direct farm business is liable for an employee's claim and the operation was required to obtain workers' compensation insurance but failed to do so, the direct farm business will have to pay all of the workers' compensation benefits, in addition to a 50% penalty (C.R.S. 8-43-408). It is unlikely that the operation's general insurance policy would cover such a liability, and the benefits owed to the injured employee can be quite costly. On the other hand, workers' compensation insurance itself can be very expensive. For these reasons, it is important to consult a lawyer to determine the business's precise needs. Furthermore, even if there is not a claim by an employee, the state can assess substantial fines against a business that fails to maintain the required workers' compensation insurance (C.R.S. 8-43-409).

B. Employer Liability When Exempt from Workers' Compensation Requirements

In cases where employers are exempt from mandatory workers' compensation insurance coverage, Colorado's common law tort principles will determine an employer's liability for an employee's on-the-job injuries. A tort is an injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit. Torts are part of the *common law*, which is the body of laws and rules that courts (rather than legislatures or other lawmaking bodies) create as they issue decisions.¹¹⁸ However, the legislature can modify the common law by passing legislation, and in several instances, the Colorado legislature has modified traditional common law rules and created special rules for tort liability within the employer-employee context. Additionally, most agricultural businesses will be covered by the worker's compensation laws, so it is important to consult with an attorney to see how the statutes and common law will apply to your operation.

Employer's Negligence

Although there are many legally recognized causes of action (harms), the most common claim is for negligence. Whether a person was negligent and caused an injury is a highly fact-specific issue that courts must decide on a case-by-case basis. To avoid being negligent, an employer must use the standard of care to protect his or her employees from workplace injury that an ordinary, prudent and reasonable person would use under the same circumstances. The standard of care obligates an employer to protect only against *reasonably foreseeable* injuries, not every injury that may occur. An employer is liable for injuries resulting from any workplace hazards that she knows *or should have known* about, including, but not limited to, product defects and dangers on her property. She also has a *duty to warn* her employees of these

¹¹⁷ available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251772250989&ssbinary=true>

¹¹⁸ For this reason, many of the cites given are for cases that describe the rule, rather than for a codified rule found in a statute or regulation.

hazards. “Knows or should have known of” requires that an employer must also act prudently and reasonably in seeking out and discovering potential workplace dangers.

Contributory Negligence of the Employee

In Colorado, a negligent employer may avoid liability if a jury determines that the employee was also negligent and was more than 50% responsible for his/her injury (C.R.S. 13-21-111). This reduction in damages is based on the theory of *contributory negligence*, which bars an injured victim from recovering any damages if he or she was primarily responsible for the injury. If the employee was negligent but contributed less than 50% to their injury, the employee's monetary award for damages is reduced proportionally according to the amount by which the employee's negligence contributed to his/her injury. This system is known as modified comparative negligence.

Assumption of the Risk

Assumption of the risk is a bar to liability where the injured party has assumed the risk of injury by voluntarily or unreasonably exposing himself to injury with knowledge or appreciation of the danger or risk involved (C.R.S. 35-21-11.7). In Colorado, assumption of risk, a defense raised by a defendant, is not considered an independent bar to liability, but rather is used by a jury in a civil case in apportioning negligence within the modified comparative negligence regime (*Harris v. Ark*, 810 P.2d 226, 228 (Colo. 1991)). Because Colorado treats assumption of risk similarly as a form of contributory negligence, the Court has interpreted the contributory negligence statute (C.R.S. 13-21-111.7), to cover assumption of risk as well (*Harris*, 810 P.2d at 233 (Colo. 1991)). Therefore, assumption of risk is not an absolute defense to negligence, but rather a way to apportion fault to the responsible parties (*id.*). For instance, an employee helping with cattle may have assumed the risk of getting kicked from a steer and an employer may therefore successfully use assumption of the risk to reduce the amount of the damages from the injury apportioned to him.

C. Employer Responsibility for Employee's Injury to Others

This section discusses the employer's potential liability when an employee injures a third party (whether on or off-farm) or a fellow employee.

Employees Injuring Third Parties

In Colorado, an employer may be liable only to the extent of that employer's proportion of the total fault for the injuries to third parties which were caused by the actions of his or her employees. Fault can be transferred to the employer through the theory of *respondeat superior* ("the master shall answer for his servant"). If a court determines that an employer is responsible for a portion of the injury, the employer will only have to pay the amount apportioned to him or her by the court, and the plaintiff will have to seek the rest of the judgment from other

ADDITIONAL RESOURCES: Labor and Employment Law

The USDA's 63-page Summary of Federal Laws Affecting Agricultural Employees is a good primer on the federal labor and employment laws that are explained in the previous pages, and includes discussion of some federal laws not covered in this guide.

<http://www.ers.usda.gov/Publications/AH719/>

The U.S. Department of Labor (DOL) Compliance Assistance Guide has a subsection specifically directed to agricultural employers.

<http://www.dol.gov/compliance/guide/>

DOL also has a compliance assistance website that provides information on all of the major DOL laws regarding employment.

<http://www.dol.gov/compliance/laws/main.htm>

The Colorado Department of Labor and Employment Division of Workers' Compensation published a guide to help employers understand the Workers' Compensation program

<http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251724760333&ssbinary=true>

responsible parties. (C.R.S. 13-21-111.5) For liability to occur under *respondent superior*, the employee's action, whether negligent or willing/knowing, must have been committed in the course of the employment and with some notion of furthering the employer's business.

For the employer to be liable there must have been an employer-employee relationship, rather than that of an independent contractor. The question of whether an employer/employee relationship exists is based on the facts of each individual case. The actual practice between the employer and the employee will determine the relationship. A number of evidentiary factors may be taken into account, including the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required for the work to be done, and who provided the tools, materials, or equipment. Of these, the *right to control* how the work is performed (not actual control) is the most important (*Moses v. Dioces of Colorado*, 863 P.2d 310, 324 (Colo. 1993)). For more information, reference this **article**¹¹⁹ that further explains the difference between an employee and an independent contractor.

Scope of Employment

For an employer to be vicariously liable for an employee's torts under the doctrine of *respondent superior*, the torts must have been committed within the scope of the employment (*Cooley v. Eskridge*, 241 P.2d 851, 855 (Colo. 1952)). An activity is within the scope of employment "only if it is performed with the knowledge and approval of the master" (*id.*). One obvious example is an employee who causes a traffic accident while delivering produce to the market. However, if an employee causes a traffic accident in her own car while driving home after work, she is probably

¹¹⁹ Diane Vaksdal Smith, *The Common Law Employee Versus the Independent Contractor: A Legal Primer*, http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadervalue1=Content-Disposition&blobheadervalue2=MDT-Type&blobheadervalue3=inline%3B+filename%3D172%2F211%2FColo+Lawyer_Feb2010_IndContr+v+Emp.pdf&blobheadervalue4=abinary%3B+charset%3DUTF-8&blobkey=id&blobtable=MungoBlobs&blobwhere=1251764467654&ssbinary=true

not acting within the scope of her employment and her employer would therefore not be liable for any resulting injuries.

As when the employer's negligence injures an employee, the employer may raise comparative negligence as a complete or partial defense when an employee injures a third-party. If the third-party victim knew of and assumed the risk of the injury they incurred, or contributed more than 50% to their own injury, the employer will not be liable, notwithstanding the employee's negligence. For example, if the third-party involved in the traffic accident with the employee delivering the produce ran a stop sign, the third party's own negligence would reduce or preclude any recovery.

Employers may also be liable for an employee's tortious conduct under the theory of negligent hiring or retention. In these cases, if an employer knew or should have known that the employee was likely to harm someone, the employer is directly liable for their own negligence.

Employees Injuring Other Employees

An employer is not liable for the negligent actions of one employee against another employee unless the employer knew, or had reason to know, that the negligent employee should not have been hired or should not have remained in his/her employ. An employer can also be held liable if the employer did not provide the proper means for the negligent employee to carry out his or her duties. An employer is responsible for ensuring that all employees follow health and safety procedures. An employer cannot shield itself from liability by delegating this responsibility to supervisors. If the employer has delegated health and safety duties to a supervisor or foreman, the supervisor's negligent actions causing injuries to a fellow employee may be imputed to the employer. This means the employer can be held responsible for the supervisor's actions as if the employer had done the act.

The best way to avoid liability is to act with reasonable care and exercise due diligence. Make sure tools and equipment are safe and in proper working order. Supervise employees and do not ask them to do tasks that are outside the scope of expected dangers on a farm. If an employee could injure others, such as in an auto accident while making deliveries, ensure that they are a responsible and reliable employee before entrusting them with a task. Nonetheless, no liability can be completely prevented. These potential liabilities are one of many reasons it is important for farmers to have insurance that covers tort liability and the cost of defending a lawsuit. Although a general farm liability policy (see the "Setting Up a Direct Farm Business" chapter of this Guide) may cover some bodily injuries that could occur on the farm, such as injuries to trespassers, it likely does not cover everything. In particular, as discussed above, workers compensation insurance may be necessary to cover injuries to employees. Therefore it is imperative that you discuss and verify your liability coverage with your insurance agent.

V. CHECKLIST

- Have you read and understood the agricultural exceptions to the FLSA and Colorado's minimum wage law? If you intend to take advantage of the exceptions, have you verified that employees' activities qualify?
- If you intend to employ minors, do you understand the restrictions on the hours and activities in which they may be employed? Have you obtained necessary proof of age for each minor?
- Have you obtained equipment and developed operational procedures necessary to comply with OSHA, FIFRA and other employee-protection laws?
- Have you complied with any necessary paperwork and disclosure requirements for migrant workers you may employ?
- If employing unpaid interns, have you established reasonable recordkeeping for ensuring and verifying compliance with all minimum wage, hours and worker safety laws? Have you developed a plan for ensuring the experience meets yours and the intern's expectations?
- Have you discussed workers' compensation insurance, and any other employee liabilities, with your insurer or an attorney?

KEY CONTACT INFORMATION

U.S. Department of Labor, Wage and Hour Division (compliance assistance)

Ph: 1-866-4USWAGE (1-866-487-9243)

Denver District Office: (866) 487-9243

Colorado Department Labor and Employment

General contact information:

(303) 318-8700

SECTION II – REGULATION BY PRODUCT



CHAPTER 6 – DAIRY

Food safety authorities impose more regulations on dairy than almost any other food product. Multiple and intertwined federal and state laws and regulations impose very high standards on anyone handling dairy products. Consequently, dairy farmers must work very closely with regulators to ensure compliance with complex regulations. This section provides an overview of the various regulatory entities and dairy-specific issues, but it cannot serve as a substitute for contacting the Colorado Department of Public Health and Environment (CDPHE) office¹²⁰ to discuss plans *before starting*.

I. FEDERAL REGULATION

Federal law technically only applies to dairy products that move in interstate commerce. However, Colorado law incorporates many of the federal regulations, and various federal services - such as the USDA grading system - are available to dairy farmers regardless of whether they sell across state lines.

A. *The Food and Drug Administration*

The Food and Drug Administration (FDA) administers the Federal Food, Drug, and Cosmetic Act, which prohibits adulterated or misbranded food from entering interstate commerce (21 U.S.C. §331). Understanding the nuances of the legal definitions of “adulterated” and “misbranded” is tricky, but it should be sufficient to know that FDA considers a food adulterated if it contains any “poisonous or deleterious substance” or if it is “filthy, putrid, decomposed” or otherwise unfit for food (21 U.S.C. § 342), and misbranded if it does not comply with FDA labeling standards (21 U.S.C. § 343). For dairy farmers, this means that all milk and milk products that will be shipped across state lines must comply with FDA standards of identity (21 C.F.R. § 131 (Milk and Cream); 21 C.F.R. § 133 (Cheese and Cheese Products)). All dairy products, with the exception of some aged cheeses, require pasteurization (21 C.F.R. § 1240.61).¹²¹ Further, all milk and milk products must also adhere to the Grade A Pasteurized Milk Ordinance (PMO), which is available on the **FDA’s website**.¹²²

The PMO is a 405-page model regulation published by the FDA. Many states, including Colorado, use the PMO as their standard for sanitation of all milk products (6 CCR 1010-4), whether the products ship in state or out of state. Farmers who are interested in starting a dairy direct farm business, including processing or production of milk products (cheese, ice cream,

¹²⁰ The CDPHE can be reached at 303-692-3633 during normal business hours.

¹²¹ 21 C.F.R. § 1240.61 exempts certain cheeses from pasteurization if they are subject to alternative pasteurization procedures that are defined in the cheese’s standard of identity, for instance aged for at least 60 days. See 21 C.F.R. part 133 for specific standards of identity and aging requirements.

¹²² <http://www.fda.gov/downloads/Food/FoodSafety/Product-SpecificInformation/MilkSafety/NationalConferenceonInterstateMilkShipmentsNCIMSMModelDocuments/UCM291757.pdf>

etc.), should read the PMO carefully. If a dairy wants to be on the Interstate Milk Shippers (IMS) list, the National Conference of Interstate Milk Shippers requires the State Milk Sanitation Rating Authorities to certify that the dairy attains the milk sanitation compliance and enforcement ratings in the PMO. More information about inclusion on the IMS list is available on the **FDA's website**.¹²³

The PMO prohibits the misbranding and adulteration of milk and milk products, requires permits and inspection of milk production and processing (including transportation), and prescribes labeling rules. The PMO also sets forth specific standards for production and processing. Grocery stores, restaurants, and other similar establishments that sell milk and milk products at retail are exempt from PMO requirements as long as no processing occurs and a permitted establishment supplies the milk. Brokers, agents, and distributors that purchase milk and milk products from permitted establishments are also exempt from permitting requirements.

B. United States Department of Agriculture (USDA)

The USDA administers a variety of programs for promoting or benefiting dairy. A full listing of USDA dairy programs can be found online on the **AMS website**.¹²⁴ This section addresses only grading and standards, milk marketing orders, and mandatory reporting.

Grading and Standards

The USDA provides grading and standards services to certify that products are of a certain quality (7 C.F.R. Part 58). To qualify for the grading and standards service, the USDA must first inspect a dairy plant and approve it as being in compliance with USDA's sanitary standards. A producer can then request grading services. Use of the program is voluntary, but it is important for producers who want to market to schools and other institutions that require foods to meet certain standards. For more information on the benefits of the grading and standards program, as well as information on how to apply for inspection and certification, visit the **USDA's website**.¹²⁵

Federal Milk Marketing Orders

Milk Marketing Orders are the USDA's means of stabilizing supply for consumers and providing uniform prices for producers. The Agricultural Marketing Service (AMS, a department of the USDA) uses the orders to routinely set the minimum price dairy farmers must be paid for fluid milk within a given geographic area (7 U.S.C. § 608c(5)). There are

¹²³ <http://www.fda.gov/Food/GuidanceRegulation/FederalStateFoodPrograms/ucm2007965.htm>

¹²⁴ <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateA&navID=CommodityAreas&leftNav=CommodityAreas&page=DairyLandingPage&description=Dairy>

¹²⁵ <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateM&navID=GradingCertificationandVerification&leftNav=GradingCertificationandVerification&page=DairyGrading&description=Dairy+Grading>

currently 10 Federal Milk Marketing Order Areas. Most of Colorado lies within the Central Federal Milk Order, although certain areas in the northeast and southeast portions of the state may be subject to a different Order. Nonetheless, the following is a brief discussion of the marketing order rules that all dairy producers might find helpful.

AMS establishes Milk Marketing Orders using rulemaking procedures, and the regulations are in 7 C.F.R. Parts 1000-1170. The orders apply to “handlers” (7 C.F.R. §§ 1030.30, 1032.30), which are anyone operating pool or non-pool plants, anyone receiving milk for processing and redistribution, or anyone brokering milk for processing (7 C.F.R. § 1000.9). AMS also considers cooperatives to be handlers, although they have a slightly different structure for determining payment amounts to their producers (*id.*). Most direct-to-consumer dairies are producer-handlers, which are producers who also process and distribute their own milk (7 C.F.R. §§ 1030.10; 1032.10). In order to be a producer-handler, a producer must be able to (1) demonstrate ownership of the animals and control over their care, (2) demonstrate ownership of the production and processing equipment, and (3) show that the operation is entirely at the owner’s risk (7 C.F.R. §§ 1030.10(e); 1032.10(e)).

Prior to June 1, 2010, producer-handlers were not subject to the minimum price orders. However, on April 23, 2010, the USDA issued a final rule that subjects producer-handlers who distribute over 3 million pounds a month to the marketing orders (75 Fed. Reg. 21157). The effect of this new rule is that exceptionally large dairies must now comply with the Milk Marketing Orders. More information on this change to the law is available on the **AMS website**.¹²⁶ Each Order provides the minimum price a fluid milk handler must pay producers in the respective region. The intended use of the milk determines the “class,” which in turn determines the price (7 C.F.R. § 1000.40). Class I, which covers milk intended for consumption as milk, is the most valuable. Class II includes, but is not limited to, milk that will be cottage cheese, frozen desserts, sour cream, custards, pancake mixes, and buttermilk biscuits. Class III is milk for products such as cream cheese and cheeses that may be grated, shredded or crumbled. Class IV, the least valuable, is milk for butter, sweetened condensed milk, and dried milk. Each month, the Milk Market Administrator will issue price orders that then adjust based on the value of the components of the milk (butterfat, protein and other solids) and the price differential for the county where the product is delivered. The calculations are somewhat confusing, although the AMS attempts to explain the method on **its website**.¹²⁷ Dairy farmers who believe that their handler is not paying the mandated minimum price for milk should contact the director of the applicable Milk Marketing Order region.

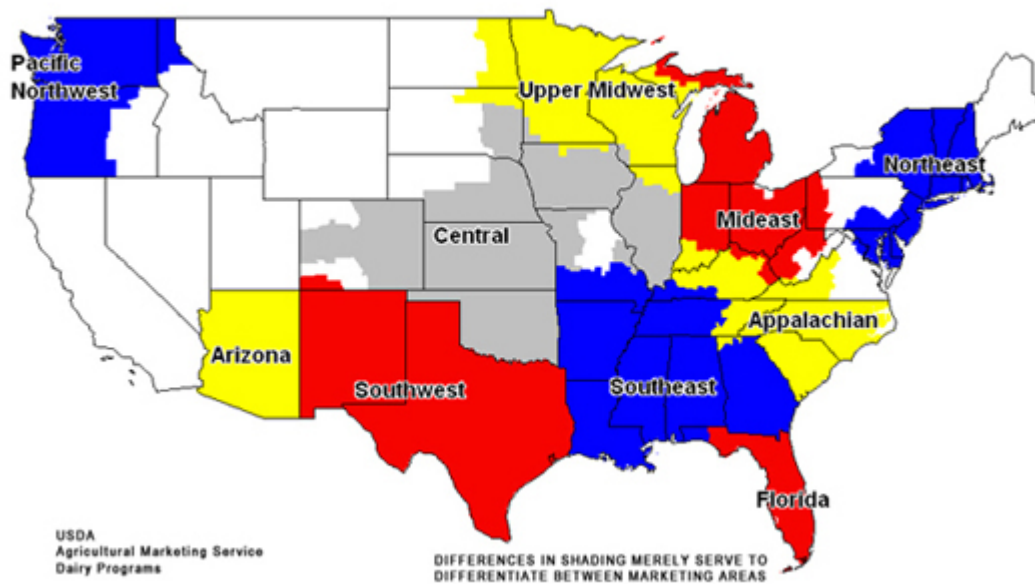
¹²⁶ USDA Agricultural Marketing Service, *Marketing Orders*,

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateO&navID=prodhandlerHearingFederalMilkMarketingOrders&rightNav1=prodhandlerHearingFederalMilkMarketingOrders&topNav=&leftNav=CommodityAreas&page=FMMOrder21&resultType=&acct=dgeninfo>

¹²⁷

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateD&navID=IndustryMarketingandPromotion&leftNav=IndustryMarketingandPromotion&page=MIBPriceDescription&description=Description&acct=dmktord>

Federal Milk Marketing Order Areas



Mandatory Price and Storage Reporting

Mandatory price and storage reporting requirements are authorized by amendments to the Agricultural Marketing Act (7 U.S.C. § 1637b). Mandatory reporting provides reliable information to calculate the pricing factors used in the Milk Marketing Order formulas. Even those producer-handlers not subject to the Milk Marketing Order must comply with reporting requirements.

Price reporting (facilities processing more than one million pounds per year): requires manufacturers of cheddar cheese, butter, nonfat dry milk, and dry whey to submit weekly reports including the price, quantity, and moisture content, where applicable (7 C.F.R. §§ 1170.7, 1170.8). Manufacturers that process and market less than one million pounds of dairy *products* (cheese, butter and other items that are not fluid milk) per year are exempt (7 C.F.R. § 1170.9). Dairy products with a higher value than the basic commodity (for instance, kosher butter produced with a rabbi on site or organic milks) are also exempt from price reporting requirements (7 C.F.R. § 1170.8). It is the obligation of the producer to track annual production and report if they exceed the 1 million pound exemption. Reports must include the “name, address, plant location(s), quantities sold, total sales dollars or dollars per pound for the applicable products, and the moisture content where applicable.” (7 U.S.C. § 1170.4(a)). A weekly price report must

be submitted to the National Agricultural Statistics Service (NASS) by noon every Wednesday using the appropriate form. The forms are available on the **NASS website**.¹²⁸

Storage reporting requires those who store butter, anhydrous milk fat (AMF), butter oil, and natural cheeses to submit monthly reports on quantity (7 C.F.R. §§ 1170.7(b), 1170.10)). There is no exemption based on quantity for the storage report requirement. Manufacturing plants must make monthly storage reports of the dairy products that they have on hand (7 C.F.R. § 1170.7(b)). Dairy products are those used to set prices for Class III and Class IV milk under the Milk Marketing Orders (7 C.F.R. § 1170.4). This includes cream cheese, cheeses that can be shredded, grated or crumbled, butter, evaporated and sweetened condensed milk, and any dried form of milk (7 C.F.R. § 1000.40). The report must indicate the name, address, and stocks on hand at the end of the month for each storage location.

The reporting requirement applies to “all warehouses or facilities, artificially cooled to a temperature of 50 degrees Fahrenheit or lower, where dairy products generally are placed and held for 30 days or more” (7 C.F.R. § 1170.10(a)(1)). Stocks in refrigerated space maintained by wholesalers, jobbers, distributors, and chain stores are exempt, but a direct farm business maintaining stocks of its own products would not be exempt from reporting. Reportable products include salted and unsalted butter, anhydrous milk fat (AMF), butter oil, and natural cheese including: barrel and cheese to be processed, American type cheeses (cheddar, Monterey, Colby, etc.), Swiss cheese, and other natural cheese types (brick, mozzarella, Muenster, Parmesan, etc.). Processed cheese is excluded (7 C.F.R. § 1170.10(a)(2)(i)). All manufacturers of nonfat dry milk and dry whey must report all stocks on hand (7 C.F.R. § 1170.10(b)). NASS mails the monthly reporting forms to producers (73 Fed. Reg. 34175, 34176 (June 17, 2008)).

II. STATE REGULATION

The Colorado Department of Public Health and Environment (CDPHE) oversees dairies in Colorado. The Colorado inspectors follow the requirements of the FDA’s PMO (6 CCR 1010-4). Dairies are inspected every five months and graded on a scale, which starts at 100, and is reduced based on the type of violation. Dairies must sample their milk on a regular basis to determine if there are antibiotics or bacterial contamination present. In addition, there are monthly samplings to see if any of the dairy cattle have brucellosis (6 CCR 1010-3 § 8).

A. Inspections & Permitting

The CDPHE maintains links to the regulations that govern the production and sale of milk in conjunction with the Grade A Pasteurized Milk Ordinance (PMO) promulgated by the FDA and adopted by the Colorado Legislature (6 CCR 1010-4) on their **website**.¹²⁹

¹²⁸ http://www.nass.usda.gov/Data_and_Statistics/Dairy_Products_Mandatory_Program/index.asp

¹²⁹ <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=CDPHE-DEHS%2FCBONLayout&cid=1251586894689&pagename=CBONWrapper>

The CDPHE Rules and Regulations Pertaining To Colorado Grade A Pasteurized Milk and Fluid Milk Products (6 CCR 1010-4)

The CDPHE Regulations on Fluid Milk and Milk products adopts the federal standards and requires dairies to comply with the Grade A PMO for all fluid and dry milk and milk products intended for human consumption. Cheese should be pasteurized unless the producer follows alternative procedures specified by FDA rules, such as the cured cheese rules in 21 CFR §133. The purpose of these rules is to prohibit misbranded or adulterated food from entering the market place.

The rules also specify that milk produced for processing and manufacturing into products for human consumption shall meet the requirements of the USDA/ AMS, as discussed above in the federal section, and outlined specifically in 7 CFR § 58.



The federal PMO requires dairy farmers or dairy plants to obtain a permit from the CDPHE Division of Environmental Health and Sustainability. In order to receive a permit, dairy farmers must comply with the requirements of the PMO. The PMO includes special labeling requirements that can be found in section 4 of the PMO. In addition dairies must be regularly inspected on a schedule set out by the CDPHE Division of Environmental Health and Sustainability. For more information, please check the Milk/Dairy Regulation **website**¹³⁰ or contact the CDPHE Division of Environmental Health and Sustainability.¹³¹

B. Marketing

As discussed in the federal section above, much of Colorado is regulated under a Federal Milk Marketing Order (MMO) Area. However, there are parts of Colorado in the northwest and southwest that are not subject to the MMO. Moreover, even the 2010 inclusion of producer-handlers into the MMO regulatory scheme does not apply to producer-handlers who produce less than 3 million pounds of milk annually (75 Fed. Reg. 21157). Nevertheless, *anyone* who receives, sells, buys, or handles milk or cream, including a dairy, creamery, ice cream factory, or cheese factory must obtain a Grade A Dairy Farm License from the CDPHE. To obtain this license, start by calling the Division of Environmental Health and Sustainability at (303) 692-

¹³⁰ <http://www.colorado.gov/cs/Satellite/CDPHE-DEHS/CBON/1251586894458>

¹³¹ Contact the office at (303) 692-3633.

3633. Additionally, all bottles, containers, or packages containing milk or milk products must be defined as Grade A and labeled in accordance with federal law.¹³²

C. Organic Milk

Farmers interested in producing and marketing certified organic milk must follow USDA's Agricultural Marketing Service (AMS) organic standards (7 CFR Part 205). The regulations generally require the dairy to manage the animals according to certain standards and obtain certification from an accredited certifying entity. For more information on organic management and certification, see the "Organic Marketing" chapter of this Guide.

D. Animal Welfare

Colorado dairy farmers should also be aware of regulations concerning livestock, such as animal cruelty laws, in the Colorado Criminal Code. The "Meat and Poultry" chapter of this Guide provides further information on various livestock welfare and health laws.

E. Raw Milk

Raw milk is milk that has not been pasteurized. Some consumers believe raw milk strengthens the immune system, and pasteurization eliminates valuable bacteria and proteins. However, raw milk can be a source of dangerous pathogens such as *salmonella*, *E. coli*, and *listeria*. Although the FDA requires pasteurization of milk sold in interstate commerce, (21 C.F.R. §1240.61) states may regulate the sale of raw milk within their state. Colorado law requires pasteurization of milk for human consumption unless the consumer owns a cow share, the farm or dairy is registered with the CDPHE, and other conditions are met in accordance with the Colorado Health Code.¹³³ A cow share is an undivided interest in the dairy animal or herd that produced the milk. By purchasing a cow share, consumers are able to obtain raw milk from that cow or herd without violating Colorado law. Although acquisition of raw milk for

¹³² All bottles, containers and packages containing milk or milk products, except milk tank trucks, storage tanks and cans of raw milk from individual dairy farms, must be conspicuously marked with: (1) The identity of the milk plant where pasteurized, ultra-pasteurized, aseptically processed, condensed and/or dried, (2) The words "keep refrigerated after opening" in the case of aseptically processed milk and milk products, (3) The common name of the hooved mammal producing the milk shall precede the name of the milk or milk product when the product is or is made from other than cattle's milk. As an example, "Goat", "Sheep", "Water Buffalo", or "Other Hooved Mammal" milk or milk products respectively (Refer to the **NOTE**: on page 27 of the PMO: 2009), (4) The words "Grade 'A'" on the exterior surface. Acceptable locations shall include the principal display panel, the secondary or informational panel, or the cap/cover, (5) The word "reconstituted" or "recombined" if the product is made by reconstitution or recombination, (6) In the case of condensed or dry milk products the following shall also apply: a) the identity of the Regulatory Agency issuing such permit; and if distributed by another party, the name and address of the distributor shall be shown by a statement, such as "Distributed by", and b) a code or lot number identifying the contents with a specific date, run, or batch of the product, and the quantity of the contents of the container. Also, all vehicles and milk tank trucks containing milk or milk products must be legibly marked with the name and address of the milk plant or hauler in possession of the contents. (21 U.S.C. § 341 *et seq.*) (21 C.F.R. 101.9 *et seq.*) (6 CCR 1010-4)

¹³³ The owner of a cow or goat share must obtain the milk directly from the farm pursuant to the ownership of the share, and the container must contain a prominent warning label about the milk not being pasteurized as well as information about the farm's standards with respect to herd health and milk production. Additionally, the farm supplying the raw milk must provide the CDPHE with the name and address of the farm or farmer and a statement that raw milk is being produced there (C.R.S. 25-5.5-117).

personal use by a consumer who owns a share of the cow or herd is allowed, retail sale of raw milk is strictly prohibited in Colorado (C.R.S. 25-5.5-117).

F. rBGH Free Labeling

Recombinant Bovine Growth Hormone (rBGH, commercially sold as Posilac) is a genetically engineered hormone designed to increase milk production by dairy cattle. Although the FDA has approved the use of the hormone and takes the position that there is no difference between milk from cows treated with rBGH and those not treated with it, many consumers (and therefore retailers) have a strong preference for milk that comes from untreated cattle. To address this consumer demand, some milk producers wish to label their milk as “rBGH free.” States have banned “rBGH” -related labels in the past, and a series of cases in different states have been brought before courts to decide whether banning this information is in violation of the First Amendment. While there is no case law about this in Colorado, other states, such as Illinois have decided that labels may state that the milk is “from cows not treated with artificial growth hormones.” However, labels cannot use the term “rBGH free,” and they must state that the FDA has found no difference between milk from rBGH-treated cows and milk from untreated cows. These rules are consistent with FDA’s national labeling standards. The reason these labels are controversial is that Grade A milk produced under the PMO is already determined by the federal government to be safe and the label “rBGH free” could cause consumers to be misled to think that the milk is of higher quality, which is currently unknown.

III. CHECKLIST

Have you...?

- Contacted the Colorado Department of Public Health and Environment to discuss what is necessary to produce the product you wish to sell?
- Followed all steps in the Grade A Pasteurized Milk Ordinance dairy farm and dairy handler permitting and inspection process?
 - applied for a permit from CDPHE Consumer Health Services
 - complied with ongoing CDPHE Consumer Health Services product testing and inspection
- Developed labeling and marketing strategies?

KEY CONTACT INFORMATION

Colorado Department of Public Health and Environment, Division of Environmental Health and Sustainability

Ph: (303)-692—3645

CHAPTER 7 – EGGS

Several laws and agencies regulate egg sales. At the federal level, the United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA) share regulatory authority. Within the Colorado Department of Agriculture (CDOA), the Inspection and Consumer Services Division and the Colorado Egg Act govern the Standards, Grades and Weight Classes (USDA AMS 56; C.R.S. 35-21-102) for the sale of eggs. The Colorado Department of Public Health and Environment (CDPHE) also has regulatory authority over eggs that are sold off the farm where they are produced, including those sold at farmers' markets and roadside stands.

I. FEDERAL OVERSIGHT OF EGGS

As mentioned above, there are two primary agencies that regulate eggs at the federal level, the FDA and the USDA. The Egg Products Inspection Act (EPIA) (21 U.S.C. Chapter 15) authorizes the USDA to inspect eggs and egg products and establish standards for uniformity of eggs. The EPIA applies to eggs shipped in interstate and intrastate commerce, but has exemptions for



small producers. The Food and Drug Administration (FDA), under the authority of the Federal Food, Drug and Cosmetic Act (FDCA) (21 U.S.C. § 341), issues and enforces standards of identity for egg products and requires shell egg producers to implement measures to prevent *Salmonella* Enteritidis. For purposes of federal regulation, egg products are defined as dried, frozen or liquid eggs, with or without added ingredients. Shell eggs (whole eggs) are treated separately. The FDCA applies only to eggs shipped in interstate commerce. Many direct farm businesses selling their eggs will not be subject to the federal rules, but determining

application of the federal law to a specific operation can be difficult. A brief discussion follows.

A. USDA's Oversight of Eggs

Within USDA, the Agricultural Marketing Service (AMS) and Food Safety and Inspection Service (FSIS) administer programs that are relevant to egg producers. AMS prohibits buying, selling, transporting, or offering to buy, sell, or transport restricted eggs, unless exemptions apply (7 C.F.R. § 57.700). Exemptions are discussed in the next section. Restricted eggs are eggs that are checks, dirties, incubator rejects, inedible, leakers or loss (unfit for human food) (7 C.F.R. § 57.1). A "*check*" means an egg that has a broken shell or crack in the shell but has its membranes intact and whose contents are not leaking. *Dirty egg* means an egg that has a shell that is unbroken, but has adhering dirt or foreign material, or prominent stains on the shell

surface, or moderate stains covering more than $\frac{1}{4}$ of the shell surface. *Inedible eggs* are any eggs of the following description: black rot, yellow rot, white rot, mixed rot (addled egg), sour egg, egg with green white, egg with a stuck yolk, moldy egg, musty egg, egg showing a blood ring, egg containing any embryo chick (at or beyond the blood ring stage), and any egg that is adulterated as that term is defined pursuant to the FDCA. *Leaker* means an egg that has a crack or break in the shell and shell membranes to the extent that the egg contents are exposed or are exuding or free to exude from the shell. *Loss* means an egg that is unfit for human food because it is smashed or broken so that its contents are leaking; or overheated, frozen, or contaminated; or an incubator reject; or because it contains bloody white, large meat spots, a large quantity of blood, or other foreign material. (7 C.F.R. § 57.1). Restricted eggs must be sent to a processing facility (overseen by FSIS, discussed below), destroyed, or processed into animal food (7 C.F.R. § 57.720).

AMS enforces the prohibition through periodic inspections of facilities, transport vehicles, and records of all persons engaged in the business of transporting, shipping, or receiving eggs (7 C.F.R. § 57.28). The EPIA requires AMS to inspect handlers packing shell eggs for sale to the end-consumer at least once per calendar quarter, unless exempt (21 U.S.C. § 1034). The term “handler” means any person who engages in buying or selling any eggs or processing any egg product for human food; the term includes poultry producers (21 U.S.C. § 1033(e)).

AMS also provides voluntary grading services for class, quality, quantity, or condition and any combination thereof (7 C.F.R. Part 56). Inspection by federal or authorized state graders must be requested, and will cost a fee. More information on requesting egg grading services, as well as the form to do so, is available through AMS’s grading **website**.¹³⁴ AMS’s official standards, grades and weight classes are available **here**.¹³⁵

B. AMS Exemptions

AMS exempts egg producers from the restrictions and inspections if they sell eggs from their own flocks directly to consumers via a door-to-door retail route or at a place of business away from the site of production *so long as* they sell fewer than 30 dozen eggs per sale (7 C.F.R. § 57.100(c)). The producer must own and operate the business and personally transport the eggs. The eggs must meet the standards for U.S. Consumer Grade B shell eggs (*id.*). Producers with fewer than 3,000 hens, producers selling directly to household consumers, and egg packers selling on site directly to consumers are also exempt from AMS’s regulations (7 C.F.R. § 57.100(d)-(f)).

¹³⁴ <http://www.ams.usda.gov/AMSV1.0/Grading>

¹³⁵ <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004376>

C. Processing Subject to FSIS

The EPIA requires USDA to continuously inspect plants processing eggs into egg products (21 U.S.C. § 1034). The Act defines egg products as “any dried, frozen or liquid eggs, with or without added ingredients” (21 U.S.C. § 1052(f)). All egg products must undergo pasteurization (21 U.S.C. § 1036). FSIS oversees the inspection of egg processing plants (9 C.F.R. § 590.24). The procedures and standards for inspections are in 9 C.F.R. Part 590. Producers who process their own eggs and sell directly to consumers are exempt from continuous inspection under the FSIS regulations (9 C.F.R. § 590.100(e)). However, they must apply for an exemption and their facility and operating procedures must meet all otherwise applicable standards. Although not subject to continuous inspection, exempted facilities must undergo periodic FSIS inspections (9 C.F.R. § 590.600-650).

D. FDA’s Oversight of Eggs

In addition to USDA’s regulation under the EIPA, the FDA regulates eggs under the FDCA. FDA specifies standards of identity for egg products, including dried and frozen eggs (21 C.F.R. Part 160). If a food does not meet the standard of identity, it is misbranded according to the FDCA (21 U.S.C. § 343(g)).

Furthermore, some shell egg producers must adhere to FDA’s *Salmonella* testing, handling and treatment standards. Producers with 3,000 or more laying hens at a particular farm that produce shell eggs for the table market, and that do not sell all of their eggs directly to consumers, are subject to the additional *Salmonella* prevention standards (21 C.F.R. Part 118).¹³⁶ The regulations require these producers to (1) develop a written *Salmonella* Enteritidis (SE) prevention plan that involves procuring pullets that are SE monitored, (2) use a bio-security program limiting visitors and controlling cross contamination between houses, (3) control rodents, flies and pests, and (4) clean poultry houses between flocks if there was a positive SE test (21 C.F.R. § 118.4). Producers must perform environmental testing for SE when laying hens are 40 to 45 weeks old and 4 to 6 weeks after molt; if an environmental test is positive for SE the producer must conduct shell egg testing (21 C.F.R. §§ 118.5 and 118.6). Producers must maintain a written SE prevention plan as well as records to verify compliance, which they must make available within 24 hours of receipt of an official agency request (21 C.F.R. § 118.10). Shell eggs being held or transported must be refrigerated at or below 45 degrees Fahrenheit ambient temperature beginning 36 hours after laying (21 C.F.R. § 118.4). This refrigeration requirement applies to shell egg producers as well as individuals transporting or holding shell eggs (21 C.F.R. § 118.1). For more information on the Egg Safety Final rule, please check the **FDA website**.¹³⁷

¹³⁶ Conversely, producers who have fewer than 3,000 hens and sell all of their eggs directly to consumers are exempt. Producers who process their eggs into egg product are also exempt, but may be subject to FSIS’s egg processing oversight.

¹³⁷ <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Eggs/ucm170615.htm>

Regardless of whether eggs are sold interstate or intrastate, the FDA requires *all shell eggs* for distribution to the consumer to have a safe handling label or be treated to kill *Salmonella* (21 C.F.R. § 101.17(h)).¹³⁸ The label must read: "**SAFE HANDLING INSTRUCTIONS:** To prevent illness from bacteria: keep eggs refrigerated, cook eggs until yolks are firm, and cook foods containing eggs thoroughly." The statement must appear on the label prominently, conspicuously, and in a type size no smaller than one-sixteenth of one inch. The statement must appear in a hairline box and the words "safe handling instructions" must appear in bold capital letters.

Any person that is engaged in the handling or storing of packed shell eggs for retail distribution must allow authorized representatives of FDA to make inspections of the facility in which the shell eggs are being held, including inspection and sampling of the labeling of the eggs based on the inspector's judgment, to determine compliance with the provisions of the safe handling labeling requirements. Inspections may be made with or without notice and will ordinarily be made during regular business hours. (21 C.F.R. § 101.17(h)(8)).

E. The Food Safety Modernization Act

The Food Safety Modernization Act (FMSA) was enacted in 2011 and is the biggest reform to food safety laws in more than 70 years (21 U.S.C. §2201). The purpose of the Act is to ensure the U.S. food supply is safe by shifting the focus from responding to contamination to preventing it. The FMSA impacts shell eggs through the creation of a system of Hazard Analysis and Critical Control Points (HACCPs) that will now apply to shell egg producers. (21 U.S.C. §350g). HACCPs identify hazards (such as physical, allergenic, chemical and biological) that could affect food manufactured, processed, packed or held by a facility and implement preventative controls to minimize the occurrence of such hazards (21 U.S.C. §350g). As of this writing, the FDA has not finalized the HACCP rules and any potential exemptions for small producers.

II. COLORADO REGULATION OF EGGS

In addition to the federal regulations laid out above, which Colorado incorporated into its own egg safety law, the state has also adopted the federal Regulations Governing the Voluntary Grading of Shell Eggs (7 C.F.R. §56). The grading program establishes a basis for quality and price relationship to enable more orderly marketing. The Regulations require a licensed and authorized grader to perform the grading services. After grading, a USDA grademark may be placed on the egg depending on which grade it falls into (7 C.F.R. §56.36). Once a shell egg is grademarked, an official receiving plant may have the egg re-checked by an authorized grader to ensure compliance and accuracy (7 C.F.R. §56.40). The fees for the grading service are paid by the applicant for the grading and will be based on the time required to perform the services.

¹³⁸ The FDA has issued one exception to this rule for "shell eggs that have been, before distribution to consumers, specifically processed to destroy all viable *Salmonella*" (21 C.F.R. § 101.17(h)(4)).

(7 C.F.R. § 56.45-46). A copy of the **Regulations Governing the Voluntary Grading of Shell Eggs** is available online for more information.¹³⁹

Colorado also has its own regulations of eggs in the Colorado Department of Agriculture, Division of Inspection and Consumer Services, which specify temperature, sanitation, labeling, sale, and dealer marketing requirements. However, producers who sell fewer than 250 dozen eggs per month and *only* market directly to consumers through a farmers' market, a community-supported agriculture program, or through on-farm sales are statutorily exempt from the regulations (C.R.S. 35-21-105). However, a producer transporting eggs for sale to a farmers' market or other off-farm venue must comply with certain transportation and labeling requirements.¹⁴⁰ For the most part, producers who fall under this exemption are in compliance as long as eggs are transported in an environment between thirty three and forty one degrees, properly cleaned, labeled with information about the farm at which the eggs were produced, and labeled with the appropriate warning information if the eggs were not treated for *salmonella*, such as by pasteurization (C.R.S. 35-21-105). A recent amendment to the Cottage Foods Act (C.R.S. 25-1614(2)(b)(II)) specifically allows for eggs to be sold at farmers' markets, so long as the producer sells less than 250 dozen eggs per month and affixes a label to the container stating the date that the eggs were laid and packaged, as well as a prominent warning label if the eggs have not been pasteurized or otherwise treated for salmonella (C.R.S. 35-21-105(2)(b)).

Determining exactly which exemptions apply and how regulations, licensing, and grading requirements impact the business can be complicated, especially for producers who market eggs directly to consumers. The CDOA Division of Inspection and Consumer Services has published a **brochure**¹⁴¹ that contains helpful information about how eggs are inspected, sized, graded, and regulated to assure quality and safety. For more information, contact the CDOA or a licensed attorney.

III. SELLING EGGS FOR RESALE – LICENSING AND INSPECTION REQUIREMENTS

According to the Colorado Egg Act (C.R.S. 35-21-104), "Every person selling poultry eggs in this state shall obtain a dealer's license for each place where such business is conducted." However, producers who sell less than 250 dozen eggs per month are exempted from this requirement only if all of the sales are made directly to the ultimate consumer. (C.R.S. 35-21-105) If more than 250 dozen eggs are sold monthly, or if any eggs are sold to a store or restaurant, an Egg Dealer License Application must be filled out and remitted to the CDOA. The **application**¹⁴²

¹³⁹ <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3004690>

¹⁴⁰ <http://www.cofarmtomarket.com/downloads/SmallFlockEggProducers.pdf>

¹⁴¹ CDOA Division of Inspection & Consumer Services, *The Colorado Egg Law and You: Questions and Answers About Egg Quality & Safety*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadvalue1=inline%3B+filename%3D%22Questions+and+Answers+About+Egg+Quality+%26+Safety.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822423873&ssbinary=true>

¹⁴² The application is svsilble at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content->

must be filled out each year and remitted along with an annual fee of \$20 - \$300, depending on the size of the flock. If you are a small flock egg producer with fewer than 3,000 birds, you also need to fill out the short questionnaire on the second page of the application.

Becoming licensed to sell eggs for resale requires an inspection in addition to the application requirements above. After your application is approved, a CDOA inspector will contact you to schedule an inspection. This inspection allows egg producers to be recognized as an approved source. The inspector checks to ensure that adequate facilities exist on the farm to wash and sanitize, candle, grade, size, and store eggs, as well as to label cartons appropriately.

Information on what is required is listed on the CDOA's **website**.¹⁴³

Type&blobheadervalue1=inline%3B+filename%3D%22Egg+Dealer+License+Application.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251855670437&ssbinary=true

¹⁴³ http://www.colorado.gov/cs/Satellite/ag_ICSCBON/1251622246899

IV. CHECKLIST

If you're going to sell eggs, make sure you have answered the following questions:

- How many chickens do you have?
- Who are your customers (end user, institutions, and processor)?
- Where will your sales take place (on or off the premises)?
 - On farm sales have fewer regulations, but limit available customers
 - Flock size can determine which regulations apply
- If you plan to sell off the farm:
 - Do you have the capacity to grade, candle, and inspect your eggs?
 - Have you figured out how to package and transport the eggs?
 - Are you responsible for keeping track of and remitting any fees? If so, what is your record keeping system?
- Have you obtained the appropriate licenses from the CDOA?

KEY CONTACT INFORMATION

USDA's Agricultural Marketing Service, Poultry Programs, Shell Eggs (egg grading and certification)

Ph: (202) 720-3271

Colorado Department of Agriculture, Division of Inspection and Consumer Services, Egg Program

Ph: (303) 477-0093

CHAPTER 8 – FRUITS AND VEGETABLES

Health regulators generally have a more permissive approach to raw fruits and vegetables relative to any other product sold by a direct farm business. However, if a direct farm business wants to sell value-added products, such as canned goods and juices, it is a different story. Because these items have a long and sordid history of harboring dangerous bacteria, the Colorado Department of Agriculture, Division of Inspection and Consumer Services (DICS) has concerns about safety in production. Consequently, all processed products for sale in retail locations must meet the requirements for commercial processors, and those sold at farmers' markets and roadside stands must meet the requirements of home processed foods.



Before describing the regulations that pertain to each group, it is important to understand the difference between raw and processed foods. The Federal Food, Drug, and Cosmetic Act defines a *raw agricultural commodity* as “any food in its raw or natural state, including all fruits that are washed, colored or otherwise treated in their unpeeled natural form before marketing” (21 U.S.C. §321; C.R.S. 25-5-402(21)). Processing occurs anytime a raw agricultural commodity is altered from its natural state, such as slicing,

dicing, cutting, chopping, mixing, grinding, drying, smoking, cooking, pickling, packaging, and canning. An example of this difference is raw versus processed lettuce – a washed head of lettuce is raw, while bagged salad mix is processed. A good rule of thumb is that produce sold in any form other than how it came off the plant or out of the ground may be “processed” and subject to additional regulations.

I. UNPROCESSED FRUITS, VEGETABLES AND MUSHROOMS

Probably the most common way to sell fruits and vegetables is as raw, unprocessed commodities. If a direct farm business is selling raw, unprocessed fruits and vegetables, the regulations limit pesticide residues and simply prohibit the sale of rotten or filthy food.

A. Federal Law Requirements

As noted, the federal Food and Drug Administration is the federal agency charged with ensuring the safety of food commodities sold in the United States. However, until recently, the FDA imposed no formal rules on unprocessed fruits and vegetables at the farm level, simply

because it did not have the statutory authority to do so. Instead, the FDA was limited to publishing non-binding guidance documents on best practices for the growing, harvesting, and processing of fresh fruits and vegetables.

This has changed with the passage in early 2011 of the FDA Food Safety Modernization Act (FSMA), the most significant food safety legislation since the 1938 passage of the FDCA. The intent of the FSMA is to close some of the gaps in the existing food safety system. Key additions/revisions to the existing food safety framework include:

The ability of FDA to mandate food safety measures at the farm level for fruit and vegetable production: Previously, agricultural production (i.e., farming) was the exclusive purview of the USDA, with very limited exceptions such as shell egg production. But Section 105 of the FSMA directs the FDA, by way of rulemaking, to “establish minimum standards for the safe production and harvesting of those types of fruits and vegetables, including specific mixes or categories of fruits and vegetables, that are raw agricultural commodities for which the Secretary has determined that such standards minimize the risk of serious adverse health consequences or death” (H.R. 2751 § 105 (to be codified at 21 U.S.C. § 419(a)(1)(A)).

As of this writing (July 2013), these rules have not yet been formalized, but the law states that FDA’s rules should be (1) sufficiently flexible so as to apply to fruit and vegetable producers of all sizes, including those that sell directly to consumers; (2) incorporate “science-based minimum standards related to soil amendments, hygiene, packaging, temperature controls, animals in the growing area, and water,” and (3) not conflict with or duplicate requirements of the National Organic Program.

The FDA already has established such standards by way of its **Good Agricultural Practices (GAP) Guide**¹⁴⁴ for fruit and vegetable production. This Guide is not law and compliance is, therefore, voluntary at this stage. However, fruit and vegetable producers who wish to familiarize themselves with what FDA’s rules might eventually look like – or who wish to reduce the risk of bacterial contamination in their produce – may find the Guide to be a helpful resource for altering or refining growing and production processes.

FDA authority to create a system of hazard analysis risk and risk based prevention control (HACCP) in all food-processing facilities: A Hazard Analysis and Critical Control Point (HACCP) system is a prevention-based food-safety system designed to prevent, reduce to acceptable levels, or eliminate the microbial, chemical, and physical hazards associated with food production. HACCP’s main advantage is that it is a proactive rather than reactive method of containing contamination: it is the food producer’s responsibility to identify critical points in the

¹⁴⁴

<http://www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/UCM169112.pdf>

production process that are susceptible to contamination and then develop and follow a written plan that addresses and effectively controls those risks.

To that end, Section 103 of the FSMA requires food processing, packing, and holding facilities to develop and carry out HACCP plans that (1) identify, in writing, “known or reasonably foreseeable hazards” associated with the facility, including natural toxins (such as *Salmonella* and *E. coli*), (2) identify and implement preventative controls, including at critical control points, to significantly minimize or prevent the identified hazards, and (3) take corrective actions if the preventative controls are not properly implemented or are found to be ineffective. The statute also imposes detailed monitoring, plan re-verification, and recordkeeping requirements.

Exemption for small producers: After intense lobbying by small farm and local food advocates, the Senate passed the Tester-Hagen Amendment to the FSMA as a compromise to minimize the potential financial impact of compliance with many of the new statute’s provisions. Specifically, Congress exempted small farms (less than \$500,000 in total sales) engaged in direct-farm marketing (so long as 50% of total farm sales were in direct sales to consumers or restaurants in the same state or within a 275-mile radius). Congress included a similar exemption for these entities from the HACCP requirements.

What the changes in the law mean for direct farm business producers: The FDA authority to impose on-farm safety measures is limited to fresh fruit and vegetable production, not grains or oilseeds. The HACCP requirements apply to food processing facilities. The definition of a food processing facility specifically exempts farms, unless the farm engages in some type of processing, such as milling of wheat for flour.¹⁴⁵ However, farms processing harvested goods for use on the same farm (e.g., milling own wheat for personal use) are exempted from the definition of a “facility.” Therefore, unless the farm is creating a value added product (e.g., engaging in some form of processing) and delivering this product off the premises, the farm is not a facility, and thus not subject to the HACCP rules. Food processing facilities, on the other hand, should carefully monitor the development of implementing regulations as several elements of the FMSA may apply and require operational changing and documentation of food safety procedures. The FDA has a **guide**¹⁴⁶ that helps explain how to follow food safety procedures.

That being said, many direct farm business producers will fall within the small farm exemption to the law and, therefore, will not need to comply with the new rules. FDA produce safety is

¹⁴⁵ Specifically, current law defines a “facility” as “any factory, warehouse, or establishment (including a factory, warehouse, or establishment of an importer) that manufactures, processes, packs, or holds food. Such term does not include farms; restaurants; other retail food establishments; nonprofit food establishments in which food is prepared for or served directly to the consumer; or fishing vessels....” 21 U.S.C. § 350d(b)(1).

¹⁴⁶

<http://www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/UCM169112.pdf>

currently a moving area of law, and producers who are unsure of their status should contact an attorney for specific guidance.

B. State Law Requirements

If food consists in whole or in part of a diseased, contaminated, filthy, putrid or decomposed substance, or if it is otherwise unfit for food, it is “adulterated” under the Colorado Pure Food and Drug Law (C.R.S. 25-5-410). This legal distinction, in general terms, means food should not be dirty, rotten, or contaminated with animal feces. As many direct farm businesses build their customer base through delivery of superior products and rely on reputation, common business sense would eliminate many of these potential violations. Nonetheless, it merits mentioning because this legal standard applies to both raw and processed foods.

State Pesticide Requirements

Under the Colorado Pure Food and Drug Laws, a raw agricultural commodity is adulterated when it “bears or contains a pesticide chemical which is unsafe within the meaning of Section 25-5-413i of this title[Pure Food and Drug] Act” (C.R.S. 25-5-410). Under Section 346a of the Federal Food, Drug, and Cosmetic Act (FDCA) (21 U.S.C. § 346a), the federal Environmental Protection Agency (EPA) sets tolerance levels for pesticides on and in foods. Using notice and comment rulemaking, the EPA establishes the tolerance level for each pesticide based on the potential risks to human health posed by that pesticide. EPA lists tolerance levels for more than 1,000 pesticides, so it is impossible for this Guide to cover all the standards. However, there are several ways farmers can determine the tolerance levels for pesticides they are using. One method is to look up the pesticide in the Code of Federal Regulations (CFR) (40 C.F.R. Part 180). EPA maintains a **website**¹⁴⁷ that explains how to search the CFR to determine the tolerance level for a particular crop. Another EPA **website**¹⁴⁸ contains general information on pesticides by family, commodity type, and crop type. The site also has a database to look up tolerance levels for particular pesticides, which users can search using the common names of pesticides.

State Produce Licensing and Sampling Requirements

Pathogens and chemicals may be present on the exterior surfaces of raw fruits and vegetables. Washing the produce with potable water is an effective way of removing the majority of organisms and chemicals that are present. The FDA, USDA, and CDC published a voluntary guidance document, **Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables**.¹⁴⁹

¹⁴⁷ <http://www.epa.gov/opp00001/food/viewtols.htm>

¹⁴⁸ <http://www.epa.gov/opp00001/regulating/part-180.html>

¹⁴⁹ <http://www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlantProducts/UCM169112.pdf>

Normally, retail food establishments are required to obtain licenses from their local county health departments. However, vendors who only sell whole fruits and vegetables are exempt from licensing requirements, even if the vendor is providing samples of the products. Although no license is required, vendors offering produce samples must comply with minimum sanitation guidelines, including sanitary preparation and the availability of a handwashing station. For further guidance, review the Colorado State University Cooperative Extension Office's **brochure**¹⁵⁰ about offering samples at farmers' markets.

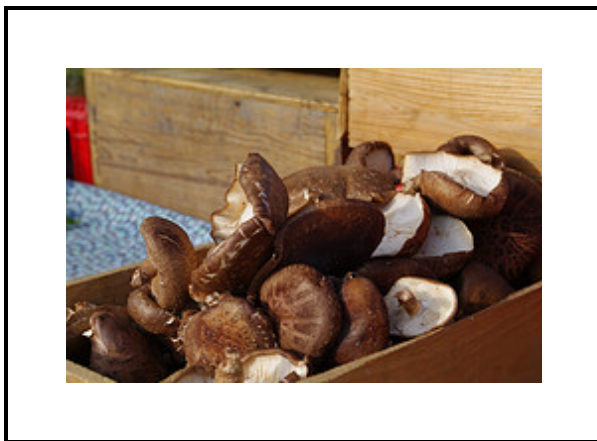
Mushrooms

Colorado regulates the sale of wild mushrooms, and requires that any mushroom species picked in the wild come from sources where each mushroom has been individually inspected and found to be safe by an approved mushroom identification expert (6 CCR 1010-2(3-306)). There are some exceptions to the above rule, including cultivated wild mushrooms that are grown in a regulated area and wild mushroom species if they are in packaged form and are the product of a processing plant that has been regulated by the CDPHE.

II. PROCESSED FRUITS AND VEGETABLES

As discussed above, the difference between raw and processed food can sometimes be slight. Beyond washing and packing, there are several popular processing methods a direct farm business may use to create "value-added" products, such as drying, canning, jarring, and pressing into a juice or other beverage. CDPHE regulates these activities for safety. Since the only guidance as to what constitutes "safe" has come from the federal Food and Drug Administration and the state has never defined the safety requirements, individual inspectors have often had to make independent "judgment calls" during the permitting process. This means that "safe practices" could mean different things between different regulators and different regions. To combat inconsistency in local enforcement, Colorado has adopted the Federal Good Manufacturing Practices (GMP) from 21 CFR 110 (6CCR 110-21). These extensive regulations are designed to ensure that processed food is free from contamination with filth or otherwise made injurious to human health. Even so, the bottom line is that direct farm businesses should cooperate with local public health inspectors during the approval process to ensure that no violations occur.

Normally, vendors who store, prepare, serve, or sell foods for human consumption must obtain a Retail Food Establishment License from their local county health departments (6 CCR 1010-2). This means farmers that process fruits and vegetables into anything other than the original raw



¹⁵⁰ <http://www.fremontco.com/building/farmersmarketbrochure.pdf>

agricultural commodity must obtain a Retail Food Establishment License. To obtain a license, farmers must comply with the CDPHE's application, inspection, sanitation, and labeling requirements (6 CCR 1010-2). However, Colorado's Cottage Foods Act (C.R.S. 25-4-1614) provides an exemption from regulatory and licensing requirements for certain processed foods.

Under the Cottage Foods Act exemption, producers are allowed to sell home processed, non-potentially hazardous foods. The exemption is limited to spices, teas, dehydrated produce, nuts, seeds, honey, jams, jellies, preserves, fruit butter, and baked goods, including candies (C.R.S. 25-4-1614(2)(b)(I)). Products under this exemption can only be sold directly to the ultimate consumer and must be sold at a roadside stand, farmers' market, community-supported agriculture organization, or similar venue (C.R.S. 25-4-1614(2)(d)). Products sold to stores or restaurants do not qualify (C.R.S. 25-4-1614(2)(d)). Furthermore, the producer must take an approved food safety course and maintain good standing according to the course requirements.¹⁵¹

Additionally, all food products produced or sold under the Cottage Foods Act must be labeled with an identification of the product; the producer's name, address, and contact information; a complete list of ingredients; and a disclaimer stating, "This product was produced in a home kitchen that is not subject to state licensure or inspection and that may also process common food allergens such as tree nuts, peanuts, eggs, soy, wheat, milk, fish, and crustacean shellfish. This product is not intended for resale" (C.R.S. 25-4-1614(3)). Lastly, producers do not qualify to market products under the cottage foods exemption if they earn more than \$5,000 per month in net revenue from any single eligible food product they produce (C.R.S. 25-4-1614(2)(e)). Importantly, this economic limitation applies only to each eligible food product (*i.e.* apple preserves).

In addition to inspection and permitting, many processed foods must have labels containing particular information. For instance, processed foods must conform to their standards of identity (if any) and bear labels giving the common name of the food. Product labels must also list all ingredients. Packaged foods must have labels that identify the manufacturer, packer or distributor, and contain an accurate accounting of the quantity of the contents.¹⁵² In addition, federal regulations require foods processed with sulfites to disclose the presence of a sulfating agent (21 C.F.R. § 130.9) and allergy labeling (21 U.S.C. § 343(w)(1)). CDPHE inspectors should advise food processors of any labeling requirements or restrictions that apply to their particular product.

¹⁵¹ The *Colorado Farm to Market Website* provides more information, as well as a list of some approved food safety courses for cottage food producers: <http://cofarmtomarket.com/value-added-products/cottage-foods/>

¹⁵² For detailed information, see the CDPHE's *Summary of Labeling Requirements*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadvalue1=inline%3B+filename%3D%22Product+Labeling+Requirements.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251807972224&ssbinary=true>

Additives

Some value-added processes may use products such as sulfites or FD&C Yellow # 5, which are food and color additives. If a product requires a processing agent, the simplest approach is to consult a local regulator to determine use restrictions and residue limits. Alternatively, information on allowable food additives is available through FDA's *Everything Added to Food Database*, which is available **online**.¹⁵³ Lists of FDA approved color additives are available in 21 C.F.R. Parts 73 and 74. If a producer uses an additive that is not approved, the food is considered to be adulterated and cannot be sold for human consumption (C.R.S. 25-5-410(1)(b)(III)).

Juice

All pre-packaged juice must be obtained from a processor that has a HACCP system as specified in 21 C.F.R. 120. Juice processors must comply with federally-mandated Hazard Analysis and Critical Control Point (HACCP) procedures, even if they are only selling the product intrastate (21 C.F.R. Part 120).¹⁵⁴ The HACCP rules require producers to develop a written analysis that identifies points in the production process where microbial, toxic, chemical, physical or other hazards may contaminate the juice, as well as a written plan for preventing hazards reasonably likely to occur (21 C.F.R. §§ 120.7 and 120.8). The developer of the written analysis and plan must have specialized HACCP training (21 C.F.R. § 120.13). For more information on the juice HACCP, the FDA has issued *Guidance for Industry: Juice HACCP; Small Industry Compliance Guide*, which is available **online**.¹⁵⁵

Processors who sell their own produce directly to consumers as juice do not have to comply with the HACCP rule, so long as they store, prepare, package, serve, and vend their product exclusively and directly to consumers (21 C.F.R. § 120.3(j)). They must comply with HACCP, however, if they sell to other retailers or if anyone else stores, prepares or packages their juice. If a processor is exempt from HACCP, they must still comply with FDA's other rules, including standards of identity proscribing minimum contents and allowable ingredients for canned fruit juices and vegetable juices (21 C.F.R. Parts 146 and 156). Additionally, FDA's labeling rule (21 C.F.R. § 101.17(g)) requires a warning label for juices that have not been pasteurized or otherwise treated to kill pathogens. The statement must read:

WARNING: This product has not been pasteurized and, therefore, may contain harmful bacteria that can cause serious illness in children, the elderly, and persons with weakened immune systems.

¹⁵³ <http://www.accessdata.fda.gov/scripts/fcn/fcnNavigation.cfm?rpt=eafusListing>

¹⁵⁴ The FDA's authority over food is generally limited to foods shipped in interstate commerce (21 U.S.C. § 331). However, FDA asserts authority to enforce the HACCP rules under the Public Health Services Act (21 U.S.C. §§ 241, 242i, 254) because juice is a vehicle for transmitting food borne illnesses (see 66 Fed. Reg. 6137, 6148, 6158-6160 (Jan. 19, 2001)).

¹⁵⁵ <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/Juice/ucm072637.htm>

Although it is not required at this time, vendors who process their own juice and are exempt from HACCP may register their facility with the CDPHE.

Wine, Beer and Spirits

Once an operation begins pressing juice, it may be a natural progression to ferment wine, beer or spirits. Like all other foods, these products fall under the jurisdiction of the CDPHE, which must inspect and permit their operation. However, these operations also are subject to oversight by the Federal Alcohol and Tobacco Trade and Tax Bureau (TTB) (27 U.S.C. §§ 201 *et seq.*; C.F.R. Title 27) and local liquor control commissions.

At the federal level, TTB requires producers to obtain several permits prior to commencing operations and submit annual forms and taxes. Forms are available through TTB's **website**¹⁵⁶ or in a packet by calling 1-800-398-2282. TTB also provides **online packets of information**¹⁵⁷ tailored to particular manufacturers.

Local and county liquor control commissions vary in their permitting requirements. Manufacturers and retailers generally must obtain state permits before obtaining local level permits (C.R.S. 12-47-301(1)). At the state level, the Colorado Liquor Enforcement Division (CLED) oversees the licensing and permitting process and regulates the production of microbrews and wineries. The **CLED website**¹⁵⁸ explains the various types of licenses and permits available, and also provides **applications for both state and local licenses and permits**.¹⁵⁹

Colorado requires distinct permits for manufacturers and distributors. If you produce wine or beer but sell *only* direct to consumers, you need a manufacturers license. If your alcoholic products are sold for resale, both licenses are required. For fee and rate information, see the **applicaton**.¹⁶⁰ If a wine or beer producer is using commodities purchased from another producer, additional licensing requirements discussed earlier in this guide may apply, such as a Commodity Handlers License or a Farm Products Dealers License.

In addition to normal tax liability, business selling wine, beer, or spiritous liquors produced and sold in Colorado are subject to additional excise taxes and surcharges. Colorado wineries are subject to a five cent surcharge on the first 9,000 liters of wine sold in Colorado. The surcharge is 3 cents per liter for the next 36,000 liters and 1 cent per liter for additional amounts. The

¹⁵⁶ <http://www.ttb.gov/forms/index.shtml>

¹⁵⁷ <http://www.ttb.gov/applications/index.shtml#Manufacturers>

¹⁵⁸ <http://www.colorado.gov/cs/Satellite/Rev-Liquor/LIQ/1209635768989>

¹⁵⁹ <http://www.colorado.gov/cs/Satellite/Rev-Liquor/LIQ/1209635769030>

¹⁶⁰

<http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251601348135&ssbinary=true>

CDOR published a **worksheet**¹⁶¹ to help wineries calculate the surcharge amount due. The surcharge goes into the Colorado Wine Industry Development Fund. Additional surcharges are due on sales of all alcoholic beverages produced and sold in Colorado. The surcharge is 8 cents per gallon for beer, malt liquor, and hard cider; 7.33 cents per gallon for wine; and 60.26 cents per gallon for distilled spiritous liquor. Additionally, any grapes grown and sold in Colorado for the production of wine are subject to an excise tax of 10 dollars per ton. Surcharges and excise taxes for alcoholic beverages are recorded and reported using **Form DR 0442**.¹⁶²

In addition to exhaustive permitting, licensing, and tax requirements for vendors selling alcoholic beverages, the labeling requirements on the products are strict and complex. Many specific pieces of information must be included on the label, and it is advisable to consult an attorney and other sources when labeling alcoholic products.¹⁶³

Other Considerations for Fruits and Vegetables

Other sections of this Guide cover several additional issues that might arise when a direct farm business chooses to grow and sell fruits and vegetables. First, producers may wish to make certain health or nutrient claims when marketing their goods. These statements are regulated by the FDA and are discussed further in the “Marketing and Managing” chapter. Second, organic production and marketing must follow additional rules, which are outlined in the “Organic Marketing” chapter. Finally, the “Weights & Measures” section of the “Marketing and Managing” chapter covers additional marketing rules applicable to direct farm businesses.

¹⁶¹

<http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251794189404&ssbinary=true>

¹⁶²

<http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251849083299&ssbinary=true>

¹⁶³ view requirements for each product in Title 27 of the CFR at ecfr.gov

III. CHECKLIST

- Have you determined what the residue limits are for any pesticides on the product
- If you are intending to raise or gather mushrooms, have you consulted with CDPHE?
- Are you pressing juice? If so, you need to undergo HACCP training and develop a written HACCP plan or hire a trained professional to do so for you.
- Thinking about selling alcohol? Look into all the permits you need to obtain from federal, state and local agencies, be aware of the order in which they must be completed, and investigate how much they will cost (some can run into the thousands). Also be aware of whether you can sell directly or will need to contract with a distributor.

KEY CONTACT INFORMATION

U.S. Environmental Protection Agency's National Pesticide Information Center

Ph: (800) 858-7378

U.S. Food and Drug Administration

Guidance on fruits, vegetables, and juices:

<http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/FruitsVegetablesJuices/default.htm>

Colorado Department of Public Health and Environment

Ph: (303) 692-2000

U.S. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB)

Ph: (877) 882-3277 (general info)

Colorado Liquor Enforcement Division

Denver Area Ph: (303) 205-2300

Colorado Springs Area Ph: (719) 594-8702

Greeley Area Ph: (970) 356-3992

Grand Junction Area Ph: (970) 248-7133

CHAPTER 9- GRAINS, CEREALS, AND OILSEEDS

Marketing grain is a complex business requiring decisions on when to sell, what type of contract to use, proper storage, and many other factors. Although selling directly means the business may not be selling on the volatile open market that most grain growers are accustomed to, many of these decisions are still pertinent to the direct farm business. Additional considerations for a direct farm business include whether and where to have the grain milled, as well as how and where to store the grain.



Although there are extensive resources for assisting conventional farmers in marketing their grain, there is limited information available for direct-to-consumer marketers. Most producers who are not selling through the traditional commodities markets have made their business planning choices using their personal judgment and experience and little else. An important marketing resource is **MarketMaker**,¹⁶⁴ which allows producers to list their businesses in a searchable database as well as search for processors and potential institutional customers.

Another excellent resource on processing and marketing grains is the National Sustainable Agriculture Information Service's *Grain Processing: Adding Value to Farm Products*.¹⁶⁵ The guide gives examples of farmers who have successfully established processing and distribution infrastructure in order to direct market their grains. Finally, although geared toward organic farming, the Rodale Institute has a variety of educational resources on alternative crop marketing on their **website**.¹⁶⁶

¹⁶⁴ <http://co.marketmaker.uiuc.edu/>

¹⁶⁵ <http://www.attra.org/attra-pub/summaries/grainpro.html>

¹⁶⁶ <http://www.tritrainingcenter.org/course/>

Additional Resources: Grain Inspection

GIPSA maintains general information about grain and rice inspection on its website:

<http://www.gipsa.usda.gov/fgis/inspweigh.html>

A list of official service providers that inspect or weigh grain is available on GIPSA's website:

<http://www.gipsa.usda.gov/fgis/svcpro.html8cde-fccdb4e53015&GUID=&SMAUTHRE>

I. GRAIN INSPECTION STANDARDS

The Federal Grain Standards Act

The Federal Grain Standards Act (7 U.S.C. § 71 et seq.) authorizes the USDA to establish standards and procedures for the inspection of grain shipped in interstate commerce and for export (7 U.S.C. §§ 76, 77). The Grain Standards Act is administered by USDA's Grain Inspection, Packers & Stockyards Administration (GIPSA).

Inspection of grain shipped domestically (within the United States) is voluntary, and performed upon request by GIPSA-authorized state agencies and private firms (7 U.S.C. § 79(b)). The regulations concerning inspection procedures and establishing standards are in 7 C.F.R. Parts 800, 801, 802 and 810. Very generally, inspectors rate grains on their moisture content, levels of contaminants such as insects or gravel, toxins caused by mildews or pesticide residues, and amount of crushed or broken grains.

II. LICENSING OF WAREHOUSES

The United States Warehouse Act

The United States Warehouse Act (USWA) (7 U.S.C. §§ 241-273) authorizes the USDA to license warehouse operators that meet the standards established by the USWA and its regulations (7 U.S.C. § 242(j), 7 C.F.R. Part 735). Being federally licensed is voluntary, but licensees must post bonds (or other financial assurance) (7 U.S.C. § 245) and comply with record keeping, contracting, and inspection requirements (7 U.S.C. § 246, 7 C.F.R. Part 735).

The Colorado Commodity Handler Act

The Commodity Handler Act (C.R.S. 12-16-201 *et seq.*) and implementing regulations (8 CCR 1202-11) are the Colorado laws relating to the marketing and storage of grain. The law, which is administered by the Colorado Department of Agriculture (CDOA), requires grain dealers and warehouses to be licensed by the CDOA (C.R.S. 12-16-203) or by the USDA pursuant to 7 U.S.C. § 241 *et seq.* (C.R.S. 12-16-204). It also establishes a requirement for stored grain to be insured to protect producers in the event of the failure of a licensed dealer or warehouse operator (C.R.S. 12-16-206).

The federal and state licensing programs serve the same purpose: protect producers by requiring warehouses and dealers to have enough financial security to pay the producers and authorize inspections to ensure that bad management practices do not damage products. To this end, CDOA licensees must maintain sufficient insurance to cover losses (C.R.S. 12-16-206) and purchase a surety bond in an amount determined by CDOA based on the weight the

warehouseman can store (C.R.S. 12-16-218). Grain processing establishments that take in grain without storage agreements, such as for processing or cleaning, are exempt from warehouse licensing (C.R.S. 12-16-204).

Warehouses must provide a receipt for all stored grain (C.R.S. 12-16-211). Each warehouse receipt, which is obtained from the CDOA, must show the amount of any cash or the value of any merchandise the warehouseman has advanced on the grain represented by the receipt (C.R.S. 12-16-211).

III. SELLING GRAINS

Unprocessed grains, nuts and seeds sold in the same condition as harvested are raw agriculture products do not need to come from a CDOA inspected and licensed facility. However, if the producer processes the grain by bagging, packaging or grinding, they must do so in an approved facility if they are a commercial processor. Processing also includes blending, roasting, sprouting, grinding, or any other process that changes the condition of the grain. However, if the processor is a home processor, they are allowed to make non-hazardous (e.g., not cream filled) baked goods or other foods from the processed grain, without requiring a license or inspected facility.

Sellers of processed grain must comply with the federal standards of identity for grains and grain products (21 CFR Part 137) and FDA Defect Action Levels. Standards of identity apply if the finished product is sold in interstate commerce. The producer must also monitor FDA Defect Action Levels, which are maximum allowable levels of natural or unavoidable defects in foods for human use that present no health hazard (21 C.F.R. § 110.110). Common defects with specific action levels include molds, insect parts, and excrements. More guidance on the action levels is available on the FDA's **website**.¹⁶⁷

¹⁶⁷<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/SanitationTransportation/ucm056174.htm>

IV. CHECKLIST

Have you:

- Come up with a marketing and business plan? What type of growth do you envision and when? Given the rarity of direct marketing grain, this may be a particularly difficult step that is especially important for establishing a successful business.
- Do you want to have your grain inspected and graded?
- Will you need to use a warehouse, or do you have storage capacity on the farm? If so, have you identified a warehouse that will take your grain?
- Will you be processing your grain, or selling it in its natural, post-harvest state? If you are processing, do you have the necessary facilities and permits, or do you need to access a commercial, certified kitchen?

KEY CONTACT INFORMATION

U.S. Grain Inspection, Packers & Stockyards Administration

Ph: (202) 720-0219 (main)

For a list of official GIPSA service providers, visit

<http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=fc&topic=fsp>

Colorado Department of Agriculture

Ph: (303) 239-4140

CHAPTER 10- HONEY

I. BEE KEEPING

In the early 1990's, the Colorado legislature cut funding and repealed major sections of the *Colorado Bee Act* (C.R.S. 35-25-101 *et seq.*). Therefore, there are no registration requirements for starting an apiary. However, municipalities vary on whether they regulate bee colonies within city limits, so be sure to contact your local government. Parts of the Colorado Bee Act are still good law, including stringent requirements about bringing live bees or used bee equipment into Colorado from another state. (C.R.S. 35-25-101 *et seq.*) As of the date of this writing (July 2013), those laws are not being enforced, primarily due to the absence of available funds, but the state could begin enforcing them at any time. Business owners that plan to start an apiary should contact the CDOA first to ensure the business is operating within the confines of the law.

II. SELLING HONEY



III. RAW HONEY

For producers selling their own honey in an unprocessed state, such as a whole honeycomb, there are currently no specific requirements. If the honey is refined or processed, registration with the local county health department is required. Colorado is in the early phases of drafting and adopting honey standards that will likely include purity, quality, and labeling requirements. Contact CDPHE to inquire into the status of these regulations.

IV. ORGANIC HONEY

To market honey as organic, the bees and processing plant must be certified organic according to USDA's National Organic Program. Although the regulatory definition of livestock specifically excludes bees (7 C.F.R. § 205.2), **USDA guidance documents**¹⁶⁸ direct certifiers to use the livestock standards for certification of bees. The livestock regulations generally require the producer to handle the livestock organically from the day of birth, use 100% organic feed, avoid most synthetic chemicals, and refrain from use of antibiotics and certain other medical treatments. For bees, this may mean locating the hive so as to prevent foraging at non-organic flowers, building the hive out of particular materials, or treating hive diseases in a manner that

¹⁶⁸ Available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5087792>

would comply with standards set out by the certifier. The “Organic Marketing” chapter of this Guide covers the livestock regulations in more detail, as well as information on the certification process, record keeping requirements, labeling rules, and processing of organic foods. Given the special nature of bees, it may be best to contact an accredited organic certifying agent that certifies bees to discuss specific requirements. Refer to the “Organic Marketing” chapter of this Guide for more general information on the organic certification process.

KEY CONTACT INFORMATION

- **Colorado Department of Agriculture**

Ph: (303) 239-4140

- **Colorado Department of Public Health and Environment**

Ph: (303) 692-2000

CHAPTER 11 – LIVESTOCK AND POULTRY

In the recent past, most farm operations included at least minimal animal production. However, declining livestock auction markets and vertical integration in the livestock and poultry industries has limited marketing opportunities for small scale livestock and poultry farmers. Selling directly to consumers is one means of retaining a presence in this potentially lucrative and rewarding business. Ongoing consumer concerns regarding food safety and the increasing interest in animal welfare should increase demand for direct farm sales of meat and poultry products. Moreover, in a 2004 study of restaurant and commercial food buyers, the most important factor in selecting a new supplier was obtaining the highest quality food available--a characteristic that provides an opportunity for local, direct market farm operations.

In order to participate in this market, however, producers must navigate a series of state and federal regulations relating to the production, slaughter and processing of meat and poultry products. This chapter will address raising, slaughtering and processing requirements. The facility may also be subject to the EPA's water permitting regulations or the National Animal Identification System, discussed in Chapter 2 – Setting up the Direct Farm Business.

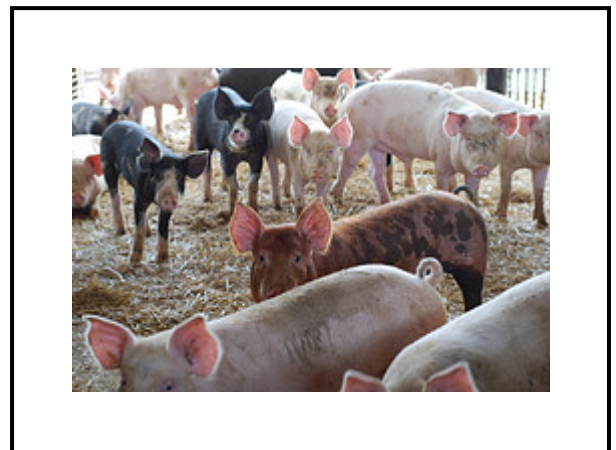
I. RAISING AND CARING FOR ANIMALS

A. *Animal Welfare Laws*

The Animal Protection Act (C.R.S. 35-42-101 *et seq.*) and *Cruelty to Animals* statute (C.R.S. 18-9-201 *et seq.*) requires that owners of animals provide:

- sufficient quantities of good quality, wholesome food and water
- adequate protection and shelter from the weather
- veterinary care when needed to prevent suffering

The statute prohibits beating, cruelly treating, tormenting, starving, overworking or otherwise abusing any animal (C.R.S. 18-9-202). However, nothing in the Act is intended to affect "the use of animal husbandry practices by any person in the care of livestock or companion animals" (C.R.S. 18-9-201.5(1)). The laws largely should not be a concern for livestock and poultry operations as long as the care provided meets the minimum standards that are common practice in the industry.



The Colorado Garbage Cooking Law

The Colorado Garbage Cooking Law (C.R.S. 35-52-113) requires farmers to cook garbage to boiling or equivalent temperature before feeding it to animals (*id.*). The law does not apply to a person who feeds his or her own animals only the garbage obtained from his or her household (*id.*). These practices, particularly feeding meat scraps and dead animals to swine, can lead to the spread of difficult-to-control diseases such as hoof-and-mouth disease or Bovine Spongiform Encephalitis (BSE). Therefore, all garbage should be thoroughly heated to the boiling point for at least 30 minutes before being fed to the swine.

B. Diseased Animals and Dead Animal Disposal

The Livestock Health Act

The Livestock Health Act (C.R.S. 35-50-101 *et seq.*) directs the state veterinarian to investigate all cases of dangerously contagious or infectious diseases among animals in the state (C.R.S. 35-50-107). The regulations implementing the law establish general requirements for reporting, quarantining, and controlling diseases as well as specific programs for particularly problematic diseases. Because of the potential for disease, those wanting to move an animal interstate must obtain an official health certificate for the animal from a veterinarian accredited by the State Veterinarian. (8 CCR 1201-19)

Anyone who suspects an animal has a reportable disease, including but not limited to avian influenza, bovine tuberculosis, pseudorabies, and Johne's disease, must report the case to the state veterinarian immediately (C.R.S. 35-50-108). The Commissioner has authority to issue quarantines if deemed necessary to prevent the spread of infectious diseases (C.R.S. 35-50-111). Additionally, if the disease becomes epidemic, the state veterinarian will inform the governor who must issue a proclamation forbidding the transfer of any animal from the locality without permission from the state veterinarian (C.R.S. 35-50-115). The state veterinarian may destroy animals with contagious or infectious diseases and any potentially infected property (*id.*).

The CDOA oversees all livestock inspection. For more information about inspection visit the CDOA **website**.¹⁶⁹

Disposal of Dead Animals

The Commissioner of Agriculture has the authority to regulate disposal of livestock carcasses (C.R.S. 35-50-105(l)), but that authority is currently delegated to local and county health departments. Livestock carcasses are classified as solid waste, so it is important to reference your local public health authority's solid waste disposal regulations. The CDPHE has provided some guidance on general best disposal practices including burial (with specific precautions taken to avoid groundwater contamination), taking the animals to a permitted landfill that will

¹⁶⁹ http://www.colorado.gov/cs/Satellite/ag_Brands/CBON/1251621324149

accept them, working with a licensed rendering facility, or composting the carcass after consulting with the CDPHE.¹⁷⁰

II. SLAUGHTERING AND PROCESSING

A. Humane Slaughter

Although most farmers do not slaughter their own animals, the laws pertaining to the humane slaughter of animals are worth noting. For one thing, if part of the retail marketing of the meat entails advertising humane treatment, slaughtering methods matter as much as raising and care. The laws are also relevant because a slaughterhouse that fails to comply with these rules may also fail to comply with other rules pertaining to food safety, which could damage a producer's reputation and increase exposure to legal liability.

ADDITIONAL INFORMATION: Animal Processing Licenses

More information on obtaining federal animal processing licenses is available on the FSIS website:

<http://www.fsis.usda.gov/wps/portal/fsis/topics/regulations>

The USDA recently launched a toll-free help desk for small meat and poultry processing plants. Staff specialists can answer questions or direct callers to appropriate assistance. Contact:

1-877-FSISHelp (1-877-374-7435)

infosource@fsis.usda.gov

The Federal Humane Slaughter Act

The Federal Humane Slaughter Act (7 USC § 1901) requires that animals be slaughtered humanely. Approved humane methods render the animal unconscious quickly or comply with Kosher or other religious methods that quickly cause unconsciousness due to anemia from a cut to the carotid artery (7 USC § 1902).

B. Processing Meat and Poultry Products

Meat and poultry processors are subject to federal or state laws and regulations regarding licensure and inspection. The USDA's Food Safety and Inspection Service (FSIS) oversees federally licensed and inspected facilities. The CDOA enforces Colorado laws and regulations applicable to Colorado registered custom processing facilities.

Meat

Colorado inspected custom processing facilities may only process wild game or livestock that is to be processed for home consumption. Custom processed meat may not be sold. (C.R.S. 35-33-103(4)) Therefore, direct farm businesses who want to sell the meat they produced at retail must have their meat processed by a federally licensed facility. Some direct farm businesses are able to utilize the services of custom processing facilities by selling their animals, or portions of them, before slaughter to the end-user. For example, if a

¹⁷⁰ <http://www.colovma.org/associations/2956/files/CDA%20Carcass%20Disposal.pdf>

consumer purchases half or one quarter of a finished steer in the days before the animal is to be taken to market, the farmer and the consumer may have their steer custom processed, each of them being a partial owner of the animal. Custom processed meat should be wrapped or packaged and marked “NOT FOR SALE.” (C.R.S. 35-33-201(10)) These facilities are exempt from federal inspection requirements. The CDOA regulates inspection of custom processing facilities. For more information, see the CDOA **brochure**¹⁷¹ on custom processing law.

As a general rule, each facility engaging in processing must have an inspection and license from either the USDA or CDOA. For instance, in sausage production, the facility that slaughters the animal must have a permit and the facility that processes the sausage, if it is a separate facility, also must have a permit. In rare circumstances, a producer can slaughter and process its own meat or poultry. Although most slaughtering and processing is done at slaughterhouses, mobile processing units, which are often more accommodating of small producers, may be available in certain areas.¹⁷²

Generally, in order to sell across state lines, farmers must take their animals to a federally licensed facility for slaughtering and processing (21 U.S.C. §§ 601; 603. The Federal Meat Inspection Act (21 U.S.C. §§ 601-695) and accompanying regulations (9 C.F.R. Parts 300-599) govern facilities that slaughter or process meat. In Colorado, all meat that is sold, even if only sold within Colorado, must be processed in a federally licensed facility. CDOA regulations are only applied to custom processing facilities where meat is processed for home use only.

The USDA places an “inspected and passed” stamp on federally inspected meat, using food-grade ink (21 U.S.C. § 606). The mark is put on carcasses and major cuts, but might not appear on retail cuts such as roasts and steaks. Producers can also request that USDA grade their meat (7 C.F.R. Parts 53 and 54). Whereas an inspection qualifies the meat for sale to consumers, grading certifies that the meat is of a particular quality. Mandatory USDA inspections are free of charge, but producers must pay for grading services (7 C.F.R. §§ 53.18, 54.28). For more information on how inspections and grading differ, visit the **FSIS website**.¹⁷³ To transport meat across state lines, the packer must affix a pre-approved, federal label (9 C.F.R. 317.1). More information on the approval process for labels is available on the **FSIS website**.¹⁷⁴

A recently enacted rule allows state-inspected meat to be sold interstate in limited circumstances (9 C.F.R. §§ 321, 332, and 381). In order to qualify, state-inspected establishments

¹⁷¹ CDOA Division of Inspection & Consumer Services, *Questions & Answers Regarding the Colorado Custom Meat Processor Law*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Questions+%26+Answers+Regarding+the+Colorado+Custom+Meat+Processor+Law.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822420505&ssbinary=true>

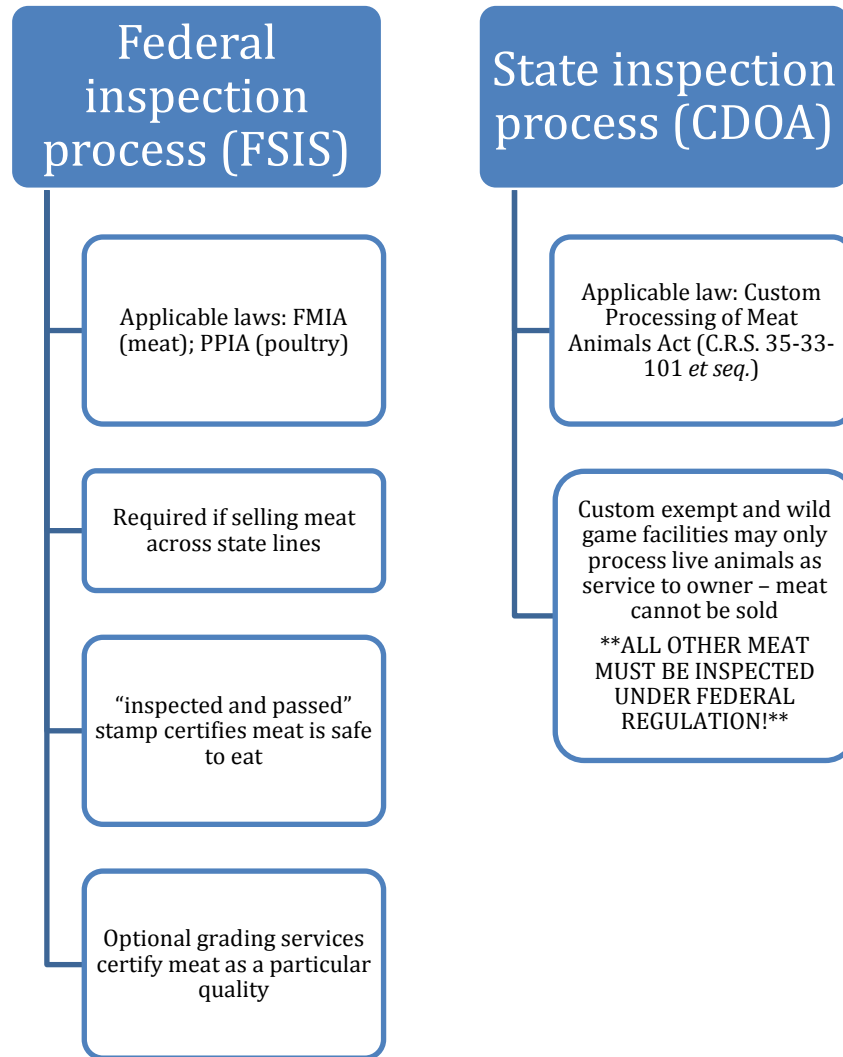
¹⁷² These units are still relatively uncommon, but USDA is stepping up efforts to disseminate information and increase their availability. For instance, in January and February 2010, the agency held a series of webinars to educate producers on special issues relating to mobile processing units. For more information, visit http://origin-www.fsis.usda.gov/News_Events/Regulatory_Web_Seminars/index.asp The state of Colorado also makes mobile processing units available. There are currently 8 units available for poultry and 8 for livestock. For more information, visit http://www.colorado.gov/cs/Satellite/ag_Markets/CBON/1251624938479

¹⁷³ http://www.fsis.usda.gov/factsheets/inspection_&_grading/index.asp

¹⁷⁴ http://www.fsis.usda.gov/regulations_&_policies/Labeling_Procedures/index.asp

must meet all Federal standards under the Federal Meat Inspection Act and the Poultry Products Inspection Act. The FSIS rule lists requirements for meat and poultry processors to be able to participate in the voluntary cooperative interstate inspection regime. The requirements include; (1) the processor must submit a request to be considered for the program, (2) can not employ more than 25 employees as defined in the regulation, (3) must be in compliance with all the requirements under the cooperative State inspection programs authorized by the FMIA and PPIA, and (5) must be otherwise in compliance with the implementing regulations for the interstate shipping program. Notably, establishments that already ship their products interstate may not participate in the new cooperative program. As of July 2013, Colorado has not elected to participate in the voluntary interstate shipment program.

The following graphic provides an overview of the federal and state meat inspection and licensing process:



A good source for guidance on marketing meat is *How to Direct Market Your Beef*.¹⁷⁵ The guide is written by Jan Holder, a rancher who successfully direct markets beef with a "grass-fed" claim, and discusses Holder's experience in complying with laws governing the slaughter, processing, and marketing of beef.

CDOA offers licenses for door-to-door sales of meat, poultry, seafood or food products (C.R.S. 33-33.5-301). In order to receive a license, the seller must provide a brochure that contains a published list price of all products listed for sale and the name, address and phone number of the company must be submitted to the CDOA. All the meat must originate from approved sources. If from another state, the meat must be inspected by the federal government. More information about requirements and the application are available **online**.¹⁷⁶

On a final note, in 2011, U.S. Congress lifted a ban that previously made it illegal to butcher horses for human consumption (House Bill. 2112). Some states, but not Colorado, have reacted by banning the processing of horse meat for human consumption.

Poultry

As a general rule, poultry products that move in interstate commerce are subject to the federal Poultry Products Inspection Act (PPIA) (21 U.S.C. §§ 451-471) and regulations (9 C.F.R. Part 381), which require poultry slaughter and/or processing of poultry products to undergo mandatory inspection. Some operations, however, are exempt from federal inspection. Even if the operation is exempt from federal inspection, some regulatory standards still apply.



Federal Inspection Exceptions for Poultry

Direct farm businesses meeting certain criteria listed below may sell poultry products directly to consumers without securing PPIA's otherwise mandatory inspection requirements (21 U.S.C. § 464; 9 C.F.R. § 381.10). In general, even exempt facilities must slaughter healthy chickens in a sanitary manner, and ensure that they handle the birds properly (*id.*). On a basic level, slaughtering is exempt when it is done by:

- the producer for personal use;
- a slaughterer who provides a service to an owner of live chickens and *is not* selling poultry to any consumers

¹⁷⁵ <http://www.sare.org/publications/beef/beef.pdf>

¹⁷⁶ http://www.colorado.gov/cs/Satellite/ag_ICSCBON/1251622205586

- a producer-grower who slaughters and sells the poultry they themselves have raised (1,000 bird limit, or 20,000 limit as long as only distributed intrastate);
- producer-growers that sell direct to consumers;
- slaughterers who purchased live poultry specifically to sell direct to consumers;
- small businesses that process fewer than 20,000 birds annually *and* the processing only goes as far as cutting up the birds; and
- a retail business that is merely cutting up birds for the store.

The intricacies of whether a producer or slaughterer qualifies for the exemption, and which sales are exempt, are more complex and nuanced than the above list. Therefore, producers should contact an FSIS district office for an individualized analysis before proceeding without obtaining an inspection and license. FSIS has published *Guidance for Determining Whether a Poultry Slaughter or Processing Operation is Exempt from Inspection Requirements of the Poultry Products Inspection Act*, which is available **online**.¹⁷⁷ The guidance document contains a helpful decision flowchart (page 5) and a table (page 21) to help determine whether the operation is exempt from the PPIA.

Regardless of the exemption, processors are never exempt from the PPIA's prohibitions against misbranding and adulteration (injurious to health, or held, packed or produced under unsanitary conditions). Attachment 2 to the *Guidance for Determining Whether...Exempt* (cited above) summarizes sanitary hygiene requirements contained in the Code of Federal Regulations (9 C.F.R. § 416), and the *FSIS Sanitation Performance Compliance Guide*, which is available on the **FSIS website**.¹⁷⁸

State Inspection for Poultry

Generally, producers who are exempt from federal processing requirements are free to sell home-raised and home-processed poultry directly to end consumers from their farm as long as the poultry is not adulterated or misbranded. The CDOA does not currently have an inspection program for poultry processing. However, when poultry products are marketed off the farm, the Retail Food Establishment Rules may impose a requirement that the food products come from an approved source, which would likely constitute a federally inspected processing facility (6 CCR 1010-2). Additionally, meat or poultry processed in a custom processing facility cannot be sold, so the only direct farm businesses exempt from the requirement to have their birds processed in a federally licensed facility are those who raise, slaughter, and sell the meat themselves. Each operation is unique, and regulations are subject to change, so poultry

¹⁷⁷ http://www.fsis.usda.gov/OPPDE/rdad/FSISNotices/Poultry_Slaughter_Exemption_0406.pdf

¹⁷⁸ http://www.fsis.usda.gov/OPPDE/rdad/FRPubs/San_Guide.pdf

producers seeking to market meat that has not been processed in a federally licensed facility should contact the CDOA to ensure compliance with all rules and regulations.

III. MARKETING MEAT AND POULTRY PRODUCTS

A. *Labeling and Storing Meat and Poultry Products*

The federal Food Safety and Inspection Service (FSIS) regulates meat and poultry product labeling under the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA). These laws explicitly preempt any state law that adds to or is different than these federal laws (21 U.S.C. § 678; 21 U.S.C. § 467(e)). The FDA also establishes labeling requirements for “food products” under the Federal Food, Drug, and Cosmetic Act. Depending on the product, the agencies’ jurisdictions may overlap or become very unclear. To resolve this potential for jurisdictional overlap, USDA exempts foods containing less than certain specified quantities of poultry or poultry products from the PPIA (although products exempted under this section are still subject to the requirements of the FDCA) so long as the producer does not represent the item as a poultry product (9 C.F.R. § 381.15). The standards are:

- 3 percent or less raw meat or less than 2 percent cooked meat; or
- Less than 2 percent cooked poultry meat and less than 10 percent cooked poultry skins, giblet, or fat when measured separately; and less than 10 percent cooked poultry skins, giblets, fat and meat when measured in combination
- Bouillon cubes, poultry broths, gravies, sauces, seasonings, and flavorings

USDA does not have a comparable regulation for meat, but has applied the same standards for several decades. It matters which agency is exercising jurisdiction, because FDA requirements differ from FSIS requirements in some respects. For example, the FSIS requires pre-market label approval for meat and poultry (9 C.F.R. §§ 317.4 (meat), 381.132 (poultry)), while the FDA does not.¹⁷⁹

A producer can obtain pre-market approval by submitting a sketch for premarket approval (9 C.F.R. §§ 317.4, 381.132) or by using a pre-approved generic label (9 C.F.R. §§ 317.5, 381.133). Generically approved labels cannot contain special claims, including quality claims, nutrient content or health claims, negative claims, geographical claims, or guarantees (*id.*). These restrictions limit the usefulness of general labels for most direct-to-consumer producers.

Labels must appear directly on the immediate packaging (9 C.F.R. §§ 317.1, 381.116), unless the packaging meets special circumstances. For instance, poultry packages destined for institutional

¹⁷⁹ Point of purchase materials (such as signs displayed near the product and stickers on the shelves) do not require pre-approval, but if the point of purchase materials ship with the meat, they must have pre-market approval (*id.*). FSIS also requires preapproval of labels or stickers applied at the point of purchase that make animal production claims (e.g., grass fed).

customers can have the label on the outside package (rather than each immediate package) as long as the label states “for institutional use” and as long as the customer is not offering the unlabeled product in the container for retail sale (9 C.F.R. §§ 381.115). FSIS also requires the principal display label to contain the name of the product, net quantity of contents, the official inspection legend, number of the official establishment, and, if necessary, a handling statement (9 C.F.R. §§ 317.2(d), 381.116(b)). Information panels (generally defined as the first surface to the right of the principal display panel) may contain an ingredients statement, the name and address of the manufacturer or distributor, and nutrition labeling, if required (9 C.F.R. §§ 317.2(m), 381.116(c)). Safe handling instructions may be placed anywhere on the label (*id.*). Further regulations dictate product names, the prominence of the statement of identity, country of origin labeling, net quantity, and many other provisions. USDA’s *Guide to Federal Food Labeling Requirements for Meat and Poultry Products*¹⁸⁰ provides more detailed information on these labeling requirements.

Nutrition Content Labeling

In 2010, the USDA enacted regulations that require major cuts of meat and poultry, as well as ground meat and poultry products, to carry nutrition labels. As of 2012, the USDA requires producers of a final, packaged meat product to place nutrition content labels on 40 of the most popular meat and poultry products. Under the rule, packages of ground meat and poultry must carry a nutrition label. Whole, raw cuts of meat must carry a nutrition label *either* on the package *or* on a sign at the point of consumer purchase. The labels must carry the number of calories and the grams of total fat and saturated fat that the meat or poultry product contains. In addition, any product that contains a “percentage lean” statement on its label (e.g., “80% lean”) must also list the corresponding fat percentage.

The new rules include a number of exemptions relevant to direct farm producers. First, the labeling rules exempt products intended for further processing, so long as these products bear no nutritional claims or nutrition information. This means that, for example, a farmer who sells a side of beef to a butcher for processing into major cuts would not have to provide nutrition content information for the side of beef to the butcher (though the butcher would have to provide nutritional content information if it sold the cuts of meat to consumers). Second, the rules exempt products that are not for sale to consumers, so long as these products do not bear nutrition claims or other nutritional information.

Third, ground or chopped meat or poultry products produced by small businesses do not have to comply with the new nutritional labeling requirements. The USDA defines a “small business” for purposes of this exception as a facility that employs 500 or fewer people and produces no more than 100,000 pounds of meat per year. This exception holds even if small

¹⁸⁰ Available online at http://www.fsis.usda.gov/wps/wcm/connect/f4af7c74-2b9f-4484-bb16-fd8f9820012d/Labeling_Requirements_Guide.pdf?MOD=AJPERES&CACHEID=c7488e7e-3007-432e-911e-156832115b08

producers use “percent fat” and “percent lean” labels on their ground meat and poultry products, so long as they include no other nutritional claims or nutritional information on their labels. However, unlike for ground products, the nutritional labeling rules for major whole cuts of meat or poultry do NOT exempt small producers. This means that direct farm businesses that sell cuts of meat or poultry to consumers – either on-premises or at a farmers’ market – *must* provide nutritional content information, either on a packaging label or on a placard at the point of sale. However, this requirement should not be overly burdensome, because USDA point-of-purchase labeling materials will be available over the Internet, free of charge. The point-of-purchase labeling materials are not available as of November 2012, but the FSIS plans to have the labels and a webinar to explain the labels soon. For more information, the FSIS has produced a **Questions and Answers document**¹⁸¹. The FSIS does have **Nutritional Information Charts**¹⁸² available online for chickens, turkeys, pork, lamb, beef and veal that provide information in the interim.

Those producers that do not qualify for the small business exemption for ground meat or poultry will need to label their products with nutrition information. The USDA has resources available to aid producers in calculating nutrition information for these products. Specifically, the agency has a **national nutrient database**¹⁸³ that contains nutrient values for ground beef, pork, chicken, and turkey products at specific percent fat levels. The agency also has a **nutrient value calculator**¹⁸⁴ for ground beef that determines the precise nutrient content information for a specified level of fat or lean in a particular ground beef product.

Whether the direct farm business itself must provide a label depends both on the product being produced and to whom the direct farm business is selling. On the issue of who has the burden to comply with the new rules, USDA guidance states:

Normally, the packer is considered the producer because the packer produces the final product. For ground or chopped product, the producer of the final packaged product is required to provide nutrition labels on the product, unless an exemption applies. The producer of the final packaged product may be a Federal establishment or retail facility. Retailers are required to provide point-of-purchase materials or nutrition labels for major cuts, unless an exemption applies.¹⁸⁵

Therefore, with regard to ground meat, producers of the final packaged product of ground meat need to provide the labels. So if a farmer sold a side of beef to a slaughterhouse, which ground it and packaged it for sale, then the slaughterhouse would have to provide nutrition information labeling to the retailer, because it is the “producer of the final packaged product.” If a farmer

¹⁸¹ http://www.fsis.usda.gov/wps/wcm/connect/d166536c-39d7-4331-b588-5dcdbe0d0f9/Nutrition_labeling_Q_A_041312.pdf?MOD=AJPERES

¹⁸² http://www.fsis.usda.gov/regulations_and_policies/Nutrition_Labeling/index.asp

¹⁸³ http://www.ars.usda.gov/main/site_main.htm?modecode=12-35-45-00

¹⁸⁴ <http://www.ars.usda.gov/Services/docs.htm?docid=13933>

¹⁸⁵ http://www.fsis.usda.gov/wps/wcm/connect/d166536c-39d7-4331-b588-5dcdbe0d0f9/Nutrition_labeling_Q_A_041312.pdf?MOD=AJPERES

slaughtered his own poultry (permissible under certain circumstances in Colorado), turned it into ground chicken and sold it to a grocery store, the farmer is now the “producer of the final packaged product” and would therefore have to label it with nutrition information *unless* he met the requirements of the small business exception for ground products, mentioned above.

With regard to whole cuts of meat or poultry, the law places the burden of labeling on the person who provides it for retail sale. So if a farmer kills his own chickens, turns them into chicken breasts and sells them at a farmers’ market, then the farmer would be required to label the chicken breasts with nutrient content information – either on the package or on a sign at his stand. The same would be true of cuts of meat processed by a slaughterhouse but sold directly to consumers by the farmer. If the farmer sold the cuts of meat or poultry to a retail grocery store, the retailer technically has to provide the nutrition labels. However, because retailers have the power to demand certain concessions from the person wanting to sell at that retailer, the retailer could, if it wanted, shift the burden of labeling to the producer as a condition of sale.

Because these labeling rules vary in applicability, depending on the product and the buyer and seller, producers should consider contacting an attorney for additional guidance before commencing meat and poultry sale operations. For more information on the USDA’s new nutrient labeling requirements for meat and poultry, visit the **FSIS nutrition labeling website**.¹⁸⁶

Specific Terms Used in Meat and Poultry Labeling

USDA regulates many terms that direct producers may wish to use on their products. Their **website**¹⁸⁷ explains what USDA requires of specialty product labels. As noted above, many of these labels require pre-approval and many involve inspections and certification fees. Separate agency regulations outline the specific requirements for each claim. Some, but not all, of the terms are

- “Natural”: A product containing no artificial ingredient or added color and is only minimally processed.
- “Organic”: The product was raised and processed in compliance with USDA’s National Organics Program standards.
- “Antibiotic free”: allowed on red meat and poultry if supported by sufficient documentation.
- “No Hormones Added”: The claim “no hormones added” may be approved for labeling beef products if the producer provides sufficient documentation to the USDA showing

¹⁸⁶ <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/labeling+policies/nutrition-labeling-policies/nutrition-labeling>

¹⁸⁷ <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms>

that no hormones have been used in raising the cattle. The claim “no hormones added” cannot be used on pork or poultry products unless it is followed by a statement that says “Federal regulations prohibit the use of hormones.” “Hormone Free” claims are not allowed on animal products, because animal products contain naturally occurring hormones.

- “Grass fed”: Grass and forage must be the feed for the lifetime of the animal, with the exception of milk consumed prior to weaning. The diet must be derived solely from forage consisting of grass (annual and perennial), forbs (e.g., legumes, *Brassica*), browse, or cereal grain crops in the vegetative (pre-grain) state. Animals cannot be fed grain or grain byproducts and must have continuous access to pasture during the growing season.
- “Free range”: allowed if producer can demonstrate to USDA that the poultry has had continuous access to the outdoors.
- “Fresh”: Poultry may be labeled as “fresh” if its internal temperature has never been below 26° Fahrenheit.
- “Mechanically Tenderized Beef”: USDA proposed a rule that beef products that have been needle or blade tenderized be referred to as “mechanically tenderized” on the label. If the business plans to use this process, producers should look up the status of this proposed rule.

B. Specialty Products

Organic Meat

The USDA Agricultural Marketing Service administers organic production and labeling standards through the National Organic Program (NOP) (7 C.F.R. Part 205). Generally, NOP requires that animals receive all organic feed and minimum access to the outdoors and prohibits use of hormones to promote growth or antibiotics for any reason. To label the meat or poultry as organic, an accredited organization must certify the production and processing practices, in which case the product can bear the USDA Organic logo. For more information on organic standards, see the “Organic Marketing” chapter of this Guide.

Kosher

Marketing meat as kosher is another way to distinguish products and access a niche market. “Kosher” is the term for foods that comply with Jewish dietary laws. A simplified explanation of kosher is that it prohibits the consuming of certain animals, most notably pork and shellfish, and requires the meticulous separation of meat and dairy production and consumption. The

dietary laws are notoriously complex, and as a result, certified kosher products can sell at a premium price.

FSIS's policy book¹⁸⁸ requires rabbinical supervision of meat processing before meat can be sold as kosher. FSIS does not certify as to the kosher preparation of products, but instead accepts the statements and markings of the rabbinical authority. Producers must provide the identity of the rabbinical authority upon request from the agency. The FSIS does not maintain a listing or any guidance on whom or what constitutes acceptable rabbinical supervision. Certification requires meticulous standards of health for the animals when presented for slaughter and entails ritual cleaning of all equipment, ritual slaughter by a sochet in a humane fashion, removal of all blood, and restrictions on which parts can be sold as kosher.

Other marketing issues related to kosher foods are important to consider. First, according to one kosher certification agency, the kosher poultry market is largely saturated. Second, although some cattle cooperatives have successfully established kosher slaughterhouses in order to market directly to consumers, doing so requires consistently processing enough cattle to justify the cost of certification and operation. As of this writing (2013), given that the market for pasture fed and organic meats is not fully saturated, it may not be worth the cost and extra effort to move into the kosher niche market, even if there is some demand.

Halal

"Halal" is the term in Islam for something that is lawful or acceptable. Although it most commonly refers to foods, it in fact means anything permitted under Islamic law. Halal meat can only come from certain animals (pork is banned), must be raised according to certain standards (humanely and vegetarian, most notably) and slaughtered according to the ritual Zibaha (humane, swift cut to the throat of a healthy animal by a Muslim as he delivers a prayer over the animal, which must be facing Mecca).

Like kosher meat, halal meat commands a premium price. Moreover, some consumers will seek out halal meat because of concerns over mad cow disease (bovine spongiform encephalopathy – BSE). However, although there are similarities between halal and kosher meat, they *are not* interchangeable because the religions impose different requirements. For instance, both Judaism and Islam require the meat to be slaughtered by someone of their religion. However, Islam prohibits the use of any alcohol to clean the carcass, whereas Judaism permits alcohol and kosher wine.

Federal policy on halal labeling is identical to the policy for kosher labeling. The same policy book used for kosher foods requires handling according to Islamic law and oversight by an appropriate authority. FSIS does not certify as to halal preparation of products, but rather accepts the statements and markings of the Islamic authority. The producer must provide the

¹⁸⁸ http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf

identity of the Islamic authority upon request from agency official. The FSIS does not maintain a listing or any guidance on who or what constitutes an acceptable Islamic organization for purposes of supervision. Colorado does not have any regulations or requirements for processing and selling foods as halal.

IV. CHECKLIST

Have you...?

- Confirmed that you have the time, resources and facilities to provide the standard of care required for your animals? If they become ill, do you have the resources to address the disease? If they die, do you have a disposal plan?
- Obtained any necessary permits for transporting your animals?
- Chosen a slaughterhouse that meets your needs? Is it adequately licensed?
- Do you need to have your labels approved? Have you done so?
- Developed a marketing strategy that realistically assesses what you can produce and what demand is? If meat will need to be stored, do you have a plan for where, how long, and what it will cost you?
- For niche markets, have you researched the market demand for your product and assessed your ability and willingness to undertake the work necessary to meet that demand?
- Read the chapter on setting up a direct farm business and done research on any additional siting, construction or environmental permits you might need for animal production?

KEY CONTACT INFORMATION**U.S. Department of Agriculture, Food Safety & Inspection Service**

Denver regional office: (303) 236-9800

Colorado Department of Agriculture, Consumer Services Division

Ph: (303) 477-0076

Colorado Department of Agriculture, Animal Industry Division

Ph: (303) 239-4109

CHAPTER 12 – ORGANIC CERTIFICATION

Organic production is an ecologically oriented process of growing crops or raising animals that encompasses a variety of social, environmental and ethical principles, including soil fertility, biological diversity and minimization of risks to human and animal health and natural resources.” In the early 1970s, farmers started using the term “organic” to attract consumers interested in agriculture that was more environmentally and socially responsible than “conventional” agriculture. As the term caught on, allegations quickly emerged that some producers were selling non-organically produced food under an “organic” claim. As a result, several states (e.g., Oregon, California, Montana, North Dakota, and Virginia) passed organic certification laws.

In 1990, the U.S. Congress passed the Organic Foods Production Act (OFPA) (7 U.S.C. § 6501 to 6522 (1990)) to reconcile inconsistent state standards and prohibit fraudulent labeling. The statute seeks to provide "national standards for organic production so that farmers know the rules, so that consumers are sure to get what they pay for, and so that national and international trade in organic foods may prosper.”

The USDA's Agricultural Marketing Service (AMS) created the National Organic Program (NOP) to implement the statute (i.e., set the specific requirements for using the "organic" label). The National Organic Standards Board (NOSB) advises the USDA on the development and implementation of the NOP (7 U.S.C. § 6518). The NOSB is a 15-member board comprised of four farmers/growers, two handlers/processors, one retailer, one scientist, three consumer/public interest advocates, three environmentalists, and one USDA accredited certifying agent (*id.*).

The NOP has three components important to direct farm businesses considering marketing their products as organic. First, the rules regulate the use of the term “organic” in labeling and marketing. Generally, producers using the term must obtain certification. Second, the NOP incorporates a comprehensive organic certification process that involves transitioning the farm and undergoing inspections. Finally, the rules require particular production practices for various types of operations and the processing/handling of goods.

I. ORGANIC LABELING AND MARKETING

The most important thing to know about labeling and marketing organic products is that goods cannot be marketed as “organic” unless they have been produced in compliance with USDA’s organic production standards (7 C.F.R. §§ 205.100 and 205.101). Moreover, producers who sell more than \$5,000 in goods must have an accredited certifying agent certify their production practices (*id.*). The certification process is covered in Section 2.

Organic labeling and marketing is relatively straightforward. A producer can label or advertise goods as “100 % organic” if the product consists entirely of organic ingredients (7 C.F.R. § 205.301). Raw fruits and vegetables and meat grown or raised according to USDA’s organic standards satisfy this labeling requirement. The ingredients in processed items, such as jams, jellies and sausages, must be entirely certified organic. Another option is to label food simply as “organic,” in which case at least 95% of the ingredients must be organic, and the remaining 5% of ingredients must be on the list of approved organic processing substances, or, if they are agricultural products, be commercially unavailable in organic form (*id.* and 7 C.F.R. §§ 205.605 and 205.606). Products at both the 100% and 95% level may use the USDA organic seal (7 C.F.R. § 205.311). If a product is made from 70 to 95% organic ingredients, it may be labeled as “made with organic [specified ingredient]” but it may not use the official USDA organic seal (7 C.F.R. §§ 205.301 and 205.311). If a product is less than 70% organic, the ingredient list may identify individual organic ingredients (7 C.F.R. § 205.305).



II. ORGANIC CERTIFICATION PROCESS

Before seeking organic certification, a producer should become as knowledgeable as possible about the benefits and costs of organic production. While not specific to Colorado, University of Illinois Extension’s **Illinois Small Farms website**¹⁸⁹ contains useful information on the organic certification process, as well as links to other resources that are useful for Colorado direct farm businesses. Another excellent resource is the Organic Trade Associations website **HowToGoOrganic.com**,¹⁹⁰ which has an extensive database of materials dedicated to informing producers of how (and why) to transition to organic, including a page dedicated to **Colorado**.¹⁹¹

The first step in the certification process is selecting and contacting a certifying agent. The CDOA is a certifying agent and has all of the information and resources listed on its **website**.¹⁹²

¹⁸⁹ <http://web.extension.illinois.edu/smallfarm/organic.html>

¹⁹⁰ <http://www.howtogoorganic.com>

¹⁹¹ <http://www.howtogoorganic.com/index.php?page=colorado>

¹⁹² http://www.colorado.gov/cs/Satellite/ag_Plants/CBON/1251623416288

The CDOA also publishes a helpful **brochure**¹⁹³ about becoming organic certified. Additionally, many other private entities are certifying agencies in Colorado. AMS's **website**¹⁹⁴ provides a national listing of certifying agents organized by state. In selecting an agent, farmers should consider the entity's experience certifying the type of operation, willingness to answer questions about the certification program, and stability as a business.

The certification process can take several months. Certifying agencies typically require an application and development and implementation of a farm management plan that complies with NOP, using only approved substances and practices (7 C.F.R. § 205.401). The agency will also inspect records or other documentation proving organic management of the land and animals for the requisite transition time.

After selecting a certifying agent, the second step in the certification process is transitioning land (i.e. production practices) from conventional to organic methods. This process may take at least three years. Producers may not apply prohibited substances¹⁹⁵ for 36 months prior to certification. Eliminating certain conventional inputs often requires implementing new, unfamiliar practices, which is why education before starting the transition is critical. One helpful source is Michigan State University's New Agriculture Network. The Network provides **online fact sheets**¹⁹⁶ that cover various aspects of the organic farming process, including pest management, weed control, and soil fertility.

The last step to certification is an on-site inspection to verify compliance with the Organic System Plan (OSP) (7 C.F.R. § 205.403). Only after a successful inspection will the agency grant certification (7 C.F.R. § 205.404).

According to estimates by the Midwest Organic and Sustainable Education Service, certification will likely cost between \$400 and \$1000 per year for non-livestock operations. Livestock operations may cost more. For the past five years, The USDA has provided funding for a cost-share program through the CDOA to help reduce the financial burden of organic certification on producers. This funding, however, has been eliminated due to federal budget cuts in the recent Farm Bill Extension. All funding, therefore, will now have to be procured by the owner of the farm. It is unclear at this point whether the program will be reinstated in the next Farm Bill. Check the CDOA **website**¹⁹⁷ for up to date information.

If you are interested in pursuing organic certification, the CDOA has a **page**¹⁹⁸ on their website dedicated to the Organic Certification Program that is a great place to start.

¹⁹³ CDOA Division of Plant Industry Organic Program, *Organic Certification*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadvalue1=inline%3B+filename%3D%22Organic+Certification+Brochure.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251855447972&ssbinary=true>

¹⁹⁴ <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5100383>

¹⁹⁵ The lists of permitted and prohibited synthetic/non-synthetic substances are codified in 7 C.F.R. §§ 601 & 602.

¹⁹⁶ <http://www.new-ag.msu.edu/Factsheets/tabid/64/Default.aspx>

¹⁹⁷ http://www.colorado.gov/cs/Satellite/ag_Plants/CBON/1251624786039

¹⁹⁸ http://www.colorado.gov/cs/Satellite/ag_Plants/CBON/1251623416288

III. PRODUCTION REQUIREMENTS

Organic systems plans vary by production activity. This section will provide a brief overview of the major requirements for organic production. For detailed explanations of each component of the program, see Harrison Pittman's *Legal Guide to the National Organic Program*, which is available **online**.¹⁹⁹

Regardless of the end product, organic farmers must have an organic system plan (OSP) to submit to their certifying entity (7 C.F.R. § 205.201). The OSP should include written plans concerning all aspects of production, including practices and procedures to be performed, monitoring practices and procedures, record keeping systems, management practices and physical barriers established to prevent commingling of organic and nonorganic products on a split operation, and any other additional information the certifying agent deems necessary (7 C.F.R. § 205.201).

A. Crops

Organic crop production has several components. The first pertains to how land is managed. The farmer may not apply prohibited substances to the land, and must stop applying these substances three years prior to certification (7 C.F.R. § 205.202). The land must have buffer zones and boundaries to prevent runoff and contamination from neighboring, non-organically managed fields (*id.*). The land must also be managed according to soil fertility and crop nutrient management practice standards, which require producers to “select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of the soil and minimize soil erosion” (7 C.F.R. § 205.203). Management methods include crop rotations, use of cover crops, and application of plant and animal materials. Requirements for the use of plant and animal materials include, but are not limited to, composting of raw animal manure (unless it meets exceptions), use of materials that have a carbon to nitrogen ratio of 25:1 to 40:1, and a prohibition on compost from plants that had prohibited substances applied to them or ash that was produced using burning as a method of disposal for crop residues (*id.*). Many of these practices contribute to another requirement, which is maintaining management practices that control crop pests, weeds, and disease (7 C.F.R. § 205.206). These practices are generally natural, such as mulching to control weeds or developing habitat to support natural enemies of pests. Producers may also use non-synthetic substances, but must ensure they are not on the list of prohibited non-synthetic substances (7 C.F.R. § 205.602). If these do not work, producers may use synthetic substances on the list of allowed synthetic substances. The OSP must detail when and how synthetic substances may be used (7 C.F.R. §205.206).

¹⁹⁹ http://www.nationalaglawcenter.org/assets/articles/pittman_organicprogram.pdf

The regulations generally require all seeds and planting stock to be organically grown. However, there are five exceptions to this rule (7 C.F.R. § 205.204):

1. When an equivalent organically-produced variety is commercially unavailable, a producer may use non-organically produced, untreated seeds and planting stocks.
2. When organically-produced equivalents and untreated, non-organically produced equivalents are not commercially available, a producer may use a non-organically produced crop that has been treated with a synthetic substance included in the list of permitted substances.
3. A producer may use non-organic annual seedlings if USDA grants a temporary variance.
4. A producer can use non-organic planting stock to produce an organic crop after maintaining the planting stock under a system of organic management for at least one year.
5. When federal or state phytosanitary regulations require application of a prohibited substance, a producer may use treated seeds, annual seedlings, and planting stock.

The NOP defines “commercially available” as “the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling *as determined by the certifying agent* in the course of reviewing the organic plan” (7 C.F.R. § 205.2). Moreover, 7 C.F.R. § 606 lists some specific products that the agency has determined to be commercially unavailable. Producers who believe a seed or planting stock is commercially unavailable should consult their certifying agent to determine what documentation the agent will require for the producer to prove they diligently sought an organic source and it is truly commercially unavailable.

B. Livestock and Poultry

The NOP rule defines “livestock” as

[a]ny cattle, sheep, goat, swine, poultry, or equine animals used for food or in the production of food, fiber, feed, or other agricultural-based consumer products; wild or domesticated game; or other nonplant life, except such term shall not include aquatic animals or bees for the production of food, fiber, feed, or other agricultural-based consumer products (7 C.F.R. § 205.2).

To market livestock products as organic, they must be under “continuous organic management from the last third of gestation or hatching” through slaughter (7 C.F.R. § 205.236). Farmers may raise poultry as organic from the second day of life. Farmers must organically manage dairy cattle for at least a year prior to marketing milk as organic. They can market the meat

from the cows' calves as organic if they managed the cows organically for the last third of gestation. For future calves to be organic, the cow must remain under continuous organic management. This prevents producers from gaming the system by managing cows as organic only during the last third of gestation, and otherwise caring for them conventionally.

"Organically managed" means feeding animals 100% organic feed for their entire lives (and the last third of their gestation); avoiding prohibited substances such as growth promoters, plastic feed pellets, formulas containing urea or manure, and mammalian or poultry slaughter by-products; and providing living conditions that accommodate health and natural behaviors, such as allowing access to fresh air, outdoors, exercise, clean and dry bedding and access to pasture for ruminants (7 C.F.R. § 205.239). The rule also requires producers to provide year-round access for all animals to the outdoors, recognize pasture as a crop, establish a functioning management plan for pasture, incorporate the pasture management plan into their organic system plan (OSP), provide ruminants with pasture throughout the grazing season for their geographical location, and ensure ruminants derive not less than an average of 30 percent of their dry matter intake requirement from pasture grazed over the course of the grazing season (7 C.F.R. §§ 205.102, 205.237, 205.239 and 205.240). If need be, synthetic and non-synthetic substances that are listed on the national list of permitted substances may be used as supplements or additives (7 C.F.R. § 205.237; the list of permitted substances is in 7 C.F.R. § 205.603). It is important to note that the USDA does not issue variances or exemptions when there is an organic feed shortage.

Preventing illness and caring for a sick animal is a point of concern for organic producers (and consumers). Many modern medicines are synthetic, which is contrary to the principles of organics, but allowing animals to suffer in the name of avoiding synthetic chemicals is also contrary to ethical concerns. As much as possible, producers must care for animals in a manner that prevents disease by doing things such as selecting animals appropriate for the environment and the site, providing feed that satisfies nutritional needs, and establishing housing, pasture conditions, and sanitation practices that minimize the spread of disease and reduce stress. However, livestock can be given vaccines to prevent disease and other "veterinary biologics" (products of biological origin) when needed. When these are insufficient, farmers may use synthetic medications that are listed on the national list of allowed substances (7 C.F.R. 205.238). The NOP prohibits all antibiotics, but it also prohibits denying an animal medical treatment with the intention of preserving the animal's organic status. This is a careful balancing act, as farmers cannot market meat as organic if the animal received any antibiotics. Dairy products, however, can be organic if the farmer manages the cow organically for a year after she received antibiotics.

C. Handling and Processing

In addition to certification of the production process, the NOP requires processing and handling facilities to obtain organic certification (7 C.F.R. § 205.100). Handling means to "sell, process, or

package agricultural products” (7 C.F.R. § 205.2). If a facility handles organic and non-organic agricultural products, only the portion that handles the organic product needs organic certification (7 C.F.R. § 205.100). However, the facility must implement practices to prevent the comingling of organic and non-organic agricultural products (7 C.F.R. § 205.272), including not using storage containers that have been treated with prohibited substances or have held products that were treated with prohibited substances. For a handling facility to receive certification, it must have an organic handling plan (7 C.F.R. § 205.201), only use allowed substances and avoid prohibited substances as listed in sections 205.602 through 205.606 (7 C.F.R. §§ 205.105 and 205.270), and maintain appropriate records (7 C.F.R. § 205.103). As far as actual process methods are concerned, the NOP generally allows any mechanical or biological process, including cooking, curing or fermenting, packaging, canning and jarring (7 C.F.R. § 205.270).

For direct farm businesses seeking to both grow and process organic products, it is critical to work carefully with the certifying agent to design a compliant processing method to maintain the “organic” status of the final product.

Retail food establishments who receive and sell products labeled as organic are usually exempt from certification, but they must nonetheless maintain proper records and comply with the requirements for the prevention of comingling (7 C.F.R. § 205.101).

Further Resources – Organic Marketing

National Organic Program (NOP)

1. For more information on the USDA's organics program, including a list of banned and allowed substances, visit their **website**:

<http://www.ams.usda.gov/AMSv1.0/nop>

2. The National Sustainable Agriculture Research and Education program (SARE, which is a branch of the USDA) has published a guide, **Transitioning to Organic Production**, which addresses some of the difficulties a farmer can encounter and lists resources for assistance.

<http://www.sare.org/publications/organic/organic.pdf>

3. The ATTRA publishes an overview of the certification process that is available online

http://attra.ncat.org/attra-pub/summaries/organic_certification.html

State-Level Resources

1. The Colorado Department of Agriculture provides useful information, and provides you with information to request an informational packet.

http://www.colorado.gov/cs/Satellite/ag_Plants/CBON/1251623416288

IV. CHECKLIST

If you want become certified as organic, you will need to:

- Research, study, and learn as much as you can about organic practices. Switching to organic takes time and requires considerable labor investments – you do not want to make a mistake that costs you money, or worse yet, prevents certification.
 - Talk to other producers in your area to learn about your local market and what grows well in your area.
 - Attend conferences, workshops, and training sessions on growing and marketing organic products.
- Develop an Organic System Plan, a record keeping system, and a business and marketing plan. Make sure your plans are consistent with each other.
- Research and choose an organic certifying entity. Make sure the certifier has experience certifying your type of production, then obtain their information on what you need to do.
- Start transitioning crops and animals to organic production practices. Keep good records!
- Contact your chosen certifying agent, obtain certification, and start marketing.

KEY CONTACT INFORMATION

U.S. Department of Agriculture, Agricultural Marketing Service

National Organic Program, Deputy Administrator Craig Morris

Ph: (202) 720-3252

Colorado Department of Agriculture, Organic Program

Organic Certification Specialist, Crystal Andrews

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Colorado Department of Agriculture, Organic Program

Program Coordinator, Barbara Rosenbach

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GLOSSARY OF TERMS

Adulterated: The full legal concept of adulteration is complex, but essentially, a food is “adulterated” if it contains any poisonous or added deleterious substance which may render it injurious to health or if it consists of or has been exposed to a diseased, contaminated, filthy, putrid, or decomposed substance during production, preparation, or packaging, or if held under unsanitary conditions.

Agency (agent): A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.

Agricultural Enterprise: Agriculturally-related activities performed by any person(s) for a common business purpose. This includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units. This could include a leasing of a department of another establishment.

Agronomic Rate: A specific rate of application that provides the precise amount of water and nutrient loading, which selected grasses/crops require without having any excess water or nutrient percolate beyond the root zone.

Amortization: The paying off of debt in regular installments over time; the deduction of capital expenses over a specific period of time.

Annex: To incorporate territory into the domain of a city, county, or state.

Articles of Incorporation: A document that dictates the management of the affairs of a corporation, including the purpose and duration of the corporation and the number and classes of shares to be issued by the corporation.

Assumed Name: (also known as "doing business as" or "d/b/a"): The name under which a business operates or by which it is commonly known.

Assumption of the Risk: A legal concept in negligence (tort) law wherein an individual knows of or is otherwise aware of a risk posed by a particular activity and nonetheless engages in the activity. The doctrine thus limits that individual's right to hold others liable for injuries incurred as a result of engaging in the activity. Assumption of the risk most commonly arises in the context of employer-employee relationships and agri-tourism.

Business Plan: The business plan helps guide the business owner through the goals, objectives, and marketing and financial strategies of a proposed business. It also may serve as an introduction to potential investors if outside financing is required.

Candling (egg): The use of a bright light source behind the egg to show details of the embryo through the shell.

Case Study: An intensive analysis of an individual unit (such as a person, business, or community) that stresses developmental factors in relation to environment.

Checkoff: A mandatory fee for all producers of a particular commodity that is used to fund commodity-specific research or marketing.

Commercially Available: Under the National Organic Program, the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling as determined by the certifying agent in the course of reviewing the organic plan.

Commodity: A tangible item that may be bought or sold; something produced for commerce.

Commodity Agriculture: The agricultural production of commodities with the primary objective of farming being to produce as much food/fiber as possible for the least cost. It is driven by the twin goals of productivity and efficiency.

Common Law: The body of laws and rules that courts create as they issue decisions.

Consideration: A vital element in contract law, consideration is something (i.e., an act, forbearance, or return promise) bargained for and received by a promisor from a promisee. It is typically the underlying purpose for entering into a contract.

Contract: A legally enforceable agreement between two or more persons involving an offer, acceptance, and consideration. It may be oral or written.

Cooperative: A user-owned and controlled business that generates benefits for its users and distributes these benefits to each member based on the amount of usage.

Copyright: (1) The right to copy a work, specifically an original work of authorship (including a literary, dramatic or other work) fixed in any tangible meaning of expression, giving the holder exclusive right to reproduce, distribute, perform, or otherwise control the work. (2) The body of law related to such works.

Corporation: a separate legal entity in which the owners (shareholders) are not personally responsible for the liability of business.

- **S corporations** elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes to avoid double taxation.
- **C corporations** are separate taxpaying entities that conduct business, realize net income or loss, pay taxes, and distribute profits to shareholders.

Cow-Share Program: A program in which consumers sign a contract to purchase a “share” in a cow or herd and pay the farmer to care for and milk the cows. The consumer then receives the milk from “their” cow without technically “purchasing” the milk.

De Minimis: something so small that it would be inconvenient and unreasonable to keep an account of; the impact is insubstantial.

Depreciation: A decline in an asset's value due to use, wear, obsolescence, or age.

Double Taxation: The government taxes the corporation on its profits and the owners/shareholders also pay individual income tax on profits distributed as dividends from the same corporation.

Estate Plan: The preparation of a plan to carry out an individual's wishes as to the administration and disposition of his/her property before or after death.

Excise Tax: A tax levied on the purchase of a specific good as opposed to a tax that generally applies to the sale of all goods.

Farm Labor Contractor (FLC): Any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other consideration, performs recruiting, soliciting, hiring, employing, furnishing, or transporting of any migrant or seasonal agricultural worker.

Feasibility Study: a process used to analyze an existing business opportunity or new venture. The questions on a feasibility checklist concentrate on areas one must seriously consider to determine if an idea represents a real business opportunity.

Good Faith: Acting honestly, fairly, and with a lawful purpose without malice or any intent to defraud or take unfair advantage. Whether a party has acted in good faith is often an issue that the court or the jury has to decide in a lawsuit.

Grading: USDA certification that a product is of a particular quality.

Grandfather Clause: A portion of a statute that provides that the law is not applicable in certain circumstances due to preexisting facts.

Gross receipts: All considerations received by the seller, except trades in personal property.

Halal: an Islamic term that refers to something lawful or acceptable.

Hazardous Positions: In the employment context, hazardous positions include, but are not limited to, operating large farm machinery, working in enclosed spaces with dangerous animals (studs and new mothers), working from a ladder or scaffold more than 20 feet high, working inside certain spaces such as manure pits, and handling hazardous chemicals.

Health Claim: A health claim describes a relationship between the food (or component of it) and the reduction of the risk of a disease or health-related condition.

Hold Harmless: A provision in an agreement under which one or both parties agree not to hold the other party responsible for any loss, damage, or legal liability.

Injunction (prohibitory): An order of a court commanding a person, corporation, or government entity to stop doing something and/or refrain from doing such actions in the future.

Intellectual Property: Creations of the mind; inventions, literary and artistic works, and symbols, names, images, and designs used in commerce, as well as the body of law (trademark, patent, copyright, trade secret) used to protect such works.

Interstate Commerce: The buying and selling of products and services between people and entities located in different states or territories.

Intrastate Commerce: The buying and selling of products and services within a single state.

Joint and Several Liability: A legal obligation under which a party may be liable for the payment of the total judgment and costs that are associated with that judgment, even if that party is only partially responsible for losses inflicted.

Karst Area: Area(s) where surface water easily flows through rock formations to ground water, posing potential risks for contamination of groundwater

Kosher: The term for foods that comply with Jewish dietary laws.

Livestock Management Facility: Any animal feeding operation, livestock shelter, or on-farm milking and accompanying milk-handling area.

Man-day: Any day where an employee performs agricultural labor for at least one hour.

Material Representation: A convincing statement made to induce someone to enter into a contract to which the person would not have agreed without that assertion.

Migrant Agricultural Worker: An individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

Misbranding: The label, brand, tag or notice under which a product is sold is false or misleading in any particular as to the kind, grade or quality or composition.

Negligence: a tort law concept; the failure to exercise the standard of care that an ordinary, prudent and reasonable person would exercise under the circumstances.

Notice-and-Comment Rulemaking: A rulemaking process by which government agencies provide the public with an opportunity to participate in the interpretation of laws by giving feedback on draft regulations.

Nuisance: A substantial interference, either by act or omission, with a person's right to use and enjoy their property.

- **Public Nuisance:** An interference or invasion that affects a substantial number of people, or an entire neighborhood or community
- **Private Nuisance:** An interference or invasion that affects a single party, or a definite, small number of individuals in the use or enjoyment of private rights.

Nutrient Content Claims: These claims characterize the level of a nutrient in a food; they must be approved by FDA.

Organic: A system of food production that is managed in accordance with the Organic Foods Production Act of 1990 to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that promote biodiversity and ecological balance. Organic certification is managed by the Agricultural Marketing Service (AMS) division of the U.S. Department of Agriculture.

Output Contract: A written agreement in which a producer agrees to sell its entire production to the buyer, who in turn agrees to purchase the entire output.

Partnership: A partnership (also known as general partnership) is an association of two or more persons who combine their labor, skill, and/or property to carry on as co-owners of a business for profit.

Patent: a patent grants the inventor the right to exclude others from making, using, or selling the invention in the United States or 'importing' the invention into the United States for a limited period, generally 20 years.

Piecework: Work completed and paid for by the piece.

Prima-facie: Latin for "at first sight." In law, an evidentiary standard that presumes particular evidence proves a particular fact; however, the fact may be disproven by providing contradictory evidence.

Processing: The manufacturing, compounding, intermixing, or preparing food products for sale or for customer service.

Procurement Contract: A term that refers to contracts used by governments and institutions to acquire products.

Properly Implemented: An administrative law concept that requires agencies to issue rules according to state or federal administrative procedure.

Qualified Health Claim: A health claim where emerging scientific evidence suggests the claim may be valid, but the evidence is not strong enough to meet the standard necessary to be a health claim; must be pre-approved by FDA.

Raw Agricultural Commodity: Any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form before marketing.

Real Property: Land and anything growing on, attached to, or erected upon it, excluding anything that may be severed without injury to the land.

Requirements Contract: A contract in which a buyer promises to buy and a seller promises to supply all the goods or services that a buyer needs during a specified period. The quantity term is measured by the buyer's requirements.

Respondeat Superior: In tort law, the doctrine holding an employer or principal liable for an employee's or agent's wrongful acts committed within the scope of the employment or agency.

Retailers' Occupation Tax: A tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption.

Sales Tax: A combination of occupation taxes (imposed on a business' receipts from the sale of goods used or consumed) and use taxes (imposed on consumers that purchase items for personal use or consumption from a business).

Seasonal Agricultural Worker: An individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence-

1. When employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or
2. when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.

Setback: The distance a facility must be from property lines or neighboring residences.

Sole Proprietorship: A business owned and operated by one individual.

Statute: a federal or state written law enacted by the Congress or state legislature, respectively. Local statutes or laws are usually called "ordinances." Regulations, rulings, opinions, executive orders and proclamations are not statutes.

Tangible Personal Property: A term describing personal property that can be physically relocated. The opposite of real property, in a sense, as real property is immovable.

Technical Bulletins: Non-binding guidance documents published by agencies that facilitate consistent interpretation and application of the regulations issued by the agency.

Three-Tier Distribution System: In the alcohol supply chain, a system that requires manufacturers to sell with distributors, who sell with retailers, who then may sell the product to the end consumer.

Tort: An injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit.

Trade Dress: A design, packaging, or other element of appearance that is both nonfunctional and distinctive.

Trademark: An identification used to distinguish goods and services from those manufactured or sold by others - it is the symbol that customers use to identify a product and equate with goodwill.

Trade Name: A name used to identify a person's business or vocation (see also ASSUMED NAME).

Trade Secret: Information companies make an effort to keep secret in order to give them an economic advantage over their competitors

Use Tax: A privilege tax imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer.

Veterinary Biologics: Products of biological origin that are used to diagnose and treat animal diseases.