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### ACKNOWLEDGEMENTS

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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.

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<sup>1</sup> [www.farmcommons.org](http://www.farmcommons.org)



## 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 while 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 whom 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 get 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.

## I. 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. Also, for whatever chapters a reader may choose to read, the reader is wise to read the entire chapter. Laws may be introduced in one paragraph and exceptions to that law may be discussed in a separate paragraph. The 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**<sup>2</sup> 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.

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<sup>2</sup> [www.dictionary.law.com](http://www.dictionary.law.com)

## U.S.C. § ### are federal laws – otherwise collectively known as the U.S. Code. They can easily be accessed at [www.gpoaccess.gov](http://www.gpoaccess.gov) (official site) or at [www.law.cornell.edu/uscode/](http://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.

## 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 [www.access.gpo.gov/nara/cfr/cfr-table-search.html](http://www.access.gpo.gov/nara/cfr/cfr-table-search.html)

Neb. Rev. Stat. ##-###.## references Nebraska Revised Statutes. The number before the dash indicates the statute chapter and the numbers following indicate the section. The statutes are available online at <http://uniweb.legislature.ne.gov/laws/browse-statutes.php>

Neb. Admin. Code, Title #, Chapter#, ###-## references Nebraska Administrative Code. The Administrative Code is organized by titles, chapters, and sections. Administrative agencies promulgate rules, and the Administrative Code is organized as to which agency is responsible for the rule. It is available online at <http://www.sos.ne.gov/rules-and-regs/regsearch/index.html>

When searching for laws or regulations, a librarian can be a terrific resource. For expertise in finding laws, forms, or other legal resources, both the University of Nebraska College of Law Library and Creighton University Law Library both offer public access. In the alternative, public law librarians are also able to help find laws and other legal information. Some Nebraska local communities also have legal self-help centers and drop in clinics that may be available to help resolve legal questions or find resources. Locations and hours for these varied resources are listed at the Nebraska Online Legal Self-Help Center Web site.<sup>3</sup>

***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 information on additional resources.

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<sup>3</sup> <http://court.nol.org/self-help/cantaffordlawyer.html>

## II. OVERVIEW OF ADMINISTRATIVE AGENCIES

Before delving into the specifics of the laws and regulations a basic understanding of the state-federal regulatory system and which agencies have authority over what operations is helpful. The Constitution gives the U.S. Congress power to regulate any goods traveling in interstate commerce which means 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.<sup>4</sup> In 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.

### *a. 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.

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<sup>4</sup> 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.

### *b. State Rulemaking*

Nebraska has a comparable Administrative Procedure Act (Neb. Rev. Stat. Chapter 84) that establishes the notice and comment rulemaking procedure for Nebraska. The process is largely the same. An agency drafts the rule, often with the help of interested parties. Then, the agency promulgating the rule publishes a notice of hearing on the proposed rule. The notice is published at least 30 days prior to the hearing in a newspaper. The Nebraska Secretary of State's office also tracks proposed rules and rule changes. The public hearing is an opportunity for the public to comment on the rule. After the hearing, the proposed rule and hearing materials are submitted to the attorney general who reviews the rule for compliance with the authorizing statute, and then forwards them to the Governor's office for final review.

As noted above, federal laws often overlap with Nebraska 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 Administration (FDA) authority only over foods shipped in interstate commerce (21 U.S.C. § 331). However, Nebraska regulates all food – including that produced and sold entirely *within* the state – under its own Nebraska Pure Food Act (Neb. Rev. Stat. 81-2239 et seq.). The Nebraska Pure Food Act incorporates federal standards as Nebraska law (Neb. Rev. Stat. 81-2257.01) and makes very few revisions in the Nebraska Food Code.<sup>5</sup>

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); for the most part, then, states may not impose additional requirements.

## **III. 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. Nebraska has incorporated the Food Code of 2009 into the Nebraska Pure Food Act by reference, and republishes it with state modifications as the Nebraska Food Code. Adoption of the federal Food Code has several important ramifications for producers in Nebraska, described below.

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<sup>5</sup> Although some states promulgate a separate regulation to adopt their Food Code, Nebraska does not because the code is adopted by reference in the statute. The Nebraska Department of Agriculture publishes a Nebraska Food Code which compiles the adopted federal food code with the modifications made in Nebraska's Pure Food Act and titles the document the "Nebraska Food Code."

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. If a Nebraska inspector, operating under the Nebraska Food Code, 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 to achieve.

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 Nebraska's neighbors have adopted some version of the Food Code. Because the Food Code standardizes the rules, complying with Nebraska'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 Nebraska's requirements should find the rules for other jurisdictions to be relatively familiar and easy to comply with.

#### IV. NEBRASKA DEPARTMENT OF AGRICULTURE (NDA)

Both NDA and local departments of public health regulate aspects of agriculture and food production in Nebraska, which is discussed in further detail throughout this guide. **Readers must be aware that local departments of health may adopt stricter regulations than the state and that local interpretation of state regulations may vary.** The basic outlines of food production and sales in Nebraska are summarized below.

##### *a. Adulterated Food*

The Nebraska Pure Food Act law prohibits the sale of adulterated food. The definition of adulterated is long and includes any foods with injurious substances, contaminated foods, or foods produced from diseased animals. Foods that were held, processed, prepared or packed under unsanitary conditions (even if it can't be shown that the food itself is unsanitary), are considered adulterated. The container also has a bearing on whether the product is adulterated. Containers that potentially harm human health or that conceal damage render the food adulterated. (Neb. Rev. Stat. 81-2,282) These regulations give broad powers to local health departments to make decisions about when a food is considered adulterated and thus, cannot be sold.

##### *b. Food Processing Facilities*

Nebraska law requires that farm businesses processing food (see the definition of processing in Chapter 8) must be licensed as a food processing plant. Farm businesses that sell food to

consumers must be licensed as a food establishment, although businesses selling only uncut fruits and vegetables or those relying on the cottage food exception (introduced below) are exempt. Farm businesses that process foods must comply with the Nebraska Food Processing Plant Requirements<sup>6</sup> and businesses that sell food to consumers must comply with the Nebraska Food Code.<sup>7</sup> As a general overview, individuals who are ill should not be in contact with food and all food handlers should be trained and supervised to ensure good manufacturing practices are followed. The water supply, plumbing, and sewage systems must be safe and adequate. Hand washing facilities and notices must be provided. Refrigeration facilities must maintain specific temperatures and records must be kept. Raw food products must be protected from contamination. Some processors must also comply with requirements that are specific to the type of food processed. 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. NDA is responsible for licensing but delegates authority to local health departments.

### *c. Local Interpretation*

NDA bases regulations on the health and safety risks of food production generally; so, local health departments and their individual inspectors make decisions as to how general regulations are applied. NDA 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 health department'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. In many cases, inspectors may require more stringent practices than other inspectors or NDA.

### *d. Cottage Foods*

With the growth of farmers markets and direct-to-consumer sales, many states are trying to make it easier for small food businesses to thrive. Food establishment or processing permits can be difficult for the small business owner. In response, many states have passed what are often called "cottage food" laws. Cottage food laws often make an exception for bakery products, jams, and candies made in the home from food processing requirements.

Nebraska does not have a law that is specifically titled a cottage food law or exception. However Nebraska's Food Code already makes it easier for home cooks to sell their products. Non-potentially hazardous foods prepared in a home and sold directly to the consumer at a

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<sup>6</sup> These rules are adopted into the Nebraska Pure Food Act, and are available as a separate document on the NDA website at [www.nda.nebraska.gov/regulations/foods/food\\_processing\\_plant.pdf](http://www.nda.nebraska.gov/regulations/foods/food_processing_plant.pdf)

<sup>7</sup> Available at [www.nda.nebraska.gov/regulations/foods/09\\_food\\_code.pdf](http://www.nda.nebraska.gov/regulations/foods/09_food_code.pdf)

farmers' market do not need a food establishment license. However, the vendor must display a sign stating that the product was prepared in a kitchen not subject to inspection (Neb. Rev. Stat. 81-2,245.01(6)).

## AGENCY OVERSIGHT OF DIRECT FARM BUSINESS ACTIVITIES

| ACTIVITY   | FEDERAL AGENCY   | STATE AGENCY  |
|--|--|---|
| <b>Environmental permitting</b>                  | Environmental Protection Agency (EPA)  | Nebraska Department of Environmental Quality (NDEQ)   |
| <b>Employment</b>                                | U.S. Department of Labor, Occupational Safety and Health Administration (OSHA)                               | Nebraska Department of Labor  |
| <b>Taxes</b>                                     | Internal Revenue Service (IRS)   | Nebraska Department of Revenue  |
| <b>Animal welfare</b>                            | United States Department of Agriculture (USDA), Animal and Plant Health Inspection Service                   | Nebraska Department of Agriculture (NDA)  |
| <b>Meat, poultry, &amp; eggs</b>                 | USDA Food Inspection Safety Services, for all products shipped across state lines                            | Nebraska Department of Agriculture, for all products produced and sold entirely within Nebraska |
| <b>Food other than meat, poultry, &amp; eggs</b> | Food and Drug Administration (FDA), for products shipped across state lines and labeling of <i>all</i> foods | Nebraska Department of Agriculture for all food sold in Nebraska                                |
| <b>Organics</b>                                  | USDA Agricultural Marketing Service (AMS)  | n/a   |

## **SECTION I: FARMING OPERATIONS**



## CHAPTER 1: STRUCTURING THE BUSINESS

Farm businesses that sell products directly to the consumer (“direct farm businesses”) conduct sales through many different means: farmers’ market sales, roadside stands, U-pick operations, agro-tourism features, Community Supported Agriculture (CSA) programs, mail order or Internet sales, delivery services, and sales to restaurants, schools, or institutions. Many farms choose a combination of business activities. For example, a farmer might sell products at the farmer's 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. Considering the diversity of direct farm businesses, many factors influence the right business plan and entity. This chapter discusses the role of planning and entity considerations in getting the direct farm business off on the right foot.



### I. PLANNING THE DIRECT FARM BUSINESS

#### A. *Feasibility Studies*

The first step in the process of establishing a direct farm business is *planning*. It is a mistake to rush into a direct farm business without first outlining the business product and what it will cost to establish the operation. If you begin by asking, "is the business I am proposing feasible?" you may prevent time wasted on dead-end paths.

Although feasibility studies are often conducted for large business proposals, small businesses may benefit from an

initial exploration as well. For example, an entrepreneur’s personal capacity to start a business is an important consideration. The U.S. Small Business Administration has compiled a **Small Business Readiness Assessment** of initial considerations for anyone planning a small business.<sup>8</sup> If you would like personal assistance with a feasibility study, consider contacting a Nebraska Small Business Development Center (NSBDC). NSBDC has 8 local offices across Nebraska who each offer support, training, and resources to small business start-ups.<sup>9</sup> Rural businesses should look at the Center for Rural Affairs’ Rural Enterprise Assistance Project (REAP)<sup>10</sup>, based out of Lyons, which works with small rural businesses to write business plans and secure funding. REAP has special services for women and Hispanic business owners as well.

<sup>8</sup> [https://eweb1.sba.gov/cams/training/business\\_primer/assessment.htm](https://eweb1.sba.gov/cams/training/business_primer/assessment.htm)

<sup>9</sup> <http://nbdc.unomaha.edu/consulting/startup/>

<sup>10</sup> [www.cfra.org/reap](http://www.cfra.org/reap)

### *B. Business Plans*

After determining that a business is feasible, the second step in the planning process is to develop a written business plan. A business plan is a concise 5-10 page summary of what the business will provide, who the customer is, how the business will reach customers, and projected income and expenses. The main advantage to writing out a business plan is that it helps an entrepreneur 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. Many banks and funders will require an entrepreneur to provide a business plan, as well. The Nebraska Department of Economic Development collects online resources to assist with **Starting a Business in Nebraska** with several organizations that can assist with business planning.<sup>11</sup>

### *C. Choosing a Business Name*

Deciding on the name for your farm business is an exciting part of starting a business. Brand recognition is important to the long-term success of your operation and the name you choose can influence your impact. The business name carries legal considerations as well, and a new business owner should not order signs or business cards unless the owner has checked that the name is permissible and available. Some words are not allowed for a farm business, such as “bank,” “trust,” or those that appear to connect the operation to a federal or state government entity. Each business name must also be distinguishable from every other, which means an entrepreneur must contact the Secretary of State’s office in writing (by fax, mail, or email) to check if a name is available.<sup>12</sup> Even if a farm business is not yet prepared to organize officially, a desired business name can be reserved for up to 120 days by filing a **Name Reservation Form**. The Secretary of State’s office has two forms: one for reserving the name of a corporation or nonprofit and the other for a limited liability company name reservation. The first costs \$30 and the second costs \$15. Forms are available for download online and must be returned to the office by postal mail or in person with the appropriate fee.<sup>13</sup> This process does not necessarily confer protection of the name from use by others. Please see Chapter 3, Section III: Intellectual Property for more information on protecting a business name. Farmers may also wish to search the federal trademark database to avoid infringing on someone else’s right to use an existing name.<sup>14</sup>

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<sup>11</sup> <http://www.neded.org/business/start-a-business>

<sup>12</sup> [http://www.sos.ne.gov/business/corp\\_serv/name\\_procedures.html](http://www.sos.ne.gov/business/corp_serv/name_procedures.html)

<sup>13</sup> [http://www.sos.state.ne.us/business/corp\\_serv/name\\_procedures.html](http://www.sos.state.ne.us/business/corp_serv/name_procedures.html)

<sup>14</sup> <http://www.uspto.gov/trademarks/index.jsp>

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### **Business Planning Resources**

1. Business planning assistance is available from the **Nebraska Business Development Center** (sponsored the U.S. Small Business Administration and the University of Nebraska Omaha.)

→ [www.nbdc.unomaha.edu](http://www.nbdc.unomaha.edu)

2. Nebraska Department of Economic Development website contains many resources to help entrepreneurs in any industry understand the basic process for getting started. Staff are also available by phone and email.

→ [www.neded.org/business/start-a-business](http://www.neded.org/business/start-a-business)

3. **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.

4. 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.

→ [www.ne.marketmaker.uiuc.edu](http://www.ne.marketmaker.uiuc.edu)

5. **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](http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3101222)

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### D. Choosing a Business Entity

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), 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 Chapter 4: Taxation. 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**<sup>15</sup> covers general partnerships, limited partnerships, limited liability partnerships, and limited liability limited partnerships. **Part II**<sup>16</sup> covers limited liability companies, corporations, and cooperatives. Although not specifically aimed at direct farm businesses in Nebraska, and therefore not a substitute for advice from legal counsel in Nebraska, the overview is nonetheless helpful in understanding the legal and tax implications of the various business entities.

The Nebraska Secretary of State’s website contains a brief description of relevant business entity factors such as tax, liability, and business concerns for the three most popular business entities, as well as helpful information on how to complete the paperwork to create these entities. The Secretary of State’s website is a useful accompaniment to the description of the most popular farm business entities below.<sup>17</sup>

#### *Sole Proprietorships*

A **sole proprietorship** is the easiest business to start because it is essentially the same entity as the owner, although this convenience comes with drawbacks.<sup>18</sup> The majority of farms are owned as sole proprietorships. The reason most farms are organized this way may be because

<sup>15</sup> [www.nationalaglawcenter.org/assets/articles/goforth\\_ownership1.pdf](http://www.nationalaglawcenter.org/assets/articles/goforth_ownership1.pdf)

<sup>16</sup> [www.nationalaglawcenter.org/assets/articles/goforth\\_ownership2.pdf](http://www.nationalaglawcenter.org/assets/articles/goforth_ownership2.pdf)

<sup>17</sup> [www.sos.ne.gov/business/corp\\_serv/businessstartups.html](http://www.sos.ne.gov/business/corp_serv/businessstartups.html)

<sup>18</sup> 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.

the entity is easy to create and because newer options such as the LLC are not yet well known in rural areas.

Under a sole proprietorship, the law treats the owner and the business as one and the same. All the business's assets are the owner's personal assets as well. At the same time, the owner is personally responsible for the liabilities of the business. A creditor of the business can reach 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 restricted in other business entities). The owner of a sole proprietorship carries the tax obligations of the business through to his or her personal tax filings, which makes the process somewhat easier.

In Nebraska, an individual wishing to start a sole proprietorship does not need to file anything to start the business, and the individual may do business both under the owner's personal name or a fictional business name (for example, John Doe's Farm or Green Acres Farm). However, a sole proprietorship may wish to register the trade name. Registering a trade name can be helpful if, in the future, the business owner wants to prevent someone else from using or misusing the name. The **Application for Registration of Trade Name**, is available on the Secretary of State's website and must be accompanied by a \$100 fee.<sup>19</sup> For the application to be effective, the business person must also publish an announcement of the trade name in the local or county newspaper. If proof of the publication in a newspaper is not submitted to the Secretary of State's office within 45 days after the registration application is received, then the name will not be registered (Neb. Rev. Stat. 87-219).

### *Partnerships*

A *general partnership* is two or more persons who combine their resources to conduct business for profit. There are no formal requirements for formation of a partnership, much like a sole proprietorship, and one may be formed by default if two people simply carry on a business together. Also as with a sole proprietorship, the individuals in a partnership are personally responsible for the liabilities of the business. In addition, each partner is personally liable for the obligations of the other partner(s). This means that if the partnership lacks the resources to pay its debts, creditors may 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. In terms of taxation, tax liability for the business's profits and losses is handled on the partners' individual tax returns and the entity itself does not file taxes.

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[www.sos.ne.gov/business/corp\\_serv/pdf/210\\_219.pdf](http://www.sos.ne.gov/business/corp_serv/pdf/210_219.pdf)

Despite the liability concerns, general partnerships are a common form of business organization, especially among family members, due to their simplicity and tax status. In Nebraska, no paperwork or filing is required to form a general partnership and the business may conduct business either under the name of the partners or under a business name. General partnerships may choose to write a partnership agreement to outline their business relationship. In the alternative, Nebraska Revised Statutes Chapter 67 governs partnerships.

The *limited partnership* (LP) is different than a general partnership because it has two types of owners, the general partner and the limited partner. The LP is similar to a general partnership in that the general partners are still personally liable for the business' obligations. However, the limited partner may be shielded from personal liability. This business entity is not a popular choice for new businesses as a Limited Liability Company (discussed below) offers broader liability protection and is more flexible. A limited partnership is formed by filing a **Certificate of Limited Partnership**. The Secretary of State's office does not provide a form certificate; thus, a applicant would follow the rules laid out in the statute which require that the certificate contain 1) the name of the limited partnership, 2) the office address, and 3) the name and address of each partner (Neb. Rev. Stat. 67-240).

#### *Limited Liability Companies (LLC)*

A Limited Liability Company (LLC) is a business entity that can be created either by a single individual or by many individuals wishing to start a business together. The LLC is quite easy to start, which gives it similar benefits to a sole proprietorship or partnership. However, the LLC offers a very distinct advantage over a sole proprietorship or partnership. An LLC, when properly established and operated, protects the owners' personal assets from the business's liabilities. That means that if the business is unable to meet its debts, creditors cannot (absent special circumstances) go after the owners' personal assets to pay off business debts. To guard this liability protection for personal assets, individuals with a farm business organized as an LLC must be sure to conduct business transactions with the business account and personal transactions with personal funds.

LLCs are an especially popular business entity because they are very flexible. Where corporations (detailed below) have several statutory obligations such as holding meetings and electing officers, LLCs have fewer statutory rules. The owners of an LLC are called "members" and there are a variety of ways to structure membership within an LLC. A farm business considering working with investors may also have more flexibility in terms of how to structure that relationship by using an LLC. Nebraska allows one person to form an LLC, which makes this entity a strong alternative to the sole proprietorship. As with sole proprietorships and partnerships, an LLC is a pass-through entity, which means that the members account for business profits and losses on their personal tax returns.

To create an LLC, a person files a **Certificate of Organization** with the Secretary of State. The state does not provide a form, but the business can create a certificate by complying with the statutory requirements for filing. The certificate must state 1) the name of the company, including the designation as an LLC, and 2) the street and mailing address of the LLC office and the person representing the company (Neb. Rev. Stat. 21-117(b)). The Certificate of Organization may be filed online and must be accompanied by a \$100 fee, as well as a \$5 per page filing fee. In addition, the business person must publish a notice that the company has been organized for three successive weeks in the local or county newspaper near the LLC's office, and then proof of the publication must be forwarded to the Secretary of State's office (Neb. Rev. Stat. 21-193).

Many LLCs choose to create an operating agreement, an internal document that governs how the LLC is structured, although one is not legally required (Neb. Rev. Stat. 21-110). Even a single-member LLC may benefit from an operating agreement. The document, when the members follow it, is further evidence of the distinction between personal and business matters, which provides the liability protection. To the extent an operating agreement is not in place which legally specifies otherwise, Nebraska law governs LLCs under Nebraska Revised Code, 21-101 et seq. An attorney can provide farm owners with more information about when and how to use an operating agreement.

#### *Corporations: C and S elections*

Farm businesses are often organized as a corporation, especially when multiple family members are involved in the operation. This entity is popular when a business works with investors or with family members who do not work on the farm day-to-day. A corporation's owners are called shareholders. Shareholders finance the corporation's existence by purchasing stock in it; each stock share represents an ownership stake in the corporation. 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. On a small farm, shareholders may also be directors. In fact, a single person can create a corporation and serve as its shareholder and hold all the offices of the directors.

The corporation is a separate legal entity from its owners (shareholders) and so shareholders may avoid personal liability for the corporation's liabilities. On the other hand, incorporation may be time consuming or expensive because additional paperwork is required by the Secretary of State's office. 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. Nebraska Revised Code Chapter 21 governs Nebraska corporations.

To form a Nebraska corporation, an individual files Articles of Incorporation with the Secretary of State's office. No form is provided, and a farm business owner may wish to work with an attorney to prepare articles, which should contain in part 1) the name of the business; 2) the

name and address of each incorporator; 3) the address of the corporation office; and 4) the number of shares the corporation is authorized to issue, the classes of shares, number of shares in each class, and the par value of each class (Neb. Rev. Stat. 21-2018(1)). Several other provisions outlining how the corporation operates and who is responsible for various liabilities may also be included in the articles. The articles of incorporation must be accompanied by a fee, which is scaled in proportion to the dollar value of the authorized initial capital stock.

Similar to the “operating agreement” that sets out rules for how an LLC is managed and distributes profit and loss, a corporation is governed by its bylaws. Shareholder agreements also lay out rules for how shares may or may not be transferred. An attorney can help farmers understand these documents and how they can help the farm business run smoothly.

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. C corporations are subject to “double taxation” - the government taxes the corporation on its profits and when the corporation passes profits back to shareholders in the form of a dividend because they pay income tax on it as well. A farm business can avoid this by making an S election. Under an S election, the corporation does not pay taxes on its profits as an entity; instead, just as with a sole proprietorship or LLC, the individual pays income taxes on his or her share of the profit.

A corporation elects S corporation status with the IRS by filing **Form 2553**.<sup>20</sup> 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 is subject to 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.

### *Cooperatives*

A cooperative is a user-owned and controlled business that generates benefits for its users. The cooperative entity is similar to a corporation in some ways; however, a single user has a single vote in the cooperative’s activities rather than voting privileges in proportion to their ownership. Members may also receive a distribution of the cooperative’s profits in proportion to their usage of the cooperative. Common reasons for forming agricultural cooperatives include improved marketing or access to markets and increased efficiency in delivering to

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<sup>20</sup> The form is available online at [www.irs.gov/pub/irs-pdf/f2553.pdf](http://www.irs.gov/pub/irs-pdf/f2553.pdf). Further instructions are available at [www.irs.gov/pub/irs-pdf/i2553.pdf](http://www.irs.gov/pub/irs-pdf/i2553.pdf).

markets. As cooperatives are organized to provide a service to members, the entity is considered a nonprofit business and unlike a corporation, the entity is not taxed on its profits. Individual members may owe tax on received distributions under specific circumstances.

In Nebraska, ten or more persons engaged in the production of agricultural products may create a cooperative corporation. Although some states limit cooperatives to agricultural enterprises, Nebraska allows cooperatives for any purpose (Neb. Rev. Stat. 21-2101). Nebraska also offers a new cooperative entity called a Limited Cooperative Association (Neb. Rev. Stat. 21-2903). Limited cooperative associations allow greater flexibility for seeking capital financing and are not entirely controlled by the members as in a traditional cooperative.

A cooperative is legally created in the same manner as a corporation, but 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, 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:

The **Nebraska Cooperative Development Center** offers detailed education, training, and technical assistance to individuals looking at starting a cooperative, with a strong emphasis on farm and local food related businesses.<sup>21</sup>

USDA/Rural Business Cooperative Service, *Cooperative Information Report*,<sup>22</sup> September 1996, contains information on how to start a cooperative.

*The Farmer's Legal Guide to Producer Marketing Associations* <sup>23</sup> by Doug O'Neil, Neil D. Hamilton, and Robert Luedeman.

USDA, *Cooperative Marketing Agreements: Legal Aspects*,<sup>24</sup> July 1992.

USDA/Rural Business Cooperative Service, *Cooperative Information Report 40*,<sup>25</sup> 1990, provides sample legal documents for cooperatives.

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<sup>21</sup> [www.ncdc.unl.edu](http://www.ncdc.unl.edu)

<sup>22</sup> Available at [www.rurdev.usda.gov/rbs/pub/cir7/cir7rpt.htm](http://www.rurdev.usda.gov/rbs/pub/cir7/cir7rpt.htm)

<sup>23</sup> Available at [www.nationalaglawcenter.org/assets/articles/obrien\\_producemarketing\\_book.pdf](http://www.nationalaglawcenter.org/assets/articles/obrien_producemarketing_book.pdf)

<sup>24</sup> Available at [www.rurdev.usda.gov/rbs/pub/rr106.pdf](http://www.rurdev.usda.gov/rbs/pub/rr106.pdf)

<sup>25</sup> Available at [www.rurdev.usda.gov/rbs/pub/cir40/cir40rpt.htm#Articles%2](http://www.rurdev.usda.gov/rbs/pub/cir40/cir40rpt.htm#Articles%2)

## II. 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.

Estate planning and farm succession is a concern in Nebraska as the state depends on a healthy agricultural economy, and the average age of Nebraskan farmers continues to increase. In response, the legislature has created a special tax credit program for beginning farmers which ties financial education to successful participation.<sup>26</sup>

The Nebraska-based Center for Rural Affairs produces several educational resources on general farm succession planning that address a range of issues from health care to ownership structures.<sup>27</sup> The University of Minnesota Center for Farm Financial Management offers an interactive tool called **AgTransitions** to help farm families create transition plans.<sup>28</sup> 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.

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<sup>26</sup> [http://www.nda.nebraska.gov/beg\\_farmer/index.html](http://www.nda.nebraska.gov/beg_farmer/index.html)

<sup>27</sup> [http://www.cfra.org/resources/planning\\_transitions.htm](http://www.cfra.org/resources/planning_transitions.htm)

<sup>28</sup> [www.agtransitions.umn.edu](http://www.agtransitions.umn.edu)

## **CHAPTER 2: SETTING UP THE DIRECT FARM BUSINESS**

At the same time a farm entrepreneur is considering the business plan and selecting a business entity, the farm entrepreneur must look into several issues that relate to the precise type of operation being planned and include:

- Investigating siting issues for the direct farm business, including *zoning and potential nuisance claims*.
- Obtaining all necessary *permits, licenses and registrations* required by the state of Nebraska and local governments.
- Adequately *insuring* 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. Zoning***

Zoning is a system of land use regulation that controls the use of private property. Under a zoning system, land is divided into different zones where specific activities are allowed or prohibited. Zoning was originally created to segregate land uses with the intent to protect community health and well-being. The state of Nebraska has given counties (Neb. Rev. Stat. 23-114) and municipalities (Neb. Rev. Stat. 19-901) the right to zone their communities. Although most have chosen to enact zoning regulations, some Nebraska communities do not have zoning regulations. Because zoning is a powerful tool, it is often litigated and detailed case law covers the precise outlines of private land use regulation. This section is intended to orient farm business entrepreneurs to the basic outlines of zoning law.

In Nebraska communities, if an area is incorporated the authority to enact zoning regulations falls to the city or village (Neb. Rev. Stat. 23-114(6)). In unincorporated areas, the county may adopt zoning resolutions (Neb. Rev. Stat. 23-114(1)). This means that in any particular location, the municipality, township, or county may handle zoning.

A farm business entrepreneur should start by determining who regulates zoning at the business site. The regulating office will have online or physical maps available, and the farm business owner should consult the map to determine which zone their location falls under. After finding

the applicable zone, the individual should consult the zoning text to determine which uses are or are not allowed in that zone.

Zoning concerns are especially relevant when farmland intersects urban areas--a common situation for many direct farm operations hoping to be near 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. In addition to determining the precise zoning classification for the specific property, the farm entrepreneur should consult the comprehensive plan, if one has been written for the area. The comprehensive plan may indicate if the area may be reclassified as a residential or commercial area in the future.

Of relevance to farm operations, counties may regulate the use of any land for agricultural purposes, but they may not require building permits for the construction of farm buildings on farmsteads of twenty acres or more that also produce farm products worth \$1000 or more each year (*Premium Farms v. County of Holt*, 263 Neb. 415 (2002)). In effect, this means that counties may regulate certain standards for the use of farm buildings such as, in the context of a confined animal feeding operation, manure removal and setback requirements although they may not regulate building permit issues. Municipalities are allowed to require building permits for agricultural buildings.

Farms considering a tourism-oriented business should make certain that their local zoning body will consider the operation to be agriculture before going without a building permit. Although the issue has not been litigated in Nebraska, some states have decided that agro-tourism operations, such as farm stands where more than 50% of the total sales are from other farms' products are not considered agriculture and do not qualify for zoning exemptions. Again, the issue hasn't been litigated in Nebraska so this is meant as a point of caution only.

#### ***b. Impacts on Neighboring Land***

Farming operations, whether through production of odors, dust, or noise can in some circumstances have a significant impact on farm neighbors. When choosing a farm site and planning production and processing activities, direct farm business owners should be aware of the legal issues that may arise if neighbors are impacted. This section discusses three potential issues: the siting of livestock facilities, fence law, and nuisance law.

#### *Livestock Waste Control Program*

Large livestock operations (those with at least 700 dairy cows, 1000 beef cattle, 2500 hogs, or over 30,000 chickens, among others) must apply to the Nebraska Department of Environmental Quality (NDEQ) Livestock Waste Control Program<sup>29</sup> before building or expanding such a facility. The permitting process regulates odor control, pest control, record keeping, dead animal disposal, maintenance, and siting criteria. Although direct farm businesses are highly unlikely to reach this size, the siting criteria are relevant because a large operation may negatively impact a smaller operation nearby. The permitting process requires public participation and a neighboring farm should be offered the chance to explain how such a large operation will impact their operation.

### *Nuisance Law*

A nuisance is when one person uses his or her land in an unreasonable, unwarranted, or unlawful way, and in so doing, affects the rights of another landowner. 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. Nuisance is a common law issue which means its exact contours have been determined through lawsuits rather than through legislation.

There are two types of nuisance claims: private and public. Public nuisance generally is a condition affecting a right common to the general public (such as clean air) and the government instead of an individual generally brings claims for public nuisance (*State ex rel. Spire v. Strawberries, Inc.*, 473 N.W.2d 428 (Neb. 1991)). Private nuisance usually affects a single party or a definite, small number of individuals in the use or enjoyment of private rights. In Nebraska a person has a private nuisance claim if they can show that someone else has 1) caused the intentional invasion of their land, and 2) the person has purposefully caused the invasion, knows that invasion is resulting from actor's conduct, or knows that invasion is substantially certain to result from his or her conduct (*Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (Neb. 1989)). In the context of a nuisance lawsuit, an "invasion" is anything that enters a person's property including smells or chemical drift. For example, in the case cited earlier, a Nebraska farmer who sprayed herbicide during strong winds leading the chemical to drift onto a neighbor's crop committed an invasion.

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. For example, nuisance may be found where neighbors are unable to open windows in summer (*Flansburgh v. Coffey*, 370 N.W.2d 127 (Neb. 1985)). Nuisance may also provide a remedy for a direct farm business adversely impacted by a neighbor's farm operation that

<sup>29</sup> <http://www.deq.state.ne.us/Agricult.nsf/Pages/LWCP>

makes it difficult for the direct farm to use its land, especially if odors and activities deter potential customers.

Nebraska farm businesses that were in existence before the person bringing the nuisance claim may have a defense under Nebraska's Right to Farm Law. Farms and grain warehouses are protected from nuisance lawsuits brought by neighbors if 1) the operation was there before the neighbor moved in, and 2) the operation would not already have been considered a nuisance before the neighbor bringing the suit arrived (Neb. Rev. Stat. 2-4403). If a farmer significantly changes or expands his or her operation to cause the nuisance the farmer cannot rely on the protections of this law (*Flansburgh v. Coffey*, 370 N.W.2d 127 (Neb. 1985)).

If a public or private 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.

### *c. Fence Law*

Fence law determines the rights and responsibilities of neighboring landowners as to the fence placed on the division line between rural properties. In the past, Nebraska has relied on a system of "fence viewers" who were selected by the parties involved to make an independent assessment of which parties should bear the cost of a new or repaired fence dividing the two properties. Recent revisions to Nebraska's fence law have done away with fence viewers and instead established a fifty-fifty based approach to who should bear the cost of a division fence (Neb. Rev. Stat. 34-102). This new law applies only to fences that divide one property from an adjacent property.

If an individual wants to build or repair a division fence and wants the neighbor to contribute, the first neighbor needs to give written notice of the individual's intention to build the fence to the second neighbor (Neb. Rev. Stat. 34-112.02(1)). The letter must state that the neighbor is expected to bear his or her responsibility to contribute to the value of half of the fence, either with money, labor, or in some other way. If the neighbor wishing to build the fence doesn't hear back from the person requested to contribute (or that individual refuses to contribute), the first neighbor can go ahead and file an action in county court (Neb. Rev. Stat. 34-112.02(2)). After that, the court will hear the case and establish responsibility for the fence. However, the first neighbor can only require the second neighbor to pay for a maximum of half of the value of a 4-strand wire fence, even if the first neighbor chooses to build a more expensive fence (Neb. Rev. Stat. 34-102(2)).

## 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 December of 2012, USDA announced the finalization of a new animal disease traceability program that addresses many of the concerns with the old NAIS program.<sup>30</sup> Under the new rules, if an animal is moved across state lines, the livestock must be officially identified and have an accompanying certificate of veterinary inspection or another form of documentation. The official identification number is not a part of a single national system; instead, producers may use a number of different existing systems such as the National Uniform Ear tagging System, which is a metal ear tag for cattle. Animals moved across state lines to a custom slaughter facility do not need the certificate or official identification number.

### *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).<sup>31</sup> 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

<sup>30</sup> The new rules are officially published in Number 6, Volume 78 of the Federal Register at page 2040.

<sup>31</sup> 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 [www.directfarmbusiness.org/storage/fsbtreg.pdf](http://www.directfarmbusiness.org/storage/fsbtreg.pdf).

registration requirement depends on the definition of “farm” set forth in FDA regulations (**and a flowchart is provided at the end of this chapter**):

- **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.
- **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.”

These vague definitions can raise more questions than they answer. In addition, 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. Even though taking sap from a tree is harvesting, heating sap into syrup is considered processing. Customers and not the farm family eat the syrup, so the farm exception does not apply. The farm also 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**<sup>32</sup> 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 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**<sup>33</sup> 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.

### III. FEDERAL AND STATE ENVIRONMENTAL REGULATIONS

Farming affects water, soil, and air while producing a waste stream in some situations and as such, the farm business may have to comply with environmental regulations. Multiple agencies may have regulatory authority depending on the environment and possible pollutants involved, so environmental permitting can be complex. This section provides a brief overview of some of the most common issues; however, it is not comprehensive.

#### *a. Waste Management*

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

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[www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodDefenseandEmergencyResponse/ucm331959.htm](http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodDefenseandEmergencyResponse/ucm331959.htm)

<sup>33</sup>

[www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/RegistrationofFoodFacilities/default.htm](http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/RegistrationofFoodFacilities/default.htm)

System (NPDES). The Nebraska Department of Environmental Quality (NDEQ) administers the CWA in Nebraska under an agreement with the Federal EPA. NPDES permits protect water quality by requiring facilities that release pollution into surface waters (or have a very high likelihood of releasing pollutants) to treat their water discharges. All large concentrated animal feeding operations (CAFOs)<sup>34</sup> require a discharge permit obtained through NDEQ. For more information on how to apply for a permit, see the NDEQ Livestock Waste Control Program webpage.<sup>35</sup>

Although the NPDES system was implemented to address pollution that comes from a specific location such as a drainpipe, “nonpoint” or pollution that enters waterways from runoff is also a problem. Agriculture is a source of nonpoint pollution when field runoff carrying dirt or manure enters waterways. The federal EPA directed all states to create plans to address nonpoint pollution and in response, Nebraska manages the Nonpoint Source Management Program that administers funds to improve water quality over large areas, community lakes, urban runoff areas, and wellheads. Grants are available to help implement planning projects to achieve the management objectives and more information is available at the NDEQ website by clicking on the programs menu and scrolling down.<sup>36</sup>

In addition, Nebraska currently participates in the Environmental Quality Incentives Program through the **USDA Natural Resources Conservation Service**, which provides technical and financial assistance to agricultural producers who implement conservation practices on agricultural land. EQIP grants can help farmers of all sizes and types implement ways to control runoff and improve environmental standards. Information can be found on the Nebraska NRCS website.<sup>37</sup>

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**.<sup>38</sup>

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<sup>34</sup> A facility is a large CAFO if it has more than 1,000 slaughter and feeder cattle, 700 mature dairy cattle, 2,500 swine each weighing over 55 pounds, 500 horses, 10,000 sheep or lambs, 55,000 turkeys, 30,000 laying hens or broilers or 5,000 ducks.

<sup>35</sup> [www.deq.state.ne.us/Agriculture.nsf/Pages/LWCP](http://www.deq.state.ne.us/Agriculture.nsf/Pages/LWCP)

<sup>36</sup> [www.deq.state.ne.us](http://www.deq.state.ne.us)

<sup>37</sup> [www.ne.nrcs.usda.gov/programs/EQIP/index.html](http://www.ne.nrcs.usda.gov/programs/EQIP/index.html)

<sup>38</sup> [www.epa.gov](http://www.epa.gov)

### *b. Stormwater runoff*

If, while constructing a new poultry or livestock facility, a farmer will be clearing, grading, or excavating one acre or more, the farmer must apply for a NPDES stormwater construction permit. This rule is not exclusive to agriculture, and is intended to control sediment runoff into waterways. This permit may require a farmer to install silt fences and other control devices to ensure that soil is not running into waterways. Information on applying for this permit and a copy of the permit application is available from the NDEQ website.<sup>39</sup>

### *c. 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 US EPA Region 7 office (which includes Nebraska) issues this permit with the Corps and has produced a **Fact Sheet: Do you need a dredge or fill permit in Nebraska** document which discusses this permit in more detail.<sup>40</sup>

### *d. 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 Chapter 6: Labor and Employment. Additional Nebraska regulations are discussed in Chapter 8: Fruits and Vegetables.

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<sup>39</sup> <http://www.deq.state.ne.us/Publications/Pages/WAT012>

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[http://www.epa.gov/region07/wetlands/pdf/Do\\_you\\_need\\_a\\_dredge\\_and\\_fill\\_permit\\_factsheet\\_Nebraska.pdf](http://www.epa.gov/region07/wetlands/pdf/Do_you_need_a_dredge_and_fill_permit_factsheet_Nebraska.pdf)

### *e. 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**.<sup>41</sup> For more information on Nebraska-specific programs, visit **USDA's Natural Resource Conservation Service's** page for Nebraska.<sup>42</sup>

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 Chapter 12: Organic Certification.

Finally, there are emerging markets that pay farmers in exchange for providing ecosystems services such as preserving the clean air and water that all community members enjoy. These 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. Farmers may be eligible for tax benefits from placing conservation easements on their land or transferring land into a land trust. Nebraska farmers should contact the Nebraska Land Trust<sup>43</sup> or another local land trust to research the most current options in their specific location.

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 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

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<sup>41</sup> [www.nrcs.usda.gov/programs/](http://www.nrcs.usda.gov/programs/)

<sup>42</sup> [www.ne.nrcs.usda.gov/programs/](http://www.ne.nrcs.usda.gov/programs/)

<sup>43</sup> [www.nelandtrust.org](http://www.nelandtrust.org)

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**.<sup>44</sup>

#### IV. 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 risks and potential losses. Businesses may also wish to compare policies from multiple agents. This section outlines the various risks farmers may encounter and the policies available to address those risks so that farmers will be better able to understand the products offered by insurance agents.

A farm business will encounter many risks depending on the type of operation. For example, farm buildings, equipment, crops or animals may be damaged from fire, weather, and other disasters. A farmer may have customers or business guests such as sales persons to the farm. Those individuals may be injured if they slip and fall, move machinery, lift products or do any number of activities. Farm crops or animals may be harmed in transit, the farmer may have to conduct a product recall, or farm products may make a customer sick. Employees may get into an accident on or off the farm.

Generally, all direct farm businesses should consider a farm liability policy and a commercial general liability (CGL) policy. These policies are distinct, but complimentary. A farm liability policy generally covers the farm buildings and equipment if they are damaged from weather or fire. Farm liability policies also cover business customers and guests if they are injured while on the farm premises. Some policies will also offer protection if farm product is damaged while on the farm.

However, a farm liability policy is limited. It often does not extend to off-farm activities. For example, a farm liability policy may not cover injuries that occur at a farmers' market stand unless the policy explicitly defines the "farm" to include such sales locations. For off-farm activities, a CGL policy may be necessary. A CGL policy generally covers all farm business activities whether on or off the farm premises. For example, a CGL policy may cover a CSA drop site location in the event a customer is injured while picking up their CSA share. A farm liability policy will probably not cover a CSA drop site.

CGL policies are necessary in other situations such as product contamination and agro-tourism. The CGL policy may provide product recall and product liability coverage. If contamination

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<sup>44</sup> [www.fs.fed.us/ecosystems-services/OEM/index.shtml/index.shtml](http://www.fs.fed.us/ecosystems-services/OEM/index.shtml/index.shtml)

occurs and the farmer needs to recall product or compensate an injured customer, a CGL policy addresses such risks. Of great importance to agro-tourism operations, a CGL policy may be necessary to cover U-pick operations, farm mazes and tours, or farm festivals. These activities because they are not typical farm activities related to the production and marketing of crops and animals, may require a CGL policy. Farm liability policies may have special endorsements for incidental business operations or product liability that cover these risks, but their scope is likely limited.

A beginning direct farm entrepreneur should investigate insurance options early in the life of the business as the cost may influence the viability of the business. 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 and outlets (for example, restaurants, hospitals and farmers markets) may require proof of adequate insurance before engaging with the direct farm business.

Although the issue is also addressed in Chapter 5: Labor and Employment, it is important to note that a farm liability and a CGL policy provide very limited coverage for injuries suffered by anyone who is working for the farm, whether that individual is paid or unpaid.

Compensating volunteers may create an employment relationship and for the purposes of an insurance policy, may disqualify their injuries from coverage. Liability insurance is not a substitute for workers' compensation insurance. Because of the high cost of medical services and the high likelihood of injury from farm labor, farmers should pay special attention that anyone who performs any labor for the farm is covered by insurance.

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.

## V. CHECKLIST

Have you...

- If you already have a farm, have you looked into your zoning code to determine what type of operation is permitted at your location?
- If you do not yet have a farm site, have you considered which zoning codes will accommodate your desired operation?
- Looked into the **FDA registration and potential environmental permitting requirements**?
- 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.

## KEY CONTACT INFORMATION

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

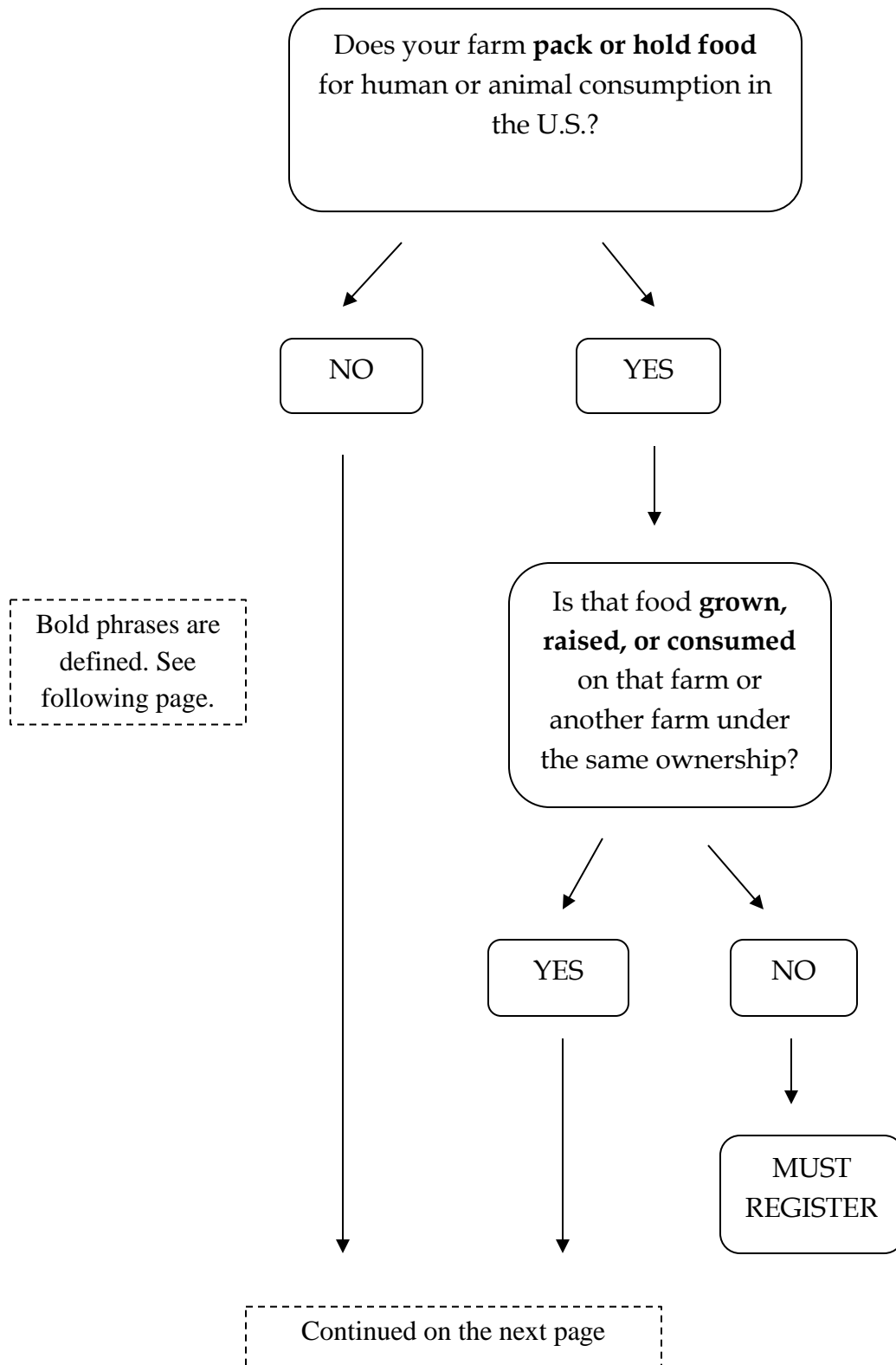
Ph: (800) 216-7331 or (301) 575-0156

### **US Army Corps of Engineers, 404 Permitting**

Ph: (402) 896-0896

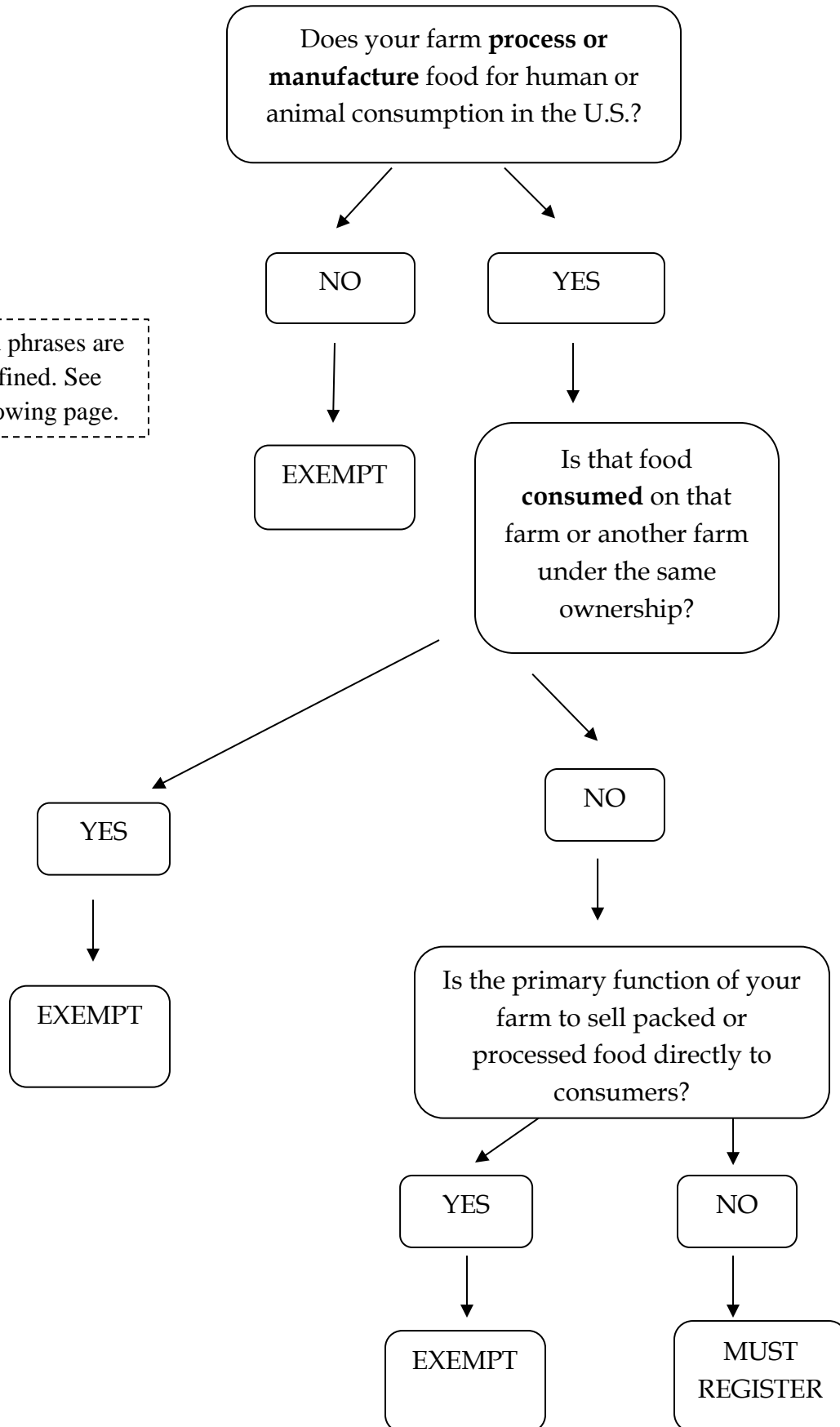
### **Nebraska Department of Environmental Quality, Agriculture Section**

Ph: (402) 471-2186

DO I NEED TO REGISTER MY FARM WITH THE FDA?

Continued from the previous page

Bold phrases are defined. See following page.



Definitions 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 “washing, 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, farmers enter into contracts of many types and should be aware of how the



principles of contract law may protect their business. A direct farm business also needs to have effective marketing in order to reach potential customers and sell products. Internet marketing, procurement contracts, and intellectual property rights, and other issues may control how marketing may be conducted. 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 parties to do something in exchange for something of value. There are three basic elements of a valid contract: an offer, acceptance, and consideration. An offer is a proposal that is communicated to someone else. An offer is accepted when a party agrees to the proposal using clear and unequivocal terms. The final requirement, consideration, requires that the contract actually involve the exchange of something of value on both sides. The concept of consideration is meant to distinguish a contract from a gift. If the exchange is a gift, and not a contract, then one party expects nothing of value in return. On the other hand, the parties to a contract both expect something valuable in return. Providing consideration can come in many shapes and sizes. The parties might exchange money, land, crops, or even a promise to provide products in the future.

*The Uniform Commercial Code (UCC)* 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. Like many states, Nebraska has adopted the UCC (Neb. Rev. Stat. UCC-1-101 et seq.). Farmers need to be aware of the UCC because it establishes unique rules for commercial transactions, including the sale of goods. Specifically, the UCC defines when a contract is formed between two business people, 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. Contracting parties are always free to negotiate alternative terms for their contract; these UCC rules are the default law that courts will apply if contracting parties have not agreed otherwise. Relevant provisions of the UCC are covered in more detail in the following discussion.

#### *Oral Contracts, Written Contracts*

A contract does not necessarily have to be in writing in order to be binding and enforceable. The sale of an item is essentially a contract because it is the exchange of product for money. In that sense, oral contracts are incredibly common. Small direct farm sales - for example, a farmers' market sale - are oral contracts. When a farmer sets up a stand and communicates the availability of her produce in some way at a certain price, she 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. If one party feels the contract was breached, they have remedies. 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 Nebraska Statute of Frauds (Neb. Rev. Stat. UCC-2A-201) lists a number of circumstances specifically requiring a written contract, but there are two situations most relevant to farmers: 1) Contracts that will take more than one year to perform, and 2) The sale of real property. Additionally, a separate statute of frauds provision applies to the sale of goods; if the amount totals \$500 or more, it must be in writing (Neb. Rev. Stat. UCC-2-201). In summary, three types of contracts must be in writing: 1) Contracts that will take more than one year to perform whether for goods or for a service, 2) The sale of real property, and 3) The sale of goods totaling \$500 or more. (Situation 3 has an important exception for a merchant, discussed below).

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 mean it must be in writing to be enforceable. 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 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.

When it comes to the sale of goods totaling \$500 or more, the statute provides a slightly different rule when two business persons (rather than a business person and a customer) are involved. Nebraska law uses the term “merchant” for business person and 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...” (Neb. Rev. Stat. UCC-2-104(1)). 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 (Neb. Rev. Stat. UCC-2-201(2)(b)). Across the country, states are split on whether farmers are merchants. In Nebraska, experienced farmers who provide for their living through farming and have the skills to market their product are considered to be merchants.<sup>45</sup> However, if farmers sell certain products on a more incidental basis such as processing fruits into jam and selling it to a store, Nebraska case law does not clearly state whether a farmer would be a merchant for the purposes of those incidental sales. To be safe, Nebraska farmers should memorialize contracts for sale in writing, whenever possible.

Farmers should note what constitutes a “writing.” It does not mean a full contract must be executed. An email confirming what will be sold, how many, and at what price may be considered a contract. Likewise, the writing does not have to have a handwritten signature to be signed. For email, a typed name at the bottom may be considered as good as a signature. Although a Nebraska court has not issued the final word, several courts have found that a simple email from one party to the other is a signed writing for the purposes of the statute of

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<sup>45</sup> *Agrex, Inc. v. Schrant*, 221 Neb. 604, 608 (1986).

frauds.<sup>46</sup> Several documents may be pieced together to create a wiring, such as one that states the terms and a second that states acceptance of the terms (*Nebraska Builders Prod. Co. v. Industrial Erectors*, 478 N.W. 2d 508 (1981)). Farmers should write contracts in as secure a form as possible; where that is not possible email exchanges may be sufficient.

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 any problems do arise. Having an attorney review any important contract before signing it is also a good idea.

#### *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

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<sup>46</sup> See, John E. Theuman, *Satisfaction of Frauds by E-Mail*, 110 A.L.R.5<sup>TH</sup> 277 (2003).

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 law imposes upon certain agricultural contracts.

*The Packers and Stockyards Act (P&SA)* (7 U.S.C. §§ 181-229b) was enacted 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

#### **ADDITIONAL RESOURCES: PACA'S PROVISIONS**

*Farmer's Legal Action Group Handout, available at <http://www.flaginc.org/publication/understanding-farmers-rights-to-be-paid-for-fruit-and-vegetable-crops/pacaart12007/>*

*National Agricultural Law Center's Overview, available at [www.nationalaglawcenter.org/assets/overviews/perishablecommodities.html](http://www.nationalaglawcenter.org/assets/overviews/perishablecommodities.html)*

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**.<sup>47</sup>

*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**.<sup>48</sup>

<sup>47</sup> [www.gipsa.usda.gov](http://www.gipsa.usda.gov)

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[www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateG&navID=FileaPACACla](http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateG&navID=FileaPACACla)

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 get a PACA license in order to benefit from the PACA trust protections.

*The Agricultural Fair Practices Act* (7 U.S.C. §§ 2301-2306) was enacted 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)).

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 Issues*

#### *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

contracts can be very unfair to the farmer in terms of how compensation is determined, supplies are distributed, and market adjustments are made.

Nebraska's Competitive Livestock Markets Act provides protections designed to foster transparency and more competitive prices for agricultural producers (Neb. Rev. Stat. 54-2603).

This law prohibits packers from owning or feeding livestock for more than 5 days prior to slaughter (Neb. Rev. Stat. 54-2604). Purchasers of swine are not permitted to contract for different prices to sellers of swine unless the difference is related to carcass merit or actual differences in transporting or acquiring the swine (Neb. Rev. Stat. 54-2608 and 2609). Contracts for purchases of cattle may not prohibit the seller from disclosing the terms of the contract, unless the seller has some flexibility on delivery date or the packer reports the contract information (Neb. Rev. Stat. 54-2618).

**ADDITIONAL RESOURCES:  
Model Producer Protection  
Act**

***A helpful article on state  
regulation of production  
contracts***

*[www.nationalaglawcenter.org  
/assets/articles/peck\\_contract  
regulation.pdf](http://www.nationalaglawcenter.org/assets/articles/peck_contract_regulation.pdf)*

Nebraska farmers considering signing a production contract should look for red flags such as 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.<sup>49</sup>

Federal law does provide some protections for poultry and swine producers entering into production contracts.<sup>50</sup> First, the 2008 Farm Bill contains a provision that protects poultry and

<sup>49</sup> For a more in depth discussion of potential issues to look out for, see <http://faircontracts.org/issues/farming>

<sup>50</sup> 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,

livestock producers from non-disclosure provisions in their production contracts (7 U.S.C. § 229b). Second, 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 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 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

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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, an Nebraska producer who contracts with an Nebraska poultry dealer to raise poultry to be sold exclusively to Nebraska 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.

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 including a duty of “good faith” on the parties to the contract (Neb. Rev. Stat. UCC-1-304). 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 might, 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.**<sup>51</sup> Schools are allowed to specify a geographic preference in their food bids, which can give the direct farm business an advantage while avoiding the impracticality of the USDA procurement system. Lincoln Public Schools publishes a manual for vendors looking to sell to the schools, which may be useful for farmers.<sup>52</sup> The Center for Rural Affairs works with farmers interested in selling to schools through their Community Food Program<sup>53</sup> and has hosted a conference to connect farmers with school buyers.<sup>54</sup> From a national perspective, the National Farm to School Network collects a wide variety of information and resources on selling to schools.<sup>55</sup>

#### **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.***

*[www.ftc.gov/bcp/policystmt/ad-food.shtm](http://www.ftc.gov/bcp/policystmt/ad-food.shtm)*

## **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 product labels and other brand collateral, 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 developing a brand for a direct farm business.

### ***a. Labeling and Advertising***

#### ***Basic Labeling Laws***

As for federal law, the FDA under the Food, Drug, and Cosmetic Act regulate labeling (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 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

<sup>51</sup> [www.dm.usda.gov/procurement/business/procedure.htm](http://www.dm.usda.gov/procurement/business/procedure.htm)

<sup>52</sup> [www.lps.org/busaff/purchasing/dbwlps.html](http://www.lps.org/busaff/purchasing/dbwlps.html)

<sup>53</sup> [www.cfra.org/community-food](http://www.cfra.org/community-food)

<sup>54</sup> [www.cfra.org/newsrelease/130319/first-ever-nebraska-farm-school-summit-coming-central-nebraska](http://www.cfra.org/newsrelease/130319/first-ever-nebraska-farm-school-summit-coming-central-nebraska)

<sup>55</sup> [www.farmentoschool.org](http://www.farmentoschool.org)

that a consumer could not reasonably avoid and that is not outweighed by the benefit to consumers.

Nebraska law follows the same pattern as federal law as it also prohibits the selling of adulterated or misbranded food (Neb. Rev. Stat. 81-2,282 and 81-2,283). Adulterated foods are those that contain poisonous or contaminated product, or that have been handled under unsanitary conditions that may have contaminated the product. Animals that died in any way other than slaughter are also considered adulterated (Neb. Rev. Stat. 81-2,282). Misbranded food is defined as anything with a false or misleading label, the wrong name of the food, a misleading container, or an imitation product that is not labeled as such. Of importance to the direct farm business, any package without the name and place of business of the manufacturer or packer and an accurate quantification of the contents (such as weight, measure or count) are misbranded ((Neb. Rev. Stat. 81-2,283).

The laws relating to misbranded and adulterated food are designed to give consumers a broad cause of action against producers that use labels to mislead consumers. In addition, Nebraska citizens have a cause of action for misleading advertising as well (Neb. Rev. Stat. 87-301 et seq.). As with the federal law, Nebraska law prohibits deceptive practices in a consumer transaction. Deceptive practices include many acts such as causing confusion about the source or geographic origin of goods, telling a customer that a product is of a certain quality when it is not, or lying about the goods of another business (Neb Rev. Stat. 87-302(a)).

### *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 (21 C.F.R. § 101.9(j)(18)(ii)). 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**.<sup>56</sup> The FDA also publishes a comprehensive **Food Labeling Guide**<sup>57</sup> 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 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**<sup>58</sup> 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

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<sup>56</sup>

<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm053857.htm>

<sup>57</sup>

<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm006828.htm>

<sup>58</sup>

<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Allergens/ucm059116.htm>

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, the FDA through a petition must preapprove qualified health claims. Failure to obtain pre-approval causes the food to be “misbranded,” and therefore subject to FDA enforcement.

#### *Structure or Function Claims*

Structure or 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 information on these types of claims, see the FDA’s **Small Entity Compliance Guide on Structure/Function Claims**.<sup>59</sup>

#### *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. Nebraska Domestic Marketing Logos***

#### *GROW Nebraska*

Any Nebraska-based business or service may participate in GROW Nebraska, a nonprofit program sponsored by the Central Plains Development Center. Membership in GROW Nebraska comes with training and marketing opportunities for beginning businesses including: listings on the GROW Nebraska website, technology assistance, retail training, product evaluations, and outreach opportunities. Members may also use the GROW Nebraska label. For more information, see the GROW Nebraska website.<sup>60</sup>

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<sup>59</sup> Available at

<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/DietarySupplements/ucm103340.htm>

<sup>60</sup> [www.grownebraska.org](http://www.grownebraska.org)

Specific to agricultural products, farmers may be interested in the Buy Fresh Buy Local Nebraska (BFBL).<sup>61</sup> The BFBL program is sponsored by the University of Nebraska Lincoln and is available to farmers and ranchers that grow or raise food in Nebraska for consumption in the state. Bordering state residents who sell into Nebraska will be considered on a state-by-state basis. Membership benefits include the rights to use the suite of BFBL branding products including the logo, point-of-purchase materials, as well as a listing in the BFBL guide to local food sources. More information is available at the BFBL website.<sup>62</sup>

### *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 reach more customers. USDA's Agriculture and Marketing Service has published an informative brochure, **How To Direct-Market Farm Products on the Internet**,<sup>63</sup> 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 **Nebraska MarketMaker**<sup>64</sup> or Buy Fresh Buy Local Nebraska<sup>65</sup>. 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.

### *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

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<sup>61</sup> <http://food.unl.edu/web/localfoods/home>

<sup>62</sup> <http://food.unl.edu/web/localfoods/bfblmembership#Benefits>

<sup>63</sup> Available at [www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3101222](http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3101222)

<sup>64</sup> <http://ne.marketmaker.uicu.edu/>

<sup>65</sup> <http://food.unl.edu/web/localfoods/home>

possible - preferably overnight. The USDA advises consumers to make sure that the food temperature is below 40 degrees Fahrenheit when it arrives. These shipping recommendations are recommendations only, and are not legally required. However, the farm business will have a customer relations problem and perhaps a deceptive advertising problem if the business claimed product would be sold in a specified manner and did not follow through. The USDA provides a helpful **guide of safe handling times**<sup>66</sup> for a large variety of mail-order foods. Keep in mind that shipping food out of state may subject the business to federal laws with which the operation may not otherwise have to comply. The laws discussed in this guide, for example, that refer to interstate shipment of food will apply to mail-order products sold out of state.

The FTC's 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**<sup>67</sup> to assist businesses in complying with consumer protection requirements.

#### *Taxation of Internet Sales*

Determining the taxes owed on Internet sales can be complex. For the most part, however, Nebraska direct farm businesses will need to collect state and local sales taxes if a sale takes place in Nebraska or the product is delivered to a Nebraska address (assuming the product is taxable- See Chapter 4: Taxation for more details). 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 (such as an office) in the state (*Quill Corp. v. North Dakota*,

<sup>66</sup> Available at <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/safe-food-handling/mail-order-food-safety>

<sup>67</sup> <http://business.ftc.gov/privacy-and-security/consumer-privacy>

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 (in that case, the consumer becomes subject to their own state's use tax law).

#### *d. 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 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.

#### *e. Signage*

Farmers who operate farm direct-to-consumer businesses such as U-pick operations and produce stands often depend on signage to direct consumers. Signage may be regulated by the Nebraska Department of Roads (Nebraska DOR). Sign regulations are easier to understand by dividing sign content and location into two categories: 1) Signs may be outside the right-of-way and advertise goods or services available on the property where the sign is located, 2) Signs may be outside the right-of-way and advertise another businesses goods or services, or 3) Signs may offer directions and be located in the right-of-way.

Signs in the first two categories are regulated by Nebraska DOR if they are adjacent to a primary highway or the interstate. Signs in the first category must carry a permit (which is called a Class II Permit) and are restricted in terms of their size, spacing, and lighting.<sup>68</sup> Signs in the second category are only allowed in areas zoned commercial or industrial, and must also adhere to size, spacing, and lighting restrictions (Neb. Admin. Code. Title 410, Chapter 3, 002.05).<sup>69</sup> Signs in the third category may not be placed by the individual business themselves. Instead, businesses may participate in the Tourist-Oriented Directional Signing Program (TODS) and is discussed below.

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<sup>68</sup> Under the Nebraska Department of Roads, Title 410, Chapter 3 regulations, these signs are considered "Class II" signs. The full regulations for these signs may be found on page 28 of the regulations available from Nebraska DOR at [http://www.sos.ne.gov/rules-and-regs/regsearch/Rules/Roads\\_Dept\\_of/Title-410/Chapter-3.2.pdf](http://www.sos.ne.gov/rules-and-regs/regsearch/Rules/Roads_Dept_of/Title-410/Chapter-3.2.pdf) or by contacting Nebraska DOR.

<sup>69</sup> The Nebraska DOR regulations cited and linked in the above footnote also have the full restrictions for commercial signs under Class III Signs on page 31.

However before discussing the TODS rules, farms and ranches should consider special exemptions from the sign laws discussed above. Although non-farm businesses must have a Class II permit to put up a sign on their premises if the sign is adjacent to a primary highway, farms and ranches do not. In addition, a farm or ranch may put up a sign with the name of the farm or ranch, the owner, the direction and distance to the farm (and no other information) beyond 100 feet of the right-of-way of a primary highway (Neb. Admin. Code. Title 410, Chapter 3, 002.07). Farms and ranches wishing to take advantage of this opportunity need to apply for a Class V permit from Nebraska DOR. Farm and ranch signs may not be placed along the interstate.

Before placing any sign, businesses should contact the Nebraska DOR for full rules and regulations pertaining to the specific location and intent of the sign planned.

#### *Tourist-Oriented Directional Assistance*

Because it can otherwise be difficult to post a directional sign for a non-farm business, Nebraska businesses may participate in the Tourist-Oriented Directional Signing Program (TODS). Businesses participating in the TODS program may have a sign made, installed, and maintained at intersections on rural state highways (excluding locations at freeway interchanges or within an incorporated municipality) that direct motorists to local, tourist-oriented businesses (Neb. Rev. Stat. 39-207). To be eligible for the TODS program, a direct farm business must be: 1) within 5 miles of the state highway, 2) open at least five days per week, one of which must be Saturday or Sunday (wineries must be open 20 hours per week), 3) ineligible for the logo sign program used on interstate freeways, and 4) derive at least 50% of their income from motorists not residing in 40 miles of the business (or 30% if open year-round) (Neb. Admin. Code. Title 411, Chapter 5, 003.01 et seq).

Businesses interested in the TODS program should fill out an information form online at [www.nebraskatods.interstatelogos.com](http://www.nebraskatods.interstatelogos.com). The fee for participation is \$420 annually.

### **III. INTELLECTUAL PROPERTY**

Marketing a business often involves developing and protecting intellectual property (IP). Intellectual property are non-tangible items created by a person such as literary and artistic works, symbols, names, images, and designs used in commerce. Intellectual property may be protected with several means including trademarks, patents, copyrights, and trade secrets. Each may be important to the direct farm business because IP protection gives the farm business 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 violating others' IP rights.

### *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 symbol that customers use to identify a product. 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. By contrast to trademarks, 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 United States Patent and Trademark Office (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 a very similar 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. 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 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 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**.<sup>70</sup>

State registration is less expensive and cumbersome than the federal system, but it provides protection only within Nebraska. To register a Nebraska trademark, fill out the Trademark or Service Mark Application,<sup>71</sup> and submit it to the Nebraska Secretary of State's office with the \$100 filing fee. Applicants cannot submit the application before the name or logo is in use, and the application must be notarized. If a logo is being registered, three examples of the logo such as letterhead, a business card, or a brochure must be included with the application (Neb. Rev. Stat. 87-130).

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.

In order to be registered and enforceable, trademarks may not be generic or primarily geographically descriptive, and cannot infringe on an existing trademark. A phrase or slogan that is commonly used to refer to a category of product or that falsely suggests a connection with a person, institution or governmental body may not be registered (R.C. 1329.55). Federal registration follows similar guidelines. 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.

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<sup>70</sup> [www.uspto.gov/trademarks/index.jsp](http://www.uspto.gov/trademarks/index.jsp)

<sup>71</sup>

[http://www.sos.ne.gov/business/corp\\_serv/pdf/TRADEMARK%20or%20SERVICE%20MARK%20APPLICATION%20\\_2\\_.pdf](http://www.sos.ne.gov/business/corp_serv/pdf/TRADEMARK%20or%20SERVICE%20MARK%20APPLICATION%20_2_.pdf), or at [http://www.sos.ne.gov/business/corp\\_serv/corp\\_form.html](http://www.sos.ne.gov/business/corp_serv/corp_form.html), under Trade Names, Trademarks, and Service Marks

### *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 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**.<sup>72</sup>

### *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.

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<sup>72</sup> [www.uspto.gov/web/offices/pac/doc/general/index.html#patent](http://www.uspto.gov/web/offices/pac/doc/general/index.html#patent)

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**.<sup>73</sup> The site includes a link to step-by-step instructions on obtaining a copyright.

#### *d. Trade Secrets*

A trade secret is information that companies attempt to keep secret in order to give them an advantage over their competitors. Trade secrets are controlled entirely at the state rather than federal level. The legal definition of a trade secret in Nebraska is a, "drawing, formula, pattern, compilation, program, device, method, technique, code or process that derives independent economic value (actual or potential) from not being known . . ." (Neb. Rev. Stat. 87-502(4)). 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 farm 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 tomatoes. Under Nebraska law, the practice or item the business wants to protect as a trade secret must 1) have independent economic value because it is not generally known or ascertainable and 2) be protected within the business (Neb. Rev. Stat. 87-502(4)).

The first criterion is satisfied if, as explained, the trade secret is actually a new, valuable, and not generally accepted practice. To satisfy the second criterion, the employer should take steps such as not advertising the advantage, not educating others about the secret process or technique, and requiring employees to sign non-disclosure agreements or non-compete agreements. A typical non-disclosure agreement outlines the nature of the trade secret and the obligations of the employee to not disclose the information, and a time period in which former employees must maintain the secret. A non-compete agreement prohibits an employee from using the trade secret to their own advantage, for example, by starting their own business using the trade secret. State law may find overly broad or restrictive non-compete agreements to be invalid. There are exclusions on the scope and duration of non-disclosure or non-compete agreements, so an attorney may be helpful in drafting a proper enforceable agreement.

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<sup>73</sup> [www.copyright.gov/](http://www.copyright.gov/)

#### IV. WEIGHTS AND MEASURES

Because agricultural products are sold by weight or measure, protecting the integrity of a specified weight or measure is important to maintaining the public's trust. Nebraska's Weights and Measures Act is designed to protect that trust and set regulations for labeling requirements and scale certification, among other things. Regarding agriculture, Nebraska law regulates measurement and delivery of wholesale and retail commodities by establishing standards for how commodities can be measured or weighed, by certifying the accuracy of scales, and by requiring weight and measure information on labels (Neb. Rev. Stat. 89-182.01 et seq.).

Nebraska law lays out some very basic rules including that a seller may not misrepresent or misstate a quantity of an item for sale (Neb. Rev. Stat. 89-196.01(14) and (15)). For the direct farm business, that means if a farmers' market stand has a sign stating that one-pound bags of spinach are for sale at \$5 each, if representative bags of spinach are displayed, they must weigh one pound and the customer must be given one pound in return for \$5. In addition, all weighing done for the purposes of selling product to a customer (as opposed to weighing for the purposes of farm record-keeping) must be done on a scale certified by the Department of Agriculture (Neb. Rev. Stat. 89-186.01(2)). The Weights and Measures act also affects packaging. Prepackaged items for sale to retail customers must have a label stating 1) the nature of the contents (for example, "apples") 2) the quantity of the contents in terms of weight, measure, or count, and 3) the name and place of the business (Neb. Rev. Stat. 89-194).

## 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 local inspection and approval of your scales and measuring devices?

## V. 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

**Nebraska Department of Agriculture, Weights and Measures Division**

Ph: (402) 471-3422

**Nebraska Secretary of State Office, (trademarks and tradenames)**

Ph: (402) 471-2554

**Nebraska Department of Roads (signs)**

Ph: (402) 435-5646

## 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. REGISTRATION REQUIREMENTS**

#### ***a. Federal***

A direct farm business may need to obtain a federal employer identification number (EIN) to identify the business entity with the federal Internal Revenue Service (IRS). Banks may also require an EIN to open an account. An EIN is available by phone or at the IRS website, is free of charge, and is provided in about 24 hours.<sup>74</sup> If the answer to any of the following questions is yes,<sup>75</sup> the operation needs an EIN:

- Does the business have employees?
- Is the business operated as a corporation or a partnership?
- 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
  - Non-profit organizations
  - Farmers' cooperatives

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<sup>74</sup> [www.irs.gov/Businesses/Small-Businesses-&Self-Employed/How-to-Apply-for-an-EIN](http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/How-to-Apply-for-an-EIN)

<sup>75</sup> These questions are also on the IRS's website:

[www.irs.gov/businesses/small/article/0,,id=97872,00.html](http://www.irs.gov/businesses/small/article/0,,id=97872,00.html)

### *b. State*

Businesses with no employees who provide only services may not need to register for a tax account with the state of Nebraska. However, most direct farm businesses will sell products and need a tax account. A farm business that collects sales tax, remits use tax, withholds income tax, or files a partnership or corporate income tax return will need to register with Nebraska, and registration is handled by completing the Nebraska Tax Application, Form 20.<sup>76</sup> This form is available online, via email, or by calling 800-742-7474. More information is at the Nebraska Department of Revenue Web site.<sup>77</sup> After Form 20 is filed, the business will receive a Nebraska State Identification Number to be used for all future filings and remittances. Businesses collecting sales tax will be issued a Sales Tax Permit. This permit must be displayed at each retail location. The different tax permits and obligations are discussed in each section below.

## 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**.<sup>78</sup> 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 get 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. Finally, the **Tax Guide for Owners and Operators of Small and Medium Sized Farms** by Phillip Harris and Linda Curry is an excellent resource for smaller farm operations.

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<sup>76</sup> [http://www.revenue.ne.gov/tax/current/fill-in/f\\_20.pdf](http://www.revenue.ne.gov/tax/current/fill-in/f_20.pdf)

<sup>77</sup> [http://www.revenue.ne.gov/business/bus\\_regist.html](http://www.revenue.ne.gov/business/bus_regist.html)

<sup>78</sup> [www.irs.gov/pub/irs-pdf/p225.pdf](http://www.irs.gov/pub/irs-pdf/p225.pdf)

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**.<sup>79</sup>

### *Sole Proprietorships*

#### **ADDITIONAL RESOURCES: Federal Taxation**

##### **Partnerships**

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

[www.irs.gov/pub/irs-pdf/p541.pdf](http://www.irs.gov/pub/irs-pdf/p541.pdf)

##### **Corporations**

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

[www.irs.gov/pub/irs-pdf/p542.pdf](http://www.irs.gov/pub/irs-pdf/p542.pdf)

##### **Investment Income**

***Taxation of investment income is covered in IRS Publication 550.***

[www.irs.gov/pub/irs-pdf/p550.pdf](http://www.irs.gov/pub/irs-pdf/p550.pdf)

Sole proprietorships file taxes on the owner's income tax using Form 1040. The sole proprietorship itself is not taxed on its profit; instead, tax liability "passes through" to the individual who owns the business. The owner of a sole proprietorship is also liable for self-employment tax, social security and Medicare taxes, income tax withholding (if the business has employees), and federal unemployment tax. These taxes are imposed on all employers and discussed in detail in Section 3, below.

### *Partnerships*

Partnerships file Form 1065 to report earnings, but the partnership itself does not pay income tax. 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 profit. 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 profit in expanding the business, partners would still pay taxes on their share of the undistributed profit. Similarly, partnership losses pass through to individuals and are deductible by the individual up to the partner's basis<sup>80</sup> in the partnership.

### *Limited Liability Companies (LLC)*

An LLC is a unique business entity in that, although the entity is registered with the state, an LLC is not a taxable entity itself. Instead, the owners (who are called "members") must choose whether to be taxed 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 an S corporation. Similarly, if the LLC has two

<sup>79</sup> [www.irs.gov/businesses/small/article/0,,id=154770,00.html](http://www.irs.gov/businesses/small/article/0,,id=154770,00.html)

<sup>80</sup> Basis, in simple terms, is the value of any capital and property the partner contributed the partnership, subject to adjustment based on various factors.

or more owners, the IRS automatically will treat the LLC as a partnership unless it elects otherwise. The LLC may elect S corporate taxation status using Form 8832. Sole proprietorships or partnerships do not have to file Form 8832 unless they wish to be treated as an S corporation.

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

### *S Corporations*

For the purposes of forming a business at the state level, a corporation is one option. However, at tax time, all corporations can choose whether to make an “S election” or a “C election.” For convenience, business owners often refer to their operation as an S Corporation or a C Corporation. However, it is important to note that both are corporations at the state level and the distinction is made only for tax filing purposes. Only corporations meeting certain requirements are allowed to make an S election.

S corporations, except in limited circumstances, do not pay taxes at the business level, as is the case with sole proprietorships and partnerships. 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. This is the same situation as with a partnership. For instance, if the business reinvests all of the profit in expanding the business, shareholders would still pay taxes on their share of the undistributed profit. An S corporation reports earnings and losses on Form 1120S.

### *C Corporations*

Unlike the pass through entities (partnerships, sole proprietorships, S Corporations, and LLCs) the corporate entity must pay taxes as an entity itself before passing the profits back to shareholders. 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.<sup>81</sup> 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 also pays individual income taxes on their income.

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<sup>81</sup> Because the corporation also pays taxes on that profit as the business itself, this situation is often referred to as “double taxation.” The profit is taxed once at the corporate level and second at the shareholder level.

### *Cooperatives*

Subchapter T of the Internal Revenue Code governs federal taxation of cooperatives. A cooperative 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**<sup>82</sup> 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 of Business Income***

Any business that files with the IRS as a corporation and derives that income from within Nebraska is also subject to Nebraska's corporation income tax (Neb. Rev. Stat. 77-2734 et seq.). These businesses should file the Nebraska Corporation Income Tax Return, Form 1120N, available at the Nebraska Department of Revenue Web site.<sup>83</sup> If the business is an LLC that files as a partnership with the IRS, as described in the federal business income tax section above, the business should file the Nebraska Partnership Return of Income, Form 1065N.<sup>84</sup> This form is also the form a Nebraska business should file to report the income from pass-through entities.

### **III. INCOME, EMPLOYEE AND SELF EMPLOYMENT TAXES**

This section provides brief summaries of the taxes employers must pay and withhold from income on behalf of employees.

#### ***a. Federal Employee-Related Taxes***

##### *Overview*

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 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

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<sup>82</sup> [www.rurdev.usda.gov/rbs/pub/legal.htm](http://www.rurdev.usda.gov/rbs/pub/legal.htm)

<sup>83</sup> [http://www.revenue.ne.gov/tax/current/corp\\_s-corp\\_forms.html](http://www.revenue.ne.gov/tax/current/corp_s-corp_forms.html)

<sup>84</sup> [http://www.revenue.ne.gov/tax/current/partnership\\_forms.html](http://www.revenue.ne.gov/tax/current/partnership_forms.html)

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.

#### *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. An employer is responsible both to withhold an employee's own FICA contribution from wages and to pay the business' share of FICA for the employee. Agricultural employers have a very narrow exemption from FICA taxes. If the farm pays any individual less than \$150 in wages in a year, then the farm does not need to withhold or contribute for FICA taxes. However, if the farm pays a total of \$2,500 or more to all workers in sum, then the farm must withhold and contribute to FICA for every employee, even those receiving less than \$150 in wages.<sup>85</sup>

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 2012 extends to 2010).

#### *Unemployment Insurance Taxes*

The Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.) governs whether agricultural operations must pay an unemployment insurance tax on cash wages paid to employees and are known as "FUTA" taxes. An agricultural operation is considered an employer subject to the federal unemployment tax 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(c)(5)). The federal tax is paid using Form 940, with deposits generally required quarterly. FUTA tax rates have been around 6% but change frequently, and a credit is often available for paying state unemployment taxes. *Publication 51: Agricultural Employer's Tax Guide* describes federal unemployment taxes.

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<sup>85</sup> Internal Revenue Services, Publication 51, Agricultural Employer's Tax Guide at Section 4.

*More information*

For more comprehensive information on federal employment-related tax, 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.

***b. Nebraska Employee-Related Taxes****Withholding Taxes from Wages*

Nebraska farm businesses with employees must withhold taxes from the employee's income (Neb. Admin. Code, Title 316, 21-001). The first step is to file the Nebraska Tax Application, Form 20, discussed at the beginning of this chapter. After filing Form 20, the business will be sent a Nebraska Withholding Certificate. Although federal law requires Form W-4 to begin withholding, there is no equivalent Nebraska form. Instead, the employer uses the same exemption number the employee claims on the W-4 to compute the state income tax withholding rate. The precise rate should be calculated using the wage bracket or percentage tables included in the most recent Nebraska Circular EN, which is available at the Nebraska Department of Revenue's Web site (Neb. Admin. Code, Title 316, 21-004). Then, the employer pays the withheld taxes over to the Nebraska Department of Revenue quarterly using the Nebraska Employer's Quarterly Withholding Return, Form 941N. This form must be completed even if no withholding occurred. However, an employer with a tax liability of less than \$500 in a calendar year may file annually. On the other hand, if the quarterly amount exceeds \$500, the employer must file monthly (Neb. Admin. Code, Title 316, 21-007). Employers must give employees a statement of wages paid, deducted, and withheld as tax annually on a federal Form W-2.

*Unemployment Compensation*

Nebraska's unemployment compensation law follows the federal law's agricultural exemption (i.e., 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(c)(5)). Farms meeting this requirement need not contribute to Nebraska's unemployment compensation fund (Neb. Rev. Stat. 48-604(4)).

However, if an employer paid \$20,000 or more in wages in a calendar quarter or had at least 10 individuals employed in agricultural labor for some portion of a day in each of 20 different weeks in the current or preceding calendar year, then that employer must contribute to unemployment. Farm businesses in this category must file an Application for an Unemployment Insurance Account Number on UI Form 1, which is on the Nebraska Department of Labor's Web site.<sup>86</sup> The tax rate varies by year and according to how long the employer has been in business. Current tax rates are listed at the Nebraska Department of Labor Web site.<sup>87</sup> The department also publishes a useful Employer's Guide to Unemployment Insurance.<sup>88</sup>

*More information*

More comprehensive information on Nebraska employment-related taxes can be found at the in the 2013 Nebraska Circular EN on Nebraska income tax withholding for wages paid in 2013. This booklet is a thorough guide to employment tax withholding in Nebraska.<sup>89</sup>

*c. 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. Self-employment tax rates change annually, and farmers should consult the latest IRS bulletin on the subject.<sup>90</sup> 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*<sup>91</sup> provides additional details regarding the self-employment tax rules.

## IV. SALES AND SERVICES TAXES

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<sup>86</sup> <http://www.dol.nebraska.gov/employers/tax/forms/uiform1.pdf>

<sup>87</sup> <http://www.dol.nebraska.gov/>

<sup>88</sup>

<http://www.dol.nebraska.gov/workers/The%20Employer's%20Guide%20to%20Unemployment%20Insurance.pdf>

<sup>89</sup> [http://www.revenue.ne.gov/circ-en/2013/circ\\_en\\_2013.html](http://www.revenue.ne.gov/circ-en/2013/circ_en_2013.html)

<sup>90</sup> [http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Self-Employment-Tax-\(Social-Security-and-Medicare-Taxes\)](http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Self-Employment-Tax-(Social-Security-and-Medicare-Taxes))

<sup>91</sup> Available online at [www.irs.gov/pub/irs-pdf/p225.pdf](http://www.irs.gov/pub/irs-pdf/p225.pdf)

Sales tax affects the direct farm businesses in two ways. First, the farm may be responsible to collect and remit sales tax on the retail sale of non-food items. Second, direct farm businesses that purchase goods may be responsible for paying sales tax if the purchase is not exempt. The section below describes these obligations. (For tax information regarding interstate internet sales, See Chapter 2: Marketing.)

#### *a. Sales Tax on Farm Product Sales*

Sales tax is a tax determined as a percentage of a business' gross receipts on retail sales that is collected from consumers and sent to the state department of revenue. Most states have a sales tax, including Nebraska. Even if the product being sold is exempt from sales tax, a person doing business in Nebraska is still responsible to have a tax permit and show why tax was not collected or submitted (Neb. Admin. Code, Title 316, 1-004). As discussed in the beginning of this chapter, Nebraska Tax Application, Form 20, should be completed and submitted to the Nebraska Department of Revenue to open a tax account before sales occur.



The amount of sales tax a business should collect depends on the delivery location of the item. That means that if the farm business drives into town for the farmers' market and makes sales there, local city sales taxes will apply to that sale (Neb. Admin. Code, Title 316, 1-006). The Nebraska Department of Revenue has a sales tax rate finder which is searchable by zip code on their website.<sup>92</sup> Sales tax is remitted to the state quarterly or annually depending on the business' size.

However, some sales are exempt from sales tax and these exemptions are especially relevant to the direct farm business. The sale of food (but not restaurant meals) and animals for human consumption are exempt (Neb. Admin. Code, Title 316, 1-012.02B), as are seeds, plants, chemicals, irrigation water, and agricultural machinery sold for agricultural purposes (Neb. Admin. Code, Title 316, 1-012D). Sales of food animals and food do not need an exempt certificate, but the sale of seed and other agricultural products under section 1-012D need to be accompanied by an exempt sale certificate (Neb. Admin. Code, Title 316, 1-014). Form 13: Nebraska Resale or Exempt Sale Certificate form is available online.<sup>93</sup>

Direct farm business that do value-added sales will need to pay special attention to when food products are and are not taxable. Prepared foods, including sandwiches, heated foods, foods

<sup>92</sup> <http://www.revenue.ne.gov/salestaxrates.html>

<sup>93</sup> [http://www.revenue.ne.gov/tax/current/fill-in/f\\_13.pdf](http://www.revenue.ne.gov/tax/current/fill-in/f_13.pdf)

sold with a utensil, and foods intended for immediate consumption are taxable (Neb. Admin. Code, Title 316, 1-087.03). To use a farmers' market example, crafts are taxable but fruit preserves and whole pies are not. For more information, see the Department of Revenue's chart of exemptions.<sup>94</sup>

### ***b. Sales Tax on Farm Purchases***

Many items that a direct farm business may purchase to run the farm may be exempt from sales tax. Under Nebraska law, sales of agricultural equipment for use in commercial agriculture are exempt from sales tax if the farmer completes Nebraska Resale or Exempt Sale Certificate, Form 13, Section B<sup>95</sup> (Neb. Admin. Code, Title 316, 1-094). This regulation is very broad and additional definitions are necessary. An item is used in commercial agriculture if it is used to produce food crops or in the raising or caring for animals. It also includes nurseries, sod farms, and other non-food crop farms. However, it does not include operations where animals are held for sale in a stockyard or products are held off the farm (Neb. Admin. Code, Title 316, 1-094.01B). The items must also qualify as agricultural equipment. Items satisfy this definition if they are used to produce income in commercial agriculture, have a lifespan of more than one year and are depreciable. Real estate and motor vehicles are not agricultural equipment (Neb. Admin. Code, Title 316, 1-094.01). A helpful powerpoint presentation is available online that outlines the specifics of the ag equipment exemption, including agricultural feed, buildings, water, and other inputs.<sup>96</sup> The required Form 13 is available at the Department of Revenue Web site.<sup>97</sup>

### ***c. Fuel Use 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 Nebraska statutes, certain uses of fuel, such as farm use, are nontaxable. The user may be able to seek a credit or refund of the excise tax paid for fuel.

#### *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

<sup>94</sup> [www.revenue.ne.gov/question/exempt\\_sales\\_chart.html](http://www.revenue.ne.gov/question/exempt_sales_chart.html)

<sup>95</sup> [http://www.revenue.ne.gov/tax/current/fill-in/f\\_13.pdf](http://www.revenue.ne.gov/tax/current/fill-in/f_13.pdf)

<sup>96</sup> [http://www.revenue.ne.gov/education/fall\\_2012/agri-bus\\_2012\\_BW.pdf](http://www.revenue.ne.gov/education/fall_2012/agri-bus_2012_BW.pdf)

<sup>97</sup> [http://www.revenue.ne.gov/tax/current/f\\_13.pdf](http://www.revenue.ne.gov/tax/current/f_13.pdf)

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 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 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.

#### *Nebraska Fuel Excise Taxes*

Nebraska law taxes fuel for use in motor vehicles on highways and waterways. However, if an individual purchases diesel fuel for agricultural purposes and places it into unlicensed equipment, the individual may request a refund of the tax paid (Neb. Admin. Code, Title 316, 73-003.04). Farmers should file Nebraska Ag Use Motor Fuels Tax Refund Claim, Form 84AG to request the refund.<sup>98</sup> The total tax paid must be at least \$25 for the calendar year, and farmers must keep and attach records documenting the sale and use of the fuel. The form contains a table that specifies the refund rate for specific purchase periods.

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<sup>98</sup> [http://www.revenue.ne.gov/fuels/f\\_84ag.pdf](http://www.revenue.ne.gov/fuels/f_84ag.pdf)

## V. PROPERTY TAXES

The direct farm business must pay local property taxes each year on real property owned by the business. The total tax is based on the actual or market value of the real estate. Although most Nebraska property is assessed for tax purposes at 100% of its value (Neb. Admin. Code, Title 350, 14-006.05B), agricultural land receives special treatment. Instead, agricultural land is valued at between 75-80% of its actual value, depending on the most recent legislative changes. The current value as of 2013 is 75% (Neb. Admin. Code, Title 350, 14-006.05B). Agricultural land is defined as, “land used primarily for agricultural or horticultural purposes,” but does not include any land, “directly associated with any building or enclosed structure” (Neb. Admin. Code, Title 350, 14-002.5). Agricultural and horticultural purposes are defined to be, “used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture” (Neb. Rev. Stat. § 77-1359.) Without the special valuation percentage, farmland may bear a disproportionate share of the property tax burden as it may be valued for development rather than farmland (Neb. Admin. Code, Title 350, 14-004.2B).

## VI. CHECKLIST

Have you...?

- Obtained an Employer Identification Number from the Internal Revenue Service?
- Opened a Nebraska tax account?
- 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?
  - State and local sales taxes?
  - 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?

## VII. 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 [www.irs.gov/localcontacts/index.html](http://www.irs.gov/localcontacts/index.html) (zip code search).

### Nebraska Department of Revenue

General Business Questions: (888) 742-7474

### Nebraska Department of Labor (unemployment tax)

General Administration: (402) 471-9000

## **CHAPTER 5: LABOR AND EMPLOYMENT**

Several federal and Nebraska 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 liability for employees. 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.

Readers should keep in mind that federal and state laws may differ in terms of their minimum wage rates, exceptions for agriculture from employment laws, and rules on child labor. A farm operation must comply with the strictest regulation, whether it is the state or the federal rule.

Also, if a farm operation is exempt from one employment regulation, such as minimum wage, that does not mean the farm operation is also exempt from other employment laws.

Additionally, what may be classified as “employment” in one context may be volunteerism in another context. Lastly, farmers are cautioned from assuming that any exception available from employment regulations applies to all aspects of a business. To the contrary, some employment law exceptions apply only to the type of labor being performed. A single employee may be exempt from employment laws while performing one task and not exempt while performing another.

This chapter begins with a discussion of minimum wage, overtime, and child labor regulations on a federal and state level, followed by workplace safety laws. Then, state workers’ compensation rules, seasonal and migrant worker rules, and intern positions are discussed. Employment law can be quite complex. Farm operations with value-added production, employees under the age of 18, volunteers, interns, or seasonal workers are especially encouraged to seek the advice of an attorney.

### **I. MINIMUM WAGE AND OVERTIME**

#### ***a. Federal: The Fair Labor Standards Act***

The federal Fair Labor Standards Act (FLSA) (29 U.S.C. Chapter 8) establishes a minimum wage, establishes maximum hours worked per week (40 hours) over which amount employees must be paid time and a half, prohibits employment discrimination, and regulates child labor (29 U.S.C. §§ 206; 207; 206; 212, respectively).

Minimum wage is one aspect of the FLSA. Currently, the federal minimum wage is \$7.25 per hour, which is the same as Nebraska’s minimum wage rate. However, *there is an exception to*

*federal minimum wage law for agricultural employees* (29 U.S.C. § 213; 29 C.F.R Part 780). To qualify for the exception, two conditions must be satisfied: 1) The employee's activity must fall under the FLSA's definition of agricultural labor, and 2) the farm must qualify as a small farm under the FLSA's definition. These conditions are detailed and are addressed individually below.

To be exempt from minimum wage, an employee must perform agricultural labor. Agricultural labor 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). Obviously, this definition is complex and must be broken down for further analysis.

Agricultural labor breaks down 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," 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 off the farm (including sales at a farmers market stand), performing work on another farmer's products, or doing any processing or value-added operations, 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**.<sup>99</sup> For more general information, the U.S. Department of Labor maintains an agriculturally oriented **compliance webpage**.<sup>100</sup>

If an employee performs non-agricultural work during a week, then the exemption from minimum wage is lost for that entire workweek rather than for the specific hours of non-agricultural labor performed.

<sup>99</sup> [www.dol.gov/whd/america2.htm#Nebraska](http://www.dol.gov/whd/america2.htm#Nebraska)

<sup>100</sup> [www.dol.gov/compliance/topics/wages-agricultural.htm](http://www.dol.gov/compliance/topics/wages-agricultural.htm)

The second requirement for exemption from the federal minimum wage requirements for agricultural labor is the small farm requirement. Under the federal definition, a small farm is one that employs fewer than 500 “man days” of labor in the previous calendar year. A man day is any day in which a single employee performs at least one hour of labor. For example, if two people work one hour on the same day, the employer has two man days. A farm’s man day assessment is made according to the previous year’s employment records rather than the current year’s estimated labor needs. For a more thorough discussion of this calculation and a sample record-keeping template to help track man days, see Farmers’ Legal Action Group’s **Farmers’ Guide to Farm Employees**, available for purchase or download.

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 for that workweek (29 C.F.R. § 780.10). The FLSA 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)).

The small farm agricultural labor exemption only applies to federal minimum wage. State minimum wage may still apply, (although it does not in Nebraska) as discussed below. In addition to the exemption for employees performing agricultural labor for a small farm, the following situations are also exempt from the FLSA’s minimum wage requirements (29 U.S.C. § 213(a)):

- 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.

## II. NEBRASKA: MINIMUM WAGE AND OVERTIME

Under Nebraska's minimum wage law, individuals "employed in agriculture" are not owed the Nebraska minimum wage. The exception applies to agriculture entirely, regardless of the size of the farm. This means that Nebraska direct farm businesses must pay the minimum wage only if they exceed the federal exemption (for example, when the farm grows beyond the small farm size or employs individuals in non-agricultural labor). Nebraska direct farm businesses should carefully read the FLSA section above and recommended materials to assess whether the farm must provide federal minimum wage to employees. The Nebraska Department of Labor enforces Nebraska employment law.

## III. CHILD LABOR LAWS

### *a. Federal*

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 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).



### *b. Nebraska Child Labor Regulations*

Nebraska's child labor laws do not apply to minors who work on farms (or other businesses) operated by their parents (Neb. Rev. Stat. 48-302.02). However, for direct farm businesses employing children not their own, these laws apply. Children as young as twelve may work detasseling corn as long as two supervisors of 18 years of age or older, who also have the authority to handle wage, safety, hour and work hours issues, are present (Neb. Rev. Stat. 48-302.02). Also, the child may not work more than 48 hours in a week or more than 8 hours in the day between the hours of 6am and 8pm (Neb. Rev. Stat. 48-310). Children under 14 may only work for a school employment program (Neb. Rev. Stat. 48-304). Children under 16 years of age are allowed to work only if the employer has an employment certificate from the child's school showing that the child has completed sixth grade and can read and write in English (Neb. Rev. Stat. 48-304). The employer must also keep a list of all children employed in the area and comply with the hours detailed above relating to detasseling. Nebraska law prohibits children under 16 from work that is dangerous to life or limb (Neb. Rev. Stat. 48-313).

## **IV. WORKER HEALTH AND SAFETY**

### *a. Occupational Safety and Health Act*

The federal Occupational Safety and Health Act (the Act) (29 U.S.C. Chapter 15) and implementing regulations (29 C.F.R. Parts 1900-2009) establish safety and health standards for employees of private businesses. 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). Any housing provided for seasonal farm employees is considered to be a temporary labor camp, which means that a farm providing housing to an intern or a single seasonal employee does not meet this exception. Although the Act technically applies to small farms, there is nothing OSHA can do if a small farmer without employee housing fails to comply with the rules.

29 C.F.R. Part 1928 lists most of the OSHA regulations for farms. The regulations require rollover 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 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. §§ 1910.1200, 1910.1201, 1910.111(a)&(b), 1910.266, 1910.145, and 1910.1027, respectively) This section also establishes minimum plumbing, sewage, laundry, trash, and first aid standards for any housing provided to seasonal farm workers. 29 C.F.R. § 1910.142. *Agricultural operations are exempt from all the other provisions of Part 1910, which establish general operational safety standards* (29 C.F.R. § 1928.21(b)).

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 impose 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.

#### ***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. Pursuant to FIFRA, the EPA has promulgated a Worker Protection Standard (WPS) for agricultural pesticides. In Nebraska, the Department of Agriculture administers and enforces the federal FIFRA law. 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**<sup>101</sup> for employers on its website.

## V. MIGRANT AND 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. Under the MSPA, a “seasonal agricultural worker” is one who is employed in agricultural employment of a seasonal nature and who performs fieldwork such as harvesting or planting (as opposed to processing or packing) on a farm or ranch. Despite the title of the MSPA, **this law applies to most agricultural workers and not just workers who migrate.**

#### *Hiring*

Some direct farm businesses use a Farm Labor Contractor (an 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**<sup>102</sup> that should be checked before doing business with any FLCs.

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*

<sup>101</sup> [www.epa.gov/oecaagct/htc.html](http://www.epa.gov/oecaagct/htc.html)

<sup>102</sup> [www.dol.gov/whd/regs/statutes/mspa\\_debar.htm#.UJPOjVE2f3A](http://www.dol.gov/whd/regs/statutes/mspa_debar.htm#.UJPOjVE2f3A)

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 English and in the worker's native language, with translation expenses being born by the employer (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).

## VI. 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**<sup>103</sup> that provides step-by-step instructions on how the H-2A program works, including links to forms.

## VII. UNPAID EMPLOYEES: INTERN AND STUDENT WORKER PROGRAMS

For many small farms, hiring unpaid interns is a common practice. The farm benefits by receiving 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, the intern is likely an employee and employment law applies. The federal Department of Labor provides a fact sheet that lists 6 criteria to determine if an internship program is exempt from the federal FLSA because the intern is not an employee. These criteria are as follows:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

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<sup>103</sup> [www.foreignlaborcert.doleta.gov/h-2a.cfm](http://www.foreignlaborcert.doleta.gov/h-2a.cfm)

Most farms will not meet the DOL's six criteria and as such, the farm business must take care to comply with the FLSA. If a farm does not qualify for the FLSA's minimum wage exception delineated above (employing fewer than 500 man days per quarter in the previous calendar year), then the farm must pay interns the minimum wage. State minimum wage must be considered separately. Internship issues are addressed in extensive detail in a publication by Farmers' Legal Action Group called **Farmers' Guide to Internships**. The resource is available for purchase or download.<sup>104</sup>

If interns (and employees) are not being paid the minimum wage, the farm should still require workers to clock in and out as if they were paid employees. Records of employee names, dates of employment, and duties performed should be kept for each individual. The farm will need this information to calculate if the farm meets the 500 man day exemption. Farms employing paid and unpaid employees must count the unpaid employees' man days in calculating the next year's 500 man day minimum wage exemption. This information is also important if a disgruntled intern complains to the Department of Labor. If 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, FIFRA, and MSPA may still apply. Workers' compensation is also required if even one intern works on the farm, whether paid or unpaid.

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. However, this exception is relevant only for Nebraska farms that do not meet the small farm minimum wage exemption.

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* –

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<sup>104</sup> <http://www.flaginc.org/publication/farmers-guide-to-farm-internships/>

*Practical Approaches to Teaching on the Farm*, for \$35, provides more detailed guidance. The publications are available through **NESFI's website**.<sup>105</sup>

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 federal or state inspection.

### VIII. INJURIES AND WORKERS' COMPENSATION

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.

If an employee of a direct farm business is injured, the injured employee can seek compensation in two potential ways — make a claim under Nebraska workers' compensation program or sue the employer for negligently causing the injury. Workers' compensation insurance covers medical treatment and lost pay owed to employees injured on the job, regardless of who was at fault in causing the injury. Nebraska's workers' compensation statutes follow a fee schedule for payment of medical treatment and daily disability pay. If workers' compensation insurance is available, an employee may not choose the second option to sue the employer under tort law. This ban protects employers from negligence claims and the unpredictability of compensation awards.

*The Nebraska Workers' Compensation Act* (Neb. Rev. Stat. 48-106(2)) requires all employers with one or more employees to obtain workers' compensation insurance with some very large exceptions for agriculture. Farm businesses that only employ people for agricultural labor are exempt from providing workers compensation. In many states, an agricultural exemption for workers' compensation is limited to the type of labor performed, but this is not the case for Nebraska. An individual working for an exempt employer, such as an agricultural operation (described in the next paragraph) with only agricultural employees, is exempt even if the individual performs non-agricultural work (Neb. Rev. Stat. 48-106(2)(c); *Larsen v. D B Feedyards*, 264 Neb. 483 (2002)).

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<sup>105</sup> [www.smallfarm.org/main/bookstore/publications/](http://www.smallfarm.org/main/bookstore/publications/)

The fact that an employee works on a farm does not necessarily mean that the employer is agricultural in nature. Because the exception from workers compensation applies to agricultural operations, it is important to determine whether a business is agricultural or commercial in nature. The law defines agricultural operations as cultivating land or producing livestock (Neb. Rev. Stat. 48-106(9)(a)). Unlike many other far broader definitions of agriculture, the marketing or processing of agricultural products are not explicitly included in the definition of an agricultural “operation.” The Nebraska Supreme Court has made a distinction between commercial operations and agricultural operations. This determination is heavily fact-specific, but the court has found that when a farmer works with other farmer’s products such as feeding another individual’s cattle on the farmer’s site or grinding hay under contract or for sale to others, those operations, because they are motivated by profit-seeking rather than agricultural concerns, are commercial (*Larsen v. D B Feedyards* 264 Neb. 483 (2002); *Campos v. Tomoi*, 175 Neb. 555 (1963)). Farmers who incorporate other’s products on their farm or offer services to other farmers for money should consult with an attorney to determine if they are an agricultural or commercial operation.

Even if the operation is agricultural, employers who employ ten or more employees for any thirteen weeks in the year must still purchase workers’ compensation. In addition, the farmer cannot decide to drop coverage during the same or following calendar year if the number of employees drops below ten (Neb. Rev. Stat. 48-106). Farms should also be cautious about determining who is and is not an employee. Interns, volunteers, and other casual work situations may be considered employees.

Farm employers who qualify for and wish to take advantage of the exception to workers compensation must give each employee written notice stating, “In this employment you will not be covered by the Nebraska Workers' Compensation Act and you will not be compensated under the act if you are injured on the job or suffer an occupational disease. You should plan accordingly” (Neb. Rev. Stat. 48-106(7)).

Farms may elect to provide workers’ compensation-- and there are good reasons to do so. If workers’ compensation is available to an injured employee, that person cannot sue the farmer for negligence, even if the farmer’s negligence caused the injury. Where workers’ compensation is available, it is the only option for recovery. Workers’ compensation can also be a cost effective substitute for life, disability, and liability insurance that the farm business would otherwise need to provide the same coverage. Family members and the farm owner can elect coverage for themselves as well.

If a farm business fails to get workers’ compensation when it is required the penalties can be steep. First, the injured employee may sue the employer for negligence. Second, the employer may not assert some of the defenses otherwise available, including the argument that the injured person contributed to their own injury (Neb. Rev. Stat. 48-101). In addition to medical

bills, the business may be fined up to \$1,000 per employee per day of continued failure to provide coverage, sentenced to jail time, or barred from doing business in the state until coverage is provided. For more information, see the Workers' Compensation Court Information Sheet available online.<sup>106</sup>

## IX. EMPLOYER LIABILITY WHEN EXEMPT FROM WORKERS' COMPENSATION REQUIREMENTS

In cases where employers are exempt from mandatory workers' compensation insurance coverage or fail to provide the coverage, Nebraska common law tort principles will determine a farm business's liability for 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.<sup>107</sup>

### a. *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 act in the way that a reasonably careful person would act under similar 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 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 (*Anstine v. Briggs*, 191 Neb. 489, 215 N.W.2d 878 (1974)).

### b. *Contributory Negligence of the Employee*

Whether an employee's own negligent actions contributed to his or her injury is important in a negligence lawsuit. If a regular employee would obviously know that an activity was dangerous and that a person is assuming significant risk in taking on the task, the individual may be responsible for his or her own injury. If this is the case, an employee's monetary award for damages is reduced according to the amount by which the employee's negligence contributed to his or her injury (*Stevens v. Kasik*, 201 Neb. 338 (1978)). This would apply to

<sup>106</sup> <http://dhhs.ne.gov/Documents/rightsobligations.pdf>

<sup>107</sup> 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.

injuries sustained by third parties, discussed below. To illustrate, if the damages are \$1000 and the employee was 70% negligent and the employer was 30% negligent, the employee may only recover \$300.

### *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. Please note that where workers' compensation is provided, an employee injured by another employee would be limited to workers' compensation and could not sue the employer. Under that circumstance, this section addresses situations where workers' compensation is not provided.

#### *Employees Injuring Third Parties*

It is very possible that farm employees could injure customers, visitors, or business guests, so farms should know when they might be liable for those injuries. Two primary factors affect whether the farm business will be responsible for an employee's injury of a third party: 1) the employee must have acted negligently to the third party, making the individual legally responsible, and 2) the person must have been acting within his or her position for the employer's business. If these two conditions are satisfied, then the farm business may be responsible for the injury caused by the employee. Under Nebraska case law, if the employer directed the action, both are equally responsible; where if the employer did not direct or approve of the conduct, the employer's liability is secondary to the employee's (*Kocsis v. Harrison*, 249 Neb. 274, 281 (1996)). However, the full judgment may be requested from either the employer or negligent employee.

Regarding the first factor, 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 provides the tools, materials, or equipment. The distinction between employee and independent contractor is an important one for many reasons, including taxes, and the IRS has a helpful explanation in Publication 15: Employer's Tax Guide, under Who is an Employee?

Regarding the second factor, the injury must have been caused within the employee's scope of employment. Although being on duty and at work is one indication that an action is within an employee's scope of work, it must go beyond that. In the words of one court, "an employee is not responsible for the independent self-serving acts of his employees which in no way facilitate or promote his business." If the employee's act is intended to further his or her work for the

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**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.*

[www.ers.usda.gov/Publications/AH719/](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.*

[www.dol.gov/compliance/guide/](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.*

[www.dol.gov/compliance/laws/main.htm](http://www.dol.gov/compliance/laws/main.htm)

*The Nebraska Department of Commerce maintains a website that describes the services of Nebraska DOL.*

[www.dol.nebraska.gov](http://www.dol.nebraska.gov)

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business, then it is within the scope of employment. One obvious example of work in the scope of employment is where an employee causes a traffic accident while delivering produce to the market. On the other hand, if an employee causes a traffic accident in her own car while driving home after work, she is probably not acting within the scope of her employment.

An employer can always raise the defense of contributory negligence if an employee injures a third party. If the third party knew of and assumed the risk of the injury that occurred, then the third party's award will be reduced by the proportion of his or her 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 conduct under the theory of negligent hiring or retention if the following all occur: (1) The employer must be aware or reasonably should have become aware of the employee's deficiency, past dangerous conduct, or incompetence that could cause injury to third persons. (2) The proximate cause of the injury to the third person can be attributed directly to the incompetent or dangerous employee. (3) The characteristic or deficiency that caused the injury to the third person must relate to the information about the deficiencies or incompetencies that are known to the employer. (4) The employer must owe some duty of care to the injured party. With a few exceptions, all of the above requirements must be met and sustained by adequate evidence before the third party can prevail in a legal action.<sup>108</sup>

<sup>108</sup> 7 No. 4 Neb. Employment L. Letter 1

### *Employees Injuring Other Employees*

Generally, the employee causing the injury will be responsible to the injured employee. 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.

### *Conclusion*

The best way for a farm business to avoid liability for injuries 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 visitors, it likely does not cover other injuries. In particular, as discussed above, workers compensation insurance may be necessary to cover injuries to employees. Discuss and verify your liability coverage with your insurance agent before starting your farm business and any time you make a change to your business venture.

## X. CHECKLIST

- Have you read and understood the agricultural exceptions to the FLSA and Nebraska's minimum wage law? If you intend to take advantage of the exceptions, have you verified that employee 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 certificates 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 and seasonal 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?

## XI. KEY CONTACT INFORMATION

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

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

Omaha Area Office, Ph: (402) 221-4682

### **U.S. Department of Labor, OSHA Offices**

Omaha Area Office, Ph: (402) 553-0171

### **Nebraska Department of Labor**

Ph: (402) 471-9000

### **Nebraska Department of Insurance, Workers' Compensation**

Ph: (402) 471-2201



## SECTION II – REGULATION BY PRODUCT



## CHAPTER 6: DAIRY

Dairy is subject to more food regulations 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 local Nebraska Department of Agriculture, Bureau of Dairies and Foods, to discuss plans *before starting*.

### I. FEDERAL REGULATION

Federal law technically only applies to dairy products that move in interstate commerce. However, Nebraska law incorporates 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. FDA: Pasteurization and Grade A Pasteurized Milk Ordinance*

By federal law, all milk shipped across state lines must be pasteurized. The source of this regulation is a bit complex. 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). Labeling standards include the FDA standards of identity, which require pasteurization unless the product is a cheese that is exempt (21 C.F.R. § 1240.61; parts 131; 133).<sup>109</sup>

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**.<sup>110</sup> The PMO is a 405-page model regulation published by the FDA. Many states, including Nebraska, use the PMO as their standard for sanitation of all milk products (Neb. Rev. Stat. 2-3965(2)(a)), whether the products

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<sup>109</sup> 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 (21 C.F.R. part 133).

<sup>110</sup> [www.fda.gov/downloads/Food/FoodSafety/Product-SpecificInformation/MilkSafety/NationalConferenceonInterstateMilkShipmentsNCIMSMModelDocuments/UCM291757.pdf](http://www.fda.gov/downloads/Food/FoodSafety/Product-SpecificInformation/MilkSafety/NationalConferenceonInterstateMilkShipmentsNCIMSMModelDocuments/UCM291757.pdf)

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, etc.), should read the PMO carefully. 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. If a dairy wants to be on the Interstate Milk Shippers 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 list is available on the **FDA's website**.<sup>111</sup>

### *b. USDA: Grading and Milk Marketing Orders*

The USDA administers a variety of programs that regulate or grade dairy products. A full listing of USDA dairy programs can be found online on the Agricultural Marketing Service (AMS) website.<sup>112</sup> 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 may be 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**.<sup>113</sup>

#### *Federal Milk Marketing Orders*

Milk Marketing Orders are the USDA's means of stabilizing supply for consumers and providing uniform prices for producers. AMS uses the orders to routinely set the minimum price that dairy farmers must be paid for fluid milk within a given geographic area (7 U.S.C. § 608c(5)). There are currently 11 federal Milk Marketing Order Areas. AMS establishes milk

<sup>111</sup> <http://www.fda.gov/Food/GuidanceRegulation/FederalStateFoodPrograms/ucm2007965.htm>

<sup>112</sup>

[www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateA&navID=CommodityAreas&leftNav=CommodityAreas&page=DairyLandingPage&description=Dairy](http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateA&navID=CommodityAreas&leftNav=CommodityAreas&page=DairyLandingPage&description=Dairy)

<sup>113</sup>

[www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateM&navID=GradingCertificationandVerification&leftNav=GradingCertificationandVerification&page=DairyGrading&description=Dairy+Grading](http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateM&navID=GradingCertificationandVerification&leftNav=GradingCertificationandVerification&page=DairyGrading&description=Dairy+Grading)

marketing orders using formal 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 direct-to-consumer dairies must now comply with the Milk Marketing Orders. More information on this change to the law is available on the **AMS website**.<sup>114</sup>

Direct farm businesses subject to the Milk Marketing Order will need to know that southeast Nebraska falls within the Central Order and northwest Nebraska is outside all order areas. 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**.<sup>115</sup> 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.

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

<sup>115</sup>

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

### *Mandatory Price and Storage Reporting*

Even if a producer-handler is not subject to the Milk Marketing Order, he or she is likely still subject to some reporting requirements. 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.

*Price reporting* 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 1 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 milk) 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**.<sup>116</sup>

*Storage reporting* requires those who store butter, 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, 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

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<sup>116</sup> [www.nass.usda.gov/Data\\_and\\_Statistics/Dairy\\_Products\\_Mandatory\\_Program/index.asp](http://www.nass.usda.gov/Data_and_Statistics/Dairy_Products_Mandatory_Program/index.asp)

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

Any one considering starting a dairy operation in Nebraska should contact the Nebraska Department of Agriculture (NDA), Bureau of Dairies and Foods as soon as possible in the planning stages. Milk production, storage, handling, processing, and distribution are heavily regulated; licenses are required at all stages of milk processing. Although the rules are exacting and complex, this section describes the overall framework for state regulation of dairy. By way of reference, milk production is addressed in the Nebraska Milk Act (Neb. Rev. Stat. 2-3965 et seq.).



Farmers who sell milk and cream at the farm directly to consumers for the consumer's consumption, and not for resale, do not need to comply with the Nebraska Milk Act and the Grade A standards. In the event that the farm does not also need to comply with the federal PMO through interstate shipments, on-farm sales of milk appear unregulated. However, restaurants or other food service establishments may not utilize raw milk in their operations, even if purchased directly at the farm, because the Nebraska Food Safety Act prohibits the use of milk from sources that do not comply with Grade A standards (2009 Food Code 202.11, adopted pursuant to Neb. Rev. Stat. 81-2257.01).

Milk and milk products sold by milk plants in Nebraska must meet Grade A Milk standards as adopted by the FDA's PMO described above (Neb. Rev. Stat. 2-3965(2)(a)). To sell Grade A milk, a milk plant must purchase milk from a farmer also licensed as a Grade A milk producer. The milk producer license is straightforward and the fee is \$15. Before a producer license will be issued, any milk producer who proposes to construct or extensively alter a milk production facility must submit their plans and receive approval before construction begins. The plan submission includes detailed locations and layout of the plant as well as specifications for equipment, cleaning and storage. Also, a facility inspection and water test must occur before any processing begins. After production is in place, milk plants are inspected and the product is sampled and tested frequently. In addition to producers, milk haulers and others along the

manufacturing process must be licensed. Anyone considering milk production for off-farm sales should contact NDA for more information.

Nebraska dairy farmers should be aware of regulations concerning livestock, such as animal health laws, discussed in Chapter 11: Livestock and Poultry, as they also affect dairy cows.

### III. ORGANIC MILK

Farmers interested in producing and marketing certified organic milk must follow USDA's 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 Chapter 12: Organic Certification.

### IV. 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 are able to regulate the sale of raw milk within the state. In Nebraska, the adoption of the PMO prohibits the sale of raw milk to consumers.

However, farmers who sell milk and cream directly to consumers at the farm and for the consumers' own consumption are exempted from the Nebraska Milk Act. These sales may be of raw milk. Furthermore, the farmer does not appear to need a permit to produce milk if there are no sales to a milk processor or off-farm sales. Importantly, this exemption does not apply to cheese, yogurt, or other manufactured dairy products.

### V. RBGH FREE LABELING

Recombinant Bovine Growth Hormone (rBGH) is a genetically engineered hormone designed to increase milk production in 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." 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. On the other hand, some

consumers have a strong desire to know (whether for environmental, animal welfare, or health reasons) if their milk products are derived from animals treated with rBGH.

Currently, the FDA's guidelines state that where producers wish to use labels such as rBGH free, they must also include the statement that, "no significant difference has been shown between milk derived from rbST-treated and non-rbST treated cows" (59 Fed. Reg. 6279-04). Some states have banned rBGH labels altogether, but one such law has subsequently been struck down as a violation of free speech, while other states allow the labeling. Nebraska follows the FDA guidelines. The "no difference" disclaimer must accompany any growth hormone claim on a milk label.

## VII. CHECKLIST

*Have you...?*

- Contacted the Nebraska Department of Agriculture to discuss the process necessary for developing a dairy product well before you wish to begin production?
- Followed all steps in the Grade A Pasteurized Milk Ordinance dairy farm and dairy handler permitting and inspection process if you wish to produce Grade A Milk for sale off your farm or into products other than milk or cream?
- Developed labeling and marketing strategies?

## VIII. KEY CONTACT INFORMATION

**Nebraska Department of Agriculture, Bureau of Dairies and Foods**

Ph: (402) 471-2536

## CHAPTER 7: EGGS

Several laws and agencies regulate egg sales. Federal regulations apply, for the most part, to large egg production facilities. State regulations, however, will apply to all farm businesses that sell eggs.

### I. FEDERAL OVERSIGHT OF EGGS

Two agencies regulate eggs at the federal level, the United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA). 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 under the EPIA. 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 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**.<sup>117</sup> AMS’s official standards, grades and weight classes are available **here**.<sup>118</sup>

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)).

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

<sup>117</sup> [www.ams.usda.gov/AMSV1.0/Grading](http://www.ams.usda.gov/AMSV1.0/Grading)

<sup>118</sup> [www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004376](http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004376)

to continuous inspection, exempted facilities must undergo periodic FSIS inspections (9 C.F.R. § 590.600-650).

*b. 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 SE 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 SE prevention standards (21 C.F.R. Part 118).<sup>119</sup> The regulations require these producers to (1) develop a written 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.<sup>120</sup>

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 enteritidis* (SE) (21 C.F.R. § 101.17(h)). 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.

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<sup>119</sup> 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.

<sup>120</sup>

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

The statement must appear in a hairline box and the words "safe handling instructions" must appear in bold capital letters.

### *c. 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, FDA has not yet issued implementing rules for FSMA's HACCP procedures.

## **II. NEBRASKA REGULATION OF EGGS**

### *a. Production and Handling*

The Nebraska Department of Agriculture (NDA) requires a license to sell eggs (Neb. Rev. Stat. 2-3515). Egg producers must clean and candle individual eggs before sale. Candling is a technique for assessing egg quality by spinning eggs in front of a light source. Producers must determine the grade and weight of each egg in accordance with the Graded Egg Regulations that list exact specifications for size, appearance, air cell size, and other parameters. The egg regulations are available at the NDA website.<sup>121</sup> The eggs must also be held for sale at 45 degrees and relative humidity of about 70% (Neb. Rev. Stat. 2-3505). If eggs are delivered to an off-site location for resale, the business may receive the eggs only if they are in refrigerated equipment at 45 degrees or lower and at least of federal Grade B quality (2009 Food Code 202.15, adopted pursuant to Neb. Rev. Stat. 81-2257.01). Eggs sold on the farm to consumers must also be of at least Grade B quality.

### *b. Labeling and Advertising*

A farm business that sells eggs must label the container the eggs are sold in with the following: 1) the name of the farm or packer, 2) the state identification number, 3) the quality grade of the eggs inside (i.e. Grade A), 4) The weight classification of the eggs inside (i.e. jumbo eggs), and 5) the date the eggs were packed (Neb. Rev. Stat. 2-3507, 3508 and 3509). Even eggs sold in bulk must be labeled with the same size and quality designations. Eggs may not be sold in containers with odors, mold, or attached egg or fecal matter (Neb. Rev. Stat. 2-3507). Producers selling to

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<sup>121</sup> <http://www.nda.nebraska.gov/regulations/index.html>

restaurants or retail operations must also deliver an invoice that states the quality grade and weight classifications of the eggs sold (Neb. Rev. Stat. 2-3505).

Although the Nebraska Graded Egg Regulations do not define “fresh eggs,” “farm eggs” or similar terms, the Nebraska Egg Act requires that such terms only be used for Grade A eggs. Making claims such as “vegetarian fed,” or relating too “omega-3” are not regulated specifically, but all claims are subject both to the federal prohibition on misbranding under the FDCA and under the Nebraska Food Code so the producer must be able to support such claims. The federal requirement to label eggs for safe handling is also a state law requirement and as described above, 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.

### III. CHECKLIST

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

- How many chickens do you have? 3000 or fewer?
- Have you applied for your egg producer license?
- Are you prepared to clean and candle each egg?
- Does your label comply with the regulations?

### IV. KEY CONTACT INFORMATION

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

Ph: (202) 720-3271

**Nebraska Department of Agriculture, Poultry and Egg Section**

Ph: (402) 472-2051

## CHAPTER 8: FRUITS AND VEGETABLES

Throughout recent history, legislation relating to the production or sale of fresh fruits and vegetables has been scant, although the Food Safety Modernization Act (FSMA) will change that in the near future. By contrast, if a direct farm business wants to sell value-added products, such as canned goods and juices, the regulatory landscape is quite different. Because these items have a long and sordid history of harboring dangerous bacteria, the public has concerns about safety in production and extensive licenses or permits are required.



Before describing the regulations that pertain to each group, it is important to understand the difference between raw and processed foods. Without getting into the details just yet, processing occurs anytime a raw agricultural commodity is altered from its natural state, such as slicing, mixing, grinding, drying, smoking, cooking, pickling, packaging, and canning. To use lettuce as an example, a washed head of lettuce is raw, while bagged salad mix may be considered processed. This subject is handled in much more detail in the section below on processed fruits and vegetables.

### **I. UNPROCESSED FRUITS AND VEGETABLES**

The most common way for a direct farm business to sell fruits and vegetables is as raw, unprocessed product. No license is required to sell fresh, raw, unprocessed and uncut fruits and vegetables to a consumer, restaurant, grocery store, wholesaler, or other buyer. As a cautionary note, federal regulations will soon affect on-farm production. Federal and state regulations currently regulate packaging and labeling requirements, among others. These future and current regulations are discussed below.

#### ***a. Federal Requirements***

The federal Food and Drug Administration (FDA) is charged with ensuring the safety of food commodities sold in the United States. 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 FSMA, the most significant food safety legislation since the 1938 passage of the federal Food, Drug, and Cosmetic Act. The FSMA authorizes the *FDA to mandate food safety measures at the farm level for fruit and vegetable production*. Previously, agricultural production 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 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 (Spring 2013), these rules have been proposed but are still a long ways from becoming law. The FSMA 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) include, with respect to growing, harvesting, sorting, packing, and storage operations, “science-based minimum standards related to soil amendments, hygiene, packaging, temperature controls, animals in the growing area, and water,” (3) not conflict with or duplicate requirements of the National Organic Program.

The FSMA rules will likely rely heavily on rules the FDA already has established in the voluntary **Good Agricultural Practices (GAP)**<sup>122</sup> program for fruit and vegetable production. Fruit and vegetable producers who wish to get an idea of 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.

The FSMA also authorizes the *FDA to create a system of hazard analysis risk and risk based prevention control 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 production process that are susceptible to contamination and then develop and follow a written plan that addresses and effectively controls those risks.

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[www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/UCM169112.pdf](http://www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/UCM169112.pdf)

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.

The fourth major element of the FSMA is an *exemption for small producers*: After intense lobbying by small farm and local food advocates, the Senate passed the Tester-Hagen Amendment to the FSMA 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.

The final major take-home message of the FSMA is that 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 pitting cherries.<sup>123</sup> However, farms processing harvested goods for use on the same farm (e.g., processing cherries into jam) 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 FSMA may apply and require operational changing and documentation of food safety procedures.

### ***b. State Marketing and Labeling Requirements***

Nebraska law also does not impose any on-farm regulations relating to the production or marketing of fruits and vegetables specifically.<sup>124</sup> (Environmental or waste regulations may apply to a fruit and vegetable operation but they do not control production itself.) Although common sense indicates that any farmer would do so; farmers selling fresh fruits and

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<sup>123</sup> 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).

<sup>124</sup> One exception is that local areas may petition to require inspection of all shipments of potatoes intended for human consumption (Neb. Rev. Stat. 2-1816).

vegetables off the farm to restaurants or retail buyers must sell only safe, unadulterated, and honestly presented food (2009 Food Code 101.11, adopted pursuant to Neb. Rev. Stat. 81-2257.01). Additionally, a farm business selling products other than fresh fruits and vegetables at their produce stand should read the requirements below regarding processed fruit and vegetables.

As described in Chapter 3, Nebraska law lays out some very basic labeling and advertising rules that apply to the sale of fruits and vegetables, including that a seller may not misrepresent or misstate a quantity of an item for sale (Neb. Rev. Stat. 89-196.01(14) and (15)). For the direct farm business, that means if a farmers' market stand has a sign stating that one-pound bags of spinach are for sale at \$5 each, if representative bags of spinach are displayed, they must weigh one pound and the customer must be given one pound in return for \$5. In addition, all weighing done for the purposes of selling product to a customer (as opposed to weighing for the purposes of farm record-keeping) must be done on a scale certified by the Department of Agriculture (Neb. Rev. Stat. 89-186.01(2)). The Weights and Measures act also affects packaging. Prepackaged items for sale to retail customers must have a label stating 1) the nature of the contents (for example, "apples") 2) the quantity of the contents in terms of weight, measure, or count, and 3) the name and place of the business (Neb. Rev. Stat. 89-194).

### *c. Pesticide Requirements*

Under Section 346a of the federal Food, Drug, and Cosmetic Act (21 U.S.C. § 346a), the federal Environmental Protection Agency (EPA) sets tolerance levels for pesticides on and in foods. If these rules are violated, the product is considered to be adulterated. 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**<sup>125</sup> that explains how to search the CFR to determine the tolerance level for a particular crop. Another EPA **website**<sup>126</sup> 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.

Nebraska's Pesticide Act regulates the application of pesticides in several ways (Neb. Rev. Stat. 2-2622 et seq.) All pesticides must be registered with the Nebraska Department of Agriculture (NDA) to be used in the state. In addition, both commercial and private pesticide applicators must be licensed which requires showing that the individual understands the various

<sup>125</sup> [www.epa.gov/opp00001/food/viewtols.htm](http://www.epa.gov/opp00001/food/viewtols.htm)

<sup>126</sup> [www.epa.gov/opp00001/regulating/part-180.html](http://www.epa.gov/opp00001/regulating/part-180.html)

implications of pesticides for crops, the environment, and public health. The act also imposes recordkeeping requirements on applicators.

#### *d. State Produce Sampling Requirements*

From a legal perspective, farmers selling “**only whole, uncut fresh fruits and vegetables,**” at a produce stand or farmers market do not need to be licensed as a food establishment. Most other businesses who sell food must be licensed. Technically, if a farmer cuts up fruit or vegetables for sampling purposes, they may not be offering only “whole, uncut” produce any longer, and the sampling may subject the farmer to food establishment regulations. The Nebraska Department of Agriculture states that if exposed foods such as fruits and vegetables are offered for sampling, then the producer must have handwashing facilities available. Because of the legal ambiguity of this requirement, farmers are encouraged to contact the NDA, Food Safety and Consumer Protection,<sup>127</sup> and their local food sanitarian<sup>128</sup> for up-to-date interpretations of this law.

## II. PROCESSED FRUITS AND VEGETABLES

Farm businesses thinking about doing any cutting of fruits and vegetables while preparing these products for marketing need to be aware of the rules affecting this practice. Farms selling **only whole, uncut fresh fruits and vegetables at a produce stand to consumers** are not considered a food establishment and do not need to be licensed as such. However, if the product is cut or if other products are sold at the stand, the business is a food establishment and must follow the regulations affecting such businesses (Neb. Rev. Stat. 81-2245.01(2)). If a direct farm business wholesales fresh fruit and vegetables, it must be licensed as a food establishment. NDA personnel state that a farm business selling cut fruits and vegetables will be regulated as a food processor.

The question of whether a fruit or vegetable is cut can be a tricky question. From a technical perspective, vegetables such as cabbage are cut to sever a cabbage head from the plant. For the purposes of regulation, however, a product is considered to be cut if it goes beyond the harvest stage, and may include some preparation for market such as further cutting to remove unsightly outer leaves from the cabbage head. However, if a third cut is then made to remove the core from the cabbage head, the cabbage undergoes processing. The situation is a bit more complex when it comes to salad mixes. Although several baby salad greens may be severed from their roots in a harvest cut and not processed any further beyond washing, several greens

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<sup>127</sup> See “Food Safety and Regulation Requirements for Farmers’ Markets and Craft Shows” at [http://www.nda.nebraska.gov/publications/foods/food\\_safety\\_farmers\\_markets.pdf](http://www.nda.nebraska.gov/publications/foods/food_safety_farmers_markets.pdf)

<sup>128</sup> A map of regions and contact information for each sanitarian is located at NDA’s Food Safety website: <http://www.nda.nebraska.gov/foods/inspectors.html>

may be combined and packaged as a special salad mix. This is processing because the product is combined from two or more ingredients and packaged in conspicuous manner. Farmers may have difficulty navigating distinctions between a harvest cut and a processing cut. NDA Food Safety staff are available to help producers make these distinctions. Where a product is processed, the farm must be licensed as a food processing establishment.

Options may be available for direct farm business qualifying as food establishments. A business may apply for a temporary food establishment, an itinerant food vendor, or a mobile food unit license, depending on the nature of the sale. Temporary food establishments are those that operate for no longer than 14 days at a single event (Neb. Rev. Stat. 81-2254.01). Itinerant food vendors are those that sell prepackaged, potentially hazardous foods from farmers markets or fairs (Neb. Rev. Stat. 81-2248). For example, a meat and poultry producer with a stand at the farmers' market may have an itinerant vendor permit. Mobile food units are vehicle-mounted and return to a commissary for cleaning on a daily basis (Neb. Rev. Stat. 81-2251.04). The Food Safety Focus Group at NDA is responsible for inspecting food establishments and is available to assist, as are local sanitarians.

The requirements necessary to receive these licenses are detailed in the Nebraska Food Code, available online.<sup>129</sup> The document is very long and can be quite difficult to navigate. The NDA offers a summary at their Temporary Food Establishment Regulations website.<sup>130</sup> The precise actions each vendor must take are also subject to the Act's interpretation by local inspection agents and sanitarians. Farm businesses requiring one of these permits are urged to get in touch with NDA's Food Safety Focus Group or local sanitarian as soon as possible in the planning stages. If a farm business is not eligible for the alternative food establishment licenses, they may need to comply with the complete food establishment procedures, a summary of which is posted on the NDA website by clicking on Food Safety and Consumer Protection, Foods, and then Resources.<sup>131</sup> Food processing establishments should read the Food Processing Plant Requirements, also available online.<sup>132</sup>

#### *a. Value-Added Processing: Cottage Foods*

Direct farm businesses with surplus product may wish to produce jams, jellies, or baked goods. Farm businesses have an opportunity to offer these products without the regulatory burden of food establishment licensing. "Cottage Foods" are a shorthand term for foods produced in the home that are exempt from food establishment licensing laws. Many states are passing cottage food laws to encourage economic development and robust farmers' markets. Nebraska allows cottage food producers to sell products produced in the home to be sold directly to consumers

<sup>129</sup> [http://www.nda.nebraska.gov/regulations/foods/09\\_food\\_code.pdf](http://www.nda.nebraska.gov/regulations/foods/09_food_code.pdf)

<sup>130</sup> [http://www.nda.nebraska.gov/publications/foods/temp\\_guide.html](http://www.nda.nebraska.gov/publications/foods/temp_guide.html)

<sup>131</sup> <http://www.nda.nebraska.gov/publications/foods/preopenlist.html>

<sup>132</sup> [http://www.nda.nebraska.gov/regulations/foods/food\\_processing\\_plant.pdf](http://www.nda.nebraska.gov/regulations/foods/food_processing_plant.pdf)

at farmers' markets without being licensed as a food establishment. To take advantage of this exception, the producers must place a clearly visible sign at their stand announcing that the food was prepared in a kitchen that is not subject to regulation and inspection by regulatory authorities such as local sanitarians. Also, only certain products are eligible for the cottage food exception. The law states that non-potentially hazardous foods are exempted, and the NDA has interpreted this to mean that the following items are allowed: 1) nonhazardous baked goods, excluding crème pies or other products requiring refrigeration, 2) popcorn and other seeds, 3) dried herbs and 4) jams or jellies. Salsa, pickles, canned tomatoes and other items are not eligible for the exception and must be prepared in a licensed facility.

Because the cottage food exemption is quite broad, NDA has adopted additional internal guidelines to help sanitarians determine when a business is within the exception. If a business is baking items and attending farmers' markets more than 3 days per week just as a regular business might, NDA will consider the business to be a commercial operation and require food preparation in a licensed establishment.

If the cottage food item is sold packaged, it must be labeled with 1) the name and address of the producer, 2) the name of the product, 3) the ingredients in descending order of predominance by weight, and 4) the net weight and volume of the food product. In addition, products must adhere to federal labeling requirements of 21 C.F.R. Part 101.<sup>133</sup> This federal law governs health claims, nutrition claims, specific additives such as flavorings and colorings, and allergy warning labels. Although an overview is provided in Chapter 3 under Marketing, this section of law is extensive and producers should review it to be certain they are not using prohibited ingredients or making prohibited statements.<sup>134</sup>

### *b. Juice*

If a direct farm business prepares juice then the business is processing fruits or vegetables and must be licensed as a food establishment. Juice processing comes with some additional regulations because juice has the potential to support microorganisms. A business may either have a HACCP plan in place and pasteurize juice to reduce the microorganism potential to a specific threshold OR label the juice as unpasteurized. The label must specifically state, "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." In addition to the warning label, unpasteurized juice must contain the following statements: 1) the common name of the food, 2) a list of ingredients in descending order by weight and including and artificial colors, flavors, or preservatives, 3) a description of

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<sup>133</sup> <http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcr/CFRSearch.cfm?cfrpart=101>

<sup>134</sup> The full text can be found at:  
[www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcr/CFRSearch.cfm?CFRPart=101&showFR=1](http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcr/CFRSearch.cfm?CFRPart=101&showFR=1)

the quantity, and 4) the name and address of the manufacturer or distributor (2009 Food Code 3-404.11).

If the direct farm business is selling juice to food establishments such as restaurants, those businesses are required to accept only pasteurized juice from a processor with a HACCP system in place (2009 Food Code 3-202.110(A)).

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**.<sup>135</sup>

If a processor sells product across state lines, they must 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."

### *c. 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 processed foods, these products fall under the jurisdiction of the NDA, Food Safety and Consumer Protection, which must inspect and permit the 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**<sup>136</sup> or in a packet by calling 1-800-398-2282. TTB also provides **online packets of information**<sup>137</sup> tailored to particular manufacturers.

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<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Juice/ucm072637.htm>

<sup>136</sup> [www.ttb.gov/forms/index.shtml](http://www.ttb.gov/forms/index.shtml)

<sup>137</sup> [www.ttb.gov/applications/index.shtml#Manufacturers](http://www.ttb.gov/applications/index.shtml#Manufacturers)

At the state level, an individual may produce wine, cider, beer and other non-distilled alcoholic beverages for the consumption of his or her own household and guests, but if a business wishes to sell the product to others, the operation must be licensed (Neb. Rev. Stat. 53-168.06). Craft brewery licenses are available to businesses producing no more than ten thousand barrels of beer per year. However, the license is only valid for the sale of the brewery's own beer. If other beers are offered, a retail license is required (Neb. Rev. Stat. 53-123.14). Businesses producing wines where at least 75% fruits and vegetables used are grown in the state of Nebraska may be licensed as a farm winery. Farm wineries may sell wines produced on the farm at the farm without a retail license and ship wines produced at the farm as long as the total output of the winery does not exceed 30,000 gallons of wine. Farm wineries may conduct sampling at their facility and at one branch outlet (Neb. Rev. Stat. 53-123.11). The precise details of both craft brewery and farm winery licenses are highly specific and a farm business should explore the details in the very early stages of planning a beer or wine production business.

### **III. 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 Chapter 3. Second, organic production and marketing must follow additional rules, which are outlined in Chapter 12.

#### IV. CHECKLIST

- Are you cutting vegetables or making a salad mix? If so, have you checked with NDA as to whether you need a food processing license?
- Are you pressing juice? If so, have you considered whether HACCP is required and if you have the appropriate labeling in place?
- Thinking about selling alcohol? Look into the all the permits you need to get 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.

#### V. 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:  
[www.fda.gov/Food/FoodSafety/Product-SpecificInformation/FruitsVegetablesJuices/default.htm](http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/FruitsVegetablesJuices/default.htm)

##### **Nebraska Department of Agriculture, Food Safety and Consumer Protection**

Ph: (402) 471-3422

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

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

##### **Nebraska Liquor Control Commission**

Ph: (402) 471-2571

## 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**,<sup>138</sup> which allows producers to list their businesses in a searchable database as well as search for processors and potential institutional customers.



Although geared toward organic farming, the Rodale Institute has a variety of educational resources on alternative crop marketing on their **website**.<sup>139</sup> Another excellent resource on processing and marketing grains is the National Sustainable Agriculture Information Service's *Grain Processing: Adding Value to Farm Products*.<sup>140</sup> The guide gives examples of farmers who have successfully established processing and distribution infrastructure in order to direct market their grains. For those turning grains into value added products such as bakery products, granola, or popcorn, Nebraska's exemption for home-prepared foods opens up a direct marketing avenue, which is discussed in Section IV of this chapter.

### I. GRAIN INSPECTION STANDARDS

The federal Grain Standards Act (7 U.S.C. § 71 et seq.) authorizes the United States Department of Agriculture (USDA) to establish standards and procedures for the inspection of grain shipped

<sup>138</sup> <http://ne.marketmaker.uiuc.edu/>

<sup>139</sup> [www.tritrainingcenter.org/course/](http://www.tritrainingcenter.org/course/)

<sup>140</sup> [www.attra.org/attra-pub/summaries/grainpro.html](http://www.attra.org/attra-pub/summaries/grainpro.html)

in interstate commerce and out of the country (7 U.S.C. §§ 76, 77). USDA's Grain Inspection, Packers & Stockyards Administration (GIPSA), administers the Grain Standards Act. 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 AND DEALERS

### *a. 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).

### *b. Nebraska Statutes: Buying, Warehousing and Handling of Grain*

#### ***Additional Resources: Grain Inspection***

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

*<http://www.gipsa.usda.gov/fgisma.html>*

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

*<http://www.gipsa.usda.gov/fgis/oa-dirdp.html>*

Nebraska law regulates grain dealers under the Grain Dealer Act (Neb. Rev. Stat. 75-901 et seq.) and grain warehouses under the Grain Warehouse Act (Neb. Rev. Stat. 88-525 et seq.). Both laws are intended to protect producers from the risks in handing over grain to dealers and warehouses for sale purposes.

The Nebraska Public Service Commission must license anyone who buys grain for the purpose of reselling it or acts as a marketing agent for a producer as a grain dealer. To receive a license, dealers must submit financial statements detailing grain purchases, profits and losses, as well as capital and retained earnings. The grain dealer must post a security such as a letter of credit or certificate of deposit for the benefit of a producer who files a claim that the dealer hasn't paid the producer for the grain (Neb. Rev. Stat. 75-903). Further information on the license, dealer statistics, and

forms for receiving a license are at the Nebraska Public Service Commission website.<sup>141</sup>

Nebraska law regulates grain warehousing to protect producers from problems caused by handlers. Anyone who 1) operates a facility or building in which grain is held in storage (and title has not been transferred to the warehouse operator) for more than ten days, 2) operates a warehouse, bin, or enclosed structure as a bailee (which means that the owner maintains title to the product) for receiving, storing, or shipping grain, or 3) providing marketing functions, such as consignment, that exert control over another producer's proceeds from agricultural commodities must have a warehouse license administered by the Nebraska Public Service Commission (Neb. Rev. Stat. 88-527). Because the qualifications for a license do not have volume thresholds, even a small producer who stores or ships grain from his or her neighbors, (without actually purchasing the grain outright and leaving the risk of price fluxuation or quality change on the owner) as a direct marketing strategy may qualify as operating a warehouse or acting as a warehouseman. The only exemption is available to individuals licensed under the USWA discussed above (Neb. Admin. Code, Title 291, 8-002.01). To receive a license, the business must post a security based on the capacity of the facility, with a minimum filing of \$25,000. Licensed warehouses are inspected once per year to be sure they comply with shipping records, insurance, receipts and other rules. More information on this license and the forms required to receive it are at the Nebraska Public Service Commission webpage.<sup>142</sup>

### III. SELLING GRAINS

Unprocessed grains, nuts and seeds sold in the same condition as harvested are raw agriculture products and do not need to come from an inspected and licensed facility. However, as is more thoroughly discussed in the processed fruits and vegetables section and above, grinding grain is considered processing and requires a wholesale food processor license and a retail food processor license in order to sell the grain directly to consumers. Processing also includes blending, roasting, sprouting, grinding, or any other process that changes the condition of the grain. Licensing and inspection is overseen by the Nebraska Department of Agriculture (NDA), Food Safety and Consumer Protection, but local sanitarians conduct the inspection and issue the license.

Also important are the federal standards of identity for grains and grain products (21 CFR Part 137), which will apply if the finished product is sold in interstate commerce. 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), are another important area the

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<sup>141</sup> [http://www.psc.state.ne.us/grain/grain\\_dealers.html](http://www.psc.state.ne.us/grain/grain_dealers.html)

<sup>142</sup> [http://www.psc.state.ne.us/grain/grain\\_warehouse.html](http://www.psc.state.ne.us/grain/grain_warehouse.html)

producer must monitor. 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**.<sup>143</sup>

#### IV. VALUE ADDED AND COTTAGE FOOD REGULATIONS

Direct farm businesses may be able to process grains into some value added products without a food establishment license. "Cottage Foods" are a shorthand term for foods produced in the home that are exempt from food establishment licensing laws. Many states are passing cottage food laws to encourage economic development and robust farmers' markets. Nebraska allows cottage food producers to sell products produced in the home to be sold directly to consumers at farmers' markets without being licensed as a food establishment. To take advantage of this exception, the producers must place a clearly visible sign at their stand announcing that the food was prepared in a kitchen that is not subject to regulation and inspection by regulatory authorities such as local sanitarians. Also, only certain products are eligible for the cottage food exception. The law states that non-potentially hazardous foods are exempted (Neb. Rev. Stat 81-2245.01(6)), and the NDA has interpreted this to mean that the following items are allowed: 1) nonhazardous baked goods, (not crème pies or other products requiring refrigeration such as pumpkin pie), 2) popcorn and other whole seeds and grains, 3) dried herbs, and 4) jams or jellies.

Because the cottage food exemption is quite broad, NDA has adopted additional internal guidelines to help sanitarians determine when a business is within the exception. If a business is baking items and attending farmers' markets more than 3 days per week just as a regular business might, NDA will consider the business to be a commercial operation and require food preparation in a licensed establishment.

If the cottage food item is sold packaged, it must be labeled with 1) the name and address of the producer, 2) the name of the product, 3) the ingredients in descending order of predominance by weight, and 4) the net weight and volume of the food product (Neb. Rev. Stat. 89-194 and 195). In addition, products must adhere to federal labeling requirements of 21 C.F.R. Part 101.<sup>144</sup> This federal law governs health claims, nutrition claims, specific additives such as flavorings and colorings, and allergy warning labels. Although an overview is provided in Chapter 3 under Marketing, this section of law is extensive and producers should review it to be certain they are not using prohibited ingredients or making prohibited statements.<sup>145</sup>

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<sup>143</sup>

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

<sup>144</sup> <http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcr/CFRSearch.cfm?cfrpart=101>

<sup>145</sup> The full text can be found at:

[www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcr/CFRSearch.cfm?CFRPart=101&showFR=1](http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcr/CFRSearch.cfm?CFRPart=101&showFR=1)

Producers considering applying for a home food establishment license should check that their home zoning code allows a home-based businesses before seeking approval. In addition, home based businesses carry the same insurance concerns that are relevant to any business. Homeowners insurance will very likely not cover business-related activities.

## V. CHECKLIST

Have you:

- Come up with a marketing and business plan? What type of growth do you envision and when? Do you need a grain dealer or warehouse license? 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?
- If you are planning to use the cottage foods exception, do you have your labels prepared?

## VI. KEY CONTACT INFORMATION

### **U.S. Grain Inspection, Packers & Stockyards Administration**

Ph: (202) 720-0219 (main)

**For a list of official GIPSA service providers, visit**

[www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=fc&topic=fsp](http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=fc&topic=fsp)

### **Nebraska Public Service Commission (grain warehouses)**

Ph: (402) 471-3101

### **Nebraska Department of Agriculture, Food Safety and Consumer Protection (value added products)**

Ph: (402) 471-3422

## **CHAPTER 10: HONEY**

Honey production and marketing is regulated by the state of Nebraska. Honey is addressed both from the aspects of bee keeping and honey processing.

### **I. BEE KEEPING**

This section discusses state, but not local, regulations on beekeeping. Some counties and municipalities may limit where, how, or how many bees can be raised in an area. Beekeepers should make sure to contact their local authorities before acquiring a bee colony.

Domesticated honeybees play an integral role in agricultural sectors needing pollinators, so diseases and pests affecting honeybees can cause significant economic damage. To protect Nebraska's bee colonies from disease, Nebraska's Apiary Act establishes registration and inspection requirements (Neb. Rev. Stat. 81-2165 et seq.).

Nebraska beehives must be certified by the Nebraska Department of Agriculture (NDA) each year as free from infectious or contagious diseases, and an individual receives a certificate by requesting an inspection from NDA staff. The fee is \$150 for up to 250 colonies and increases thereafter. A person selling or moving an apiary must also request a certificate from NDA (Neb. Admin. Code, Title 25, 1.002). All bee colonies must have the name of the name and the address conspicuously posted at the apiary (Neb. Rev. Stat. 81-2167).

NDA has the authority to inspect any apiary, whether publicly or privately held and to control or eradicate diseases (Neb. Rev. Stat. 81-2167). If a serious bee disease, parasite, or pest is found, the owner or person in charge must treat the disease or pest (Neb. Rev. Stat. 81-2168).

Individuals who know a bee colony has a pest or disease are required to report the finding to the NDA, who may quarantine the hive and any associated equipment (Neb. Rev. Stat. 81-2170). If the disease, parasite or pests cannot be eradicated, the NDA has the authority to destroy the infected hives without compensating the owner for the hive (Neb. Rev. Stat. 81-2169).

Abandoned bees and equipment may also be destroyed (Neb. Rev. Stat. 81-2172).

If any of the beekeeping code is violated, the director of agriculture may revoke a certificate of ownership or permit to transfer the colony after the permit holder has a chance for a hearing. Violators may be subject to a misdemeanor charge (Neb. Rev. Stat. 81-2179).

### **II. PROCESSING AND MARKETING**

Under Nebraska law, honey may not have any ingredients or additives added to the honey if the seller wants to market the product as "honey." The product also needs to be free of any

foreign matter and the pollen should not be removed, except as occurs while removing foreign matter (Neb. Admin. Code, Title 25, 1.004). During processing, the honey may not be heated so much so that its quality is impaired, no treatment to prevent or cause crystallization may be used, and no water may be added (Neb. Admin. Code, Title 25, 1.002 and 1.003). Honey, like all packaged foods, must bear a label stating the identity of the commodity, its weight, and the name and address of the manufacturer, and, where relevant, a declaration of price per pound and total selling price (Neb. Rev. Stat. 89-194 and 195).

Although not specifically addressed in Nebraska laws, an NDA staff person in the food safety division indicates that honey marketed directly to consumers at a farm stand or farmers' market does not need to be prepared for market in a licensed food establishment. However, if the honey is intended for resale through a grocery store or other food facility, licensing is required. The product must always be labeled with the common name (honey), the producer's name and address, and the net weight of the contents.

Pasteurizing honey makes the product free flowing, destroys osmophilic yeast (i.e., prevents molding) and delays crystallization. Usually, pasteurization of honey is not required because its high sugar content makes honey naturally anti-microbial. In the absence of regulation, a beekeeper probably can legally produce and sell unpasteurized "raw honey." Some consumers seek out local unpasteurized, raw honey because they believe it helps alleviate allergies. However, producers should not include this claim on their labels or in their advertising. FDA must specifically approve all health claims prior to use (21 C.F.R. § 101.14),<sup>146</sup> and it has never approved the claim linking honey and allergies (21 C.F.R. §§ 101.70-.83).<sup>147</sup>

#### *a. 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), the USDA has directed certifiers to use the livestock standards for certification of bees and the National Organic Program has recommended adoption of apiary-specific standards.<sup>148</sup> 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

<sup>146</sup> The Nutrition Education and Labeling Act of 1990 prohibits states from establishing any labeling requirements for food in interstate commerce that are not identical to FDA labeling regulations (21 USC § 343-1). It is unclear whether FDA's labeling requirements apply to purely intrastate food, but it is likely they do.

<sup>147</sup> For an interesting case regarding FDA's enforcement of allergy claims related to honey see *United States v. 250 Jars 'Cal Tuepelo Blossom U.S. Fancy Pure Honey*, 344 F.2d 288 (6th Cir. 1965).

<sup>148</sup> <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5087792>

would comply with standards set out by the certifier. Chapter 12: Organic Certification 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 Chapter 12: Organic Certification for more general information on the organic certification process.

### **III. CHECKLIST**

Have you...?

- Registered your bee colony with the Nebraska Department of Agriculture and obtained any necessary permits to transfer ownership? Checked with local authorities for other restrictions?
- If you intend to market your honey as organic, contacted an accredited certifying agent that has experience certifying honey?

### **IV. KEY CONTACT INFORMATION**

**Nebraska Department of Agriculture, Bureau of Plant Industry**

Ph: (402) 471-2394

**Nebraska Department of Agriculture, Food Safety and Consumer Protection**

Ph: (402) 471-3422

## 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 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. Livestock Animal Welfare Act*

In 2012, the Nebraska Legislature passed the Livestock Animal Welfare Act that prohibits or requires specific practices relative to cows, horses, pigs, sheep, goats, deer, elk, ostrich, emu, and poultry production.

Under this law, any law enforcement officer with reason to believe a livestock animal is being cruelly mistreated or has been abandoned may ask for a warrant to inspect the property and issue a citation to the animal's owner for violation of the law (Neb. Rev. Stat. 54-906). In addition, government employees who deal with livestock and livestock care professionals must report suspected cruel treatment to the authorities (Neb. Rev. Stat. 54-908 and 910). Specifically, intentionally causing physical harm or failing to provide food, water and other reasonable care is considered cruel treatment (Neb. Rev. Stat. 54-902). The Livestock Animal Welfare Act makes abandonment or cruel treatment of a livestock animal a Class I misdemeanor, unless the animal dies, in which case it becomes a Class IV misdemeanor (Neb. Rev. Stat. 54-904). Subsequent offenses may result in the court ordering a person not to own or possess livestock for five years following conviction (Neb. Rev. Stat. 54-909). Although the law provides exceptions for research, training, rodeos and horse races, cows may not be tripped during rodeos (Neb. Rev. Stat. 54-912).

### *b. Feeding Garbage*

Nebraska's garbage feeding statutes prohibit farmers from feeding garbage (fruit, vegetable, and animal wastes which are mixed or from non-commercial sources) to animals unless the following conditions are met: 1) the animals are owned by the farmer, 2) the garbage is from the farmer's own household, and 3) the animals are consumed only by members of the household (Neb. Rev. Stat. 54-753). However, fruit and vegetable wastes that are the product of a commercial food processing operation are not considered to be garbage and may be fed to animals, regardless of whether the animals are owned by the farmer or consumed by the farmer's household (Neb. Admin. Code, Title 23, 14-002).

### *c. Brands*

If a livestock producer wishes to brand his or her animals for the purpose of identification, rather than for in-herd identification or disease control purposes, the brand must be recorded with the Nebraska Brand Committee (Neb. Rev. Stat. 54-198). Branding is useful because it is legal evidence that the livestock belongs to the individual owning the brand (Neb. Rev. Stat. 54-1107). A list of available brands is located at the Nebraska Brand Committee website.<sup>149</sup> Before a brand may be used, the brand must be applied for using the Livestock Brand Application and accompanied by a \$100 fee.<sup>150</sup>

## **II. DISEASED ANIMALS AND DEAD ANIMAL DISPOSAL**

### *a. Animal Disease Control*

Because animal diseases can have a very negative impact on agriculture as a whole and the economic development it supports, animal disease incidents and residues are handled seriously. Any person that suspects an animal to have a dangerously contagious disease is required to report the fact to the Nebraska Department of Agriculture (NDA) (Neb. Rev. Stat. 54-742). It is also illegal to keep, sell or otherwise dispose of any animal infected with a contagious disease (Neb. Rev. Stat. 54-750). In addition, laws such as the Nebraska Poultry Disease Control Act require persons selling hatching eggs or poultry to participate in a disease control program recommended by the state veterinarian (Neb. Rev. Stat. 2-3005). NDA maintains resources to assist producers in identifying common livestock diseases on its webpage.<sup>151</sup> When a report is received, NDA works with veterinarians to investigate and report disease incidents, which are posted online in monthly and yearly formats.<sup>152</sup>

<sup>149</sup> <http://www.nbc.ne.gov/available/available.html>

<sup>150</sup> <http://nbc.nol.org/pdf/instappbrand.pdf>

<sup>151</sup> [http://www.nda.nebraska.gov/animal/animal\\_diseases.html](http://www.nda.nebraska.gov/animal/animal_diseases.html)

<sup>152</sup> [http://www.nda.nebraska.gov/animal/disease\\_reporting.html](http://www.nda.nebraska.gov/animal/disease_reporting.html)

Nebraska law also has specific reporting and monitoring programs for particularly problematic, foreign, and emerging diseases (Neb. Admin Code, Title 23, Chapter 1). Bovine Brucellosis, Bovine Tuberculosis, cattle scabies, hog cholera, scrapie, swine brucellosis and swine vesicular exanthema all have their own statutes and regulations governing their control. For example, the Nebraska Bovine Brucellosis Act (Neb. Rev. Stat. 54-1367 et seq.) authorizes NDA to establish a testing program at slaughter facilities or at the point of sale. The brucellosis law also requires the animal owner to distinguish, remove, and monitor a diseased animal. Lastly, the act gives authorities the right to access premises where disease is suspected (Neb. Rev. Stat. 54-1381). Each of the other diseases listed above follows a similar legal framework. Farmers should be aware of the signs of these diseases and their reporting and monitoring obligations for each.

Diseased animals may be ordered to be destroyed by the NDA, at which point it is the owner's responsibility to dispose of the animal as required by NDA (Neb. Rev. Stat. 54-743). However, before an animal is destroyed, the owner has the right to request a court hearing to adjudicate whether the animal is diseased (Neb. Rev. Stat. 54-747).

### *b. Disposal of Dead Animals*

If an animal dies or is destroyed because of a contagious disease, the owner must dispose of it within 36 hours of learning of the death. Nebraska law allows for the burning, burying beneath four feet of ground, composting, transferring to a rendering plant or a landfill, or transferring to a veterinary lab of the carcass (Neb. Rev. Stat. 54-744). Resources are available to assist with this choice. The federal Animal, Plant and Health Inspection Service has published detailed guidelines on selecting a disposal method for diseased animal carcasses. Although it is intended to guide emergency response personnel in selecting an appropriate method, it is useful for any producer dealing with animal disposal.<sup>153</sup>

An agricultural producer wishing to compost diseased animals should be aware of the specific regulations for this practice (Neb. Admin. Code, Title 23, Chapter 17). Composting facilities need to have an adequate amount of storage without allowing fully composted materials to build up. The composting site must be constructed to avoid runoff or pooling of liquids. Water seeping out of the compost pile must be controlled (Neb. Admin. Code, Title 23, Chapter 17, 003.01). Carcasses must be fully composted before spreading, and the composting area must be protected from scavenging animals (Neb. Admin. Code, Title 23, Chapter 17, 004.01 et seq.).

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<sup>153</sup> [www.aphis.usda.gov/emergency\\_response/tools/on-site/htdocs/images/nahems\\_disposal.pdf](http://www.aphis.usda.gov/emergency_response/tools/on-site/htdocs/images/nahems_disposal.pdf)

### III. SLAUGHTERING AND PROCESSING

#### *a. The Federal Humane Slaughter Act*

The Federal Humane Slaughter Act (7 USC § 1901) requires that animals be slaughtered humanely. Approved humane methods either 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). Humane slaughter requirements apply to all federal facilities, including those inspected as custom exempt facilities, described below.

#### *b. Federal Meat and Poultry Processing*

The USDA's Food Safety and Inspection Service (FSIS) oversees federally licensed and inspected

##### **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](mailto:infosource@fsis.usda.gov)*

facilities. 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.

Although many states also have state-level inspection for meat and poultry products sold only within the state, Nebraska does not. Nebraska producers only have the option to process their livestock at a federally exempt plant, or to use a custom exempt processor for their own livestock as described later in this section.

As an overview, the federal slaughter and processing inspection process controls sanitation practices, product branding, humane handling and slaughtering, and product testing for food safety. An inspected facility must have a HACCP system in place and a Sanitation Standards Operating Procedures (SSOP) plan implemented to be licensed. Businesses that process meat, even if they do not also slaughter, are also regulated. However, there is a retailer exemption to this rule. If the processor sells at least 75% of the dollar value of total sales are to household customers, the total dollar value of sales is below \$67,300 for red meat and 51,700 for poultry (as of 2013)<sup>154</sup> and the processor simply cuts, trims grinds or rewraps products, a HACCP plan need not be developed.

The USDA places an “inspected and passed” stamp on federally inspected meat, using food-grade ink (21 U.S.C. §

<sup>154</sup> Federal Register Volume 77, Number 79, April 24, 2012, Pages 24456-24457

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**.<sup>155</sup> 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**.<sup>156</sup>

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 must meet all federal standards under the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA). 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.

Before the cooperative program can be made available to Nebraska residents, the state must undergo an evaluation process to verify that the state program reflects federal requirements. The state legislature has instructed NDA to look into this option, but NDA's preliminary reports make further action appear unlikely.<sup>157</sup>

If a facility only provides slaughter and basic processing services to animal owners themselves and does not handle meat intended for resale, then the facility may be considered a custom exempt processor (21 U.S.C. § 623). Custom exempt facilities are also not inspected at all times that slaughter occurs. Instead, the plant is subject to occasional, random inspections approximately 1-2 times per year.<sup>158</sup> Meat processed in a custom exempt plant cannot be sold to others or retail businesses and must be stamped with the words, "Not For Sale." Meat processed and labeled as custom exempt may be served to nonpaying guests in the owner's household or given to the owner's employees but may not be donated. Custom exempt processors are required to keep records about the source of the animals processed and to

<sup>155</sup> [http://www.fsis.usda.gov/wps/wcm/connect/5d43763f-a9aa-459b-94e0-cdf9e3543923/Inspection\\_and\\_Grading\\_What\\_Are\\_the\\_Differences.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/5d43763f-a9aa-459b-94e0-cdf9e3543923/Inspection_and_Grading_What_Are_the_Differences.pdf?MOD=AJPERES)

<sup>156</sup> <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling>

<sup>157</sup> See report: Exploring Requirements for a State Meat and Poultry Inspection Program in Nebraska, available at [http://www.nda.nebraska.gov/meat\\_inspection\\_report/state\\_meat\\_inspection\\_report.pdf](http://www.nda.nebraska.gov/meat_inspection_report/state_meat_inspection_report.pdf)

<sup>158</sup> Id.

process under sanitary conditions (21 U.S.C. § 623). More details on custom exempt processing requirements, including the factors used to determine if a facility is sanitary, are available in the FSIS Directive issued on July 15, 2009 to inspectors on the Custom Exempt Review process, available online.<sup>159</sup>

### *c. Poultry: Federal*

As a general rule, poultry products that are sold across state lines are subject to the federal Poultry Products Inspection Act (PPIA) (21 U.S.C. §§ 451-471) and regulations (9 C.F.R. Part 381) that require inspection of poultry slaughter and/or processing of poultry products. (ODA's Meat Inspection Division regulates poultry slaughtered and processed only

for in-state retail sale.) However, federal law does exempt some businesses from the mandatory inspection requirements (21 U.S.C. § 464; 9 C.F.R. § 381.10). 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;
- 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 enterprises 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. 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*

<sup>159</sup> <http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/5930.1Rev4.pdf>

Act, which is available **online**.<sup>160</sup> 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* (linked above) summarizes sanitary hygiene requirements contained in the Code of Federal Regulations (9 C.F.R. § 416), and the *FSIS Sanitation Performance Standards Compliance Guide*, which is available on the **FSIS website**.<sup>161</sup> In general, even exempt facilities must slaughter healthy chickens and ensure that they handle the birds properly. (21 U.S.C. § 464; 9 C.F.R. § 381.10).

#### IV. MARKETING MEAT AND POULTRY PRODUCTS

##### *a. Federal: Labeling and Storing of Meat and Poultry Products*

FSIS regulates meat and poultry product labeling under the FMIA and the 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

<sup>160</sup> [www.fsis.usda.gov/OPPDE/rdad/FSISNotices/Poultry\\_Slaughter\\_Exemption\\_0406.pdf](http://www.fsis.usda.gov/OPPDE/rdad/FSISNotices/Poultry_Slaughter_Exemption_0406.pdf)

<sup>161</sup> [http://www.fsis.usda.gov/OPPDE/rdad/FRPubs/San\\_Guide.pdf](http://www.fsis.usda.gov/OPPDE/rdad/FRPubs/San_Guide.pdf)

approval for meat and poultry (9 C.F.R. §§ 317.4 (meat), 381.132 (poultry)), while the FDA does not.<sup>162</sup>

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 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*<sup>163</sup> provides more detailed information on these labeling requirements.

#### ***b. Federal: 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

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<sup>162</sup> 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).

<sup>163</sup> Available online at [www.fsis.usda.gov/PDF/Labeling\\_Requirements\\_Guide.pdf](http://www.fsis.usda.gov/PDF/Labeling_Requirements_Guide.pdf)

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 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 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.. For more information, the FSIS has produced a **Questions and Answers document**.<sup>164</sup> FSIS does have **Nutritional Information Charts**<sup>165</sup> 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**<sup>166</sup> 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**<sup>167</sup> for ground beef that determines the precise nutrient content information for a specified level of fat or lean in a particular ground beef product.

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<sup>164</sup> [www.fsis.usda.gov/PDF/Nutrition\\_labeling\\_Q&A\\_041312.pdf](http://www.fsis.usda.gov/PDF/Nutrition_labeling_Q&A_041312.pdf)

<sup>165</sup> <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/labeling-policies/nutrition-labeling-policies/nutrition-labeling>

<sup>166</sup> [www.ars.usda.gov/main/site\\_main.htm?modecode=12-35-45-00](http://www.ars.usda.gov/main/site_main.htm?modecode=12-35-45-00)

<sup>167</sup> [www.ars.usda.gov/Services/docs.htm?docid=13933](http://www.ars.usda.gov/Services/docs.htm?docid=13933)

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.<sup>168</sup>

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 info labeling to the retailer, because it is the "producer of the final packaged product." If a farmer slaughtered his own poultry (permissible under certain circumstances in Nebraska), 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**.<sup>169</sup>

### *Specific Terms Used in Meat and Poultry Labeling*

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<sup>168</sup> [www.fsis.usda.gov/PDF/Nutrition\\_labeling\\_Q&A\\_0211.pdf](http://www.fsis.usda.gov/PDF/Nutrition_labeling_Q&A_0211.pdf)

<sup>169</sup> <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/labeling-policies/nutrition-labeling-policies/nutrition-labeling>

USDA regulates many terms that direct producers may wish to use on their products. Their **website**<sup>170</sup> 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 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.

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<sup>170</sup> [http://www.fsis.usda.gov/wps/wcm/connect/e2853601-3edb-45d3-90dc-1bef17b7f277/Meat\\_and\\_Poultry\\_Labeling\\_Terms.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/e2853601-3edb-45d3-90dc-1bef17b7f277/Meat_and_Poultry_Labeling_Terms.pdf?MOD=AJPERES)

*Grading*

Slaughter and processing facilities may choose to have their product graded. Grading is distinct from facility inspection and is an optional process. Direct farm businesses may choose to have their products graded if customers desire products that comply with the grading standards. Producers should ask at their inspected processing facility for information about the costs and procedures for meat grading.

*c. State: Labeling, Marketing and Food Safety Regulations*

There are no additional state labeling, marketing, or food safety regulations on the sale of meat or poultry products. As discussed elsewhere in this Guide, all packaged foods must bear a label stating the identity of the commodity, its weight, and the name and address of the manufacturer, and a declaration of price per pound and total selling price (Neb. Rev. Stat. 89-194 and 195). Vendors selling processed product at farmers' markets will likely need a temporary food establishment permit which requires that frozen product be held and sold frozen and refrigerated product held and sold at refrigeration temperatures as well. The Chapter 8: Fruits and Vegetables has more information on food establishment permits.

*d. Specialty Products and Marketing**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 Chapter 12: Organic Certification.

*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 book**<sup>171</sup> 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.

### *Halal*

"Halal" is the term in Islam for something that is lawful or acceptable, although it most commonly refers to acceptable foods. Halal meat can only come from certain animals (pork is banned), must be raised according to certain humane and feed quality standards, and must be slaughtered according to the ritual Zibaha characterized by a 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 identity of the Islamic authority upon request from agency official. FSIS does not maintain a listing or any guidance on who or what constitutes an acceptable Islamic organization for purposes of supervision.

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<sup>171</sup> [http://askfsis.custhelp.com/app/answers/detail/a\\_id/375/~if-a-label-bears-a-halal-or-kosher-statement,-does-fsis-have-to-monitor-the](http://askfsis.custhelp.com/app/answers/detail/a_id/375/~if-a-label-bears-a-halal-or-kosher-statement,-does-fsis-have-to-monitor-the)

*General Resource*

A good source for guidance on marketing meat is *How to Direct Market Your Beef*.<sup>172</sup> 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.

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<sup>172</sup> [www.sare.org/publications/beef/beef.pdf](http://www.sare.org/publications/beef/beef.pdf)

## V. 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?
- Crafted a label with all the requirements?
- 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?

## VI. KEY CONTACT INFORMATION

### **U.S. Department of Agriculture, Food Safety & Inspection Service**

Denver regional office (serves the state of Nebraska): (303) 236-9800

Denver.Districtmanagment@fsis.usda.gov

### **Nebraska Department of Agriculture, Bureau of Animal Industry**

Ph: (402) 471-2351

### **Nebraska Department of Agriculture, Poultry and Egg Division**

Ph: (402) 472-2051

### **Nebraska Department of Agriculture, Food Safety and Consumer Protection**

Ph: (402) 471-3422



## **CHAPTER 12: ORGANIC CERTIFICATION**

Organic production is an ecologically oriented process of growing crops or raising animals that encompasses a variety of production principles including soil fertility, biological diversity, and minimization of risks to 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 which 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. The Nebraska Sustainable Agriculture Society<sup>173</sup> and the University of Nebraska-Lincoln CropWatch program<sup>174</sup> provide a wealth of information and support for producers looking to transition to organic and connect with other organic growers.<sup>175</sup> Another excellent resource is the Organic Trade Associations website **HowToGoOrganic.com**,<sup>176</sup> which has an extensive database of materials dedicated to informing producers of how (and why) to transition to organic, including a page dedicated to **Nebraska**<sup>177</sup>.

<sup>173</sup> <http://www.nebsusag.org/>

<sup>174</sup> <http://cropwatch.unl.edu/web/organic/orgs>

<sup>175</sup> [www.oeffa.org](http://www.oeffa.org)

<sup>176</sup> [www.howtogoorganic.com](http://www.howtogoorganic.com)

<sup>177</sup> [www.howtogoorganic.com/index.php?page=nebraska](http://www.howtogoorganic.com/index.php?page=nebraska)

The first step in the certification process is selecting and contacting a certifying agent. AMS's **website**<sup>178</sup> 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 to begin transitioning land (i.e. production practices) from conventional to organic methods. This process may take at least three years. Producers may not apply prohibited substances<sup>179</sup> 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. The Midwest Organic & Sustainable Education Service provides **online fact sheets**<sup>180</sup> 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. In the past, federal assistance has been available to help defray the costs of obtaining certification. Whether assistance will be available in the future depends upon renewed federal farm bill funding. MOSES also maintains information on current farm bill programs and funding on a web page dedicated to sources of funding for farmers.<sup>181</sup>

### 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

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<sup>178</sup> [www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5100383](http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5100383)

<sup>179</sup> The lists of permitted and prohibited synthetic/non-synthetic substances are codified in 7 C.F.R. §§ 601 & 602.

<sup>180</sup> [http://mosesorganic.org/productioninfo\\_factsheets.html](http://mosesorganic.org/productioninfo_factsheets.html)

<sup>181</sup> <http://www.mosesorganic.org/fundsforfarmers.html>

the program, see Harrison Pittman's *Legal Guide to the National Organic Program*, which is available **online**.<sup>182</sup>

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).

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):

- When an equivalent organically produced variety is commercially unavailable, a producer may use non-organically produced, untreated seeds and planting stocks.

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<sup>182</sup> [www.nationalaglawcenter.org/assets/articles/pittman\\_organicprogram.pdf](http://www.nationalaglawcenter.org/assets/articles/pittman_organicprogram.pdf)

- 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.
- A producer may use non-organic annual seedlings if USDA grants a temporary variance.
- 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.
- 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.

#### IV. 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).

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### **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**:

**[www.ams.usda.gov/AMSv1.0/nop](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.

**[www.sare.org/publications/organic/organic.pdf](http://www.sare.org/publications/organic/organic.pdf)**

3. The ATTRA publishes an overview of the certification process that is available online

**[www.attra.ncat.org/attra-pub/summaries/organic\\_certification.html](http://www.attra.ncat.org/attra-pub/summaries/organic_certification.html)**

#### **State-Level Resources**

1. The University of Nebraska Extension has many resources that guide organic farmers in production techniques.

**<http://www.extension.org/pages/67368/organic-farming-systems-research-at-the-university-of-nebraska>**

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## V. 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, and 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.

## 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; FDA must approve them.

**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. The Agricultural Marketing Service (AMS) division of the U.S. Department of Agriculture manages organic certification.

**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, providing contradictory evidence may disprove the fact.

**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-

When employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or

When employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or 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.