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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. Court decisions may also change interpretations of laws. Therefore, every user of this Guide should at all times independently ensure that the legal information is up-to-date before using it in any way.

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

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

INTRODUCTION

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



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

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

However, managing a successful direct farm business can be difficult due to a labyrinthine set of laws and regulations. These rules touch upon nearly every action a producer might take, from the obvious (such as paying taxes or hiring employees) to the unexpected (such as designing livestock barns). Adding to the complexity, direct farm business rules are implemented and enforced by more than a dozen local, state, and federal government authorities that each have their own (sometimes overlapping) requirements. Just figuring out who to contact about a particular law or regulation can sometimes be a daunting task. Therefore, the authors developed this Guide to help clarify some of the most important rules pertaining to direct farm businesses and to provide guidance on how and where to obtain 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. Following are a few additional notes about the guide.

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

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

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

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

¹ Available online at dictionary.law.com

C.F.R. ### are regulations implemented by federal agencies. IRS regulations are in Title 26 and FDA regulations are in Title 21. Department of Agriculture regulations are divided between Title 7 and Title 9. Selected CFR titles are available online at

<http://www.access.gpo.gov/nara/cfr/cfr-table-search.html>

N.Y. ABC. Law #-### are New York laws. The three-letter abbreviation following N.Y. directs you to the specific section of the code, such as “AGM” for the Agriculture and Markets Law. The numbers following the three-letter abbreviation direct you to the article and section of that portion of the code. The statutes are available online at

<http://codes.lp.findlaw.com/nycode/AGM>

NYCRR #-# are the New York Code, Rules, and Regulations. The number before NYCRR directs you to the specific title of the New York Code, Rules, and Regulations. The numbers following NYCRR direct you to the specific chapter, subchapter, and part of the New York Code, Rules, and Regulations. The New York Code, Rules and Regulations is available online at

<http://government.westlaw.com/linkedslice/default.asp?SP=nycrr-1000>

Finally, a brief article on how to find laws in New York can be found on the Georgetown Law Library website.²

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

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

II. OVERVIEW OF ADMINISTRATIVE AGENCIES

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

² <http://www.law.georgetown.edu/library/research/guides/newyork-in-depth.cfm>

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

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

Federal Agency Rulemaking

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

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

State Rulemaking

New York has a comparable State Administrative Procedure Act (N.Y. SAP. Law 1-100 *et seq.*). The Act imposes the notice and comment rulemaking procedure, with notice provided in the state register, and, when appropriate in the judgment of the agency, publication in newspapers of general circulation and in trade, industry or professional journals (N.Y. SAP. Law 2-202). Individuals may also submit a written request to the agency to be notified of all proposed rules (*id.*).

As noted above, federal laws often overlap with New York 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, New York regulates all food - including food produced and sold entirely *within*

the state - under Article 71 of the New York State Health Code⁴ and the state's various food safety laws. These food safety rules and regulations may be found on the New York State Department of Agriculture & Markets website.⁵ Often, New York's food safety laws incorporate federal standards as New York law.

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

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. New York has in large part adopted the Food Code of 2005, though it does differ from the federal model language on a few points, noted later in this Guide.⁶ The adoption of the Food Code has several important ramifications for producers in New York.

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

The second consequence of the Food Code's near-universal adoption is that producers may find it easier to sell products out-of-state. All of New York's neighbors have adopted some version of the Food Code. Because the Food Code standardizes the rules, complying with New York'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 New York's

⁴ <http://www.nyc.gov/html/doh/downloads/pdf/about/healthcode/health-code-article71.pdf>

⁵ <http://www.agriculture.ny.gov/FS/industry/circs.html>

⁶

<http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FederalStateCooperativePrograms/ucm108156.htm>

requirements should find the rules for other jurisdictions to be relatively familiar and easy to comply with.

IV. NEW YORK DEPARTMENT OF AGRICULTURE & MARKETS

Numerous New York agencies regulate agricultural production and marketing - topics which individual chapters of this Guide cover in more detail. However, the New York Department of Agriculture and Markets has issued general rules that apply to *all* food sales, which are addressed below.

Adulterated Food

The New York Agriculture and Markets law prohibits the sale of adulterated food (N.Y. AGM. Law 17-199-a). New York's definition of "adulterated" food is lengthy, but includes food that "bears or contains any poisonous or deleterious substance which may render it injurious to health," "consists in whole or in part of a diseased, contaminated, filthy, putrid or decomposed substance, or if it is otherwise unfit for food," or "has been produced, prepared, packed or held under insanitary conditions" (N.Y. AGM. Law 17-200(1)-(15)).

Further, the New York Department of Agriculture and Markets (NYDOAM) regulations require all food sold to "be obtained from sources that comply with the applicable laws relating to food safety."⁷ (Dep't of Agri. & Markets, Rules and Regulations Relating to Retail Food Stores, Article 17 Agriculture and Markets Law, § 271-2.1). This means everything sold in New York, other than raw, unprocessed commodities, must come from an inspected and licensed facility.

Construction and Sanitation of Food Processing Facilities

In addition to oversight of food content and labeling, the NYDOAM Division of Food Safety and Inspection regulates the construction and sanitation of food production and processing facilities (1 NYCRR VI-C-276.1).

The NYDOAM is responsible for ensuring compliance with "good manufacturing processes." (1 NYCRR VI-C-261.2). New York law regulates both the grounds and the plant construction and design, requiring that processing facilities are constructed and maintained in a manner that prevents everything from dust and filth to birds, rodents, insects, microorganisms, chemical and any other extraneous material (1 NYCRR VI-C-261.3). In addition, there must be adequate lighting in hand-washing areas, dressing and locker rooms, toilet rooms, all areas where food or food ingredients are examined, processed, or stored, and any area where equipment and

⁷ <http://www.agriculture.ny.gov/FS/industry/04circs/rulesandregsretailCIR962.htm>

utensils are cleaned, as well as adequate ventilation in areas where food contamination might occur (1 NYCRR VI-C-261.3).

The Commissioner of the NYDOAM, after consulting with the Commissioner of Health, may take various measures to prevent and/or combat a suspected possible disease transmitted by food from any retail food store employee. The NYDOAM may grant a variance by modifying or waiving the requirements if it believes that a health hazard or nuisance will not result from the variance.

Cottage Food Laws

Cottage food laws refer to legislation that provides exemptions from state public health regulations that otherwise would require the production of food in a state-approved and inspected facility. The purpose of these laws is to encourage the local food industry within a state. Generally, cottage food laws exempt operators who prepare food that is not potentially hazardous and is prepared for sale or use at farmers' markets and roadside stands.

The NYDOAM exempts home processed foods from the licensing requirements for food processors (N.Y. AGM. Law 20-C). Section 276.3 of the New York State Agriculture and Markets regulations defines home processed food as "any food processed in a private home or residence using only the ordinary kitchen facilities of that home. . . but shall exclude potentially hazardous food. . . ." Although not specified in the law or regulations, the NYDOAM website⁸ indicates that the home processor exemption is restricted to bakery products for wholesale marketing or retail agricultural venues such as farms, farm stands, farmers markets, green markets, craft fairs and flea markets. Other exempted foods noted on the website include traditional jams, jellies, and marmalades made with high acid/low pH fruits, repacking/blending dried spices or herbs, snack items such as popcorn, caramel corn and peanut brittle, and candy (excluding chocolate). Any finished food product that requires refrigeration is not allowed to be produced by a home processor, and therefore will not qualify for exemption from the requirements of Article 20-C.

For a processor of home processed foods to be exempted from the requirements of Article 20-C, the finished product containers must be clean, sanitary and properly labeled (glass containers for jams, jellies, marmalades and similar products must be provided with suitable rigid metal covers), neither adulterated nor misbranded, and sold only within New York State (1 NYCRR VI-F-276.3). While Internet sales are not allowed, advertising of home processed food products on the Internet is permissible.⁹

⁸ <http://www.agriculture.ny.gov/FS/consumer/processor.html>

⁹ <http://www.agriculture.ny.gov/FS/consumer/processor.html>

Food Processing Requirements

Processors must also comply with requirements that are specific to the type of food processed. The NYDOAM bases these requirements on the unique health and safety risks inherent to each food, and many times, decisions on adequacy are made by local regulators or individual inspectors. NYDOAM 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 NYDOAM office's interpretation of the applicability of rules to unique facts may differ. In any case, inspectors cannot allow a facility to fall *below* the general standards established in the regulations.

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

AGENCY OVERSIGHT OF DIRECT FARM BUSINESS ACTIVITIES

ACTIVITY	FEDERAL AGENCY	STATE AGENCY
Environmental permitting	Environmental Protection Agency (EPA)	New York Department of Environmental Conservation, Division of Environmental Permits ("NYDEC")
Employee relations	Occupational Safety and Health Administration (OSHA)	New York Department of Labor ("NYDOL")
Taxes	Internal Revenue Service (IRS)	New York Department of Taxation and Finance ("NYDOTF")
Animal welfare	United States Department of Agriculture (USDA), Animal and Plant Health Inspection Service	New York Department of Health ("NYDOH")
Meat, poultry, & eggs	USDA Food Inspection Safety Services, for all products shipped across state lines	New York Department of Agriculture & Markets, for all products produced and sold entirely within New York ("NYDOAM")
Food other than meat, poultry, & eggs	Food and Drug Administration (FDA), for products shipped across state lines and labeling of <i>all</i> foods	New York Department of Agriculture & Markets, for all food sold in New York
Organics	USDA Agricultural Marketing Service (AMS)	New York Department of Agriculture & Markets

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: farmer's markets, roadside stands, U-pick operations, agro-tourism businesses, Community Supported Agriculture (CSAs), mail order or Internet sales, and delivery service to homes, restaurants, schools, or institutions.

A direct farm business may consist of one of these types, or a combination. For example, a farmer might sell products at the 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. These considerations are covered within the different chapter topics throughout this Guide.

I. PLANNING THE DIRECT FARM BUSINESS

Feasibility Studies and Business Plans



The first step in the process of establishing a direct farm business is *planning*. It's a mistake to rush into a direct farm business without first outlining the nature of the business 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 unsuccessful endeavors. Although feasibility studies are often conducted for large business proposals, small businesses may benefit from an initial explanation as well. The U.S. Small Business Administration has compiled a **Small**

Business Readiness Assessment of initial considerations for anyone planning a small business.¹⁰ The New York Empire State Development Division for Small Business has compiled a **Start-Up Assistance** webpage for starting a small business, which includes the basics of how to conduct a *feasibility study*.¹¹

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

¹⁰ available at https://eweb1.sba.gov/cams/training/business_primer/assessment.htm

¹¹ available at <http://www.nyfirst.ny.gov/ResourceCenter/StartUp/StartUp.html>

which additional help and expertise may be needed. The New York State Small Business Development Center offers a **step-by-step guide**¹² to developing a business plan.

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. Each business name must be distinguishable from every other, which means an entrepreneur must check prospective names in the Secretary of State's database, available online, to make certain a name is available.¹³ Even if a farm business is not prepared to organize officially, a desired business name can be reserved for up to 60 days by filing an **Application for Reservation of Name** form with a fee of \$20.¹⁴

Additional business planning resources are listed on the following page.

¹² available at http://www.nyssbdc.org/resources/Publications/practical_guide.pdf

¹³ http://www.dos.ny.gov/corps/bus_entity_search.html

¹⁴ For business corporations: <http://www.dos.ny.gov/forms/corporations/0234.pdf>; for limited liability companies: <http://www.dos.ny.gov/forms/corporations/1233.pdf>

Business Planning Resources

1. The **New York Small Business Administration** provides a “Small Business Resource” guide offering advice on matters from financing a small business to getting back on your feet after a disaster.

→ http://www.sba.gov/sites/default/files/files/resourceguide_3135.pdf

2. **NY Farm Net** offers free assistance with farm business analysis and planning.

→ <http://www.nyfarmnet.org/index.php/how-we-help/business-planning>

3. The **New York Public Library** has compiled a variety of resources pertaining to starting a small business.

→ <http://www.nypl.org/smallbiz>

4. The “**Guide To Starting a Farm Business in New York State: A Resource Guide for the Rural Landowners and Beginning Farmer Focused on Business and Regulatory Requirements Applicable and Unique to Agriculture**” created by the Cornell Cooperative Extension and the South Central NY Agriculture Program.

→ <http://ccejefferson.org/wp-content/uploads/2009/09/GuidetoStartingYourFarmBusinessinNewYorkState.pdf>

5. The **Guide to Farming in NY** by the Northeast Beginning Farmers Project

→ <http://nebeginningfarmers.org/publications/farming-guide/>

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

→ ny.marketmaker.uiuc.edu

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

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

II. WHAT BUSINESS ENTITY SHOULD YOU CHOOSE?

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

Although this section touches on the tax implications of business form choice, the subject is discussed in more detail in “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 an attorney 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**¹⁵ covers general partnerships, limited partnerships, limited liability partnerships, and limited liability limited partnerships. **Part II**¹⁶ covers limited liability companies, corporations, and cooperatives. Although not specifically aimed at direct farm businesses in New York, and therefore not a substitute for advice from legal counsel in New York, the overview is nonetheless helpful in understanding the legal and tax implications of the various business entities.

The New York Department of State, Division of Corporations, State Records & UCC, also has a website detailing the **Types of Businesses Operating in New York State**.¹⁷

Sole Proprietorships

A **sole proprietorship** is a business owned and operated by one individual, which is simple to start, but this convenience has drawbacks.¹⁸ The majority of farms are owned as sole proprietorships. The reason most farms are organized this way may be because the entity is easy to create.

Under a sole proprietorship, the law treats the owner and the business as one and the same. All of the business’s assets are the owner’s personal assets as well. At the same time, the owner is

¹⁵ http://www.nationalaglawcenter.org/assets/articles/goforth_ownership1.pdf

¹⁶ http://www.nationalaglawcenter.org/assets/articles/goforth_ownership2.pdf

¹⁷ http://www.dos.ny.gov/corps/bus_forms.html

¹⁸ As an exception to the “one individual” rule, spouses may co-own a sole proprietorship. This can impact filings and paying taxes, but otherwise makes little difference. An alternative arrangement would be a partnership, discussed below.

personally responsible for the *legal* and *tax* liabilities of the business. A creditor of the business can force the owner to sell personal assets in order to pay the debts and obligations of the business. On the other hand, assets from the business may be used to satisfy personal debts (an action 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.

A. CORPORATIONS: C AND S ELECTIONS

The New York Business Corporation Law (N.Y. BSC. Law 1-101 *et seq.*) governs the formation and operation of corporations in New York State. The structure of a corporation can be complicated, but basically, a corporation consists of two separate parts: A *board of directors* and *shareholders*. Shareholders finance the corporation's existence by purchasing stock in it; each stock share represents an ownership stake in the corporation, though individual shareholders typically have no say in the day-to-day operations of the corporation. Rather, shareholders elect a board of directors, who are responsible for making all of the decisions related to the corporation's affairs. As a result of their position, members of the board of directors owe certain *fiduciary duties* to the corporation. A corporation is formed by filing a Certificate of Incorporation pursuant to Section 402 of the Business Corporation Law. The Department of State, Division of Corporations provides **instructions**¹⁹ with detailed information on how to incorporate within New York.

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

The Internal Revenue Service Code classifies corporations as either "Subchapter C corporations" or "Subchapter S corporations." The IRS considers all corporations C corporations unless

¹⁹ <http://www.dos.ny.gov/corps/bcfaq.asp#inc>

shareholders elect S corporation status. Electing Subchapter S status with the IRS, if certain requirements are met, may avoid the double taxation problem.

S Corporations

S Corporations elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes to avoid double taxation. A corporation elects S corporation status with the IRS by filing **Form 2553**.²⁰ 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.

B. PARTNERSHIPS

A *partnership* (also known as a *general partnership*) is an association of two or more persons who combine their resources – labor, skill and/or property – 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. The New York Partnership Law (N.Y. PTR. Law) governs the formation and operation of partnerships in New York. 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, the entity itself is not taxed; instead tax liability for the business's profits and losses is handled on the partners' individual tax returns in pro rata shares. Despite the liability concerns, general partnerships are a common form of business organization, especially among family members, due to their simplicity and tax status.

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

Limited Partnerships

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

The Revised Limited Partnership Act (N.Y. P.T.R. Law 8A-121-101 *et seq.*) governs the formation of limited partnerships in New York.

To form a limited partnership, a general partner must execute a general partnership agreement and file a **Certificate of Limited Partnership**.²¹ Amongst the requirements of the Revised Limited Partnership Act is the requirement that the name of the limited partnership must contain the words "Limited Partnership" or the abbreviation "L.P." (N.Y. P.T.R. Law 8A-121-102).

Limited Liability Partnerships

The formation of a **Limited Liability Partnership** (LLP) is governed by Article 8-B of the New York Partnership Law (N.Y. P.T.R. 8-A-121-1500 *et seq.*). The benefit of an LLP is that all general partners are shielded from *personal* liability for the debts and obligations of the partnership, regardless as to how the debt or obligation is created. Unfortunately, this form of business organization is not available for farming operations in New York at this time. Rather, it is reserved for licensed professional services, such as attorneys or licensed physicians.

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 easy to form, 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 always conduct business transactions with the business account and personal transactions with personal funds.

²¹ <http://www.dos.ny.gov/forms/corporations/1391-f-l.pdf>

LLCs are a popular business entity because they are very flexible. Where corporations (detailed above) have several statutory obligations such as holding meetings and electing officers, LLCs have fewer statutory requirements. 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. As with sole proprietorships and partnerships, an LLC is a pass-through entity, which means that the entity does not file taxes, and members account for business profits and losses on their personal tax returns.

The New York Limited Liability Company Law governs the establishment and operation of LLCs in New York. To form an LLC, an Articles of Organization form²² that specifies the name of the LLC must be filed with the New York Department of State.

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

C. COOPERATIVES

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

In New York, the Cooperative Corporations Law governs the formation and operation of an agricultural cooperative (N.Y. CCO. Law 1-1 *et seq.*). Five or more producers of agricultural products may form a cooperative agricultural corporation (N.Y. CCO. Law 6-112). If the principal activities of the group are connected with the marketing, processing, manufacture, sale or other dispositions of agricultural products, it may be termed a cooperative marketing corporation. If its principal activities relate to the purchase of supplies for producers of agricultural products, it may be termed a cooperative purchasing association, but in either case the cooperative corporation may engage in both purchasing and marketing activities.

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, certificate of organization to be filed with the Department of State, bylaws governing the management of the cooperative, marketing agreements between the cooperative and its

²² Available at <http://www.dos.ny.gov/forms/corporations/1336.pdf>

members, and membership applications. The details of operating a cooperative are beyond the scope of this Guide, but several online publications provide good general information on establishing a cooperative, including the legal aspects of the operation:

- USDA/Rural Business Cooperative Service, *Cooperative Information Report*,²³ September 1996, contains information on how to start a cooperative.
- *The Farmer's Legal Guide to Producer Marketing Associations* ²⁴ by Doug O'Neil, D. Hamilton, and Robert Luedeman.
- USDA, *Cooperative Marketing Agreements: Legal Aspects*,²⁵ July 1992.
- USDA/Rural Business Cooperative Service, *Cooperative Information Report 40*,²⁶ 1990, provides sample legal documents for cooperatives.

III. LOOKING TO THE FUTURE: ESTATE PLANNING

Estate planning may not seem like an important component of managing a direct farm business, but it is critical for farmers who wish to keep the farm in the family for future generations. The USDA estimates that 80% of farmers do not have estate plans in place. Without an estate plan, the estate will go through probate court, which means that it may take years to settle the distribution of land and assets among heirs and creditors. Meanwhile, younger generations may not be able to make business decisions or plant the crops necessary to continue the operation. The probate court also applies a set of default rules for distribution that may not be beneficial for the business or the family's wishes: For instance, if the farm has been used to secure equipment, land may be sold off to pay debtors instead of passed down to children, even though there may be other ways to satisfy the debts. While not New York specific, the New Jersey Department of Agriculture maintains a website with links to resources on estate planning for farmers, including some links that are intended for New York land owners.²⁷ However, estate planning is a highly personalized process that involves decisions concerning family and wealth distribution. This guide cannot provide comprehensive information on estate planning; rather, business owners are strongly encouraged to contact an attorney to develop an estate plan.

²³ Available at <http://www.rurdev.usda.gov/rbs/pub/cir7/cir7rpt.htm>

²⁴ Available at http://www.nationalaglawcenter.org/assets/articles/obrien_producemarketing_book.pdf

²⁵ Available at <http://www.rurdev.usda.gov/rbs/pub/rr106.pdf>

²⁶ Available at <http://www.rurdev.usda.gov/rbs/pub/cir40/cir40rpt.htm#Articles%2>

²⁷ Available online at <http://www.nj.gov/agriculture/sadc/farmlink/resources/farmtransition.html>

CHAPTER 2 – SETTING UP THE DIRECT FARM BUSINESS

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

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

I. SITING

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

A. Zoning

Zoning is a system of land use regulation that controls the use of private property. Under a zoning system, land is divided up into different zones and for each zone 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 New York Statute of Local Governments authorizes local governments – such as counties, municipalities, cities, towns, and villages – to establish zoning regulations (N.Y. SLG. Law 2-10). The law also authorizes local governments to perform comprehensive or other planning work relating to its jurisdiction. 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.

New York State does not specifically exempt agricultural purposes from zoning, aside from some specific instances such as in plat subdivisions. Instead, New York leaves such decisions to the individual counties and local governments. However, the New York Agricultural Districts Law does provide some protection from unreasonably restrictive local ordinances.²⁸

Article XIV, Section 4 of the New York State Constitution states that the policy of the state shall be to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provisions for the protection of agricultural lands.

²⁸ http://www.co.ulster.ny.us/planning/ucpb/agriculture/ann_inc/brochure.pdf

In 1971, the legislature enacted the Agricultural Districts Law, Agriculture and Markets Law Article 25-AA, to implement the policy set forth in the state constitution. Section 305-a of Article 25-AA states the following: *“Local Governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such a manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened.”*²⁹

To determine whether a local law is unreasonably restrictive, the NYDOAM looks to several factors, including, but not limited to: whether the requirements adversely affect the farm operator’s ability to manage the farm operation effectively and efficiently; whether the requirements restrict production options which could affect the economic viability of the farm; whether the requirements will cause a lengthy delay in the construction of a farm building or implementation of a practice; the cost of compliance for the farm operation affected; and the availability of less onerous means to achieve the locality’s objective. Disputes between farm operations and local government zoning restrictions have been the subject of several lawsuits.³⁰ A complete description of these cases is beyond the scope of this Guide, but if the farming operation is the subject of restrictive zoning, the operator should contact the NYDOAM or an attorney.

An additional zoning/siting concern arises when farmland intersects urban areas--a common situation for many direct farm operations due to the proximity to potential consumers. As towns or other urban areas expand, counties or cities may change the land’s zoning classifications. For example, towns may annex farmland previously under county jurisdiction and subject the property to municipal zoning. Other land use changes may result when the county itself rezones land due to development pressures. In either situation, governments could rezone productive farmland from "agricultural" to "residential" or "commercial," etc. The existing farm operation would be grandfathered as a "non-conforming use," which would allow the continuation of the farming operation, but could prohibit or restrict future changes or other farm-related businesses such as farm stands or U-pick operations. Therefore, it is important to determine the precise zoning classification for the specific property, even if the property has been “farmed” continuously.

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

²⁹ <http://www.agriculture.ny.gov/AP/agsservices/new305/guidance.pdf>

³⁰ *Inter-Lakes Health, Inc. v. Town of Ticonderoga Town Board*, 13 A.D.3d 846 (N.Y. 2004); *Lewis Family Farm v. New York State Adirondack Park Agency*, 64 A.D.3d 1009 (N.Y. 2009).

B. Impacts on Neighboring Land

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

Livestock Feedlot Operations

A Concentrated Animal Feeding Operation (CAFO) is an U.S. Environmental Protection Agency (EPA) term for a large concentrated Animal Feeding Operation (AFO); specifically, a CAFO is an AFO with more than 1000 animal units. According to the USDA an "animal unit" is defined as an animal equivalent of 1000 pounds live weight and equates to 1000 heads of beef cattle, 700 dairy cows, 2500 swine weighing more than 55 lbs, 125 thousand broiler chickens, or 82 thousand laying hens or pullets.³¹

CAFOs require stringent safeguards because of the environmental risk of waste contamination in nearby bodies of water.

CAFOs currently require permits if they exceed 1,000 animal units and are regulated by the New York Department of Environmental Conservation (NYDEC). The agency maintains a **website**³² that provides all of the necessary forms, declarations and statements pertaining to CAFOs.

Fence Law and Branding

New York state is a fence-in state, meaning owners are required to maintain fences between their properties in order to keep their animals off neighboring lands. However, at their own discretion, owners may choose to allow their lands to lie open (N.Y. TWN. Law 18-300).

The New York Town Law sets forth regulations pertaining to the fencing in of lands (N.Y. TWN. Law 18-300 through 325).³³ If owners of adjoining lands both own animals, those owners must make and maintain a "just and equitable" portion of the division fence separating their lands unless they agree to allow their lands to lie open and their animals to use each-other's land. If one of the neighboring landowners does not own animals, that landowner is not responsible for erecting, maintaining, or repairing the division fence that separates the two neighbor's land.

³¹ <http://www.economics.nrcs.usda.gov/wps/portal/nrcs/main/national/plantsanimals/livestock/afo>

³² <http://www.dec.ny.gov/permits/6285.html>

³³ http://asci.uvm.edu/equine/law/fence/ny_fnc.htm

New York allows freeze branding for cattle and horses.³⁴ Freeze branding is the process whereby a branding iron is chilled with a coolant such as dry ice or liquid nitrogen and applied to an animal to mark that animal. Unlike hot-iron branding which burns a scar into the animal, freeze branding damages the pigment-producing hair cells and causes the animal's hair to grow white where the brand has been applied. Freeze branding is beneficial in that it causes less damage to the animal's hide than hot-iron branding and is more visible than a hot-iron brand. The NYDOAM maintains a statewide registry of brands for livestock owners to voluntarily register the brand they use to brand their livestock (N.Y. AGM. Law 2-16).³⁵ Owners seeking to register a brand should send their design to the NYDOAM at the following address:

NYS Dept. of Agriculture and Markets
Division of Animal Industry
10B Airline Drive
Albany, NY 12235

Nuisance Law

A nuisance occurs when there is an "interference with the use or enjoyment of law" (*Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568 (App. Ct. 1977)). 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.

There are two types of nuisance claims: private and public. Private nuisance usually affects a single party or a definite, small number of individuals in the use or enjoyment of private rights. (*Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568 (App. Ct. 1977)). Unlike a private nuisance, "[a] public nuisance is an act or omission which obstructs or causes damage to the public in the exercise of rights common to all. A nuisance is a public nuisance and subject to restraint as such, where the location at which and the manner in which the particular operation is conducted is such that substantial annoyance and discomfort are caused indiscriminately to many and diverse persons who are continually or may from time to time be in the vicinity" (*People v. HST Meth, Inc.*, 74 Misc.2d 920, 922 (N.Y. 1973)).

Not all nuisance claims are actionable; a nuisance's actionability is not determined by a showing of negligence, but rather upon the demonstrated unreasonableness of the nuisance creator in view of his own needs and those of his neighbors." (*Mandell v. Pasquaretto*, 76 Misc.2d 405, 409 (N.Y. 1973)). Direct farm businesses must be aware of conditions they create that rise to the level of actionable nuisance, particularly those businesses in close proximity to land used for non-agricultural purposes. Courts have found some large livestock facilities to be a "nuisance" due to the presence of strong odors and flies such that neighbors can no longer use their property (e.g., unable to open windows in summer due to odors).

³⁴ <http://www.agriculture.ny.gov/AI/equine/equine.html>

³⁵ http://asci.uvm.edu/equine/law/brands/ny_brand.htm

Courts frequently balance the interests of both sides in determining liability for nuisance (*Mandell v. Pasquaretto*, 76 Misc.2d 405, 409 (N.Y. 1973)). Courts will also consider whether the complaining party came to the nuisance--that is, whether the condition existed when the complaining party acquired the property. While coming to the nuisance does not bar a nuisance action, it may help determine what, if any, damages are appropriate.

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

New York's "right to farm" law may protect some farmers from nuisance actions (N.Y. AGM. Law 25-AA-308). Provided that the agricultural practice constitutes a sound agricultural practice pursuant to an opinion issued upon request by the Commissioner, that agricultural practice shall not constitute a nuisance. Sound agricultural practices refer to those practices necessary for the on-farm production, preparation and marketing of agricultural commodities. However, despite the "right to farm" law, aggrieved parties are still able to recover damages for personal injury or wrongful death.

It should be noted, however, that courts in other states with similar statutes have sometimes found these "right to farm" laws unconstitutional because the government requires neighboring property owners to bear a burden -- the nuisance -- without compensation.³⁶ Accordingly, the best defense for direct farm businesses is to operate in a reasonable, non-negligent manner and minimize potential interference with neighboring property.

II. REGISTRATION

A. *Animal Disease Traceability*

To protect the health of U.S. livestock and poultry and the economic well-being of those industries, the USDA's Animal and Plant Health Inspection Service (APHIS) developed the National Animal Identification System (NAIS) to identify and record the movement of livestock, poultry and other farmed animals throughout the United States. Through NAIS, APHIS aimed to achieve a 48-hour trace back of the movements of any diseased or exposed animal in the event of an animal disease outbreak. NAIS consisted of three components: premises registration, animal identification and animal tracing. The program meant to protect livestock and poultry producers by enabling USDA to identify the location of a disease outbreak and

³⁶ *Bormann v. Kossuth County*, 584 N.W.2d 309 (Iowa 1998); Neil D. Hamilton, *Right-To-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103 (1998).

which animals were exposed in order to limit the scope of quarantines and animal destruction while also adequately preventing any further spread. However, it met significant resistance from producers and state departments of agriculture. In February 2010, the USDA announced it would be overhauling the animal disease traceability system to apply only to animals traveling in interstate commerce and to be more flexible and accommodating to states' needs. Therefore, registration requirements of premises and animals for disease tracing are currently in flux. According to USDA press releases, the agency intends to develop a program in collaboration with states and tribal governments, and provide transparency through notice and comment rulemaking. On August 9, 2011, USDA issued a proposed rule to establish general regulations for improving traceability of U.S. livestock moving interstate when animal disease events take place. The proposed rule requires livestock moved interstate to be officially identified and accompanied by an interstate certificate of veterinary inspection. For the most up-to-date information on the status of premises registration requirements, see **USDA's Animal Disease Traceability website**.³⁷

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).³⁸ Farms, retail facilities, restaurants, nonprofit food facilities, fishing vessels, and operations regulated exclusively by USDA throughout the entire facility (e.g., facilities that handle exclusively meat, poultry, or egg products) are **exempt** from the registration requirement. Whether a direct farm business qualifies for an exemption to the registration requirement depends on the definitions set forth in FDA regulations:

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

³⁷ <http://www.aphis.usda.gov/traceability/>

³⁸ FDA has published a helpful 16-page guide on facility registration ("What You Need to Know About Registration of Food Facilities") that explains who must register (including exemptions) and how to register. It is available online at <http://www.directfarmbusiness.org/storage/fsbtreg.pdf>.

- 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.

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

The FDA has published a **guidance document**³⁹ 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**⁴⁰ that contains step-by-step instructions and tutorials for registering online or by mail. Facilities are required to register only once. However, if information about the facility changes, the facility must update the registration within 60 days of the change. If a facility relocates, it must cancel the existing registration and submit a new registration. If the facility goes out of business or changes ownership, the facility must submit a registration cancellation within 60 days. Cancellations are irreversible. Information on how to update or cancel a registration is available through the same FDA webpage for registering online.

C. Federal and State Environmental Regulations

Farmers might also encounter issues with environmental permits and regulations. Because multiple agencies may have regulatory authority - depending on the environment and possible pollutants involved - environmental permitting is often very complex and individualized. This section provides a brief overview of some of the most common issues; however, it is not comprehensive. The National Association of State Departments of Agriculture (NASDA), in conjunction with the National Center for Agricultural Law, has published a more comprehensive guide on *State Environmental Laws Affecting New York Agriculture*.⁴¹ Certain federal environmental programs may also apply to agricultural operations, such as the Endangered Species Act and the Safe Drinking Water Act. The EPA has provided brief summaries of its programs on its **website**.⁴² While these resources are useful starting points, farm operations should not rely exclusively on websites because they may not cover every potential environmental issue a farmer may encounter.

Waste Management

There are multiple laws that require waste and nutrient management plans, including the Federal Clean Water Act (CWA) (33 U.S.C. § 1541, *et seq.*). The New York Department of Environmental Conservation (NYDEC) regulates and monitors facilities and generators of hazardous waste and controls disposal of radioactive materials and use of pesticides. NYDEC

³⁹ Available online at

<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/FoodDefense/ucm331959.htm>

⁴⁰ <http://www.fda.gov/Food/GuidanceRegulation/FoodFacilityRegistration/ucm2006831.htm>

⁴¹ Available online at http://law.pace.edu/sites/default/files/CLE/3-13-13_Survey-of-local-food-law_5.pdf

⁴² <http://www.epa.gov/agriculture/agmatrix.pdf>

also promotes sound management of wastes by communities, businesses and industries. More information is available at their **website**.⁴³

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 System (NPDES). NYDEC administers the CWA in New York under an agreement with the Federal EPA. The NYDEC State Pollutant Discharge Elimination System (SPDES) Multi-Sector Permit for Stormwater Discharges Associated with Industrial Activity⁴⁴ protects water quality by requiring facilities that release pollution into surface waters to treat their water discharges. The Department of Environmental Conservation sets pollutant limits for SPDES permits based on the facility's operation and the impairment of the water body to which the facility's water runs.

Livestock that graze on open lands are a potential source of nonpoint source pollution and subject to the New York State Soil & Water Conservation Committee's Nonpoint Source Program.⁴⁵ This program employs voluntary and incentive methods to reduce nonpoint source pollution. Nonpoint source pollution means the source of the pollution is difficult to determine and can make complying with CWA's requirements difficult on a state. New York currently has a program entitled New York State Agricultural Nonpoint Source Abatement & Control Grant Program that seeks to provide technical and financial assistance to agricultural producers who implement conservation practices on agricultural land. Information can be found on the **EPA's Agricultural Nonpoint Source Abatement and Control Program** website.⁴⁶ In contrast, all large concentrated animal feeding operations (CAFOs)⁴⁷ require a discharge permit issued by the NYDEC. For more information on how to apply for a permit, see the the NYDEC's **Permits for CAFOs website**.⁴⁸ In addition, the NYDEC maintains a website with helpful information on manure management.⁴⁹ The current federal rule is available on the federal EPA website.⁵⁰

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

⁴³ <http://www.dec.ny.gov/chemical/292.html>

⁴⁴ http://www.dec.ny.gov/docs/water_pdf/gp12001.pdf

⁴⁵ <http://www.nys-soilandwater.org/aem/nonpoint.html>

⁴⁶ <http://www.epa.gov/agstar/tools/funding/incentive/NYagriculturalnonpointsourceabatementa.html>

⁴⁷ 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.

⁴⁸ <http://www.dec.ny.gov/permits/6285.html>

⁴⁹ <http://www.dec.ny.gov/energy/53490.html>

⁵⁰ <http://cfpub.epa.gov/npdes/afo/cafofinalrule.cfm>

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**.⁵¹

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 New York District Army Corps of Engineers oversees the state of New York. The New York District’s website maintains a list of useful links for information on wetlands.⁵²

Pesticide Regulation

The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Chapter 6) (FIFRA) requires EPA to approve *all* pesticides sold or distributed in the United States. Upon approval, the pesticides are subject to labeling requirements, and applicators must comply with the use and application restrictions on the labels. Applicators must meet training and certification standards. The FIFRA is also the law that established the worker protection standards discussed in the “Labor and Employment” section of this Guide.

Although the Pesticide Control Board within the Department of Health sets forth rules regarding the use, transportation, storage and disposal of pesticides (N.Y. PBH. Law 16), the NYDEC regulates the use of pesticides and is responsible for compliance assistance and enforcement of the requirements of the Environmental Conservation Law in New York (N.Y. ENV. Law 33). The NYDEC maintains a **website**⁵³ providing information about pesticide certification and business registration.

New York law requires registration of every pesticide used, distributed, transported, sold, or offered for sale within New York (N.Y. ENV. Law 33-0701). In order to purchase and possess a

⁵¹ www.epa.gov

⁵² <http://www.nan.usace.army.mil/Missions/Regulatory/WetlandsIdentification.aspx>

⁵³ <http://www.dec.ny.gov/permits/209.html>

restricted use pesticide (a pesticide is defined as restricted use by the Commissioner) within New York, a purchase permit or certification identification is required (N.Y. ENV. Law 33-0903).

Pesticides must be used according to the labeling and, unless the label indicates otherwise, may only be used for agricultural purposes in a dose, concentration or frequency less than the label specifies (N.Y. ENV. Law 33-0725).

With the exception of private applications of general use pesticides, any person who commercially or privately applies pesticides must be certified by the Commissioner (N.Y. ENV. Law 33-0905). Pesticide applicator certifications are valid for three years, private applicator certifications are valid for five years, and certification for commercial pesticide application is valid for one year (N.Y. ENV. Law 33-0701). Before applying a pesticide, the applicator must provide the property owner information regarding the pesticide's safety (N.Y. ENV. Law 33-0701).

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**.⁵⁴ For more information on New York-specific programs, visit **USDA's Natural Resource Conservation Service's** page for New York.⁵⁵

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

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

⁵⁴ <http://www.nrcs.usda.gov/programs/>

⁵⁵ <http://www.nrcs.usda.gov/wps/portal/nrcs/site/ny/home/>

examples of ecosystem services markets already in operation. Oftentimes, farmers can gain tax benefits from placing conservation easements on their land or transferring land into a land trust. The Land Trust Alliance maintains a **website**⁵⁶ detailing the New York State Conservation Partnership Program that provides information and reference materials.

Section 2709 of the Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill) directed the Secretary of Agriculture to “establish technical guidelines that outline science-based methods to measure the environmental services benefits from conservation and land management activities in order to facilitate the participation of farmers, ranchers, and forest landowners in emerging environmental services markets” (16 U.S.C. § 3845). As a result of this legislation, the Department of Agriculture established the Office of Environmental Markets (OEM) in order to help facilitate the creation of market-based approaches to agriculture, rangeland, and forest conservation. The Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) took steps to facilitate landowner participation in emerging markets for ecosystem services and retained the same language as the 2002 Farm Bill. More information on ecosystems services markets is available through the **USDA’s Environmental Markets website**.⁵⁷

III. INSURANCE

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

Many of these insurance needs may be incorporated into a basic farm insurance policy. These include losses to the farm dwellings and outbuildings, personal property (including tractors and other equipment), and premises liability arising from some incidental on-farm business operations. Depending upon the scale of the operation and the insurance company, roadside farm stands and U-pick enterprises may or may not be covered under incidental business operations in the basic farm insurance policy. Agritourism, petting zoos or seasonal farm festival activities generally are not considered incidental farm business operations for insurance purposes and will require specific endorsements. Insurance field agents can review all of these operations in order to implement best management practices that are designed to eliminate or reduce potential risks.

⁵⁶ <http://www.landtrustalliance.org/about/regional-programs/ne/nyscpp>

⁵⁷ <http://www.fs.fed.us/ecosystems-services/OEM/index.shtml/index.shtml>

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

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

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

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

IV. CHECKLIST

Have you...

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

KEY CONTACT INFORMATION

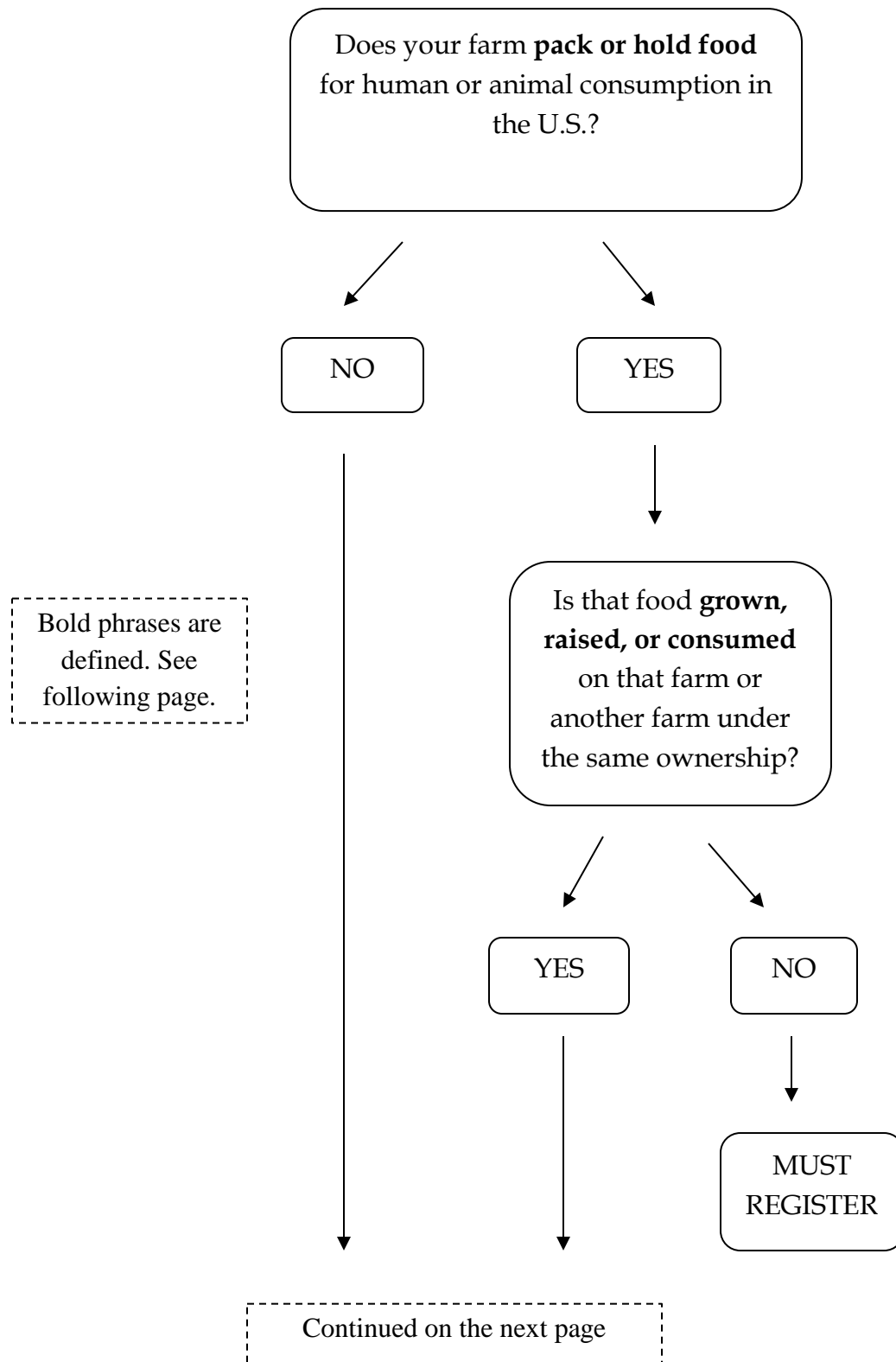
- **U.S. Food and Drug Administration (registration of food facilities help desk)**

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

- **New York Department of Environmental Conservation (info on the CAFOs):**

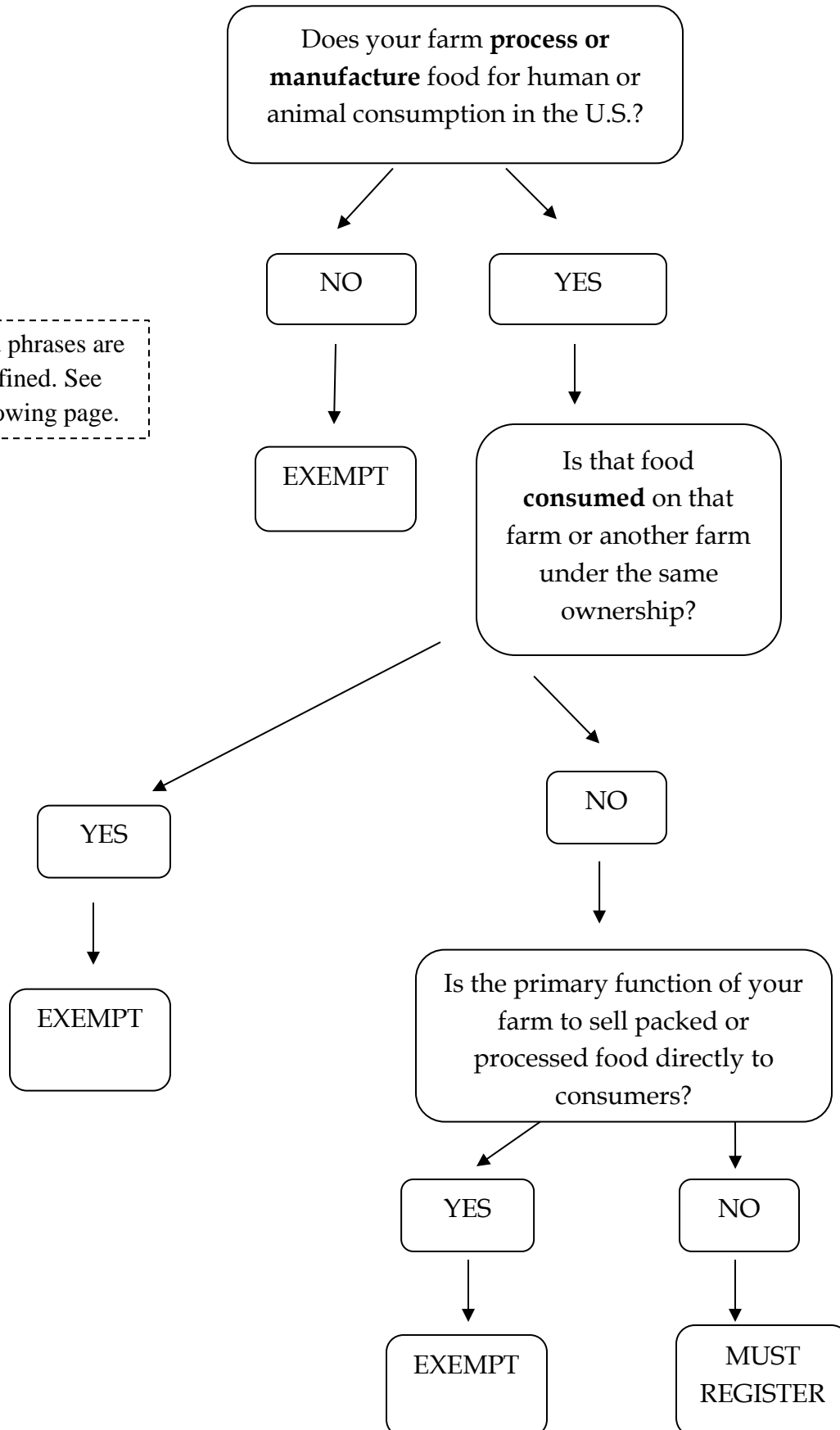
Directory available at: <http://www.dec.ny.gov/about/556.html>

Ph: (518) 402-8013 (Division of Public Affairs and Education)

DO I NEED TO REGISTER MY FARM WITH THE FDA?

Continued from the previous page

Bold phrases are defined. See following page.



Definitions

As used in this flowchart:

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

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

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

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

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

CHAPTER 3: MANAGING AND MARKETING THE DIRECT FARM BUSINESS

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



reach potential customers and sell the product.

This marketing plan may encompass many facets, including Internet marketing, procurement contracts, and valid intellectual property rights. And when a sale is made, the direct farm business must accurately measure its products in order to comply with state law.

I. CONTRACTING

Contracts are an integral part of every business. Contractual agreements can take many forms: some are small cash transactions, while

others are detailed documents resulting from lengthy negotiations. Regardless of the type of direct farm business, owners and managers should be familiar with certain basic contract principles that will help them run a smooth operation and protect their business interests.

A. General Contract Law

A contract is an agreement between two or more competent parties to do something in exchange for something of value. There are three basic elements of a valid contract: an offer, an acceptance, and consideration. An offer is a committed and definite proposal that is sufficiently communicated to others. Acceptance is communicated when a party agrees to the proposal using clear and unequivocal terms. The final requirement, consideration, concerns the subject of the contract. Consideration requires that the contract actually involve the exchange of something of value from 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. In New

York, the UCC can be found within the New York Code (N.Y. UCC. Law 1-101 *et seq.*). The UCC covers a broad array of commerce issues, such as the rights and duties of creditors and debtors, how loans can be transferred between varying parties, and standards for forming and interpreting leases for goods. Farmers need to be aware of the UCC, especially with regard to sale of goods, because it establishes unique rules for commercial transactions. Specifically, the UCC defines when a contract is formed between two merchants, sets standards for how contract terms are interpreted, provides default terms to cover contractual omissions, and defines what remedies are available if the contract is breached. It is important to note, however, that these UCC rules are the default law that courts will apply if contracting parties do not come to an agreement or fail to include a term in their agreement. Contracting parties are always free to negotiate alternative terms for their contract. Relevant provisions of the UCC are covered in more detail in the following discussion.

Oral Contracts, Written Contracts – Which One?

A contract does not necessarily have to be in writing in order to be binding and enforceable. 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, most roadside stand cash transactions - are usually oral contracts. When a farmer sets up a stand and communicates the availability of his produce in some way at a certain price, he has made an *offer*. By agreeing to pay the purchase price, the consumer *accepts* the offer, forming an enforceable contract. The *consideration* is the produce the farmer provides and the money the customer pays. The contract is *performed* (and thus complete) when the farmer receives the money and the customer receives the produce. In most cases, oral contracts are binding and enforceable—just like a written contract. If one party feels that the contract was breached, there are legal remedies available. 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 New York Statute of Frauds is located in Article 2, Part 2, Section 2-201 of the New York Uniform Commercial Code and lists a number of circumstances specifically requiring a written contract, but there are two situations most relevant to farmers in which a written contract is required: First, contracts that will take more than one year to perform (N.Y. GOB. Law 5-701(a)(1)), and second, the sale of real property (N.Y. GOB. Law 5-703(1)). Additionally, the UCC has its own statute of frauds provision, which requires contracts for the sale of goods totaling \$500 or more to be in writing (N.Y. UCC. Law 2-201(1)).

Contracts lasting more than a year can present themselves in many different forms. For example, a contract to sell grain could have an execution date that is more than a year away, making it fall within this section of the statute. The statute only applies to contracts that cannot possibly be performed within one year. The mere possibility that a contract will take longer than a year to perform does not force it into the statute. So, for example, a contract to sell the milk of an animal for the rest of its life would not fall within the statute because there is no guarantee that the animal will live longer than one year. Similarly, if the contract is set up in a way that could potentially last more than a year but could also be completed within a year under certain circumstances (for example, a contract to design and build a house), it does not fall within this provision of the statute of frauds. Many community supported agriculture (CSA) contracts also might fall within this provision of the statute of frauds. For example, an agreement to receive delivery on produce through the end of the next year may or may not fall within the provision based upon the timing and terms of the contract. If the agreement requires taking delivery at a date that is more than one year away, it generally must be in writing.

When it comes to the sale of goods totaling \$500 or more, the statute provides a slightly different rule when merchants are involved. New York law defines a merchant as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction . . .” (N.Y. UCC. Law 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 within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.” (N.Y. UCC. Law 2-201(2)). Across the country, states are split on whether farmers are merchants when they market their crops or engage in other activities, such as processing fruits into jellies.⁵⁸ New York courts have yet to determine if farmers are merchants under the Uniform Commercial Code (*R.F. Cunningham & Co. Inc. v. Driscoll*, 7 Misc. 3d 234, 235 (N.Y. 2005)).

Direct farm business owners should become familiar with what constitutes a “writing.” To be enforceable, the written document must be signed by the party that has an obligation imposed upon them or by someone who is authorized to sign for them. An email confirming what will be sold, the quantity which will be sold, and at what price those items will be sold may be considered a contract. Likewise, the writing does not have to have a signature to be signed. For an email, the “to” line may be considered as good as a signature. Additionally, both parties are not required to sign; the writing must be signed by the party that has an obligation imposed

⁵⁸ The Supreme Courts of Illinois and Texas and an Appellate Court of Ohio have held that the farmer who regularly sells his crops is a “merchant” within the meaning of 2-201(2) of the UCC, while the Supreme Courts of South Dakota, Iowa, Kansas, Utah, Wisconsin, Arkansas and Alabama have refused to make this generalization. (*Pierson v. Arnst*, 534 F.Supp. 360, 361 n.1 (D. Mont. 1982)).

upon them or by someone who is authorized to sign for them. The party seeking to enforce the contract is not required to have signed it. Farmers should try to obtain a contract in as secure a form as possible; but where that is not possible, a confirming email may be sufficient. If a written document omits terms or includes a term that is different from what was actually agreed upon, the contract will usually still be binding. In fact, evidence of the oral agreement usually cannot be offered as evidence to show that the terms of the final written contract were supposed to be something else.

Although it may be difficult to understand when a written contract is technically required and when an oral contract will be enforceable, it is *always* a good business practice to put contracts in writing. Doing so protects legal interests and avoids potential disagreements that can lead to a negative business reputation and possible legal battles. When preparing a written contract, it is important to be thorough and accurate. At a minimum, the contract should contain the identities of the parties, the item(s) contracted for (including quantities and a clear description that includes quality standards), the negotiated price, and time and location of performance. It might also include ways the contract can be cancelled and what remedies each side will have if the other fails to perform. Contradictory oral statements made during negotiations will not typically override the terms contained in a written contract. In sum, taking the time to prepare a well-crafted written document will increase the security of each side's interest in the contract, reduce the chance of unmet expectations due to ambiguity, and create a tangible record in case 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 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 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**.⁵⁹

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**.⁶⁰

⁵⁹ <http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=lmp&topic=landing>

⁶⁰ <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateG&navID=FileaPACAClaimorApplyforaLicense&rightNav1=FileaPACAClaimorApplyforaLicense&topNav=&leftNav=CommodityAreas&page=PACA&resultType>

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 receive payment 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 acquire 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

**ADDITIONAL RESOURCES:
PACA'S PROVISIONS**

*Farmer's Legal Action Group
Handout, available at*

<http://www.flaginc.org/topics/pubs/arts/PACAhandout2007.pdf>

*National Agricultural Law Center's
Overview, available at*

<http://www.nationalaglawcenter.org/assets/overviews/perishablecommodities.html>

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 Contracts

Production Contracts

Production contracts are contracts in which a company hires a farmer to raise animals or crops for the company using seed or animals, feed, and other inputs that the company supplies. These

ADDITIONAL RESOURCES:
Model Producer Protection Act

A helpful article on state regulation of production contracts

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

are usually adhesion contracts that may contain unfair provisions based on unequal bargaining power between the processors and smaller producers. In 2001, sixteen state attorneys general responded to the potential issues involved in production contracts by proposing to adopt the Model Producer Protection Act. Although seven states have adopted varying forms of the Model Producer Protection Act, New York has not passed the legislation, and currently does not offer producers any special protection. Potential issues to be aware of in production contracts include a confidentiality clause, which may prevent the producer from being able to seek advice from attorneys or other professionals; 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.⁶¹

The New York State Agricultural Producers Security Program provides producers with some protection (N.Y. AGM. Law 20 *et seq.*). According to the Department of Agriculture and Markets, "[t]he purpose of the law is to ensure New York State producers are paid fully and promptly; ensure payment in the event a dealer defaults in payment; and, to suppress and prevent any unfair and fraudulent marketing practices." Further details about the Agricultural Producers Security Program can be found on the Department of Markets and Agriculture **website**.⁶²

Federal law also provides some protections for poultry and swine producers entering into production contracts.⁶³ First, the 2008 Farm Bill contains a provision that protects poultry and

⁶¹ For a more in depth discussion of potential issues to look out for, see <http://faircontracts.org/issues/farming>

⁶² <http://www.agriculture.ny.gov/programs/apsf.html>

⁶³ 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

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

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

current of commerce. *The Produce Place v. U.S. Dept. of Agriculture*, 91 F.3d 173 (D.C. Cir. 1996). In their analogy, the court stated:

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

Id. at 175-176. Under such a standard, a New York producer who contracts with an New York poultry dealer to raise poultry to be sold exclusively to New York 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.

Requirements and Output Contracts

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

Entering into a requirements or output contract is not a green light for producers to simply increase production, knowing that a party is contractually bound to purchase everything that the producer can churn out. The UCC puts some restrictions on these types of contracts. Section 2-306 of the UCC imposes a duty of “good faith” on the parties to the contract (N.Y. UCC. Law 2-306(1)). This means that neither side can demand or produce a quantity that is unreasonably disproportionate to the quantity that was estimated by the parties at the time of contract formation. If the parties failed to make any estimates at the inception of the contract, the UCC restricts quantities to those “normal” or “comparable” to what would ordinarily be required or produced. However, the UCC does not specifically identify how those terms should be defined.

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

Procurement Contracts

Procurement contracts can be an advantageous way for a direct farm business to make significant sales. The USDA purchases large quantities of commodities through various

procurement programs in order to supply food for school lunch programs, prisons, international food aid and other programs. USDA's programs are varied and complex, although they generally consist of some sort of notice of intent to purchase followed by a competitive bidding process. Information for small businesses is compiled by the USDA and **available online**.⁶⁴ The Agricultural Marketing Service (a subsidiary of the USDA) provides commodity-specific information on its **website**.⁶⁵ The state of New York also administers a procurement program through the Office of General Services. New York State's Empire State Development maintains a **website**⁶⁶ that provides information on the procurement program. More information on selling to the state of New York is available **online**.⁶⁷

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 direct farm businesses.

A. Labeling and Advertising

Labeling is regulated by the Food and Drug Administration (FDA) under the Food, Drug, and Cosmetic Act (21 U.S.C. Chapter 9), which prohibits selling "adulterated" or "misbranded" food. The Federal Trade Commission (FTC) regulates advertising pursuant to the Federal Trade Commission Act (FTCA) (15 U.S.C. §§ 41-58), which prohibits untruthful and deceptive or unfair advertising. Although the line between advertising and labeling is a bit fuzzy, both are subject to consistent rules because the FTC and FDA have a collaborative enforcement arrangement. FTC guidance documents treat advertising as deceptive if it contains a statement or omits information that is material (that is, important to a consumer's decision-making process) and is likely to mislead consumers. A statement is unfair if it causes or is likely to cause substantial consumer injury that a consumer could not reasonably avoid and that is not outweighed by the benefit to consumers. These laws have implications for several types of

⁶⁴ <http://www.dm.usda.gov/procurement/business/procedure.htm>

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<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateQ&navID=CommodityPurchasing&leftNav=CommodityPurchasing&page=CommodityPurchasing&acct=AMSPW>

⁶⁶ <http://www.esd.ny.gov/BusinessPrograms/ProcurementAssistance.html>

⁶⁷ <http://ogs.ny.gov/Purchase/BidCalendarLV.asp>

claims a direct farm business may wish to make about its products, whether on its labels or in its advertising: Health claims, structure/function claims, and nutrient content claims.

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

ADDITIONAL RESOURCES:

Food Labeling

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

<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/FoodLabelingGuide/ucm064919.htm>

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

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

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**.⁶⁸ The FDA also publishes a comprehensive **Food Labeling Guide**⁶⁹ that outlines the requirements of the agency's food labeling laws.

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<http://www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/foodlabelingnutrition/ucm053857.htm>

⁶⁹

<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/FoodLabelingGuide/default.htm>

The USDA promulgated new rules for the nutrition labeling of meat and poultry. These rules are discussed in Chapter 11 of the 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**⁷⁰ that examines the allergen labeling requirements in further detail.

Health Claims

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

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<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm059116.htm>

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

Structure/Function Claims

Structure/function claims describe the role of a nutrient in affecting normal structure or function in humans (for instance, “calcium helps build strong bones”). FDA pre-approval of such claims is not required, but the statements must be truthful and not misleading. For more information on these types of claims, see the FDA’s **Small Entity Compliance Guide on Structure/Function Claims**.⁷¹

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. New York Domestic Marketing Logos

Farmers in New York who seek to differentiate their products based on the locality of the products may be interested the Pride of New York Program.

Pride of New York

According to the **Pride of New York website**,⁷² the purpose of this program is to promote and support the selling of agricultural products grown in New York State and food products processed in New York State. Farmers, processors, retailers, distributors, restaurants and related culinary and support associations are amongst the members of the program.



⁷¹ Available at

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

⁷² http://www.agriculture.ny.gov/AP/PrideOfNY/pride_index.html

C. Internet Marketing

Many small businesses consider an Internet presence to be an essential part of their business strategy. The Internet and other forms of electronic communication (email or social networking sites such as Facebook) can help direct farm businesses sell to customers who would otherwise be unable to visit the retail operation due to distance, time, or other factors. USDA's Agriculture and Marketing Service (AMS) has published an informative brochure, **How To Direct-Market Farm Products on the Internet**,⁷³ 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 **New York MarketMaker**.⁷⁴ This directory helps 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 possible - preferably overnight. The USDA advises consumers to make sure that the food temperature is below 40 degrees Fahrenheit when it arrives. The USDA also provides a helpful **guide of safe handling times**⁷⁵ 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.

⁷³ Available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3101222>

⁷⁴ <http://ny.marketmaker.uiuc.edu/>

⁷⁵ 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/>

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

Protecting Customers' Personal Information

If a business allows consumers to enter personal information into its website, the FTC requires that the business have a plan to safeguard that information. There are no specific requirements that a business information security plan must follow. Adequate safeguards depend on various factors, such as the size and nature of the business and the amount and type of information collected on the Internet. The FTC maintains a **website**⁷⁶ to assist businesses in complying with consumer protection requirements.

Email Marketing

Emailing a weekly, monthly or annual newsletter avoids the cost and hassle of printing and sending documents via mail. Short email updates concerning revised hours of operation or seasonality may be a convenient way to communicate with customers. All commercial email from a business to a consumer is regulated by the FTC's CAN-SPAM Act (15 U.S.C. § 7701 et seq.). When sending commercial emails, the "from" and "to" lines and routing information must be accurate and identify who initiated the email, and may not contain deceptive subject lines. The email must give the recipient an opt-out method if they do not wish to receive any more commercial emails from the business. The email must also be identified as an advertisement and include the sender's valid physical postal address. As a general rule, emails concerning an agreed-upon business transaction or updating the customer on that business relationship are allowed under the Act. Violations of this Act can result in significant fines.

Taxation of Internet Sales

To the extent Internet sales are allowed, determining the taxes owed can be complex. For the most part, New York direct farm businesses will need to collect state and local sales taxes if the product is delivered to a New York address. The local tax rate to be applied depends upon where the order is accepted. A U.S. Supreme Court decision prohibits states from requiring out-of-state retailers to collect and remit the sales tax for the state where the product is

⁷⁶ <http://business.ftc.gov/>

delivered if the retailer has no physical presence in the state (*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). Instead, it is the responsibility of consumers within the state to report and remit the taxes they owe in their own state (in that case, the consumer becomes subject to their state's use tax law).⁷⁷ Nolo maintains a **helpful website**⁷⁸ for those who wish to learn more about New York Internet sales tax rules.

D. Signage

City and County Signage Requirements

Farmers who operate farm-direct-to-consumer businesses such as U-pick operations and produce stands may wish to create signs directing consumers to their place of business. For the most part, New York law delegates the power to regulate commercial signage to local government authorities (e.g., cities, townships, and municipalities), which vary from location to location. In New York City, for example, the New York City Buildings Department Sign Enforcement Unit regulates outdoor signage pursuant to the regulations outlined in the New York City Construction Codes and the New York City Zoning Resolution. In New York City, advertising signs are forbidden in residential districts and most commercial districts and, according to New York City Construction Code Section 3307.1.1, advertising signs are not permitted on construction fences, scaffolds and sidewalk sheds. Those who plan to advertise their business outdoors must register as Outdoor Advertising Companies; the New York City Building Department maintains a **website**⁷⁹ detailing the Outdoor Advertising Registration Program.

Most municipalities regulate signs and billboards in some manner and a sign permit is likely required; some municipalities may even regulate on-premises business signs. For that reason, farm business owners should be sure to check applicable signage regulations before erecting any sign.

The New York Highway Law contains general regulations regarding advertising signs, such as the location and size of the signs (N.Y. HAY. Law 4-86 and 88).

Business owners should examine the sign code of the city or county in which the business is located prior to putting up signs to advertise a business, and to contact an attorney for additional guidance if necessary. In any case, a city or county sign code that prohibits off-premises directional signs might create difficulty for businesses in rural or isolated areas away from main highways. As a result, the New York State Department of Transportation offers the Tourist Oriented Directional (TOD) Signs Program (17 NYCRR 17-IV-C-150.1 *et seq.*). The TOD Signs Program allows qualified businesses, which are located within five miles of the highway

⁷⁷ http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/use_tax_for_individuals.htm

⁷⁸ <http://www.nolo.com/legal-encyclopedia/new-york-internet-sales-tax.html>

⁷⁹ http://www.nyc.gov/html/dob/html/safety/signs_outdoor.shtml

to erect and maintain a sign of either standard (24 inches x 15 inches) or intermediate (36 inches x 24 inches) size directing tourists to their businesses. There are numerous requirements for participation in the TOD Signs Program and those interested should visit the Department of Transportation **website**.⁸⁰

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 or 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. This is known as "trade dress." By contrast, trade names are used to identify a person's *business or vocation*. While there may be some overlap between trade names and trademarks, if a name is used only as a trade name it may not be registered with the USPTO. Courts have held, however, that a trade name may have trademark protection if the business adopts a stylized font and other design features that would set the name apart from regular text.

Registration of Trademarks and Trade Names

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

⁸⁰ <https://www.dot.ny.gov/programs/nys-signs/tod>

federal registration symbol, ®, may only be used after a mark is registered with the USPTO (not while the application is pending).

Trademark registration is available at both the state and federal level. To be valid, the trademark must appear on the goods, their container, or on the displays associated with the goods. Federal registration of a trademark is done through the United States Patent and Trademark Office (USPTO). Federal registration can be costly: \$275-\$325 per mark per class of product (for instance, a sheep farmer wishing to trademark both her wool yarn and artisan cheese would have to file two applications because yarns and cheeses are in different classes). The USPTO also recommends hiring an attorney who is familiar with trademark law, because applicants are expected to comply with all procedural and substantive rules. Despite its cost and complexity, federal registration has several benefits. First, it allows the trademark owner to bring suit in federal court (in addition to state court) and to register the trademark with the United States Customs and Border Protection (CBP) in order to stop the importation of infringing goods into the United States. Second, federal registration protects and ensures the legitimacy of the trademark throughout the country. For more information, including a link to the USPTO's searchable trademark database, visit the **USPTO's trademark website**.⁸¹

State registration is less expensive and cumbersome than the federal system, but it provides protection only within New York. To register a New York trademark, complete an **Original Application to Register a Trademark**⁸² with the New York State Department of State, Division of Corporations, State Records and Uniform Commercial Code. There is currently a \$50 filing fee for each registration.

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

⁸¹ <http://www.uspto.gov/trademarks/index.jsp>

⁸² <http://www.dos.ny.gov/forms/corporations/0241-f-l-a.pdf>

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

B. Patents

A patent grants the inventor the right to exclude others from making, using, or selling a particular invention in the United States or 'importing' the invention into the United States for a limited period, generally 20 years. In the United States, a patent is issued by the USPTO. To obtain a patent, an invention must be *new* - meaning that it was not known or used by others in the United States or "patented or described in a printed publication in a foreign country" - and it cannot be *obvious*. There are different kinds of patents, but the most common farm-related ones are plant patents and patents on genetically modified plants. Plant patents are also available to someone who has invented or discovered and asexually reproduced a distinct and new variety 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**.⁸³

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

⁸³ <http://www.uspto.gov/web/offices/pac/doc/general/index.html#patent>

operation. A copyright does not protect actual ideas or methods, but instead gives the owner certain exclusive rights to the way the copyrighted work is *used*. For example, in many circumstances a copyright owner has the exclusive right to reproduce the work, to make derivative works, and to display the work publicly. The owner also has the exclusive right to authorize others to do the same. Pictures of growing crops or a farmers' market used on the direct farm business website or on promotional material would qualify for copyright protection. On the other hand, unpermitted use of another's pictures (perhaps copied from the Internet) could constitute infringement upon the copyrights of another.

A work does not have to be published or even registered with the Copyright Office to gain protection. Copyrights attach once a work is "created" - that is, once it has been fixed in a tangible medium of expression such as a copy or recording. Even so, registration is important for providing a public record of the copyright claim. Registration also provides significant advantages regarding the enforcement of rights in courts and with Customs and Border Protection. Other information on copyrights, including a searchable database of registrations and up-to-date fee information can be found at the United States Copyright Office's **website**.⁸⁴ 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. Unlike other forms of intellectual property, there is no federal regulation of trade secrets. Although many states have now adopted statutes modeled after the Uniform Trade Secrets Act, New York has not done so. Instead, New York relies on common law to regulate trade secrets. According to New York courts, "a trade secret is generally defined as a formula, process, device, or compilation of information used in one's business which confers a competitive advantage of those in similar businesses who do not know or use it" and "[a]n essential requisite to legal protection against misappropriation of [trade secrets] is the element of secrecy" (*Delta Filter Corp. v. Morin*, 108 A.D.2d 991, 992 (N.Y. 1985)). New York courts rely heavily on the original Restatement of Torts and define secrecy in two ways: "(1) as substantial exclusivity of knowledge of the formula process, device or compilation of information" or "(2) as the employment of precautionary measures to preserve such exclusive knowledge by limiting legitimate access by others" (*Id.*).

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

⁸⁴ <http://www.copyright.gov/>

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

IV. WEIGHTS AND MEASURES

The NYDOAM Bureau of Weights and Measures regulates the weights and measurements pertaining to commercial transactions in the state of New York. The Bureau seeks to ensure accurate measurement and delivery of wholesale and retail commodities by establishing standards for how commodities can be measured or weighed and by certifying the accuracy of scales. Direct farm businesses must make sure that any instruments and devices used in commerce for weighing and measuring comply with the provisions of Article 16 of the Agriculture and Markets Law (N.Y. AGM. Law 16-182). It is a misdemeanor to sell, offer for sale, or expose for sale any item which has been falsely labeled (N.Y. AGM Law 16-194).

If an individual is selling a carcass, side, quarter or primal source of meat which individually has a gross or hanging weight of fifty pounds or more, the seller must provide buyers with the name and address of the seller, the estimate gross or hanging weight of the order, the USDA quality grade of the meat, the estimated total price of the order, the estimated cutting loss on the order (which the buyer may keep), a breakdown of each cut of meat to be derived from the order, the price per pound of the order, and the additional cost of cutting, wrapping and freezing (N.Y. AGM. Law 16-190-B).

If the method of sale for a particular commodity is not specifically detailed in Article 16 of the Agriculture and Markets Law, the commodity must be sold or offered for sale by the net weight, standard measure, or numerical count pursuant to the Commissioner's standards (N.Y. AGM. Law 16-189).

New York has adopted the weights and measures furnished by the federal government as its own (N.Y. AGM. Law 17-178). The **Handbook 44: Specification, Tolerances, and Other Technical Requirements for Weighing & Measuring Devices**⁸⁵ provides extensive information on the weights and measures requirements. For example, the standard weight per bushel for agriculture commodities varies depending on the item.

Pre-packaged commodities must identify on the outside of the package (1) the commodity in the package, (2) the net quantity of the contents in terms of weight, measure or count, and (3) the name and the place of business of the source of the commodity if sold elsewhere than on the premises where it was packed. This and much more information can be found in **Handbook**

⁸⁵ <http://www.nist.gov/pml/wmd/pubs/upload/HB44-09-Combined.pdf>

130: Uniform Laws and Regulations in the Areas of Legal Metrology and Engine Fuel Quality⁸⁶ under the section entitled Uniform Weights and Measures Law. These standards promulgated by the National Institute of Standards and Technology have been adopted by New York (N.Y. AGM. Law 17-178).

Handbook 130 also contains information on commercial weighing and measuring devices. Commercial weighing and measuring devices must be marked with the name of the manufacturer and the serial number and must have been issued a Certificate of Conformance by the National Conference on Weights and Measures (NCWM), which signifies that the device complies with the requirements of the National Institute of Standards and Technology's Handbooks. To find out if a device is certified by the NCWM, enter the requested criteria into the **NTEP Certificate Database Search**.⁸⁷

Inspection frequency varies depending upon what is to be inspected (1 NYCRR 220.5). Municipal directors of weights and measures will inspect the following at least once per year: weighing devices and accessories, petroleum dispensing devices and accessories, volumetric measures (which "shall be recalibrated at least once in every five years except for bulk milk holding tanks which shall be calibrated upon installation and shall be recalibrated upon request by either the producer or receiver or whenever the weights and measures official deems it necessary."), linear measures and linear measuring devices, and "all devices where time is a basis for charge." Further detail is available in the **Administrative and General Requirements**.⁸⁸

⁸⁶ <http://www.nist.gov/pml/wmd/pubs/upload/HB130-2009-PDF-FullDoc.pdf>

⁸⁷ <http://www.ncwm.net/certificates>

⁸⁸ <http://www.agriculture.ny.gov/WM/RegPart220.pdf>

Checklist

Have you...

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

KEY CONTACT INFORMATION

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

Ph: (202) 720-8317

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

Ph: (800) 786-9199

U.S. Copyright Office (general questions)

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

NYDOAM Bureau of Weights and Measures

Ph: (518) 457-3146

CHAPTER 4: TAXATION

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

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

I. REQUIREMENTS AT SET-UP

A. Federal Registration Requirements

A direct farm business may need to obtain a federal employer identification number (EIN) to identify the business entity. If the answer to any of the following questions is yes,⁸⁹ the operation needs an EIN:

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

⁸⁹ These questions are also on the IRS's website: <http://www.irs.gov/businesses/small/article/0,,id=97872,00.html>

- Farmers' cooperatives
- Plan administrators

B. New York Registration Requirements

Individuals interested in starting a business in the state of New York should read the New York State Department of Taxation and Finance **Guide to Sales Tax in New York State**.⁹⁰ According to the Guide, those selling tangible personal property or services on which sales tax must be collected must register with the New York State Tax Department. Once registered, the Tax Department will issue a Certificate of Authority which must be prominently displayed at your place of business. If you engage in business without obtaining a valid Certificate of Authority, you will be subject to a substantial penalty.

If a business hires any employees, it must obtain a **federal employer identification number**⁹¹ (EIN) from the Internal Revenue Service (IRS) and then **register with the New York State Department of Labor**.⁹² Individuals who plan to hire employees to assist in the operation of their business should view the information on **hiring employees**⁹³ on the New York State Department of Taxation and Finance website in order to learn about the process of obtaining a federal employer identification number (EIN), registering with the state of New York, reporting new hires, withholding taxes, paying unemployment insurance, and paying workers compensation or disability insurance. The Labor and Employment chapter of this Guide covers labor and employment requirements in greater detail.

II. TAXATION OF BUSINESS INCOME

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

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

An excellent place to start any research is *Publication 225: Farmer's Tax Guide*. The guide, published by the IRS, is available through the IRS **Agricultural Tax Center website**.⁹⁴ 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

⁹⁰ <http://www.tax.ny.gov/pdf/publications/sales/pub750.pdf>

⁹¹ <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Apply-for-an-Employer-Identification-Number-%28EIN%29-Online>

⁹² <http://www.labor.state.ny.us/ui/employerinfo/registering-for-unemployment-insurance.shtm>

⁹³ <http://www.tax.ny.gov/bus/doingbus/hire.htm>

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

sales, casualties/theft/condemnation, self-employment tax, employment tax, excise tax, estimated taxes, filing a return, and where to procure 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.

ADDITIONAL RESOURCES: Federal Taxation

Partnerships

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

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

Corporations

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

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

Investment Income

Taxation of investment income is covered in IRS Publication 550.

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

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**.⁹⁵

Sole Proprietorships

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

Partnerships

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

partnership losses pass through to individuals and are deductible by the individual up to the partner's basis⁹⁶ in the partnership.

Corporations

⁹⁵ <http://www.irs.gov/businesses/small/article/0,,id=154770,00.html>

⁹⁶ Basis, in simple terms, is the value of any capital and property the partner contributed the partnership, subject to adjustment based on various factors.

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

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

S corporations

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

Limited Liability Companies (LLC)

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

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

Cooperatives

Subchapter T of the Internal Revenue Code governs federal taxation of cooperatives. A cooperative, as a non-profit, typically is not taxed, as any earnings pass through to individual patrons of the cooperative. The cooperative reports profits on Form 1120-C and patrons report income on form 1099-patr. For a primer on the federal taxation of cooperatives, the USDA Rural Development maintains a **website**⁹⁷ that contains many publications related to the taxation of cooperatives, including *Cooperative Information Report 23, The Tax Treatment of*

⁹⁷ <http://www.rurdev.usda.gov/rbs/pub/legal.htm>

Cooperatives, published by the USDA Rural Development program. *IRS Publication 225: Farm Income* also touches on cooperative reporting of taxes.

B. State Taxation

In addition to federal income taxes, the direct farm business is subject to New York business income taxes. Various articles of the New York Tax Code will govern, dependent upon the structure of the direct farm business. The New York State Department of Taxation and Finance has published a **Summary of Tax Provisions in SFY 2013-14 Budget**⁹⁸ that contains detailed information for those interested in learning more about state taxation in New York.

Corporations

The New York Tax Code governs corporate taxation (N.Y. TAX. Law 9-180 *et seq.*).

The New York State Department of Taxation and Finance has a **corporate tax forms website**⁹⁹, which provides the necessary forms, filing dates, and other pertinent information. With the exception of S corporations, all general business corporations must file franchise tax returns using either Form CT-3 or CT-4. Corporations that elect to be treated as an S corporation by filing Form CT-6 must file Form CT-3-S.¹⁰⁰

The New York State Department of Taxation and Finance maintains a **website**¹⁰¹ which provides a listing of the various forms necessary for tax purposes, as well as instructions for completing those forms. Most corporations are required to complete Form CT-400,¹⁰² which can be completed via paper or through e-filing. The return and payment dates vary depending upon when your fiscal year ends; these dates are listed at the bottom of the instructions for CT-400.¹⁰³

S corporations are treated differently in New York State. The New York State Department of Taxation and Finance maintains a **website**¹⁰⁴ providing the forms and instructions specific to S Corporations.

Partnerships

In both federal and New York law, limited partnerships and limited liability companies are treated as partnerships for income tax purposes.

⁹⁸ http://www.tax.ny.gov/pdf/stats/sumprovisions/summary_of_2013_14_tax_provisions.pdf

⁹⁹ http://www.tax.ny.gov/forms/corp_cur_forms.htm

¹⁰⁰ http://www.tax.ny.gov/pdf/2012/corp/ct3_4i_2012.pdf

¹⁰¹ http://www.tax.ny.gov/forms/current_estimated_tax.htm

¹⁰² <http://www.tax.ny.gov/bus/ads/webct400.htm>

¹⁰³ http://www.tax.ny.gov/pdf/current_forms/ct/ct400i.pdf

¹⁰⁴ http://www.tax.ny.gov/forms/corp_s_forms.htm

Because a partnership's income is passed through to its partners, a partnership does not pay income tax directly on its income, instead the tax is reported as income on each partner's income tax or franchise tax return based on their pro rata share. The New York Department of Taxation and Finance has a **Partnerships website**,¹⁰⁵ which provides a description of the forms necessary for partnerships as well as the due dates for those forms; partnerships must file Form IT-204, returns are due by April 15, and fiscal-year returns are due by the 15th day of the fourth month after the end of the tax year. The **Partnership and LLC/LLP tax forms**¹⁰⁶ required by the state are available online.

Cooperatives

The New York Tax Code also governs the taxing of cooperatives (N.Y. TAX. Law 9-185 *et seq.*). The law stipulates that farmers, fruit growers and other similar agricultural cooperations organized and operated under the cooperative corporations law must pay an annual tax calculated on the basis of its capital stock within the state during the preceding year. Though the amount of the tax may vary dependent upon gross assets, every cooperative corporation must pay at least ten dollars in total, and not less than five dollars per share of capital stock.

III. EMPLOYMENT AND SELF EMPLOYMENT TAXES

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

A. If the Direct Farm Business Has Employees

Employers are responsible for withholding and submitting federal employment taxes on behalf of their employees. Federal employment taxes to be withheld include the Federal Income Tax and Social Security/Medicare (FICA) taxes. Employers must also withhold New York income tax (N.Y. ADC. Law 11-1771).

A direct farm business must register with both the IRS and the New York State Department of Labor if it plans to hire employees. Additionally, within twenty days of an employee's hiring

¹⁰⁵ <http://www.tax.ny.gov/pit/efile/partneridx.htm>

¹⁰⁶ http://www.tax.ny.gov/forms/partner_llc_llp_cur_forms.htm

date, the business must report information about each of the newly-hired employees to the New York State Tax Department (N.Y. TAX. Law 8-171-H). Each report of new hires must contain the name, address, and social security number of each newly hired or re-hired employee working within the state and must be submitted on a W-4 form or other equivalent form (N.Y. TAX. Law 8-171-H). Information pertaining to the reporting of new employees can be found on the New York State Department of Taxation and Finance **New Hire Homepage**.¹⁰⁷

Employee Income Taxes

Withholding federal income taxes from employees entails obtaining a W-4 form from each employee that indicates what withholding allowances they qualify for and what class (e.g., single or married) they fall into. The employer uses this information to calculate the employee's tax rate using the IRS's withholding tables, which are available in *IRS Publication 15-T*. The IRS bases withholdings on base pay, as well as supplemental wages (such as overtime pay) and fringe benefits (for instance, providing farm employees with fresh produce or other farm products to satisfy their weekly grocery needs). The IRS excludes some fringe benefits, such as the *de minimis* exception that covers small benefits for which it would be inconvenient and 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. The New York State Department of Taxation and Finance maintains a **website**¹⁰⁸ discussing the intricacies of withholding tax, including who must withhold personal income tax, who you must withhold tax for, the income subject to withholding, the amount to deduct and withhold, and information regarding same-sex married employees. Form IT-2014¹⁰⁹ is to be completed by employees and provided to the employer and instructs the employer on how much tax to withhold from the employee's pay. In order to claim exemption from withholding, Form IT-2014-E¹¹⁰ must be completed.

Social Security and Medicare Taxes

Social Security and Medicare taxes pay for employees' benefits upon retirement. These taxes are known collectively as Federal Insurance Contributions Act taxes, or "FICA" taxes. Social Security and Medicare taxes have different rates, and the Social Security Tax has a wage base

¹⁰⁷ <https://www.nynewhire.com/index.jsp>

¹⁰⁸ <http://www.tax.ny.gov/bus/wt/wtidx.htm>

¹⁰⁹ http://www.tax.ny.gov/pdf/current_forms/wt/it2104_fill_in.pdf

¹¹⁰ http://www.tax.ny.gov/pdf/current_forms/wt/it2104e_fill_in.pdf

cap--a maximum limit on the wages subject to the Social Security tax. The employee pays the tax from his/her wages, and the employer makes a matching payment. Form 943 is used to file income taxes and FICA taxes withheld for farm workers. Employers deposit these taxes on a weekly or monthly basis, depending on the total taxes reported for a two year lookback period (e.g., the lookback period for 2013 extends to 2011).

Unemployment Insurance Taxes

Almost every employer pays unemployment taxes. Direct farm business owners who are considering hiring employees within the state of New York should read the New York State Department of Taxation and Finance **Employer's Guide to Unemployment Insurance, Wage Reporting, and Withholding Tax**.¹¹¹ Although an employer must pay both federal and state unemployment insurance taxes, paying the New York unemployment taxes may allow an employer to receive credit towards some of the federal unemployment tax. The Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.), the New York Labor Law (N.Y. LAB. Law 18-5-564), and the New York State Department of Labor govern whether agricultural operations must pay an unemployment insurance tax on cash wages paid to employees. According to the New York State Department of Labor, contributions to unemployment insurance are based on the first \$8,5000 of compensation paid to each employee in the calendar year.¹¹² Salary, tips, cash wages, vacation pay, commissions, the value of meals and lodging, bonuses and other types of non-cash compensation are all taken into account when calculating the employee's remuneration.

The New York State Department of Labor has published a brief guide to **Agricultural Labor as Defined in Section 511, Subdivision 6 of the New York State Unemployment Insurance Law**.¹¹³ According to the Department of Labor, "[e]mployers of agricultural workers become liable for unemployment insurance taxes . . . [if] (1) at the beginning of any calendar year in which they employ ten or more farm workers on each of 20 days, each day being in a different week, during a calendary year or the preceding year, or (2) at the beginning of any calendar quarter in which they pay cash remuneration of \$20,000 or more to farm workers, or (3) on the first day on which they pay remuneration to farm workers in this State if the employer is subject to the Federal Unemployment Act."

The federal tax is paid using Form 940, with deposits generally required quarterly. Prior to July 1, 2011, the tax rate was 6.2%, but on July 1, 2011, the tax rate decreased to 6.0% of the first \$7,000 paid to each employee, but there is a credit of up to 5.4% for paying state unemployment taxes. *Publication 51: Agricultural Employer's Tax Guide* describes federal unemployment taxes.

¹¹¹ <http://www.tax.ny.gov/pdf/publications/withholding/nys50.pdf>

¹¹² <http://www.labor.ny.gov/ui/employerinfo/quarterly-reporting.shtm>

¹¹³ <http://www.labor.ny.gov/formsdocs/ui/ia318.11.pdf>

The New York State Department of Taxation and Finance has published NYS-50, the Employer's Guide to Unemployment Insurance, Wage Reporting, and Withholding Tax.¹¹⁴ According to the Guide, agricultural employers are subject to the New York Unemployment Insurance Law as of the first day of the calendar year in which they pay cash wages of \$20,000 or more to agricultural laborers, as of the first day of the calendar year in which they employ 10 or more agricultural laborers who work at least one day per week for 20 different weeks that year or the preceding year, or as of the first day of the calendar quarter in which they pay any wages in New York to agricultural laborers if the employer is liable under the Federal Unemployment Insurance Tax Act (FUTA). An employer is liable under the FUTA for any calendar year in which they pay wages of \$20,000 or more to agricultural laborers in any calendar quarter of that year or the preceding year, or if they employ 10 or more agricultural laborers for at least one day per week for 20 different weeks that year or the preceding year.



B. Farmers Who Are Self-Employed

Many farmers are self-employed. The self-employment tax is a Social Security and Medicare tax paid by persons who work for themselves. Farmers carrying on the direct farm business as a sole proprietor or member of a partnership, or who are otherwise in business for themselves, are "self-employed" and must pay self-employment tax if their net earnings are \$400 or more. The self-employment tax rate for 2013 is 15.3% (12.4% for Social Security and 2.9% for Medicare) on the first \$113,700, and 2.9% on any additional income. Income subject to the Social Security Tax is capped, and 50% of the self-employment tax due is deductible from total income on Form 1040. Individuals must report self-employment taxes on Schedule SE. The IRS's *Farmer's Tax Guide*¹¹⁵ provides additional details regarding the self-employment tax rules.

IV. SALES AND SERVICES TAXES

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

¹¹⁴ <http://www.tax.ny.gov/pdf/publications/withholding/nys50.pdf>

¹¹⁵ Available online at <http://www.irs.gov/pub/irs-pdf/p225.pdf>

A. Sales Tax

Sales tax is levied on a business's receipts from the sale of tangible personal property and services to purchasers for use or consumption. Although the sellers owe the sales tax to the state, they reimburse themselves by collecting the sales tax from the consumer. According to the New York State Department of Taxation and Finance **Recordkeeping Requirements for Sales Tax Vendors (Tax Bulletin ST-770)**,¹¹⁶ if you register for purposes of New York's sales tax, you are a trustee of the state and therefore have the responsibility to collect sales tax from customers and remit that tax with your sales tax return. Business owners should keep detailed records as a sales tax return must show total sales, taxable sales, purchases by the business subject to tax on which no tax was paid to the seller, credits (if any), sales and use taxes due for each locality, and any other special taxes due. These records must be dated and business owners must keep a copy of every sales slip, invoice, receipt, contract, statement or other memorandum of sale, cash register tape and any other original sales document. The consequences of inadequate records are severe and include audits, penalties, criminal sanctions and the revocation of your Certificate of Authority.

Article 28 of the New York State Tax Law and Title 20 of the New York Codes, Rules and Regulations govern sales taxation in New York State (N.Y. TAX. Law 28 and 20 NYCRR I-A-1 *et seq.*).

To determine the applicable State and local sales tax rate(s), business owners should use the New York State Department of Taxation and Finance **Sales Tax Jurisdiction and Rate Lookup**.¹¹⁷ Additionally, business owners should view the New York Department of Taxation and Finance **Sales tax guidances**¹¹⁸ webpage.

Licensing

The New York State Department of Taxation and Finance notes that “[e]very person who sells taxable personal property or taxable services (even if you make sales from your home) must register with the Tax Department before beginning business.” The Department of Taxation and Finance has published a **Do I Need to Register for Sales Tax**¹¹⁹ guide. For information on the registration process, see the Department of Taxation and Finance **How to Register for New York State Sales Tax**¹²⁰ guide.

According to the New York State Department Taxation and Finance **Guide to Sales Tax in New York State**¹²¹, “[a] farmer is not required to register for sales tax purposes if the only sales the

¹¹⁶ http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/record-keeping_requirements_for_sales_tax_vendors.htm

¹¹⁷ <http://www8.tax.ny.gov/STLR/stlrHome>

¹¹⁸ http://www.tax.ny.gov/pubs_and_bulls/guidances/sales_g.htm

¹¹⁹ http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/do_i_need_to_register_for_sales_tax.htm

¹²⁰ http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/how_to_register_for_nys_sales_tax.htm

¹²¹ <http://www.tax.ny.gov/pdf/publications/sales/pub750.pdf>

farmer makes are sales of food and food products that are exempt from tax However, if a farmer sells taxable tangible personal property such as hay, livestock, plants, shrubs, trees, homemade crafts, or items such as candy and other confections, or sells food or drink for consumption on the premises where sold, then the farmer must register . . . and collect sales tax on sales of taxable tangible personal property and services, or taxable food and drink.”

Who Pays?

The New York State Department specifies that sales tax is applied to tangible personal property (unless specifically exempt), gas, electricity, refrigeration and steam, telephone service, food and beverages sold by restaurants, taverns, and caterers, hotel occupancy and certain admission charges and dues.¹²² Direct farm business owners should be aware that tangible personal property, services, and transactions that are subject to sales tax include, but are certainly not limited to, candy or confections, soda and beer, cigarettes and tobacco products, food and supplies for animals, trees, shrubs, seeds, machinery and equipment, parts, tools, and supplies, as well as the maintaining, installing, servicing and repairing of tangible personal property.

There are many exemptions that are relevant to the direct farm business owner. The Department of Taxation and Finance provides a **Quick Reference Guide for Taxable and Exempt Property and Services**,¹²³ which includes a listing of the exemptions. Some of the relevant exemptions are for property or services used in farming or commercial horse boarding (N.Y. TAX. Law 1115(a)(6) and 1115(c)(2)), milk crates purchased by a dairy farmer or New York State licensed milk distributor (N.Y. Tax. Law 1115(a)(19-a)), and certain trucks, tractors, and tractor-trailers (N.Y. TAX. Law 1115(a)(22) and (26)). For some of these exemptions, such as that for milk crates purchased by a dairy farmer or New York state licensed milk distributor, an exemption document is required.

In addition to the above-referenced exemptions, all sales to New York State, its political subdivisions, and to the federal government are also exempt from sales tax.

Computing and Paying the Sales Tax

In New York State, the combined sales and use tax rate equals the state rate, which is currently 4%, plus any local tax rate imposed by a city, county, or school district. For taxable sales made within the Metropolitan Commuter Transportation District, an additional sales tax rate of .375% applies. Because taxes vary by jurisdiction, it is important that business owners know that New York’s retail sales tax is a destination tax, meaning that the point of delivery or the point at which possession is transferred by the vendor to the purchaser determines the tax rate to be

¹²² <http://www.tax.ny.gov/bus/st/subject.htm>

¹²³

http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/quick_reference_guide_for_taxable_and_exempt_property_and_services.htm

collected. Sales delivered outside New York State are exempt from tax. The New York State Department of Taxation and Finance has a **website**¹²⁴ providing sales tax guidance that details the sales tax rates by local taxing jurisdiction.

Farmers should read **Tax Bulletin ST-283**,¹²⁵ which details the foods that are subject to sales tax and the foods that are exempt from sales tax unless sold under specific conditions. In general, food and food products sold by food stores are exempt from sales tax. Food that is heated, sold for consumption on premises, or has been prepared by the seller and is ready to be eaten (whether on or off premises) is taxable as are sandwiches, candy and confectionary products.

Taxes are filed either annually, quarterly, part-quarterly, or promptly depending upon total taxable sales. If, on your registration application, you indicate that you do not expect to pay or collect any sales or use tax and describe your major business activity as manufacturer or wholesaler, you will automatically be classified as an annual filer. All others are quarterly filers. These classifications are not static and may change depending upon the amount of your total sales or tax due.

The New York State Department of Taxation and Finance has published a guide on **Filing Requirements for Sales and Use Tax Returns**¹²⁶ that provides business owners with links to the necessary forms and schedules and filing periods. Business owners should take care to ensure that they file on time and in full as, if they fail to do so, they will be subject to a penalty of at least \$50, interest, and unable to claim a vendor collection credit. Even if no tax is due for the reporting period, tax returns must be filed or else a \$50 penalty will be imposed.

Tax on Lodging

Those interested in beginning an agrotourism operation with a bed and breakfast or guest ranch where customers stay on a farm and learn about the farm's operation should review the New York State Department of Taxation and Finance **Guide to Sales Tax for Hotel and Motel Operators**.¹²⁷ According to the guide, "[s]ales tax is imposed on the rent for every occupancy of a room or rooms in a *hotel* in New York State." New York law includes tourist cabins, bed and breakfasts, dude ranches, and other similar establishments within the definition of *hotel*. The applicable sales tax is determined by applying the combined state and local tax, including, where applicable, the .375% sales tax imposed in the Metropolitan Commuter Transportation District (MCTD), to the amount of rent charged for the room.

¹²⁴ http://www.tax.ny.gov/pubs_and_bulls/publications/sales/rates_by_local_jurisdiction.htm

¹²⁵ http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/food_sold_by_food_stores.htm

¹²⁶ http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/filing_requirements_for_sales_and_use_tax_returns.htm

¹²⁷ <http://www.tax.ny.gov/pdf/publications/sales/pub848.pdf>

V. EXCISE TAXES

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

A. Federal Fuel Excise Taxes

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

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

The IRS also exempts fuel used off-highway in a trade, business or income producing activity. This exemption does not apply to fuel used in a highway vehicle registered or required to be registered for use on public highways, including boats. Nontaxable uses in this category include fuels used in stationary machines such as generators, compressors, power saws and similar equipment; fuels used for cleaning purposes; and fuel for forklift trucks, bulldozers, and earthmovers. Some fuels that would not otherwise qualify for the farming exemption may qualify for this exemption - fuel used to boil sap into syrup, for example. A business can recoup excise taxes on fuel used off highway for business purposes either by claiming a credit (using Form 4136) or a refund. Taxpayers use Form 8849 and Schedule 1 (which details the federal excise tax rates) to claim a refund of excise taxes paid on fuel used off-highway for business purposes. Taxpayers that pay over \$750 in excise taxes in one quarter can

claim a refund at the end of a quarter rather than waiting until the end of the year. Claims not exceeding \$750 in one quarter can carry over to the next quarter, because the amount claimed on Schedule 1 must be at least \$750.

B. New York Fuel Excise Taxes

New York has both a **motor fuel excise tax**¹²⁸ and a **petroleum business tax**.¹²⁹ The motor fuel tax is imposed when diesel motor fuel is sold and used within New York State (N.Y. TAX. Law 12-A-282-A). The tax on diesel motor fuel is a combination of four cents per gallon upon sale or use (N.Y. TAX. Law 12-A-282-A), three cents per gallon upon sale or use within the state (N.Y. TAX. Law 12-A-282-B), and one cent per gallon upon the sale or use within the state (N.Y. TAX. Law 12-A-282-C), bringing the total to eight cents per gallon.

Direct farm business owners should be aware that full refunds of the motor fuel excise tax are provided for certain off-highway uses, such as farming, and that sales of non-highway diesel motor fuel and residual petroleum product for farming purposes are exempt from the petroleum business tax.

VI. PROPERTY TAXES

Direct farm businesses must pay local property taxes each year on real property owned by the business. If a farmer leases land from an owner who is otherwise exempt from paying property taxes (e.g., a governmental entity), the farmer must nonetheless pay property taxes on the rented land. The property tax varies by jurisdiction and is calculated by multiplying your property's taxable assessment by the tax rates for school districts, municipalities, counties and special districts.¹³⁰ The overall full-value tax rate per county is provided on the New York State Department of Taxation **website**¹³¹ and varies from 14.9 cents per \$1,000 of full value in Hamilton County to 48.8 cents per \$1,000 of full value in Allegany county. The New York State Department of Taxation and Finance maintains a **website** providing information about property taxes and assessments, including the tax rates by county, methods of tax assessment, and how to contest your assessment.¹³²

The legislature created the Agricultural Districts Law “to provide a locally-initiated mechanism for the protection and enhancement of New York state’s agricultural land as a viable segment of the local and state economies and as an economic and environmental resource of major importance” (N.Y. AGM. Law 25-AA-300). Farmers should be aware that Section 305 stipulates that individuals who own land within an agricultural district that is used for agricultural production may be eligible for a reduced property tax assessment. The New York State

¹²⁸ <http://www.tax.ny.gov/bus/gas/gasidx.htm>

¹²⁹ <http://www.tax.ny.gov/bus/petrol/ptidx.htm>

¹³⁰ <http://www.tax.ny.gov/pit/property/learn/proptaxcalc.htm>

¹³¹ http://www.tax.ny.gov/research/property/reports/fvtaxrates/overall_county_12.htm

¹³² <http://www.tax.ny.gov/pit/property/>

Department of Taxation and Finance has a website detailing the **agricultural assessment program**,¹³³ which provides an overview of the program, eligibility requirements, and necessary forms.

To be eligible for the agricultural assessment program, the land must total at least seven acres and for the past two years be used for the production of crops, livestock, or livestock products for sale. Additionally, the annual gross sales of agricultural products must average at least \$10,000 for the preceding two years. Farmers with less than seven acres may still qualify, but their average annual gross sales for the preceding two years must be at least \$50,000. Start-ups, too, may qualify if a farm of at least seven acres generated at least \$10,000 in sales in its first year of operation or if a farm of less than seven acres generated at least \$50,000 in sales in its first year of operation.

To apply, farmers must complete **Form RP-305**.¹³⁴ Farmers who qualify for an agricultural assessment should take advantage of the program as it allows for reduced property tax bills.¹³⁵

It should be noted, though, that the program “applies only to land and any posts, wires and trellises used to support vines or trees for the production of fruit on eligible land . . . [and] does not apply to farm buildings, residences, and other improvements.” Land of seven or more acres that was used for the preceding two years for the production for sale of crops, livestock, or livestock products is generally eligible according to the New York State Department of Taxation and Finance.¹³⁶ However, farm buildings may qualify for other exemptions. More information on farm building exemptions is available in the New York State Department of Taxation and Finance Office of Real Property Tax Services **Farm Building Exemptions Questions & Answers**¹³⁷ brochure.

In addition to the agricultural assessment program, farmers should also be aware of the farmers school tax credit,¹³⁸ which provides a refundable credit to farmers who have paid school district property taxes on qualified agricultural property. According to the **Form IT-217 instructions**,¹³⁹ “[f]arming includes the operation or management of livestock, dairy, poultry, fish, fruit, fur-bearing animal, and vegetable . . . farms. Farming also includes the operation or management of plantations, ranches, ranges, and orchards.” The farm must be for-profit (though it does not need to actually make a profit) to qualify, and those who farm for hobby or recreation do not qualify. Interested farmers must complete **Form CT-47**¹⁴⁰ or **Form IT-217**,¹⁴¹ depending upon

¹³³ http://www.tax.ny.gov/research/property/assess/valuation/ag_overview.htm

¹³⁴ http://www.tax.ny.gov/pdf/current_forms/orpts/rp305_fill_in.pdf

¹³⁵ http://www.tax.ny.gov/research/property/assess/valuation/ag_overview.htm

¹³⁶ http://www.tax.ny.gov/research/property/assess/valuation/ag_overview.htm

¹³⁷ <http://www.tax.ny.gov/pdf/publications/orpts/farmbuilding.pdf>

¹³⁸ http://www.tax.ny.gov/pit/credits/farmers_school_tax.htm

¹³⁹ http://www.tax.ny.gov/pdf/current_forms/it/it217i.pdf

¹⁴⁰ http://www.tax.ny.gov/pdf/current_forms/ct/ct47.pdf

¹⁴¹ http://www.tax.ny.gov/pdf/current_forms/it/it217_fill_in.pdf

which is applicable. Form CT-47 applies to corporations whereas Form IT-217 applies to individuals.

Agricultural and horticultural buildings and structures may qualify for a tax exemption pursuant to Real Property Tax Law (N.Y. RPT. Law 4-2-483). According to form **RP-483-Ins**,¹⁴² “[t]he exemption applies to newly constructed or reconstructed structures or buildings (or portions thereof) used directly and exclusively in the raising and production for sale of agricultural and horticultural commodities including structures or buildings used for the storage of honey bees.” Only buildings and structures that are “essential to the operation of lands consisting of not less than five acres actually used in an agricultural or horticultural operation carried on for profit” are eligible for this exemption. In addition, buildings used for processing, retail merchandising, and residency of the farm owner do not qualify for the exemption.

Farm silos, farm feed grain storage bins, commodity sheds, bulk milk tanks and coolers, and manure storage and handling facilities may qualify to a tax exemption pursuant to the Real Property Tax Law (N.Y. RPT. Law 4-2-483-A). So long as the aforementioned structures are permanently affixed to agricultural land, they may qualify for a tax exemption.

Historic barns (those which were at least partially constructed before 1936 and were originally designed and used for storing farm equipment or agricultural products, or for housing livestock) that are reconstructed or rehabilitated may qualify for a tax exemption pursuant to Real Property Tax Law (N.Y. RPT. Law 4-2-483-B). To qualify for this exemption, it must be the case that the governing board of a county, city, town or village has passed a resolution to permit the exemption and it must also be the case that the reconstruction or rehabilitation was commenced subsequent to the effective date of the municipality’s resolution to permit the exemption. If the barn is used for residential purposes or has been reconstructed or rehabilitated in a manner that materially altered the historic appearance of the barn, no exemption will be granted for the expenses.

The Real Property Tax Law also provides an exemption for temporary greenhouses (N.Y. RPT. Law 4-2-483-C). To qualify for the temporary greenhouse exemption, according to the New York State Department of Taxation & Finance Office of Real Property Tax Services,¹⁴³ “the temporary greenhouse must be specialized agricultural equipment having a framework covered with demountable polyethylene or polypropylene material or materials of a polyethylene or polypropylene nature. The equipment must be specially designed and constructed and used for agricultural production. The temporary greenhouse may include, but is not limited to, the use of heating devices, water and electrical utilities and embedded supporting poles.” If a farmer

¹⁴² http://www.tax.ny.gov/pdf/current_forms/orpts/rp483ins.pdf

¹⁴³ http://www.tax.ny.gov/pdf/current_forms/orpts/rp483cins.pdf

files for and qualifies for this exemption, the temporary greenhouse will be fully exempted from taxation, special ad valorem levies and special assessments.

Lastly, the Real Property Tax Law also provides an exemption for farm or food processing labor camps or commissaries, as defined by the law as “structures used to improve the health, living and working conditions for farm laborers” (N.Y. RPT. Law 4-2-483-D). So long as that structure is in compliance with all applicable standards set by the Departments of Health and Labor and the State Building Code Commission, that structure may be exempt from taxation, special ad valorem levies and special assessments.

Your **local assessor or county director of real property tax services** is a resource that farmers should turn to with further questions. The New York State Office of Real Property Tax Services has a **website**¹⁴⁴ that provides a searchable index to help interested individuals find their local assessor or county director of real property tax services. The New York State Department of Taxation and Finance also has an informational **website**¹⁴⁵ providing further details, such as the agricultural assessment values, forms, and more.

¹⁴⁴ <http://orpts.tax.ny.gov/MuniPro/>

¹⁴⁵ <http://www.tax.ny.gov/research/property/assess/valuation/agindex.htm>

VI. CHECKLIST

Have you...?

- Obtained an Employer Identification Number from the Internal Revenue Service?
- Obtained the necessary forms and established proper taxing procedures for your business entity?
- Obtained the appropriate forms and established good record keeping procedures for:
 - income, Medicare and social security tax withholdings?
 - filed with the state for unemployment tax registration?
 - collection and remission?
 - fuel excise tax reimbursements and credits?
- Looked up your land's assessed value and calculated your current property taxes and how changed land uses could alter the tax value? Or contacted the Department of Revenue for assistance in calculating your agricultural land's value?

KEY CONTACT INFORMATION

U.S. Internal Revenue Service (general help)

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

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

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

New York State Department of Taxation and Finance

Personal Income Tax Information Center: (518) 457-5181

Sales Tax Information Center: (518) 485-2889

Property Tax Information Center: (518) 591-5232

<http://www.tax.ny.gov/help/contact/telephone.htm>

CHAPTER 5: LABOR AND EMPLOYMENT

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

I. FAIR LABOR STANDARDS

A. *The Fair Labor Standards Act*

The Fair Labor Standards Act (FLSA) (29 U.S.C. Chapter 8) is the federal law that establishes minimum wages (currently \$7.25, but see New York below) and maximum hours worked per week (40 hours, over which amount employees must be paid time and a half), and prohibits employment discrimination and child labor (29 U.S.C. §§ 206; 207; 208; 212, respectively).

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

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

performing work on another farmer's products, the employer should consult an attorney or contact the local U.S. Department of Labor's Wages & Hours division before relying on the agriculture exemption to the FLSA. Contact information is available on the Department of Labor **website**.¹⁴⁶ For more general information, the U.S. Department of Labor maintains an agriculturally oriented **compliance webpage**.¹⁴⁷

Minimum Wage & Overtime Exceptions

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

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

- the employer did not use more than 500 man-days¹⁴⁸ of labor during any quarter of the preceding year;
- the employee is an immediate family member;
- the employee is a hand laborer paid on a piece-rate basis who commutes from his/her home each day and was not employed in agriculture more than 13 weeks in the preceding year;
- the employee is a family member under the age of 16 working on the same farm as the parent or surrogate parent who is paid on a piece-rate basis and is paid at the same rate as those over 16; OR
- the employee is principally engaged in the production of range livestock.

¹⁴⁶ <http://www.labor.ny.gov/workerprotection/laborstandards/workprot/usdoloff.shtml>

¹⁴⁷ <http://www.dol.gov/compliance/topics/wages-agricultural.htm>

¹⁴⁸ A "man day" is defined as any day where any employee performs agricultural work for at least one hour.

B. Federal Child Labor Laws

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



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

C: The New York Minimum Wage Law

As of July 24, 2009, the minimum wage in New York State is \$7.25, equal to federal minimum wage (N.Y. LAB. Law 19-652). The New York Department of Labor enforces specific **minimum wage standards for farm workers**.¹⁴⁹ However, for farms with total wages below \$3,000 in the previous year, the minimum wage standards do not apply (12 NYCRR II-F-190.1).

Special rules apply for farms employing youths (assuming minimum wage rules apply). If the employer has a youth rate certificate and employs youths under the age of 18 for harvest work, they must be paid at least \$3.80 per hour for the first two seasons of work and the basic minimum wage rate (\$7.25 per hour) during the third season. If the youths are employed for non-harvest work, they must be paid at least \$3.80 per hour during their first 300 hours of employment and the basic minimum wage rate (\$7.25 per hour) thereafter. For youths under 16, employers must pay \$3.20 per hour. These youth wages are not subject to deductions for spoilage or breakage, cash shortages or losses, fines or penalties for tardiness, misconduct, or quitting without notice. Individuals paid at a piece-rate have slightly different rules. Minors

¹⁴⁹ <http://www.labor.state.ny.us/formsdocs/wp/CR190.pdf>

under the age of 17 that work on the same farm as their parents are not subject to the minimum wage rules so long as they are paid on the same piece-rate as those over the age of 17 (N.Y. LAB. Law 19-A- 671-2-C). In contrast, the federal law applies only to those under the age of 16.

The New York Child Labor Law

The **New York State Child Labor Law**¹⁵⁰ (N.Y. LAB. Law 4-130 *et seq.*) has much in common with the Federal Child Labor Law, but does vary in certain instances. When state law differs from federal law, an employer must comply with the more protective standards (in this case, New York's).

Unlike the federal child labor law, the New York child labor law regulates the hours worked by 16 and 17 year-olds both when school is not in session (up to 8 hours per day and 48 hours per week) and when school is in session (up to 4 hours per day on a day preceding a school day, up to 8 hours per day on Friday, Saturday and Sunday, and up to 28 hours per week total). For those not 16 or 17 years-old, the New York child labor law regulates labor the same as federal law does. The New York State Department of Labor maintains a **website**¹⁵¹ comparing the state child labor laws to the federal child labor laws.

II. OCCUPATIONAL HEALTH AND SAFETY

A. Occupational Safety and Health Act

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

New York law has incorporated the OSHA into its own law with respect to public-sector employees and public construction projects.¹⁵² For private-sector employees, Article 7, Section 200, of the New York Labor Law provides further safety guarantees, requiring that all places be constructed, equipped, arranged, operated and conducted so as to protect the lives, health and safety of all employees or anyone legally on the premises. In addition, all machinery, equipment

¹⁵⁰ <http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/nyvsfed.shtm>

¹⁵¹ <http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/nyvsfed.shtm>

¹⁵² https://www.osha.gov/dcsp/osp/stateprogs/new_york.html

and devices must be guarded and lighted so as to protect employees or anyone legally on the premises.

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

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

B. Toxic Substances Disclosure to Employees

Federal OSHA regulations on hazardous communication imposes disclosure requirements on employers (29 C.F.R. § 1910.1200). The New York State Department of Labor enforces the federal regulations. Employers must maintain information on how to handle and detect dangerous chemicals in the workplace, as well as provide training and information to

employees. The regulations do not apply to toxic substances regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Instead, the FIFRA requirements discussed below for labeling/posting apply.

C. Federal Insecticide, Fungicide and Rodenticide Act

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. Chapter 6) requires the U.S. Environmental Protection Agency to regulate the production and use of farm chemicals. Pursuant to FIFRA, the EPA has promulgated a Worker Protection Standard (WPS) for agricultural pesticides. The standard requires employers to provide safety training and access to information on pesticides used on the farm. Employers must protect workers from exposure during pesticide mixing and application, as well as notify workers and restrict entry to sites after application. Finally, employers must provide adequate soap and water for clean up, and emergency assistance if a worker is injured by a pesticide. The EPA has provided a **WPS compliance manual**¹⁵³ for employers on its website.

III. MIGRANT/SEASONAL WORKERS

A. The Migrant and Seasonal Agricultural Worker Protection Act

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

Hiring

Some direct farm businesses use a Farm Labor Contractor (FLC) to obtain migrant or seasonal workers. FLCs recruit, pay, and transport workers to the needed locations. In return, the direct farm business pays the FLC a fee. FLCs must register and obtain a certificate with the United States Department of Labor pursuant to the MSPA (29 C.F.R. §§ 500.1, 500.40). An employee of a registered FLC must obtain a Farm Labor Contractor Employee Certificate of Registration (29 C.F.R. § 500.40). The direct farm business should ensure that it deals only with a registered FLC. The United States Department of Labor maintains a **list of MSPA Ineligible Contractors**¹⁵⁴ 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

¹⁵³ <http://www.epa.gov/oecaagct/htc.html>

¹⁵⁴ http://www.dol.gov/whd/regs/statutes/mspa_debar.htm#.UJPOjVE2f3A

during every quarter of the preceding year, it qualifies for the small business exception (29 C.F.R. § 500.30(b)). The regulation defines a “man-day” as any day in which an employee performs agricultural labor for at least one hour.

Wages

Employers must pay migrant and seasonal workers when wages are due, which must be at least every two weeks (29 C.F.R. § 500.81). According to New York law, anyone who is employed or permitted to work on a farm by an employer is considered an employee and is therefore due the same minimum wage as New York law dictates, subject to the agricultural exceptions noted above: \$7.25 per hour (N.Y. LAB. Law 19-A-671).

Disclosures

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

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

A grower or processor that employs five or more out-of-state migrants, whether or not they use the services of a Farm Labor Contractor, must submit to the New York State Department of Labor Division of Labor Standards an **Application for Grower/Processor Certificate of Migrant Registration**.¹⁵⁵

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,

¹⁵⁵ <http://www.labor.ny.gov/formsdocs/wp/ls113.pdf>

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).

According to the New York Department of Labor, the Minimum Wage Order for Farm Workers permits employers to deduct specified allowances from the minimum wage for lodging. It should be noted, though, that this deduction is not allowed for seasonal migrant workers.¹⁵⁶

Recordkeeping

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

Prohibitions

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

H-2A Visas

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

The Department of Labor maintains a **website**¹⁵⁷ that provides step-by-step instructions on how the H-2A program works, including links to forms.

B. Unpaid Interns

For many small farms, hiring unpaid interns is a common practice. They provide much needed labor, and the intern benefits by receiving valuable mentoring and experience. However, if the

¹⁵⁶ http://www.labor.ny.gov/workerprotection/laborstandards/farm_labor.shtm

¹⁵⁷ <http://www.foreignlaborcert.doleta.gov/h-2a.cfm>

intern is doing work on the farm that contributes to the farm's profitability, he or she is an employee and the farm business must take care to comply with applicable employment laws. If a farm qualifies for the federal minimum wage exception delineated above (employing fewer than 500 man-days per quarter), the federal rules and the student-learner exemption¹⁵⁸ to the New York Wage and Hour Law allow employers not to pay interns. For those farms where the federal and/or state minimum wage rules apply, employers should consider the following requirements.

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. The New York State student-learner exemption is similar, requiring that the "student-learner [be] enrolled in a vocational education training program in agriculture under a recognized State or local educational authority, or in a substantially similar program conducted by a private school; . . . employed under a written agreement which provides that: (i) the work of the student-learner is incidental to his/her training; (ii) such work shall be intermittent, for short periods of time, and under the direct and close supervision of a qualified and experienced person; (iii) safety instruction shall be given by the school and correlated by the employer with on-the-job training; and (iv) a schedule of organized and progressive work process to be performed on the job have been prepared" In addition, the written agreement must have the name of the student, be signed by the employer and an authorized representative of the educational authority or school, and both the educational authority or school and the employer must keep copies of the agreement on file.

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

¹⁵⁸ <http://www.labor.state.ny.us/formsdocs/wp/CR190.pdf>

Making an internship a positive experience for the farmer and the intern requires more than simply expecting the intern to show up and work. It requires carefully recruiting and selecting interns mentally and physically prepared for the nature of the work and developing a realistic plan for what and how they will learn. The New England Small Farms Institute publishes two guides that can assist in hiring interns and ensuring positive experiences. *Cultivating a New Crop of Farmers – Is On-Farm Mentoring Right for You and Your Farm? A Decision Making Workbook*, for \$20, contains worksheets covering all aspects of mentoring. *The On-Farm Mentor's Guide – Practical Approaches to Teaching on the Farm*, for \$35, provides more detailed guidance. The publications are available through **NESFI's website**.¹⁵⁹

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

IV. EMPLOYEE INJURIES

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

If an employee of a direct farm business is injured, the injured employee can seek compensation in *one* of two ways-- a claim under the New York Workers' Compensation Law or a common law action for tort. However, an employee may only seek damages through tort if the injury is not subject to workers' compensation (N.Y. WKC. Law 11 and 29(6)).

A. Workers' Compensation

The New York Workers' Compensation Law (N.Y. WKC. Law 1-3-14-b) and the **New York State Workers' Compensation Board**¹⁶⁰ require almost all employers to obtain workers' compensation insurance to cover medical treatment and lost pay owed to employees injured on the job, regardless of fault. The New York Workers' Compensation Board has fee schedules for

¹⁵⁹ <http://www.smallfarm.org/main/bookstore/publications/>

¹⁶⁰ <http://www.wcb.ny.gov/content/main/Employers/wclcompliance.jsp>

medical fees, dental fees, pharmacy fees and durable medical goods/equipment fees available on its **website**.¹⁶¹ In exchange, the New York Workers' Compensation Law bars employees from suing employers under tort law. This ban protects employers from the courts' unpredictability and absence of limits on compensation awards.

The New York State Workers' Compensation Law covers "[f]arm workers whose employer paid \$1,200 or more for farm labor in the precedening calendar year." (N.Y. WKC. Law 1-3-14-b). If the farm had less than \$1,200 of payroll in the preceding calendar year, workers' compensation insurance is not required.¹⁶² According to the New York State Workers' Compensation Board, farm laborers are generally considered to be employees of the farmer.¹⁶³

If a court holds that a direct farm business is liable for an employee's claim and the operation was required to obtain workers' compensation insurance but failed to do so, the direct farm business will have to pay all of the workers' compensation benefits. It is unlikely that the operation's general insurance policy would cover such a liability, and the benefits owed to the injured employee can be quite costly. On the other hand, workers' compensation insurance itself can be very expensive. For these reasons, it is important to consult a lawyer to determine the business's precise needs. Furthermore, the New York Workers' Compensation Law imposes significant fines for failure to obtain workers' compensation insurance. The punishments for failing to obtain worker's compensation are severe, ranging from a misdemeanor and one thousand dollar fine to a class E felony and five thousand dollar fine (N.Y. WKC. Law 4-52(1)(a)).

B. Employer Liability When Exempt from Workers' Compensation Requirements

In cases where employers are exempt from mandatory workers' compensation insurance coverage, New York's common law tort principles will determine an employer's liability for an employee's on-the-job injuries. A tort is an injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit. Torts are part of the *common law*, which is the body of laws and rules that courts (rather than legislatures or other lawmaking bodies) create as they issue decisions.¹⁶⁴ However, the legislature can modify the common law by passing legislation, and in several instances, the New York legislature has modified traditional common law rules and created special rules for tort liability within the employer-employee context. Additionally, most agricultural businesses will be covered by the worker's compensation laws, so it is important to consult with an attorney to see how the statutes and common law will apply to your operation.

¹⁶¹ <http://www.wcb.ny.gov/content/main/hcpp/FeeSchedules.jsp>

¹⁶² <http://www.wcb.ny.gov/content/main/onthejob/CoverageSituations/farms.jsp>

¹⁶³ <http://www.wcb.ny.gov/content/main/onthejob/CoverageSituations/farms.jsp>

¹⁶⁴ 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.

Employer's Negligence

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

Contributory Negligence of the Employee

An employee's own negligence that contributes to the injury will reduce the amount of damages recovered in any lawsuit (N.Y. CVP. Law 14-A-1411). For example, if the damages are \$100 and the employee was 70% negligent and the employer was 30% negligent, the employee may only recover \$30.

Assumption of the Risk

Some types of employment still present an inherent risk of injury to the employee, even if the employer exercises due care and complies with the laws governing employee safety. An employee's voluntary acceptance of employment serves as his or her consent to assume the risk of injury inherent to that particular type of employment (N.Y. EML. Law 2-4). If the employer has exercised due care and complied with the laws governing employee safety, the employer is not liable for an employee's injury that is caused by the risk inherent to that particular type of employment (*id.*).

C. Employer Responsibility for Employee's Injury to Others

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

Employees Injuring Third Parties

An employer may be liable for injuries to third parties caused by the actions of its employees through the theory of *respondeat superior* (“the master shall answer for his servant”). For liability

to occur under *respondeat superior*, the employee's action, whether negligent or intentional, must have been "generally foreseeable and a natural incident of the employment" (*Fernandez v. Rustic Inn, Inc.*, 60 A.D.3d 893, 896 (N.Y.S.2d 2009)). Generally, this means that the employee's action must have been committed in the course of the employment and with some notion of furthering the employer's business.

For the employer to be liable there must have been an employer-employee relationship, rather than that of an independent contractor. The question of whether an employer/employee relationship exists is based on the facts of each individual case. The actual practice between the employer and the employee will determine the relationship. A number of evidentiary factors may be taken into account, including the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required for the work to be done, and who provides the tools, materials, or equipment. Although there is no one factor that determines whether there is an employer/employee relationship, courts find the amount of control exercised over the individual to be particularly important (*Claim of Wells*, 87 A.D.2d 960, 960 (N.Y.S.3d 1982)). For more information, the New York State Department of Labor has a **website**¹⁶⁵ that further explains the difference between an employee and an independent contractor.

Scope of Employment

For an employer to be vicariously liable for an employee's torts under the doctrine of *respondeat superior*, the torts must have been committed within the scope of the employment (*Holmes v. Gary Goldberg & Co., Inc.*, 40 A.D.3d 1033 (N.Y. 2007)). An activity is within the scope of employment "if it is performed while the employee is engaged generally in the business of his employer, or if his act may be reasonably said to be necessary or incidental to such employment" (*id.*). Generally, an activity is within the scope of employment if (a) it is of the kind his is employed to perform, (b) it occurs during the hours and at the place where he was hired to work, and (c) it is motivated, at least in part, to serve the employer's interest. One obvious example is an employee who causes a traffic accident while delivering produce to the market. However, if an employee causes a traffic accident in her own car while driving home after work, she is probably not acting within the scope of her employment and her employer would therefore not be liable for any resulting injuries.

¹⁶⁵ <http://www.labor.ny.gov/ui/dande/ic.shtm>

ADDITIONAL RESOURCES: Labor and Employment Law

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

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

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

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

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

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

The New York State Department of Labor maintains a website listing the labor and employment laws that it enforces.

<http://labor.ny.gov/legal/index.shtm>

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

Employees Injuring Other Employees

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

The best way to avoid liability is to act with reasonable care and exercise due diligence. Make sure tools and equipment are safe and in proper working order. Supervise employees and do not ask them to do tasks that are outside the scope of expected dangers on a farm. If an employee could injure others, such as in an auto accident while making deliveries, ensure that they are a responsible and reliable employee before entrusting them with a task. Nonetheless, no liability can be completely prevented. These potential liabilities are one of many reasons it is important for farmers to have insurance that covers tort liability and the cost of defending a lawsuit. Although a general farm liability

policy (see the "Setting Up a Direct Farm Business" chapter of this Guide) may cover some

bodily injuries that could occur on the farm, such as injuries to trespassers, it likely does not cover everything. In particular, as discussed above, workers compensation insurance may be necessary to cover injuries to employees. Therefore it is imperative that you discuss and verify your liability coverage with your insurance agent.

IV. CHECKLIST

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

KEY CONTACT INFORMATION

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

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

Chicago District Office: (312) 596-7230

Springfield District Office: (217) 793-5028

New York Department of Labor (general contact information)

General contact information:

(518) 457-9000

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 New York Department of Agriculture & Markets (NYDOAM) Division of Milk Control and Dairy Services to discuss plans *before starting*.

I. FEDERAL REGULATION

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

A. *The Food and Drug Administration*

The Food and Drug Administration (FDA) administers the Federal Food, Drug, and Cosmetic Act, which prohibits adulterated or misbranded food from entering interstate commerce (21 U.S.C. §331). Understanding the nuances of the legal definitions of “adulterated” and “misbranded” is tricky, but it should be sufficient to know that FDA considers a food adulterated if it contains any “poisonous or deleterious substance” or if it is “filthy, putrid, decomposed” or otherwise unfit for food (21 U.S.C. § 342), and misbranded if it does not comply with FDA labeling standards (21 U.S.C. § 343). For dairy farmers, this means that all milk and milk products that will be shipped across state lines must comply with FDA standards of identity (21 C.F.R. § 131 (Milk and Cream); 21 C.F.R. § 133 (Cheese and Cheese Products)). All dairy products, with the exception of some aged cheeses, require pasteurization (21 C.F.R. § 1240.61).¹⁶⁶ In addition, all milk and milk products must also adhere to the Grade A Pasteurized Milk Ordinance (“PMO”), which is available on the **New York Department of Agriculture and Markets, Division of Milk Control and Dairy Services website**.¹⁶⁷

The 2009 PMO is a 382-page model regulation published by the FDA. Many states, including New York, use the PMO as their standard for sanitation of all milk products (NYDOAM Division of Milk Control and Dairy Services, 1 NYCCR Part 2 (Requirements for the Production, Processing, Manufacturing and Distribution of Milk and Milk Products)), whether the products ship in state or out of state. Farmers who are interested in starting a dairy direct farm business,

¹⁶⁶ 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).

¹⁶⁷ http://www.agriculture.ny.gov/DI/Laws%20in%20PDF/2009_PMO.pdf

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. Grocery stores, restaurants, and other similar establishments that sell milk and milk products at retail are exempt from PMO requirements as long as no processing occurs and a permitted establishment supplies the milk. Brokers, agents, and distributors that purchase milk and milk products from permitted establishments are also exempt from permitting requirements.

If a dairy wants to be on the Interstate Milk Shippers (IMS) list, the National Conference of Interstate Milk Shippers requires the State Milk Sanitation Rating Authorities to certify that the dairy attains the milk sanitation compliance and enforcement ratings in the PMO. More information about inclusion on the IMS list is available on the **FDA's website**.¹⁶⁸

B. United States Department of Agriculture (USDA)

The USDA administers a variety of programs for promoting dairy production. A full listing of USDA dairy programs can be found online on the **AMS website**.¹⁶⁹ This section addresses only grading and standards, milk marketing orders, and mandatory reporting.

Grading and Standards

The USDA provides grading and standards services to certify that products are of a certain quality (7 C.F.R. Part 58). To qualify for the grading and standards service, the USDA must first inspect a dairy plant and approve it as being in compliance with USDA's sanitary standards. A producer can then request grading services. Use of the program is voluntary, but it is important for producers who want to market to schools and other institutions that require foods to meet certain standards. For more information on the benefits of the grading and standards program, as well as information on how to apply for inspection and certification, visit the **USDA's website**.¹⁷⁰

¹⁶⁸ <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/FederalStatePrograms/InterstateMilkShippersList/default.htm#rules>

¹⁶⁹ <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateA&navID=CommodityAreas&leftNav=CommodityAreas&page=DairyLandingPage&description=Dairy>

¹⁷⁰ <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateM&navID=GradingCertificationandVerification&leftNav=GradingCertificationandVerification&page=DairyGrading&description=Dairy+Grading>

Federal Milk Marketing Orders

Milk Marketing Orders are the USDA's means of stabilizing supply for consumers and providing uniform prices for producers. The Agricultural Marketing Service (AMS, a department of the USDA) uses the orders to routinely set the minimum price that dairy farmers must be paid for fluid milk within a given geographic area (7 U.S.C. § 608c(5)). There are currently 10 Federal Milk Marketing Order Areas. The majority of New York falls within the Northeast Order; if you are located within the western part of New York, or are unsure of whether your business falls within the Northeast Order, you should contact the USDA to inquire as to whether your business is covered by the Milk Marketing Order.

AMS establishes Milk 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 dairies must now comply with the Milk Marketing Orders. More information on this change to the law is available on the **AMS website**.¹⁷¹

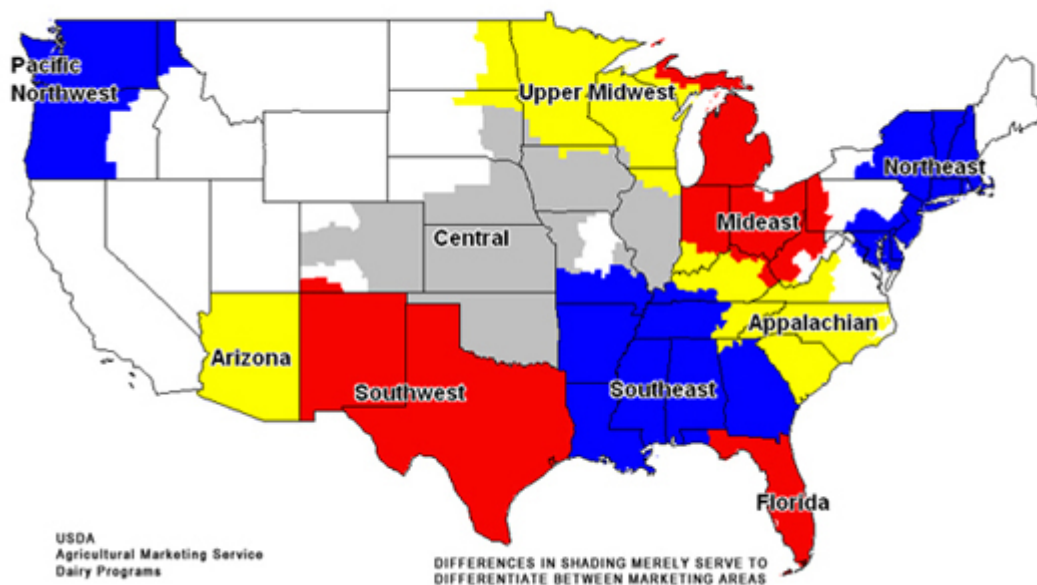
Each Milk Marketing Order provides the minimum price a fluid milk handler must pay producers in the respective region. The intended use of the milk determines the "class," which in turn determines the price (7 C.F.R. § 1000.40). Class I, which covers milk intended for consumption as milk, is the most 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

¹⁷¹

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

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**.¹⁷² 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.

Federal Milk Marketing Order Areas



Mandatory Price and Storage Reporting

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

Price reporting (facilities processing more than one million pounds per year): requires manufacturers of cheddar cheese, butter, nonfat dry milk, and dry whey to submit weekly reports including the price, quantity, and moisture content, where applicable (7 C.F.R. §§ 1170.7,

¹⁷²

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

1170.8). Manufacturers that process and market less than one million pounds of dairy *products* (cheese, butter and other items that are not fluid milk) per year are exempt (7 C.F.R. § 1170.9). Dairy products with a higher value than the basic commodity (for instance, kosher butter produced with a rabbi on site or organic milks) are also exempt from price reporting requirements (7 C.F.R. § 1170.8). It is the obligation of the producer to track annual production and report if they exceed the 1 million pound exemption. Reports must include the “name, address, plant location(s), quantities sold, total sales dollars or dollars per pound for the applicable products, and the moisture content where applicable” (7 U.S.C. § 1170.4(a)). A weekly price report must be submitted to the National Agricultural Statistics Service (NASS) by noon every Wednesday using the appropriate form. The forms are available on the **NASS website**.¹⁷³

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

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

II. STATE REGULATION

Anyone considering forming a dairy operation in New York should contact the NYDOAM Division of Milk Control and Dairy Services as soon as possible in the planning stages. Milk production, storage, handling, processing, and distribution are heavily regulated and licenses are required at all stages of milk processing. Although the rules are exacting and complex, this

¹⁷³ http://www.nass.usda.gov/Data_and_Statistics/Dairy_Products_Mandatory_Program/index.asp

section describes the overall framework for state regulation of dairy. By way of reference, the New York Agriculture and Markets Law (N.Y. AGM. Law 4), together with the New York Codes, Rules, and Regulations (1 NYCRR I), lay out the precise requirements.

A. Inspections & Permitting

The NYDOAM Division of Milk Control and Dairy Services administers different licenses depending on the type of business or product involved. There are different licenses, permits, and required reports for a producer, producer-dealer, plant operator, distributor (or subdealer), milk broker, milk hauler, cooperative, frozen dessert and goat and/or sheep milk, as well as various exceptions from licensing. The NYDOAM Division of Milk Control and Dairy Services maintains a **website**,¹⁷⁴ which lists all of the regulations and requirements and provides links to the necessary forms, reports and schedules.

All Licensed Milk Dealers who purchase milk directly from dairy farmers must complete a Bulk Tank Unit (BTU) Report (Schedules R & S),¹⁷⁵ Payment Report (Schedule G)¹⁷⁶ and Dairy Promotion Order (DPO) Assessment Report¹⁷⁷ each month in order to sell milk within New York State

A producer is required to abide by 1 NYCRR Part 2 (Requirements for the Production, Processing, Manufacturing and Distribution of Milk and Milk Products) as well as the 2009 PMO. However, farmers are not required to be licensed unless they handle more than 3,000 pounds per month and either deliver their own milk from the farm to the plant, operate a plant using milk produced on their own farm, or distribute packaged fluid milk, if the milk is processed by another plant operator.

¹⁷⁴ <http://www.agriculture.ny.gov/DI/DIBusiness.html>

¹⁷⁵ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/Blank%20Bulk%20report.pdf>

¹⁷⁶

<http://www.agriculture.ny.gov/DI/PDF%20WebDocs/NYS%20Payment%20Report%20Blank%20copy%20to%20email.pdf>

¹⁷⁷

<http://www.agriculture.ny.gov/DI/FORMS/DIS%20FORMS/DIS%20405A%20DPO%20Report%20PRODUCER-DEALERS.pdf>

A producer-dealer must obtain a Milk Dealer License,¹⁷⁸ Part 2 Permit,¹⁷⁹ participate in the Inspection Program,¹⁸⁰ and receive a Processing Plant Superintendent Certificate¹⁸¹ in order to produce and sell milk within New York State. For those processing milk into a frozen dessert, a Frozen Dessert Manufacturing and Handlers License¹⁸² is required. If a producer-dealer's own milk is processed in its own plant, a DPO Assessment Report¹⁸³ and Plant Report¹⁸⁴ must be completed each month, along with a Route Sales (Schedule D) and Subdealer Sales (Schedule H) report. In addition, Supplemental Sales Reports and NYS Route Sales are required in May and October.

Other permit and reporting requirements apply to plant operators (those who receive a single location or mobile unit which pasteurized fluid milk or manufactures milk into other dairy products); distributors and subdealers; milk brokers (one who does not purchase or sell any milk but negotiates the purchase or sale of milk on behalf of another licensed milk dealer); milk haulers (one who does not buy or sell any milk but transports the milk from farm to plant or from plant to plant); and those manufacturing frozen desserts.



Bargaining and Collecting cooperatives (an incorporated group of producers who negotiate for the sale of its members' milk and the receipt of sale proceeds) are required to obtain a Milk Dealer License.¹⁸⁵ Operating cooperatives (an incorporated group of producers that negotiate for the sale of its members' milk and is either responsible for the operation of farm bulk tank routes to bring its member's milk from farm to plant or plant to plant or responsible for processing or manufacturing its members' milk by operating a processing or manufacturing facility or transfer station) are required to obtain a Milk Dealer License,¹⁸⁶ Part 2 Permit,¹⁸⁷ Milk Receiver License,¹⁸⁸ participate in the Inspection Program¹⁸⁹ and receive a Certified Milk

¹⁷⁸ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/NYMilkDealerApp.pdf>

¹⁷⁹ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/DMC%201507%20-%20Part%202%20App..pdf>

¹⁸⁰ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/Inspection%20Program.pdf>

¹⁸¹ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/DMC%201618%20-%20PPS%20Application.pdf>

¹⁸² <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/DMC%2074%20-%20Frozen%20Dessert%202yr..pdf>

¹⁸³ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/DIS%20405A%20DPO%20Report%20PRODUCER-DEALERS.pdf>

¹⁸⁴ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/blank%20manufacturing%20Plant%20Report.pdf>

¹⁸⁵ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/NYMilkDealerApp.pdf>

¹⁸⁶ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/NYMilkDealerApp.pdf>

¹⁸⁷ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/DMC%201507%20-%20Part%202%20App..pdf>

¹⁸⁸ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/DMC%20163%20-%20Article%204.pdf>

¹⁸⁹ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/DMC%20297%20-%20Inspection%20Program.pdf>

Inspector Certificate. If the cooperative operates a plant, the cooperative must also obtain a Processing Plant Superintendent Certificate.¹⁹⁰ If the cooperative is purchasing milk directly from producers, the cooperative must also complete a DPO Assessment Report.¹⁹¹

For those dealing with goat and/or sheep milk, sanitation requirements are the same as those for producers, producer-dealers, plant operators, and those dealing with frozen desserts. However, there are no reports necessary for goat or sheep milk.

There are various exemptions from licensing requirements. For example, milk dealers who handle less than 3,000 pounds of milk per month may be exempted. Stores are exempt from milk dealer licensing requirements, provided that they do not engage in the customary functions of a milk dealer, meaning that stores that handle less than 3,000 pounds of milk per month may be exempted from the milk dealer licensing requirements and stores that do not distribute milk to its store(s), do not operate a milk processing plant, and do not sell milk to other stores may be exempted. Producers are also exempted unless they handle more than 3,000 pounds per month and: (1) deliver their own milk from the farm to the plant, (2) operate a plant using milk produced on their own farm, or (3) distribute packaged fluid milk if that packaged fluid milk is processed by another plant operator.

All of the various laws, requirements, permits, licenses and reports can be found on the New York Department of Agriculture and Markets, Division of Milk Control and Dairy Services website.¹⁹²

B. Organic Milk

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

C. Animal Welfare

New York Dairy farmers should also be aware of regulations concerning livestock, such as animal health laws, administered by the NYDOAM Division of Animal Industry. The "Meat and Poultry" chapter of this Guide provides further information on various livestock welfare and health laws.

¹⁹⁰ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/DMC%201502-CMI%20application.pdf>

¹⁹¹ <http://www.agriculture.ny.gov/DI/PDF%20WebDocs/DIS%20405A%20DPO%20Report%20PRODUCER-DEALERS.pdf>

¹⁹² <http://www.agriculture.ny.gov/DI/DIBusiness.html#0>

III. 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.¹⁹³ However, raw milk can be a source of dangerous pathogens such as *salmonella*, *E. coli*, and *listeria*.¹⁹⁴ Although the FDA requires pasteurization of milk sold in interstate commerce, (21 C.F.R. §1240.61) states may regulate the sale of raw milk within their state.

In New York, raw milk may only be sold at dairy farms that hold a permit from the NYDOAM (1 NYCRR 1-A-2.3). Raw milk cannot be sold at retail.¹⁹⁵ Permitted farms are required to maintain sanitation, animal health, packaging procedures, monthly inspections, routine sampling and testing and post signs that warn that raw milk does not provide the protection of pasteurization.

IV. 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.” These labels are controversial because 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. States have banned “rBGH”-related labels in the past, and a series of cases in different states have been brought before courts to decide whether banning this information is violation of the First Amendment.

While there is no case law about this in New York, other states such as Illinois have decided that labels may state that the milk is “from cows not treated with artificial growth hormones.” However, labels cannot use the term “rBGH free,” and they must state that the FDA has found no difference between milk from rBGH-treated cows and milk from untreated cows. These rules are consistent with FDA’s national labeling standards. The reason these labels are controversial is that Grade A milk produced under the PMO is already determined by the federal government to be safe, and the label “rBGH free” could cause consumers to be misled to think that the milk is of higher quality, which is currently unknown. As part of the permitting process for dairy plants, the NYDOAM evaluates any labeling that the plant will be using, so plants should work with their local permitting authority in order to develop a non-misleading label.

¹⁹³ For more information see <http://www.realmilk.com/>

¹⁹⁴ <http://www.cdc.gov/foodsafety/rawmilk/raw-milk-index.html>

¹⁹⁵ <http://www.realrawmilkfacts.com/raw-milk-regulations/state/new-york>

Checklist

Have you...?

- Contacted the New York Department of Agriculture and Markets, Division of Milk Control and Dairy Services to discuss what is necessary to produce the product you wish to sell?
- Followed all steps in the Grade A Pasteurized Milk Ordinance dairy farm and dairy handler permitting and inspection process?
 - applied for a permit from New York Department of Agriculture and Markets, Division of Milk Control and Dairy Services?
 - complied with ongoing New York Department of Agriculture and Markets, Division of Milk Control and Dairy Services product testing and inspection?
- Developed labeling and marketing strategies?

KEY CONTACT INFORMATION

New York Department of Agriculture and Markets, Division of Milk Control and Dairy Services

Ph: (800) 554-4501

Regional office contact list: <http://www.agriculture.ny.gov/DI/DIDirectory.html>

CHAPTER 7 – EGGS

Several laws and agencies regulate egg sales. At the federal level, the United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA) share regulatory authority. The grading and standards for eggs are set forth in Article 13-A of the Agriculture and Markets Law and enforced by the NYDOAM.

I. FEDERAL OVERSIGHT OF EGGS

As mentioned above, there are two primary agencies that regulate eggs at the federal level, the FDA and the USDA. The Egg Products Inspection Act (“EPIA”) (21 U.S.C. Chapter 15) authorizes the USDA to inspect eggs and egg products and establish standards for uniformity



of eggs. The EPIA applies to eggs shipped in interstate and intrastate commerce, but has exemptions for small producers. The Food and Drug Administration (“FDA”), under the authority of the Federal Food, Drug and Cosmetic Act (“FDCA”) (21 U.S.C. § 341), issues and enforces standards of identity for egg products and requires shell egg producers to implement measures to prevent *Salmonella Enteritidis*. For purposes of federal regulation, egg products are defined as dried, frozen or liquid eggs, with or without added ingredients. Shell eggs (whole eggs) are treated separately. The FDCA applies only to eggs

shipped in interstate commerce. Many direct farm businesses selling their eggs will not be subject to the federal rules, but determining application of the federal law to a specific operation can be difficult. A brief discussion follows.

USDA’s Oversight of Eggs

Within the USDA, the Agricultural Marketing Service (AMS) and Food Safety and Inspection Service (FSIS) administer programs that are relevant to egg producers. The 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. A “*dirty egg*” is an egg that has a shell that is unbroken, but has adhering dirt or foreign material, or prominent stains on the shell surface, or moderate stains covering more than $\frac{1}{4}$ of the shell surface. An “*inedible egg*” is any egg 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).

The 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 the 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). A “handler” is 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)).

The 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 the AMS’s grading **website**.¹⁹⁶ The AMS’s official standards, grades and weight classes are available **here**.¹⁹⁷

AMS Exemptions

The 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 the AMS’s regulations (7 C.F.R. § 57.100(d)-(f)).

Processing Subject to the FSIS

The EPIA requires the 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). The 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

¹⁹⁶ <http://www.ams.usda.gov/AMSV1.0/Grading>

¹⁹⁷ <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004376>

FSIS regulations (9 C.F.R. § 590.100(e)). However, they must apply for an exemption and their facility and operating procedures must meet all otherwise applicable standards. Although not subject to continuous inspection, exempted facilities must undergo periodic FSIS inspections (9 C.F.R. § 590.600-650).

The FDA's Oversight of Eggs

In addition to the USDA's regulation under the EIPA, the FDA regulates eggs under the FDCA. The 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 the FDA's *salmonella* testing, handling and treatment standards. Producers with 3,000 or more laying hens at a particular farm that produce shell eggs for the table market, and that do not sell all of their eggs directly to consumers, are subject to the additional *salmonella* prevention standards (21 C.F.R. Part 118).¹⁹⁸ The regulations require these producers to: (1) develop a written *Salmonella Enteritidis* ("SE") prevention plan that involves procuring pullets that are SE monitored, (2) use a bio-security program limiting visitors and controlling cross contamination between houses, (3) control rodents, flies and pests, and (4) clean poultry houses between flocks if there was a positive SE test (21 C.F.R. § 118.4). Producers must perform environmental testing for SE when laying hens are 40 to 45 weeks old and four to six 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.¹⁹⁹

Regardless of whether eggs are sold interstate or intrastate, the FDA requires all shell eggs for distribution to the consumer to have a safe handling label or be treated to kill *Salmonella* (21 C.F.R. § 101.17(h)). 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

¹⁹⁸ 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.

¹⁹⁹ <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/EggSafety/EggSafetyActionPlan/ucm170615.htm>

appear in a hairline box and the words “safe handling instructions” must appear in bold capital letters.

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

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

II. NEW YORK REGULATION OF EGGS

In addition to the federal regulations laid out above, the NYDOAM enforces New York-specific rules pertaining to eggs.²⁰⁰ The following summarizes the most important aspects of the New York statutes and regulations that are most likely to apply to a direct farm business. This summary is not intended to comprehensively discuss all aspects of egg production regulations in New York and is not a substitute for obtaining legal advice prior to starting an egg operation.

Definitions

The New York Agriculture and Markets Law provides definitions to be used when describing the standards applicable to eggs.²⁰¹ Though the New York definitions are similar to the federal definitions in many respects, there are some differences. For that reason, it is important New York egg producers to be aware of both the state and federal definitions.

A “clean” shell is one that is free from foreign material and from stains or discolorations that are readily visible. An egg may be considered clean if it has only very small specks or stains, if such

²⁰⁰ http://www.agriculture.ny.gov/FS/general/04circs/Circular854_eggs.html

²⁰¹ http://www.agriculture.ny.gov/FS/general/04circs/Circular854_eggs.html

specks or stains are not of sufficient number or intensity to detract from the generally clean appearance of the egg. Eggs that show traces of processing oil on the shell are considered clean unless otherwise soiled. A “dirty” egg is one that has an unbroken shell with adhering dirt or foreign material, prominent stains, or moderate stains covering more than 1/32 of the shell surface if localized, or 1/16 of the shell surface if scattered. “Inedible eggs” are any eggs of the following description: black rots, yellow rots, white rots, mixed rots (addled eggs), sour eggs, eggs with green whites, eggs with stuck yolks, moldy eggs, musty eggs, eggs showing blood rings, eggs containing embryo chicks (at or beyond the blood ring stage), and any eggs that are adulterated as such term is defined pursuant to the Federal Food, Drug and Cosmetic Act. A “leaker” is an egg that has a crack or break in the shell and shell membranes to the extent that the egg contents are exuding or free to exude through the shell. A “loss” is an egg that is inedible, smashed, or broken so that contents are leaking, cooked, frozen, contaminated, or containing bloody whites, large blood spots, large unsightly meat spots, or other foreign material. These terms are defined in 1 NYCRR IV-D-190.

No person (for purposes of this statute, “person” includes an individual, partnership, corporation or association) may sell, offer for sale, or expose for sale, “any eggs in the shell or otherwise which are unfit for human food” (N.Y. AGM. Law 13-A-160-A). Eggs that are to be sold or exposed for sale for human consumption in New York must be graded according to the New York grades and standards (*id.*). The grades and standards applicable to eggs sold, offered for sale, or exposed for sale in New York are set forth in the New York Codes, Rules and Regulations (1 NYCRR IV-D-190.1 *et seq.*). New York law prohibits the sale of any eggs other than clean shell eggs that meet the state’s grading requirements and all containers in which eggs are sold must identify the source of the eggs (1 NYCRR VI-E-271-2.2). No individual, partnership, corporation or association may sell ungraded eggs (N.Y. AGM. Law 13-A-160-A). Direct sales of eggs are allowed, but must meet all state requirements and must indicate the following: “To prevent illness from bacteria: keep eggs refrigerated, cook eggs until yolks are firm, and cook foods containing eggs thoroughly” (1 NYCRR VI-E-271-2.2). If the eggs have not been specifically treated to destroy all viable *Salmonella*, the eggs must be stored, displayed and transported where the ambient temperature is 45 degrees Fahrenheit (*id.*).

New York State also regulates the labeling of the grade and size of eggs sold, offered for sale, or exposed for sale (1 NYCRR IV-D-190.1 *et seq.*). If the eggs are offered for sale in cartons or other containers, the grade and size is to be plainly and conspicuously printed or written on each carton or container. If the eggs are offered or displayed for sale in bulk, the grade and size is to be noted plainly and conspicuously by a placard exhibited among or closely adjacent to the eggs. The marking of grade and size upon any placard as to eggs offered for sale must be in legible printing or writing in letters not less than 3/8 inch in height. The mark of grade and size upon any carton, bag or other container in which eggs are exposed for sale shall be in legible printing or writing at least equal in height to all other required markings or not less than 3/8

inch in height, and that grade and size statements on placards, cartons, bags or other containers shall not be abbreviated.

The Commissioner of Agriculture and Markets has authority to alter the standards, grades, and sizes by which eggs are sold, provided however, that the revised standards, grades, and sizes are not below the lowest grade or standards for edible eggs established by the USDA (N.Y. AGM. Law 13-A-160-B).

The standards, grades, and sizes for shell eggs may be found in Section 190 of Article 13-A of the Agriculture and Markets Law. Though the New York State grades differ slightly from the federal standards, the weight classes are the same as those of the United States Department of Agriculture as required by Public Law 91-597.

For additional information, please check the NYDOAM **Circular 854**.²⁰²

The NYDOAM Division of Animal Industry maintains a **website**²⁰³ detailing the New York State Egg Quality Assurance Program (NYSEQAP). This program was created in 1997 and is run by the New York State Poultry Producer's Association, the New York State Department of Health, and the NYDOAM. After a bacteriologic evaluation, producers can seek full NYSEQAP certification, which evaluates the producer's facilities for biosecurity, sanitation, refrigeration and egg storage. Thus far, the NYSEQAP has certified twelve commercial, shell egg producers – comprising more than 85% of shell eggs produced in New York.



²⁰² http://www.agriculture.ny.gov/FS/general/04circs/Circular854_eggs.html

²⁰³ <http://www.agriculture.ny.gov/programs/eggquality.html>

III. CHECKLIST

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

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

KEY CONTACT INFORMATION

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

Ph: (202) 720-3271

New York Department of Agriculture and Markets

Ph: (800) 554-4501

CHAPTER 8 – FRUITS AND VEGETABLES

Health regulators generally have a more permissive approach to raw fruits and vegetables relative to any other product sold by a direct farm business. In the New York State, there is no special license required for the sale of unprocessed fruits and vegetables, though there are regulations that produce sellers should be aware of.

Article 20 of the Agricultural and Markets Law – Licensing & Sale of Farm Products – gives rise to the Agricultural Producers Security Program, which provides for the licensing of all dealers who buy or receive farm products from New York producers in excess of \$10,000 annually to re-sell at wholesale (N.Y. AGM. Law 20). The NYDOAM requires any dealer (including commission merchants, net-return dealers, brokers and processors) who buy or receive New

York farm products from New York State producers for resale to obtain a Farm Products Dealer License. All agricultural products grown or raised in New York State are covered by the law, with the exception of dairy, eggs and timber (N.Y. AGM. Law 20-245-1). Agricultural cooperative corporations, when receiving, processing, and marketing farm products of its producer members, are exempt (N.Y. AGM. Law 20-244-2-a).



Before describing the regulations that pertain to each group, it is important to understand the

difference between raw and processed foods. New York defines a *raw agricultural commodity* as “any food in its raw or natural state, including all fruits that are washed, colored or otherwise treated in their unpeeled natural form before marketing” (N.Y. AGM. Law 17-198-9). According to New York law, processing is the “manufacturing, canning, preserving, freezing, drying, dehydrating, juicing, pickling, baking, brining, bottling, packing, repacking, pressing, waxing, heating or cooking, or otherwise treating [of] food in such a way as to create a risk that it may become adulterated if improperly handled” (N.Y. AGM. Law 20-C-251-Z-2). Processing occurs anytime a raw agricultural commodity is altered from its natural state, such as slicing, dicing, cutting, chopping, mixing, grinding, drying, smoking, cooking, pickling, packaging, and canning. An example of this difference is raw versus processed lettuce – a washed head of lettuce is raw, while bagged salad mix is processed. A good rule of thumb would be that produce sold in any form other than how it came off the plant or out of the ground may be “processed” and subject to additional regulations.

New York’s Cottage Foods Law, discussed in the introduction to this Guide, has two categories of processed foods: commercial and home processed foods. Commercial processors must obtain

a license and meet the requirements of the New York Food Safety Rules, including labeling requirements. These products may be sold in commercial establishments in New York, such as restaurants and retail stores. Home processed foods that are not potentially hazardous, including processed fruits and vegetables, can be sold at farmers' markets, roadside stands, and private homes. According to the NYDOAM, home processors are exempt from licensing and inspection requirements of Article 20-C of the Agriculture and Markets Law.²⁰⁴

I. UNPROCESSED FRUITS AND VEGETABLES

Probably the most common way to sell fruits and vegetables is as raw, unprocessed commodities. If a direct farm business is selling raw, unprocessed fruits and vegetables, the regulations limit pesticide residues and simply prohibit the sale of rotten or filthy food. The NYDOAM has specific guidelines for selling many fruits and vegetables, such as apples, lettuce, grapes, and potatoes.

Federal Law Requirements

As noted, the federal Food and Drug Administration (FDA) is the federal agency charged with ensuring the safety of food commodities sold in the United States. However, until recently, the FDA imposed no formal rules on unprocessed fruits and vegetables at the farm level, simply because it did not have the statutory authority to do so. Instead, the FDA was limited to publishing non-binding guidance documents on best practices for the growing, harvesting, and processing of fresh fruits and vegetables.

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

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

As of this writing (July 2013), these rules have not yet been formalized, but the law states that FDA's rules should be (1) sufficiently flexible so as to apply to fruit and vegetable producers of all sizes, including those that sell directly to consumers; (2) include, with respect to growing,

²⁰⁴ <http://www.agriculture.ny.gov/FS/consumer/processor.html>

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,” and (3) not conflict with or duplicate requirements of the National Organic Program.

The FDA already has established such standards by way of its **Good Agricultural Practices (GAP) Guide**²⁰⁵ for fruit and vegetable production. This Guide is not law and compliance is, therefore, voluntary at this stage. However, fruit and vegetable producers who wish to learn of what the FDA’s rules might eventually look like – or who wish to reduce the risk of bacterial contamination in their produce – may find the Guide to be a helpful resource for altering or refining growing and production processes.

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

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

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

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

What the changes in the law mean for direct farm business producers: The FDA authority to impose on-farm safety measures is limited to fresh fruit and vegetable production, not grains or oilseeds. The HACCP requirements apply to food processing facilities. The definition of a food processing facility specifically exempts farms, unless the farm engages in some type of processing, such as milling of wheat for flour.²⁰⁶ However, farms processing harvested goods for use on the same farm (e.g., milling own wheat for personal use) are exempted from the definition of a “facility.” Therefore, unless the farm is creating a value added product (e.g., engaging in some form of processing) and delivering this product off the premises, the farm is not a facility, and thus not subject to the HACCP rules. Food processing facilities, on the other hand, should carefully monitor the development of implementing regulations as several elements of the FMSA may apply and require operational changing and documentation of food safety procedures.

That being said, many direct farm business producers will fall within the small farm exemption to the law and, therefore, will not need to comply with the new rules. FDA produce safety is currently a moving area of law, and producers who are unsure of their status should contact an attorney for specific guidance.

Pesticide Requirements

According to the Federal Food, Drug, and Cosmetic Act, and the New York corollary, a raw agricultural commodity is adulterated if it contains an unsafe pesticide chemical. (21 U.S.C. § 342; N.Y. AGM. Law 17-200-2). Under Section 346a of the Federal Food, Drug, and Cosmetic Act (FDCA), the federal Environmental Protection Agency (EPA) sets tolerance levels for pesticides on and in foods. Using notice and comment rulemaking, the EPA establishes the tolerance level for each pesticide based on the potential risks to human health posed by that pesticide. EPA lists tolerance levels for more than 1,000 pesticides, so it is impossible for this Guide to cover all the standards. However, there are several ways farmers can determine the tolerance levels for pesticides they are using. One method is to look up the pesticide in the Code of Federal Regulations (CFR) (40 C.F.R. Part 180). EPA maintains a **website**²⁰⁷ that explains how to search the CFR to determine the tolerance level for a particular crop. Another EPA **website**²⁰⁸ contains general information on pesticides by family, commodity type, and crop type. The site also has a database to look up tolerance levels for particular pesticides, which users can search using the common names of pesticides.

State Produce Sampling Requirements

²⁰⁶ 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).

²⁰⁷ <http://www.epa.gov/opp00001/food/viewtols.htm>

²⁰⁸ <http://www.epa.gov/opp00001/regulating/part-180.html>

If an agricultural producer or vendor would like to offer samples of cut fruit or vegetables at a farmer's market, they must obtain permission from market managers.²⁰⁹ In addition, if the food is prepared or handled on site, whether the food samples are offered for free or for sale, the producer or vendor must obtain a valid permit from an issuing official authorized by the State Commissioner of Health (10 NYCRR I-14-2.2).

The Farmers Market Federation of New York has a guide entitled **General Guidelines for Food Sampling at Direct Marketing Venues**²¹⁰ that agricultural producers or vendors may find useful.

Apples

The New York Agriculture and Markets Law (N.Y. AGM. Law 13), together with the New York Codes, Rules and Regulations (1 NYCRR IV-C-185 through 187), governs apples in the state of New York.

Every closed package of apples that is sold, exposed for sale, or transported for sale, must be plainly and conspicuously branded to show the variety, grade, and minimum diameter or numerical count of the apples, as well as the quantity of contents and the name and address of the packer or repacker (N.Y. AGM. Law 13-158). When the packer or repacker does not know the specific variety, the branding must include the words "variety unknown" in place of the name of the variety. If the branding on any closed package of apples is changed, the person making the change must substitute his or her own name and address for that of the original packer (*id.*).

All apples sold, exposed for sale, or transported for sale within the state of New York must be in closed packages which are branded in accordance with the guidelines established by Section 158 and marked with the grade of the apple (N.Y. AGM. Law 13-159). The grade of the apple must conform with either the official standards and grades for apples established and promulgated by the Commissioner under provisions of Article 13 or with the official standards of the United States (the "U.S. Grades"). New York's Codes, Rules and Regulations set forth the requirements for the various grades of apples, such as U.S. Extra Fancy, U.S. Fancy, U.S. No. 1, U.S. No. 1 Early, and U.S. No. 1 Hail (1 NYCRR IV-C-185.1). For an apple to meet New York State standards, there are many factors to be considered. Therefore, apple producers and sellers should carefully examine the requirements for each of the standards to ensure proper compliance.

Apples in consumer containers of ten pounds or less which are packed in the store and conform in variety, grade, and size to a bulk display which is plainly and conspicuously marked as to the grade, variety, minimum diameter or numerical count of the apples, are excepted from the

²⁰⁹ <http://www.nyfarmersmarket.com/NYFMFoodSafety/Handouts/Guide-for-Food-Sampling.pdf>

²¹⁰ <http://www.nyfarmersmarket.com/NYFMFoodSafety/Handouts/Guide-for-Food-Sampling.pdf>

above-referenced regulations. If any statement, design or device pertaining to the apples within either an open or closed package is false or misleading in any way, those apples shall not be sold, exposed for sale, or transported for sale. If the face or shown surface of the apples packed in either an open or closed package is not an average of the contents of the package, those apples shall not be sold, offered for sale, or transported for sale (N.Y. AGM. Law 13-159).

Grapes

The New York Agriculture and Markets Law (N.Y. AGM. Law 13-B), together with the the New York Code, Rules and Regulations (1 NYCRR IV-A-162.17), governs the standards for the sale of grapes in the state of New York.

The Commissioner of the Department of Agriculture and Markets establishes and promulgates official standards of quality for grading, classifying and packing grapes packed or repacked within the state, and may change those standards from time to time (N.Y. AGM. Law 13-B-160-i). The Commissioner is required to take into account the factors of maturity, color, firmness of attachment to capstems, compactness of bunches, and damage caused by freezing or by disease or insects when establishing these standards. Furthermore, the standards must not be less strict in their requirements than the corresponding grades of grapes as promulgated by the Secretary of Agriculture for the United States: the “United States grades.” All grapes in packages that are sold, exposed for sale, or shipped for sale within the state of New York must be graded and classified according to the standards established by the Commissioner and, if they are not classified, may be sold, exposed for sale, or shipped for sale only if they are marked as unclassified in a conspicuous manner on an irremovable part of the container (N.Y. AGM. Law 13-B-160-i).

New York requires that grapes “be bunches of grapes of one variety (except when designated as assorted varieties) which are mature and well colored.” In addition, the berries must be “firm, firmly attached to capstems, . . . not split, shattered, crushed, dried or wet, and . . . free from decay, mold, mildew, berry moth, russetting and hail, and free from damage caused by freezing, disease, insects or other means” (1 NYCRR IV-A-162.17). Furthermore, grapes must be firm (“reasonably turgid and does not yield more than slightly to moderate pressure”), well-colored (“show full color characteristics of the variety”), 90% of each bunch must have a minimum diameter of 9/16 of an inch, and at least 50% of the bunches in the containers must be compact (“the bunches are well filled and have no open spaces”) (*id.*).

Lettuce

The New York Agriculture and Markets Law (N.Y. AGM. Law 13-C), together with the New York Code, Rules and Regulations (1 NYCRR IV-C-189), governs the grading, branding and sale of lettuce.

When selling, exposing for sale, or transporting for sale, operators must plainly and conspicuously brand closed packages of lettuce (N.Y. AGM. Law 13-C-160-q). The branding must include the number of heads of lettuce, the name and address of the packer or repacker, and, if applicable, that the lettuce is “cull lettuce” and/or that the package was vacuum cooled (*id.*). The requirement that cull lettuce be labeled as such does not apply to closed packages of lettuce, which are being held for sale at retail in the retailer’s own storage facilities or are being transported from such storage facilities to stores operated by such retailer (*id.*). If the branding on any closed package of lettuce is changed, the person making the change must substitute his or her own name and address for that of the original packer (*id.*).

No person may sell, offer for sale, or transport unwrapped lettuce or lettuce in open or closed packages if the branding, representation as to grade, or any statement, design or device appearing on the label, package or bulk display is false or misleading (N.Y. AGM. Law 13-C-160-r). Additionally, all lettuce that is to be sold in closed cardboard containers must be vacuum cooled (*id.*). Delivery of lettuce in closed packages to a common carrier for shipment is presumptive evidence that the lettuce is intended for sale (*id.*).

In New York there are three grades for lettuce: fancy, No. 1, and No. 2 (1 NYCRR IV-C-188.1). The requirements for each of these grades are extensive, so lettuce producers and sellers should closely examine the New York Codes, Rules and Regulations to ensure compliance.

Potatoes

The NYDOAM Division of Food Safety and Inspection regulates the grading, classifying and sale of potatoes pursuant to the New York Agriculture and Markets Law (N.Y. AGM. Law 12-A-156-C *et seq.*) and the New York Codes, Rules and Regulations (1 NYCRR IV-A-165.1 *et seq.*).

New York’s standards of potato grades are identical to those established by the USDA (1 NYCRR IV-A-165.1). In New York there are four grades for potatoes: Extra No. 1, No. 1, Commercial, and No. 2. The requirements for each of these grades are extensive, so potato producers and sellers should closely examine the New York Codes, Rules and Regulations to ensure compliance.

Depending upon the weight of the packages of potatoes, the required markings – which must be clear and legible, plainly printed, stenciled, or stamped conspicuously and facing outwards – vary in size. Packages less than 10 pounds require markings made in at 1/8 inch height; packages between 10 and 50 pounds require markings in at least 3/8 inch height; packages over 50 pounds require markings in at least 5/8 inch height. Additionally, markings on tags must be

at least 5/8 inches in height, markings designating “cull” potatoes must be at least 1.5 inches in height, and grade markings for bulk displays must be at least 1 inch in height. Detailed information regarding the standards of grading, classifying and sale of potatoes can be found in **Circular 860**.²¹¹

II. PROCESSED FRUITS AND VEGETABLES

As discussed above, the difference between raw and processed food can sometimes be slight. According to the New York Agriculture and Markets Law, a food is processed if it has been manufactured, canned, preserved, freeze-dried, dehydrated, juiced, pickled, baked, brined, bottled, packed, repacked, pressed, waxed, heated or cooked, or otherwise treated in a “way to create a risk that it may become adulterated if improperly handled” (N.Y. AGM. Law 20-C-251-Z-2). The NYDOAM regulates these activities and requires that every food processing establishment must be licensed bi-annually by the Commissioner (N.Y. AGM. Law 20-C-251-Z-3). Processors may be exempted from the licensing requirements of Article 20-C of the Agriculture and Markets Law if they meet the definition of home processors, as discussed earlier in this Guide. Additionally, the Commissioner may exempt other small food processing establishments upon a determination that the regulation is unnecessary (N.Y. AGM. Law 20-C-251-Z-4).

In addition to inspection and permitting, many processed foods must have labels containing particular information required by federal law. For instance, processed foods must conform to their standards of identity (if any) and bear labels giving the common name of the food. Product labels must also list all ingredients. Packaged foods must have labels that identify the manufacturer, packer or distributor, and contain an accurate accounting of the quantity of the contents (21 U.S.C. § 343(e)). In addition, federal regulations require foods processed with sulfites to disclose the presence of a sulfating agent (21 C.F.R. § 130.9). Direct farm owners should contact NYDOAM for assistance on labeling requirements or restrictions that apply to their particular product.

Olive Oil Regulation

The Agriculture and Markets Law regulates olive oil mixtures and makes it illegal “for any person to manufacture, pack, possess, sell, offer for sale and/or expose for sale any compound or blended oil of any kind which purports to be an olive oil mixture unless the container thereof be permanently and conspicuously labeled ‘compound oil’ or ‘blended oil’ with a statement of the different ingredients thereof and the specific percentage of olive oil, the total percentage of other vegetable oils and the specific percentage of each other ingredient comprising more than one-half of one per centum of the mixture” (N.Y. AGM. Law 17-204-a*2). New York’s regulation

²¹¹ <http://www.agriculture.ny.gov/FS/general/04circs/Circular860Potatoes.pdf>

of olive oil and olive oil mixtures is extensive, so those involved in the manufacturing and/or selling of olive oil should carefully read the Agriculture and Markets Law.

Additives

Some value-added processes may use products such as sulfites or FD&C Yellow # 5, which are food and color additives. If a product requires a processing agent, the simplest approach is to consult a local regulator to determine use restrictions and residue limits. Alternatively, information on allowable food additives is available through FDA's "Everything Added to Food Database," which is available **online**.²¹² Lists of FDA approved color additives are available in 21 C.F.R. Parts 73 and 74.

For certain products, including rice, macaroni and noodle products, the Commissioner of Agriculture and Markets may require enrichment pursuant to the Agriculture and Markets Law (N.Y. AGM. Law 17-A-215). Maximum and minimum amounts of vitamins, minerals and other nutrients may be applied by the Commissioner to "food products within the following categories: (a) wheat flour, corn flour and related products; (b) bread, rolls and related bakery products; (c) miller rice; (d) macaroni and noodle products" (N.Y. AGM. Law 17-A-215-a). If you plan to produce any food products within the above-mentioned categories, you should reference the New York Code, Rules and Regulations to ensure that you properly comply with the relevant standards (1 NYCRR 1-VI-D).

Juice

Like all foods, juice and cider processing facilities must undergo inspection and approval by NYDOAM. In addition, juice processors must also comply with federally-mandated Hazard Analysis and Critical Control Point (HACCP) procedures, even if they are only selling the product intrastate (21 C.F.R. Part 120).²¹³ 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

²¹² <http://www.accessdata.fda.gov/scripts/fcn/fcnNavigation.cfm?rpt=eafusListing>

²¹³ The FDA's authority over food is generally limited to foods shipped in interstate commerce (21 U.S.C. § 331). However, FDA asserts authority to enforce the HACCP rules under the Public Health Services Act (21 U.S.C. §§ 241, 242l, 254) because juice is a vehicle for transmitting food borne illnesses (see 66 Fed. Reg. 6137, 6148, 6158-6160 (Jan. 19, 2001)).

more information on the juice HACCP, the FDA has issued *Guidance for Industry: Juice HACCP; Small Industry Compliance Guide*, which is available **online**.²¹⁴

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

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

Wine, Beer and Spirits

Once an operation begins pressing juice, it may be a natural progression to ferment wine, beer or spirits. New York regulates alcoholic beverages pursuant to the New York Code Alcoholic Beverage Control Law (N.Y. ABC. Law 1-1 *et seq.*). In addition to state regulation, these operations 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**²¹⁵ or in a packet by calling 1-800-398-2282. TTB also provides **online packets of information**²¹⁶ tailored to particular manufacturers.

Pursuant to the Alcoholic Beverage Control Law, the New York State Liquor Authority Division of Alcoholic Beverage Control is responsible for regulating alcoholic beverages within the state (N.Y. ABC. Law 2-10). Individuals who plan to brew and/or sell alcoholic beverages should carefully review the Alcoholic Beverage Control Law, as there are special licenses and regulations for each of the following types of alcoholic beverages: beer (N.Y. ABC. Law 4), cider (N.Y. ABC. Law 4-A), liquor (N.Y. ABC. Law 5), and wine (N.Y. ABC. Law 6). In addition, there are a multitude of permits that may be required depending upon your specific involvement with the alcohol industry (N.Y. ABC. Law 90 through 99-G).

²¹⁴

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

²¹⁵ <http://www.ttb.gov/forms/index.shtml>

²¹⁶ <http://www.ttb.gov/applications/index.shtml#Manufacturers>

The Alcoholic Beverage Control Law details the different types of licenses that may be needed by producers or sellers of wine: winery license (N.Y. ABC. Law 6-76), farm winery license (N.Y. ABC. Law 6-76-A), temporary winery or farm winery permit (N.Y. ABC. Law 6-76-B), special winery license (N.Y. ABC. Law 6-76-C), special farm winery license (N.Y. ABC. Law 6-76-D), micro-winery license (N.Y. ABC. Law 6-76-F), wholesaler's wine license (N.Y. ABC. Law 6-78), seven day license to sell wine at retail for consumption off the premises (N.Y. ABC. Law 6-79), license to sell wine at retail for consumption on the premises (N.Y. ABC. Law 6-81), and special license to sell wine at retail for consumption on the premises (N.Y. ABC. Law 6-81-A).

Licensing fees for wine vary depending upon what type of license you need and, in the case of the license to sell wine at retail for consumption on the premises, the population of the city in which you plan to sell the wine. The annual fee for the farm winery license and temporary winery or farm winery permit is \$125 (N.Y. ABC. Law 6-83). For a winery license, the annual fee is \$625 (*id.*). For a micro-winery, the fee is \$50 (*id.*). To sell wine at wholesale, the annual fee is \$800 (*id.*). In cities with a population of 100,000 or more, the annual fee for selling wine at retail for consumption on the premises is \$480 (*id.*). In cities with a population of less than 100,000, the annual fee for selling wine at retail for consumption on the premises is \$240 (*id.*).

Anyone who has obtained a license to sell wine may conduct wine tastings (N.Y. ABC. Law 6-80). The wine tasting must be conducted under the constant supervision of an official agent of a farm, winery, wholesaler, or importer (*id.*).

If you do not have any of the above-mentioned licenses, you may still sell bottled wine to a wholesale or retail licensee who is authorized to sell wine (N.Y. ABC. Law 6-85). This wine must have a permanently attached label indicating that the wine is from a private collection (*id.*).

Like wine, there are a variety of licenses required for those wishing to become involved in the beer industry. There is a brewer's license (N.Y. ABC. Law 4-51), brewer's retail license (N.Y. ABC. Law 4-52), wholesaler's license (N.Y. ABC. Law 4-53), vendor's license (N.Y. ABC. Law 4-53-A), license to sell beer at retail for consumption off the premises (N.Y. ABC. Law 4-54), license to sell beer and wine products at retail for consumption off the premises (N.Y. ABC. Law 4-54-A), and license to sell beer at retail for consumption on the premises (N.Y. ABC. Law 4-55).

These license fees also vary depending upon which type you require. The annual fee for a brewer's license is \$4,000 for those producing more than 60,000 barrels per year and \$320 for those producing less than 60,000 barrels per year (N.Y. ABC. Law 4-56). A wholesaler's beer license is \$800 annually (*id.*). A vendor's license is \$140 annually (*id.*). If you wish to sell beer at retail not to be consumed on the premises where sold, the annual fee is \$110; however, if you have two licenses, the annual fee doubles for each additional license (*id.*). To sell beer at retail for consumption on the premises, the annual fee is \$320 for cities with a population of 100,000 or more and \$160 for cities with a population of less than 100,000 (*id.*). To sell beer and wine products at retail for consumption off the premises, the annual fee is \$198 (*id.*). There are also

special provisions for the sale of beer at outdoor athletic fields and stadiums, on railroad cars, or upon any other vessel within the state of New York (*id.*).

Other Considerations for Fruits and Vegetables

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

III. CHECKLIST

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

KEY CONTACT INFORMATION

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

Ph: (800) 858-7378

U.S. Food and Drug Administration

Guidance on fruits, vegetables, and juices:

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

New York State Department of Agriculture and Markets

Ph: (800) 554-4501

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

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

New York State Liquor Authority Division of Alcoholic Beverage Control

Website: <http://www.sla.ny.gov/>

Contact Directory: <http://www.sla.ny.gov/contact-directory>

[Ph: \(518\) 474-3114 \(Licensing\)](http://www.sla.ny.gov/contact-directory)

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**,²¹⁷ which allows producers to list their businesses in a searchable database as well as search for processors and potential institutional customers.

Another excellent resource on processing and marketing grains is the National Sustainable Agriculture Information Service's *Grain*

Processing: Adding Value to Farm Products.²¹⁸ The guide gives examples of farmers who have successfully established processing and distribution infrastructure in order to direct market their grains. Finally, although geared toward organic farming, the Rodale Institute has a variety of educational resources on alternative crop marketing on their **website**.²¹⁹

The New York Real Property Tax Law provides many exemptions for grain producers, manufacturers, and sellers. For example, farm silos, farm feed grain storage bins, and commodity sheds are exempt from taxation, special ad valorem levies and special assessments (N.Y. RPT. Law 4-2-483-a). The owner of the property upon which the aforementioned structures lie must apply for the exemption on a form prescribed by the Commissioner on or before the taxable status date. No renewals are needed once the exemption has been granted.

I. GRAIN INSPECTION STANDARDS

²¹⁷ <http://ny.marketmaker.uiuc.edu/>

²¹⁸ <http://www.attra.org/attra-pub/summaries/grainpro.html>

²¹⁹ <http://www.tritrainingcenter.org/course/>

Additional Resources: Grain Inspection

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

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

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

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

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

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

II. LICENSING OF WAREHOUSES

The United States Warehouse Act

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

The federal and licensing program aims to protect producers by requiring warehouses and dealers to have enough financial security to pay the producers and authorize inspections to ensure that bad management practices do not damage products.

III. SELLING GRAINS

Unprocessed grains, nuts and seeds sold in the same condition as harvested are raw agriculture products. As such they do not need to come from a NYDOAM inspected and licensed facility. However, if the producer processes the grain by bagging, packaging or grinding, they must do so in an approved facility in order to sell the products to consumers. Processing also includes blending, roasting, sprouting, grinding, or any other process that changes the condition of the grain.

Sellers of processed grain must comply with the federal standards of identity for grains and grain products (21 CFR Part 137) and FDA Defect Action Levels. Standards of identity apply if the finished product is sold in interstate commerce. The producer must also monitor FDA Defect Action Levels, which are maximum allowable levels of natural or unavoidable defects in

foods for human use that present no health hazard (21 C.F.R. § 110.110). Common defects with specific action levels include molds, insect parts, and excrements. More guidance on the defect action levels is available on the FDA's **website**.²²⁰

²²⁰<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/SanitationTransportation/ucm056174.htm>

IV. CHECKLIST

Have you:

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

KEY CONTACT INFORMATION

U.S. Grain Inspection, Packers & Stockyards Administration

Ph: (202) 720-0219 (main)

For a list of official GIPSA service providers, visit

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

New York Department of Agriculture and Markets

Ph: (800) 554-4501

CHAPTER 10 - HONEY AND MAPLE SYRUP

This chapter summarizes the basics of New York laws for beekeepers involved in honey production. This section concludes with a brief discussion of rules for maple syrup production, which are similar to those for honey.

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. Therefore, beekeepers should make sure to contact their local authorities. The Empire State Honey Producers Association maintains a helpful **website**.²²¹

Domesticated honeybees play an integral role in agricultural sectors needing pollinators, and diseases and pests affecting honeybees can cause significant economic damage. The NYDOAM Division of Plant Industry is responsible for the regulation of bees within New York State through inspections and certifications as well as education and outreach to beekeepers. The Division of Plant Industry maintains a website on **Honey Bee Inspection & Certification**²²² that provides many resources that may be of use to beekeepers and honey producers.

Any individual keeping honey bees must file a notice with the New York Department of Health per New York Health Code Article 161. The notice must include the following information: the beekeeper's name, address, telephone, e-mail and fax numbers, emergency contact information, and location of the hive. If any of the information provided to the Department of Health changes, the beekeeper must notify the Department of those changes within ten business days. A copy of the necessary registration notice for the City of New York's Department of Health and Mental Hygiene may be found on their website.²²³

Article 161 of the New York Health Code further requires that all beekeeper's maintain bee colonies in moveable-frame hives that are kept in sound and usable condition, provide a constant and adequate water source, locate hives so that the movement of bees does not become an animal nuisance, and must be able to respond immediately to control bee swarms and remediate nuisance conditions. A beekeeping nuisance, according to Article 161 of the New York Health Code, "shall mean conditions that include, but not be limited to, aggressive or objectionable bee behaviors, hive placement or bee movement that interferes with pedestrian traffic or persons residing on or adjacent to the hive premises; and overcrowded, deceased or abandoned hives."²²⁴

²²¹ <http://www.eshpa.org/index.php/ny-apiary-laws>

²²² http://www.agriculture.ny.gov/PI/apiary_inspection.html

²²³ <http://www.nyc.gov/html/doh/downloads/pdf/ehs/ehs-beekeeping-guideline.pdf>

²²⁴ <http://www.nyc.gov/html/doh/downloads/pdf/about/healthcode/health-code-article161.pdf>

The law allows the Commissioner of the NYDOAM to inspect all apiaries within New York State for purposes of detecting infectious diseases and insects or parasitic organisms which may cause harm to the state's useful bee population, crops, or plants (N.Y. AGM. Law 15-173). In order to effectively regulate the apiary industry, the Commissioner is given access to all apiaries, structure, appliances or premises where bees or honey or comb used in apiaries may be (*id.*). In addition, the Commissioner may inspect any hive, colony, package or receptacle that he suspects may cause harm to the state's useful bee population, crops, or plants (*id.*).

If, during an inspection by either the Commissioner or a representative, an apiary, appliance, structure, colony, or comb is discovered to be a nuisance, the Commissioner or representative may destroy or treat the colony or equipment or order the owner or person in charge of the colony or equipment to destroy or treat that colony or equipment. However, if the Commissioner or representative orders the destruction of any bees, hives, fixtures or appurtenances, the owner may, within five days from receipt of the order, submit to the Commissioner a request for review. The owner is not entitled to any damage(s) for the loss of any apiary, bees, hives, apiary appliance, or bee product destroyed pursuant to Article 15 of New York's Agriculture and Markets Law.

According to the Agriculture and Markets Law, any transporting or selling of bees, used comb, or used beekeeping materials requires a license from the Commissioner (N.Y. AGM. Law 15-175). It is illegal to buy, sell, possess, or transport any species of bees that the Commissioner has determined will injure the state's useful bee population (*id.*). All shipments of live bees without comb, used comb, or beekeeping equipment that come into New York from out of state must have with it a permit from the Commissioner or a certificate of freedom from disease by an official from that state or country who is recognized by the Commissioner (*id.*).

The Agriculture and Markets Law also prohibits individuals from keeping any colony of bees which the Commissioner has deemed harmful to the state's useful bee population or any colony of bees affected with any contagious or infectious disease, infested by insects or parasitic insects harmful to bees (N.Y. AGM. Law 15-174). It is illegal to hide any bees or beekeeping equipment from the inspector (*id.*). Any colony of bees or bee material, structure, or appliance affected by an infectious disease or exposed to insects or parasitic organisms harmful to bees is to be quarantined and not moved, tampered with, handled, or disturbed without a permit from the Commissioner (*id.*). Any bees that might pose a danger to the state's useful bee population is to be declared a nuisance and then either destroyed or otherwise remedied (*id.*). If a bee, hive or fixture is ordered to be destroyed by the Commissioner, the owner may submit a written request for review within five days of receipt of the order for destruction (*id.*).

II. SELLING HONEY

New York defines honey, liquid or extracted honey, strained honey, or pure honey as the “nectar of flowers that has been transformed by, and is the natural product of the honey-bee, taken from the honeycomb and marketed in a liquid, candied or granulated condition” (N.Y. AGM. Law 17-205). It is illegal to “package, label, sell, keep for sale, expose or offer for sale, any article or product in imitation or semblance of honey depicting thereon a picture or drawing of a bee, beehive or honeycomb, or branded as ‘honey,’ ‘liquid or extracted honey,’ ‘strained honey’ or ‘pure honey’ which is not pure honey” (N.Y. AGM. Law 17-206). All imitation products “shall be labeled as ‘honey flavored syrup’ or ‘artificially honey flavored syrup’” (*id.*).

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 it naturally anti-microbial. Some consumers seek out local raw honey because they believe it helps alleviate allergies. Due to U.S. Food and Drug Administration regulation of health claims, 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),²²⁵ but it has never approved the claim linking honey and allergies (21 C.F.R. §§ 101.70-.83). Therefore, labels and advertisements *should not* include any health claims connecting raw honey to allergy relief.

Organic Honey

To market honey as organic, the bees and processing plant must be certified organic according to USDA’s National Organic Program. Although the regulatory definition of livestock specifically excludes bees (7 C.F.R. § 205.2), **USDA guidance**

documents²²⁶ direct certifiers to use the livestock standards for certification of bees. The livestock regulations generally require the producer to handle the livestock organically from the day of birth, use 100% organic feed, avoid most synthetic chemicals, and refrain from use of antibiotics and certain other medical treatments. For bees, this may mean locating the hive so as to prevent foraging at non-organic flowers, building the hive out of particular materials, or treating hive diseases in a manner that would comply with standards set out by the certifier. The “Organic Marketing” chapter of this Guide covers the livestock regulations in more detail, as well as information on the certification process, record keeping requirements, labeling rules,

²²⁵ 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.

²²⁶ Available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5087792>



and processing of organic foods. Given the special nature of bees, it may be best to contact an accredited organic certifying agent that certifies bees to discuss specific requirements. Refer to the “Organic Marketing” chapter of this Guide for more general information on the organic certification process.

Maple Syrup

Like honey, the manufacture, distribution and sale of maple syrup in New York is heavily regulated. The Agriculture and Markets Law (N.Y. AGM. Law 13-D-160-u, 203, and 204), together with the New York Codes, Rules and Regulations (1 NYCRR IV-B), set forth the guidelines for manufacturing, distributing, and selling maple syrup in New York.

New York defines maple syrup as “syrup made exclusively by the evaporation of pure maple sap” (1 NYCRR IV-B-175.1). In New York, maple syrup is graded as either *Grade A*, *Grade B*, or *extra dark for cooking*, depending upon the color, flavor, odor, defects and clarity of the syrup (1 NYCRR IV-B-175.2). Unless the syrup being sold is pure maple syrup as defined by laws of New York, the syrup must be labeled and list the ingredients which make up the syrup (N.Y. AGM. Law 17-204).

Regulation of Food Processing Establishments

Article 20-C of the Agriculture and Markets Law details the licensing requirements for food processing establishments, including those producing honey and maple syrup. However, there are exemptions that producers may qualify for in both Article 20-C of the Agriculture and Markets Law and Section 276.4 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Section 276.4 exempts “[p]roducers of maple syrup or honey who do not purchase maple syrup or honey from others for repackaging, and who do not combine maple syrup or honey with any other substance . . . provided that the following conditions are met: (1) Such establishments are maintained in a sanitary condition and manner, and to this end the following requirements shall be complied with: (i) Every practicable precaution shall be taken to exclude birds, insects (except those involved in the production of the product), rodents and other vermin and animals from the premises of the operation. (ii) The use of insecticides, rodenticides and other pest control items in such establishments shall be permitted only under such precautions and restrictions as will prevent the contamination of the product. (iii) Rooms, compartments, places, equipment and utensils used for preparing, storing or otherwise handling the product, and all other parts of the operating premises, shall be kept in a clean and sanitary condition. (iv) There shall be no handling or storing of materials which may create insanitary conditions in any place or places where the product is prepared, stored or otherwise handled. (v) All equipment and utensils used in processing or handling the product shall be maintained in good repair to assure

sanitary conditions in the operation. (vi) All finished product containers must be clean, sanitary and properly labeled”

Though a producer may be exempted from the requirements of Article 20-C, that producer is not exempted from inspections of compliance with the above-referenced requirements.

III. CHECKLIST

Have you...?

- Registered your bee colony with the New York Department of Health and obtained any necessary permits? Checked with local authorities for other restrictions?
- Obtained the proper licensing?
- If you intend to market your honey as organic, contacted an accredited certifying agent that has experience certifying honey?
- Do you have a license for your food processing establishment or do you qualify for an exemption?

KEY CONTACT INFORMATION

New York Department of Agriculture & Markets Division of Plant Industry

Ph: (518) 457-2087

CHAPTER 11 – LIVESTOCK AND POULTRY

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

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

I. RAISING AND CARING FOR ANIMALS

A. Animal Welfare Laws

Articles 25 and 26 of the New York Agriculture and Markets Law provide substantial protection for animals. According to New York law, it is a misdemeanor to:

- overdrive, overload, torture, cruelly beat, unjustifiably injure, maim, mutilate or kill any animal
- fail to provide necessary sustenance, food, or drink

The Agriculture and Markets Law does provide an exception to the above stipulations, though, for properly conducted scientific tests, experiments, or investigations involving the use of living animals approved by the Commissioner of Health (N.Y. AGM. Law 26-353). The regulations generally focus on the care and upkeep of companion animals. The law largely should not be a concern



for livestock and poultry operations as long as the care provided meets the minimum standards that are common practice in the industry.

Feeding of Garbage to Livestock

New York's Agriculture and Market's law prohibits the "feeding of garbage, offal or carcasses to cattle, swine or poultry" due to findings that "[m]eat from animals so afflicted, when consumed by human beings, is a primary source of trichinosis and other human sickness" (N.Y. AGM. Law 5-72-A). Garbage is defined as "putrescible animal and poultry wastes from the handling, processing, preparation, cooking and consumption of foods" (*id.*). Offal is defined as "the waste parts of butchered animals or poultry," and carcasses are defined as "the dead bodies of animals or poultry" (*id.*). However, the law exempts feeding the household garbage of an individual to his or her own cattle, swine or poultry (*id.*).

B. Diseased Animals and Dead Animal Disposal

Contagious and Infectious Diseases Amongst Livestock

If you know of the existence of any infectious or communicable disease among animals, the Agriculture and Markets Law requires you to immediately notify the Commissioner of the NYDOAM (N.Y. AGM. Law 5-73). The Law requires that your report be in writing and include "a description of the diseased animal or animals, the location thereof, the name of the disease suspected, and, if known, the name and address of the owner or person in charge of such animal or animals" (*id.*). The NYDOAM Division of Animal Industry maintains a website detailing **Animal Disease Reporting**,²²⁷ which contains a listing of reportable diseases as well as contact information for reporting diseases.

The New York Codes, Rules and Regulations have significant specific regulations pertaining to *avian influenza* (1 NYCRR II-45), *bovine brucellosis* (1 NYCRR II-46), *pollorum and typhoid disease* (1 NYCRR II-57), *vesicular stomatitis* (1 NYCRR II-67), as well as further regulations for livestock auction buildings (1 NYCRR II-49-50). Livestock owners should carefully examine the requirements of New York law to ensure compliance.

Owners of cattle should visit Cornell's website on the **New York State Cattle Health Assurance Program**²²⁸ to learn more about this disease prevention program run by the Department of Agriculture and Markets.

Disposal of Dead Animals

Pursuant to the Agriculture and Markets Law, "[t]he carcasses of large domestic animals, including but not limited to horses, cows, sheep, swine, goats and mules, which have died

²²⁷ http://www.agriculture.ny.gov/AI/disease_rep.html

²²⁸ <https://ahdc.vet.cornell.edu/sects/NYSCHAP/index.cfm>

otherwise than by slaughter, shall be buried at least three feet below the surface of the ground or otherwise disposed of in a sanitary manner by the owner of such animals, whether the carcasses are located on the premises of such owner or elsewhere” (N.Y. AGM. Law 26-377). The owner of the deceased animal must dispose of the carcass within 72 hours (*id.*).

II. SLAUGHTERING AND PROCESSING

A. Humane Slaughter

Although most farmers do not slaughter their own animals, the laws pertaining to the humane slaughter of animals are worth noting. For one thing, if part of the retail marketing of the meat

entails advertising humane treatment, slaughtering methods matter as much as raising and care. The laws are also relevant because a slaughterhouse that fails to comply with these rules may also fail to comply with other rules pertaining to food safety, which could damage a producer’s reputation and increase exposure to legal liability.

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).

B. Processing Meat and Poultry Products

Meat and poultry processors are subject to federal or state laws and regulations regarding licensure and inspection. The USDA's Food Safety and Inspection Service (FSIS) oversees federally licensed and inspected facilities. The NYDOAM Division of Animal Industry enforces New York laws and regulations applicable to New York registered facilities. Whether a direct farm meat or poultry producer contracts with a state or federally licensed slaughterhouse will depend on a number of factors, including whether the producer is shipping across state lines and whether potential customers (such as restaurants) require that meat originate from a federally licensed facility.

As a general rule, each facility engaging in processing must have an inspection and license from the USDA and the NYDOAM (N.Y. AGM. Law 5-A-96-B). For instance, in sausage production, the facility that slaughters the animal must have a permit and the facility

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/reg
ulations](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)**

inforesource@fsis.usda.gov

that processes the sausage, if it is a separate facility, also must have a permit. In rare circumstances, a producer can slaughter and process its own poultry. Although most slaughtering and processing is done at slaughterhouses, mobile processing units, which are often more accommodating of small producers, may be available in certain areas.²²⁹

Farmers who butcher their own animals on their own farm should be aware of the “farmer and custom processors” exemption from the requirements of the Agriculture and Markets Law (N.Y. AGM. Law 5-B-96-J). This exemption applies to farmers who butcher their own animals on their own farms or deliver their own animals to custom slaughterhouses (*id.*). All custom meat products must be identified as custom meat products (*id.*).

Aside from the custom meat exemption, all meat sold, exposed for sale, or transported in the state of New York must have an official inspection legend or meat label affixed pursuant to a federal inspection (N.Y. AGM. Law 5-B-96-L). Any carcass, meat, meat by-products, and meat products that have such a legend or label may be sold, exposed for sale or transported anywhere within the state of New York (N.Y. AGM. Law 5-B-96-M). The Commissioner may seize and destroy any meat, meat by-product or meat product that does not have such a legend or label if it does not fall within the custom meat exemption (N.Y. AGM. Law 5-B-96-Q).

Meat

Generally, in order to sell across state lines, farmers must take their animals to a federally licensed facility for slaughtering and processing (21 U.S.C. §§ 601; 603). The Federal Meat Inspection Act (21 U.S.C. §§ 601-695) and accompanying regulations (9 C.F.R. Parts 300-599) govern facilities that slaughter or process meat. Some customers, such as restaurants (who have insurance companies imposing requirements on them), may demand that meat originate from a federally inspected facility even if not sold across state lines. If a producer intends to sell meat only within New York (i.e., not in interstate commerce), the meat may come from a facility inspected according to the New York statutes, rules and regulations, which follow the federal rules.

All meat that is transported in New York state must be transported in an enclosed vehicle (N.Y. AGM. Law 5-B-96-P-2). Frozen products must remain frozen and non-frozen products must stay below 40 degrees Fahrenheit (*id.*). An exception to these rules exists for meat products that have been manufactured, processed or packaged in a manner that requires no special handling temperatures to prevent adulteration or unwholesomeness (*id.*).

²²⁹ These units are still relatively uncommon, but USDA is stepping up efforts to disseminate information and increase their availability. For instance, in January and February 2010, the agency held a series of webinars to educate producers on special issues relating to mobile processing units. For more information, visit http://origin-www.fsis.usda.gov/News_&_Events/Regulatory_Web_Seminars/index.asp

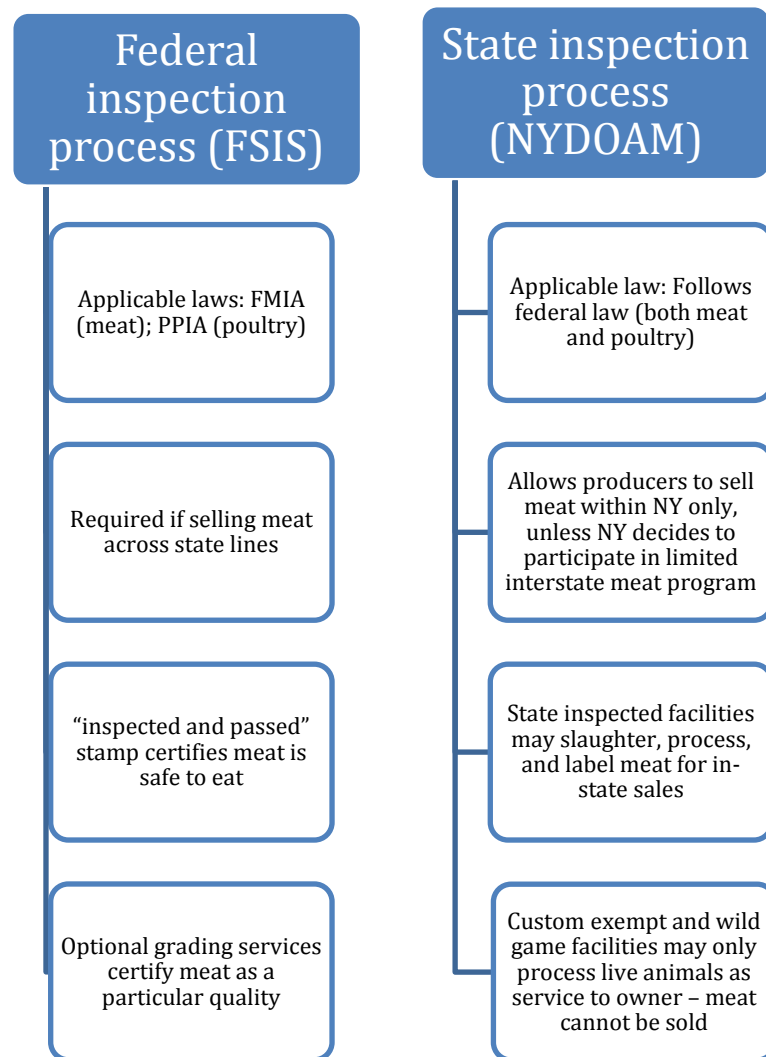
The USDA places an “inspected and passed” stamp on federally inspected meat, using food-grade ink (21 U.S.C. § 606). The mark is put on carcasses and major cuts, but might not appear on retail cuts such as roasts and steaks. Producers can also request that USDA grade their meat (7 C.F.R. Parts 53 and 54). Whereas an inspection qualifies the meat for sale to consumers, grading certifies that the meat is of a particular quality. Mandatory USDA inspections are free of charge, but producers must pay for grading services (7 C.F.R. §§ 53.18, 54.28). For more information on how inspections and grading differ, visit the **FSIS website**.²³⁰ 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**.²³¹

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.

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

²³⁰ http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/inspection-and-grading-of-meat-and-poultry-what-are-the-differences_/inspection-and-grading-differences

²³¹ <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/labeling-procedures>



A good source for guidance on marketing meat is *How to Direct Market Your Beef*.²³² 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.

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

Poultry

As a general rule, poultry products that move in interstate commerce are subject to the federal Poultry Products Inspection Act (PPIA) (21 U.S.C. §§ 451-471) and regulations (9 C.F.R.

²³² <http://www.sare.org/publications/beef/beef.pdf>

Part 381), which require poultry slaughter and/or processing of poultry products to undergo mandatory inspection. Some operations, however, are exempt from federal inspection. Even if the operation is exempt from federal inspection, state inspection requirements may nonetheless apply. Therefore, it is important to carefully assess both federal and state exemptions.

Federal Inspection Exceptions for Poultry

Direct farm businesses meeting certain criteria listed below may sell poultry products directly to consumers without securing PPIA's otherwise mandatory inspection requirements (21 U.S.C. § 464; 9 C.F.R. § 381.10). In general, even exempt facilities must slaughter healthy chickens in a sanitary manner, and ensure that they handle the birds properly (*id.*). On a basic level, slaughtering is exempt from federal USDA inspection 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 businesses that process fewer than 20,000 birds annually *and* the processing only goes as far as cutting up the birds; and
- a retail business that is merely cutting up birds for the store.

The intricacies of whether a producer or slaughterer qualifies for the exemption, and which sales are exempt, are more complex and nuanced than the above list. Therefore, producers should contact an FSIS district office for an individualized analysis before proceeding without obtaining an inspection and license. FSIS has published *Guidance for Determining Whether a Poultry Slaughter or Processing Operation is Exempt from Inspection Requirements of the Poultry Products Inspection Act*, which is available **online**.²³³ 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

²³³ http://www.fsis.usda.gov/OPPDE/rdad/FSISNotices/Poultry_Slaughter_Exemption_0406.pdf

above) summarizes sanitary hygiene requirements contained in the Code of Federal Regulations (9 C.F.R. § 416), and the *FSIS Sanitation Performance Compliance Guide*, which is available on the **FSIS website**.²³⁴

State Inspection Exceptions for Poultry

New York law follows the federal exemptions for on-farm poultry slaughter. For a discussion of on-farm slaughter rules, see Cornell's On-Farm Poultry Slaughter Guidelines.²³⁵

III. MARKETING MEAT AND POULTRY PRODUCTS

A. Labeling and Storing Meat and Poultry Products

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

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

USDA does not have a comparable regulation for meat, but has applied the same standards for several decades. It matters which agency is exercising jurisdiction, because FDA requirements differ from FSIS requirements in some respects. For example, the FSIS requires pre-market label approval for meat and poultry (9 C.F.R. §§ 317.4 (meat), 381.132 (poultry)), while the FDA does not.²³⁶

²³⁴ http://www.fsis.usda.gov/OPPDE/rdad/FRPubs/San_Guide.pdf

²³⁵ <http://smallfarms.cornell.edu/files/2012/03/On-Farm-Poultry-Processing-Guidelines.7-17-12-1w7j6jj.pdf>

²³⁶ 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).

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). The 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. The USDA’s *Guide to Federal Food Labeling Requirements for Meat and Poultry Products*²³⁷ provides more detailed information on these labeling requirements.

Nutrition Content Labeling

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

The new rules include a number of exemptions relevant to direct farm producers. First, the labeling rules exempt products intended for further processing, so long as these products bear no nutritional claims or nutrition information. This means that, for example, a farmer who sells a side of beef to a butcher for processing into major cuts would not have to provide nutrition

²³⁷ Available online at http://www.fsis.usda.gov/wps/wcm/connect/f4af7c74-2b9f-4484-bb16-fd8f9820012d/Labeling_Requirements_Guide.pdf?MOD=AJPERES&CACHEID=c7488e7e-3007-432e-911e-156832115b08

content information for the side of beef to the butcher (though the butcher would have to provide nutritional content information if it sold the cuts of meat to consumers). Second, the rules exempt products that are not for sale to consumers, so long as these products do not bear nutrition claims or other nutritional information.

Third, ground or chopped meat or poultry products produced by small businesses do not have to comply with the new nutritional labeling requirements. The USDA defines a “small business” for purposes of this exception as a facility that employs 500 or fewer people and produces no more than 100,000 pounds of meat per year. This exception holds even if small producers use “percent fat” and “percent lean” labels on their ground meat and poultry products, so long as they include no other nutritional claims or nutritional information on their labels. However, unlike for ground products, the nutritional labeling rules for major whole cuts of meat or poultry do NOT exempt small producers. This means that direct farm businesses that sell cuts of meat or poultry to consumers – either on-premises or at a farmers’ market – *must* provide nutritional content information, either on a packaging label or on a placard at the point of sale. However, this requirement should not be overly burdensome, because USDA point-of-purchase labeling materials will be available over the Internet, free of charge. The point-of-purchase labeling materials are not available as of November 2012, but the FSIS plans to have the labels and a webinar to explain the labels soon. For more information, the FSIS has produced a **Questions and Answers document**²³⁸. The FSIS does have **Nutritional Information Charts**²³⁹ 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 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**²⁴⁰ 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**²⁴¹ for ground beef that determine the precise nutrient content information for a specified level of fat or lean in a particular ground beef product.

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

Normally, the packer is considered the producer because the packer produces the final product. For ground or chopped product, the producer of the final packaged product is required to provide nutrition labels on the product, unless an exemption applies. The

²³⁸ http://www.fsis.usda.gov/PDF/Nutrition_labeling_Q&A_041312.pdf

²³⁹ http://www.fsis.usda.gov/regulations_&_policies/Nutrition_Labeling/index.asp

²⁴⁰ http://www.ars.usda.gov/main/site_main.htm?modecode=12-35-45-00

²⁴¹ <http://www.ars.usda.gov/Services/docs.htm?docid=13933>

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.²⁴²

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 New York), 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**.²⁴³

Specific Terms Used in Meat and Poultry Labeling

USDA regulates many terms that direct producers may wish to use on their products. Their **website**²⁴⁴ 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

²⁴² http://www.fsis.usda.gov/wps/wcm/connect/d166536c-39d7-4331-b588-5dcdbe0d0f9/Nutrition_labeling_Q_A_041312.pdf?MOD=AJPERES

²⁴³ <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/labeling+policies/nutrition-labeling-policies/nutrition-labeling>

²⁴⁴ <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms>

- “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 Hormone 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 referred to as “mechanically tenderized” on the label. If the business plans to use this process, producers should look up the status of this proposed rule.

B. Specialty Products

Organic Meat

The USDA Agricultural Marketing Service administers organic production and labeling standards through the National Organic Program (NOP) (7 C.F.R. Part 205). Generally, NOP requires that animals receive all organic feed and minimum access to the outdoors and prohibits use of hormones to promote growth or antibiotics for any reason. To label the meat or poultry as organic, an accredited organization must certify the production and processing practices, in

which case the product can bear the USDA Organic logo. For more information on organic standards, see the “Organic Marketing” chapter of this Guide.

Kosher

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

FSIS’s policy book²⁴⁵ 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 who or what constitutes an acceptable rabbinical supervision. Certification requires meticulous standards of health for the animals when presented for slaughter and entails ritual cleaning of all equipment, ritual slaughter by a sochet in a humane fashion, removal of all blood, and restrictions on which parts can be sold as kosher.

Other marketing issues related to kosher foods are important to consider. First, according to one kosher certification agency, the kosher poultry market is largely saturated. Second, although some cattle cooperatives have successfully established kosher slaughterhouses in order to market directly to consumers, doing so requires consistently processing enough cattle to justify the cost of certification and operation. As of this writing (2012), given that the market for pasture fed and organic meats is not fully saturated, it may not be worth the cost and extra effort to move into the kosher niche market, even if there is some demand.

New York regulates Kosher foods through the Agriculture and Markets Law (N.Y. AGM. Law 17-201-a and b) and the New York Codes, Rules and Regulations (1 NYCRR VI-C-254 and 255).

If a food is sold as kosher or kosher for Passover within the state of New York, it must have a label affixed by the manufacturer or packer at its premises (N.Y. AGM. Law 17-201-a). If kosher and non-kosher foods are sold or offered for sale at the same location, window signs must indicate that both kosher and non-kosher food products are sold at that location (N.Y. AGM. Law 17-201-b). If fresh meat, meat preparations, meat by-products and poultry are sold or offered for sale, there must be a sign indicating either “soaked and salted” or “not soaked and salted” (*id.*).

²⁴⁵ http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf

New York requires that whomever certifies non-prepackaged food as kosher or kosher-for-Passover – whether an individual, partnership, corporation, or association – must “file with the Department of Agriculture and Markets a statement, upon a form provided by that department, of that person’s qualifications to certify foods as kosher. Such statement may include the certifier’s background, training, education, experience and any other information that shows the certifier’s qualifications” (1 NYCRR VI-C-254.1). Those manufacturing, producing, processing, packing or selling non-prepackaged foods represented or branded as Kosher are required to file with the NYDOAM (1 NYCRR VI-C-254.2).

The regulations of kosher food products in New York are extensive and those who will be producing or selling kosher foods in New York should closely examine the relevant portions of New York law (N.Y. AGM. Law 17-201-a and b; 1 NYCRR VI-C-254 and 255). Individuals who are planning to become involved in the production or sale of kosher foods in New York State should contact the NYDOAM, Division of Kosher Law Enforcement for more information and visit the NYDOAM webpage discussing the **Kosher Law Enforcement and New York’s Kosher Law Protection Act of 2004**.²⁴⁶

Halal

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

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

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

²⁴⁶ <http://www.agriculture.ny.gov/KO/KOHome.html>

listing or any guidance on who or what constitutes an acceptable Islamic organization for purposes of supervision.

New York regulates the packaging and labeling of foods as Halal (N.Y. AGM. Law 17-201-e and f; 1 NYCRR VI-C-258).

The regulation of halal food products is similar to that of kosher food products. “All food and food products packaged in any container and sold or offered for sale as ‘halal’ shall have a ‘halal’ label affixed by the manufacturer or packer at its premises [and] [n]o person other than such manufacturer or packer shall affix such label” (N.Y. AGM. Law 17-201-e). Those certifying non pre-packaged foods or food products as halal must file with the NYDOAM a statement “of that person’s qualifications to certify food as halal. Such statement may include the certifier’s background, training, education, experience and any other information that shows the certifier’s qualifications” (1 NYCRR VI-C-258.1).

The regulations of halal food products in New York are extensive and those who will be producing or selling hala foods in New York should closely examine the relevant portions of New York law (N.Y. AGM. Law 17-201-e and f; 1 NYCRR VI-C-258). Individuals who are planning to become involved in the production or sale of halal foods in New York should visit the New York State Department of Agriculture and Markets webpage discussing the **New York State Halal Foods Protection Act of 2005**.²⁴⁷

²⁴⁷ <http://www.agriculture.ny.gov/Halalsite/halals.html>

IV. CHECKLIST

Have you...?

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

KEY CONTACT INFORMATION

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

Philadelphia regional office (serves the New York area): (215) 597-4219

New York Department of Agriculture and Markets, Division of Animal Industry

Ph: (518) 457-3502

CHAPTER 12 – ORGANIC CERTIFICATION

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

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

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

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

I. ORGANIC LABELING AND MARKETING

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

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



II. ORGANIC CERTIFICATION PROCESS

Before seeking organic certification, a producer should become as knowledgeable as possible about the benefits and costs of organic production. While not specific to New York, University of Illinois Extension’s **Illinois Small Farms website**²⁴⁸ contains useful information on the organic certification process, as well as links to other resources that are useful for New York direct farm businesses. Another excellent resource is the Organic Trade Associations website **HowToGoOrganic.com**,²⁴⁹ which has an extensive database of materials dedicated to informing producers of how (and why) to transition to organic, including a page dedicated to **New**

²⁴⁸ <http://web.extension.illinois.edu/smallfarm/organic.html>

²⁴⁹ <http://www.howtogoorganic.com>

York²⁵⁰. The NYDOAM also maintains a webpage entitled “Organic Farming Information Center” which has a section entitled **How To Become Certified Organic**.²⁵¹

The first step in the certification process is selecting and contacting a certifying agent. The AMS’s **website**²⁵² 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 substances²⁵³ for 36 months prior to certification. Eliminating certain conventional inputs often requires implementing new, unfamiliar practices, which is why education before starting the transition is critical. One helpful source is Michigan State University’s New Agriculture Network. The network provides **online fact sheets**²⁵⁴ 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).

III. PRODUCTION REQUIREMENTS

Organic systems plans vary by production activity. This section will provide a brief overview of the major requirements for organic production. For detailed explanations of each component of the program, see Harrison Pittman’s *Legal Guide to the National Organic Program*, which is available **online**.²⁵⁵

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,

²⁵⁰ <http://www.howtogoorganic.com/index.php?page=new-york>

²⁵¹ <http://www.agriculture.ny.gov/AP/organic/BecomeCertifiedOrganic.html>

²⁵² <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5100383>

²⁵³ The lists of permitted and prohibited synthetic/non-synthetic substances are codified in 7 C.F.R. §§ 601 & 602.

²⁵⁴ <http://www.new-ag.msu.edu/Factsheets/tabid/64/Default.aspx>

²⁵⁵ http://www.nationalaglawcenter.org/assets/articles/pittman_organicprogram.pdf

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):

1. When an equivalent organically-produced variety is commercially unavailable, a producer may use non-organically produced, untreated seeds and planting stocks.
2. When organically-produced equivalents and untreated, non-organically produced equivalents are not commercially available, a producer may use a non-organically produced crop that has been treated with a synthetic substance included in the list of permitted substances.
3. A producer may use non-organic annual seedlings if USDA grants a temporary variance.

4. A producer can use non-organic planting stock to produce an organic crop after maintaining the planting stock under a system of organic management for at least one year.
5. When federal or state phytosanitary regulations require application of a prohibited substance, a producer may use treated seeds, annual seedlings, and planting stock.

The NOP defines “commercially available” as “the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling *as determined by the certifying agent* in the course of reviewing the organic plan” (7 C.F.R. § 205.2). Moreover, 7 C.F.R. § 606 lists some specific products that the agency has determined to be commercially unavailable. Producers who believe a seed or planting stock is commercially unavailable should consult their certifying agent to determine what documentation the agent will require for the producer to prove they diligently sought an organic source and it is truly commercially unavailable.

B. Livestock and Poultry

The NOP rule defines “livestock” as

[a]ny cattle, sheep, goat, swine, poultry, or equine animals used for food or in the production of food, fiber, feed, or other agricultural-based consumer products; wild or domesticated game; or other nonplant life, except such term shall not include aquatic animals or bees for the production of food, fiber, feed, or other agricultural-based consumer products (7 C.F.R. § 205.2).

To market livestock products as organic, they must be under “continuous organic management from the last third of gestation or hatching” through slaughter (7 C.F.R. § 205.236). Farmers may raise poultry as organic from the second day of life. Farmers must organically manage dairy cattle for at least a year prior to marketing milk as organic. They can market the meat from the cows’ calves as organic if they managed the cows organically for the last third of gestation. For future calves to be organic, the cow must remain under continuous organic management. This prevents producers from gaming the system by managing cows as organic only during the last third of gestation, and otherwise caring for them conventionally.

“Organically managed” means feeding animals 100% organic feed for their entire lives (and the last third of their gestation); avoiding prohibited substances such as growth promoters, plastic feed pellets, formulas containing urea or manure, and mammalian or poultry slaughter by-products; and providing living conditions that accommodate health and natural behaviors, such as allowing access to fresh air, outdoors, exercise, clean and dry bedding and access to pasture for ruminants (7 C.F.R. § 205.239). The rule also requires producers to provide year-round access for all animals to the outdoors, recognize pasture as a crop, establish a functioning

management plan for pasture, incorporate the pasture management plan into their organic system plan (OSP), provide ruminants with pasture throughout the grazing season for their geographical location, and ensure ruminants derive not less than an average of 30 percent of their dry matter intake requirement from pasture grazed over the course of the grazing season (7 C.F.R. §§ 205.102, 205.237, 205.239 and 205.240). If need be, synthetic and non-synthetic substances that are listed on the national list of permitted substances may be used as supplements or additives (7 C.F.R. § 205.237; the list of permitted substances is in 7 C.F.R. § 205.603). It is important to note that the USDA does not issue variances or exemptions when there is an organic feed shortage.

Preventing illness and caring for a sick animal is a point of concern for organic producers (and consumers). Many modern medicines are synthetic, which is contrary to the principles of organics, but allowing animals to suffer in the name of avoiding synthetic chemicals is also contrary to ethical concerns. As much as possible, producers must care for animals in a manner that prevents disease by doing things such as selecting animals appropriate for the environment and the site, providing feed that satisfies nutritional needs, and establishing housing, pasture conditions, and sanitation practices that minimize the spread of disease and reduce stress. However, livestock can be given vaccines to prevent disease and other “veterinary biologics” (products of biological origin) when needed. When these are insufficient, farmers may use synthetic medications that are listed on the national list of allowed substances (7 C.F.R. 205.238). The NOP prohibits all antibiotics, but it also prohibits denying an animal medical treatment with the intention of preserving the animal’s organic status. This is a careful balancing act, as farmers cannot market meat as organic if the animal received any antibiotics. Dairy products, however, can be organic if the farmer manages the cow organically for a year after she received antibiotics.

C. Handling and Processing

In addition to certification of the production process, the NOP requires processing and handling facilities to obtain organic certification (7 C.F.R. § 205.100). Handling means to “sell, process, or package agricultural products” (7 C.F.R. § 205.2). If a facility handles organic and non-organic agricultural products, only the portion that handles the organic product needs organic certification (7 C.F.R. § 205.100). However, the facility must implement practices to prevent the comingling of organic and non-organic agricultural products (7 C.F.R. § 205.272), including not using storage containers that have been treated with prohibited substances or have held products that were treated with prohibited substances. For a handling facility to receive certification, it must have an organic handling plan (7 C.F.R. § 205.201), only use allowed substances and avoid prohibited substances as listed in sections 205.602 through 205.606 (7 C.F.R. §§ 205.105 and 205.270), and maintain appropriate records (7 C.F.R. § 205.103). As far as actual process methods are concerned, the NOP generally allows any mechanical or biological

process, including cooking, curing or fermenting, packaging, canning and jarring (7 C.F.R. § 205.270).

For direct farm businesses seeking to both grow and process organic products, it is critical to work carefully with the certifying agent to design a compliant processing method to maintain the “organic” status of the final product.

Retail food establishments who receive and sell products labeled as organic are usually exempt from certification, but they must nonetheless maintain proper records and comply with the requirements for the prevention of comingling (7 C.F.R. § 205.101).

Further Resources – Organic Marketing

National Organic Program (NOP)

1. For more information on the USDA's organics program, including a list of banned and allowed substances, visit their **website**:

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

2. The National Sustainable Agriculture Research and Education program (SARE, which is a branch of the USDA) has published a guide, **Transitioning to Organic Production**, which addresses some of the difficulties a farmer can encounter and lists resources for assistance.

<http://www.sare.org/publications/organic/organic.pdf>

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

http://attra.ncat.org/attra-pub/summaries/organic_certification.html

State-Level Resources

1. The New York Department of Agriculture and Markets **Organic Farming Information Center**

<http://www.agriculture.ny.gov/AP/organic/ConsumerInformation.html>

IV. CHECKLIST

If you want become certified as organic, you will need to:

- Research, study, and learn as much as you can about organic practices. Switching to organic takes time and requires considerable labor investments – you do not want to make a mistake that costs you money, or worse yet, prevents certification.
 - Talk to other producers in your area to learn about your local market and what grows well in your area.
 - Attend conferences, workshops, and training sessions on growing and marketing organic products.
- Develop an Organic System Plan, a record keeping system, and a business and marketing plan. Make sure your plans are consistent with each other.
- Research and choose an organic certifying entity. Make sure the certifier has experience certifying your type of production, then obtain their information on what you need to do.
- Start transitioning crops and animals to organic production practices. Keep good records!
- Contact your chosen certifying agent, obtain certification, and start marketing.

KEY CONTACT INFORMATION New York Department of Agriculture & Markets

Organic Farming Development and Assistance

Ph: (518) 457-4531

GLOSSARY OF TERMS

Adulterated: The full legal concept of adulteration is complex, but essentially, a food is “adulterated” if it contains any poisonous or added deleterious substance which may render it injurious to health or if it consists of or has been exposed to a diseased, contaminated, filthy, putrid, or decomposed substance during production, preparation, or packaging, or if held under unsanitary conditions.

Agency (agent): A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.

Agricultural Enterprise: Agriculturally-related activities performed by any person(s) for a common business purpose. This includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units. This could include a leasing of a department of another establishment.

Agronomic Rate: A specific rate of application that provides the precise amount of water and nutrient loading, which selected grasses/crops require without having any excess water or nutrient percolate beyond the root zone.

Amortization: The paying off of debt in regular installments over time; the deduction of capital expenses over a specific period of time.

Annex: To incorporate territory into the domain of a city, county, or state.

Articles of Incorporation: A document that dictates the management of the affairs of a corporation, including the purpose and duration of the corporation and the number and classes of shares to be issued by the corporation.

Assumed Name: (also known as "doing business as" or "d/b/a"): The name under which a business operates or by which it is commonly known.

Assumption of the Risk: A legal concept in negligence (tort) law wherein an individual knows of or is otherwise aware of a risk posed by a particular activity and nonetheless engages in the activity. The doctrine thus limits that individual's right to hold others liable for injuries incurred as a result of engaging in the activity. Assumption of the risk most commonly arises in the context of employer-employee relationships and agri-tourism.

Business Plan: The business plan helps guide the business owner through the goals, objectives, and marketing and financial strategies of a proposed business. It also may serve as an introduction to potential investors if outside financing is required.

Candling (egg): The use of a bright light source behind the egg to show details of the embryo through the shell.

Case Study: An intensive analysis of an individual unit (such as a person, business, or community) that stresses developmental factors in relation to environment.

Checkoff: A mandatory fee for all producers of a particular commodity that is used to fund commodity-specific research or marketing.

Commercially Available: Under the National Organic Program, the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling as determined by the certifying agent in the course of reviewing the organic plan.

Commodity: A tangible item that may be bought or sold; something produced for commerce.

Commodity Agriculture: The agricultural production of commodities with the primary objective of farming being to produce as much food/fiber as possible for the least cost. It is driven by the twin goals of productivity and efficiency.

Common Law: The body of laws and rules that courts create as they issue decisions.

Consideration: A vital element in contract law, consideration is something (i.e., an act, forbearance, or return promise) bargained for and received by a promisor from a promisee. It is typically the underlying purpose for entering into a contract.

Contract: A legally enforceable agreement between two or more persons involving an offer, acceptance, and consideration. It may be oral or written.

Cooperative: A user-owned and controlled business that generates benefits for its users and distributes these benefits to each member based on the amount of usage.

Copyright: (1) The right to copy a work, specifically an original work of authorship (including a literary, dramatic or other work) fixed in any tangible meaning of expression, giving the holder exclusive right to reproduce, distribute, perform, or otherwise control the work. (2) The body of law related to such works.

Corporation: a separate legal entity in which the owners (shareholders) are not personally responsible for the liability of business.

- **S corporations** elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes to avoid double taxation.
- **C corporations** are separate taxpaying entities that conduct business, realize net income or loss, pay taxes, and distribute profits to shareholders.

Cow-Share Program: A program in which consumers sign a contract to purchase a “share” in a cow or herd and pay the farmer to care for and milk the cows. The consumer then receives the milk from “their” cow without technically “purchasing” the milk.

De Minimis: something so small that it would be inconvenient and unreasonable to keep an account of; the impact is insubstantial.

Depreciation: A decline in an asset's value due to use, wear, obsolescence, or age.

Double Taxation: The government taxes the corporation on its profits and the owners/shareholders also pay individual income tax on profits distributed as dividends from the same corporation.

Estate Plan: The preparation of a plan to carry out an individual's wishes as to the administration and disposition of his/her property before or after death.

Excise Tax: A tax levied on the purchase of a specific good as opposed to a tax that generally applies to the sale of all goods.

Farm Labor Contractor (FLC): Any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other consideration, performs recruiting, soliciting, hiring, employing, furnishing, or transporting of any migrant or seasonal agricultural worker.

Feasibility Study: a process used to analyze an existing business opportunity or new venture. The questions on a feasibility checklist concentrate on areas one must seriously consider to determine if an idea represents a real business opportunity.

Good Faith: Acting honestly, fairly, and with a lawful purpose without malice or any intent to defraud or take unfair advantage. Whether a party has acted in good faith is often an issue that the court or the jury has to decide in a lawsuit.

Grading: USDA certification that a product is of a particular quality.

Grandfather Clause: A portion of a statute that provides that the law is not applicable in certain circumstances due to preexisting facts.

Gross receipts: All considerations received by the seller, except trades in personal property.

Halal: an Islamic term that refers to something lawful or acceptable.

Hazardous Positions: In the employment context, hazardous positions include, but are not limited to, operating large farm machinery, working in enclosed spaces with dangerous animals (studs and new mothers), working from a ladder or scaffold more than 20 feet high, working inside certain spaces such as manure pits, and handling hazardous chemicals.

Health Claim: A health claim describes a relationship between the food (or component of it) and the reduction of the risk of a disease or health-related condition.

Hold Harmless: A provision in an agreement under which one or both parties agree not to hold the other party responsible for any loss, damage, or legal liability.

Injunction (prohibitory): An order of a court commanding a person, corporation, or government entity to stop doing something and/or refrain from doing such actions in the future.

Intellectual Property: Creations of the mind; inventions, literary and artistic works, and symbols, names, images, and designs used in commerce, as well as the body of law (trademark, patent, copyright, trade secret) used to protect such works.

Interstate Commerce: The buying and selling of products and services between people and entities located in different states or territories.

Intrastate Commerce: The buying and selling of products and services within a single state.

Joint and Several Liability: A legal obligation under which a party may be liable for the payment of the total judgment and costs that are associated with that judgment, even if that party is only partially responsible for losses inflicted.

Karst Area: Area(s) where surface water easily flows through rock formations to ground water, posing potential risks for contamination of groundwater

Kosher: The term for foods that comply with Jewish dietary laws.

Livestock Management Facility: Any animal feeding operation, livestock shelter, or on-farm milking and accompanying milk-handling area.

Man-day: Any day where an employee performs agricultural labor for at least one hour.

Material Representation: A convincing statement made to induce someone to enter into a contract to which the person would not have agreed without that assertion.

Migrant Agricultural Worker: An individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

Misbranding: The label, brand, tag or notice under which a product is sold is false or misleading in any particular as to the kind, grade or quality or composition.

Negligence: a tort law concept; the failure to exercise the standard of care that an ordinary, prudent and reasonable person would exercise under the circumstances.

Notice-and-Comment Rulemaking: A rulemaking process by which government agencies provide the public with an opportunity to participate in the interpretation of laws by giving feedback on draft regulations.

Nuisance: A substantial interference, either by act or omission, with a person's right to use and enjoy their property.

- **Public Nuisance:** An interference or invasion that affects a substantial number of people, or an entire neighborhood or community

- **Private Nuisance:** An interference or invasion that affects a single party, or a definite, small number of individuals in the use or enjoyment of private rights.

Nutrient Content Claims: These claims characterize the level of a nutrient in a food; they must be approved by FDA.

Organic: A system of food production that is managed in accordance with the Organic Foods Production Act of 1990 to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that promote biodiversity and ecological balance. Organic certification is managed by the Agricultural Marketing Service (AMS) division of the U.S. Department of Agriculture.

Output Contract: A written agreement in which a producer agrees to sell its entire production to the buyer, who in turn agrees to purchase the entire output.

Partnership: A partnership (also known as general partnership) is an association of two or more persons who combine their labor, skill, and/or property to carry on as co-owners of a business for profit.

Patent: a patent grants the inventor the right to exclude others from making, using, or selling the invention in the United States or 'importing' the invention into the United States for a limited period, generally 20 years.

Piecework: Work completed and paid for by the piece.

Prima-facie: Latin for "at first sight." In law, an evidentiary standard that presumes particular evidence proves a particular fact; however, the fact may be disproven by providing contradictory evidence.

Processing: The manufacturing, compounding, intermixing, or preparing food products for sale or for customer service.

Procurement Contract: A term that refers to contracts used by governments and institutions to acquire products.

Properly Implemented: An administrative law concept that requires agencies to issue rules according to state or federal administrative procedure.

Qualified Health Claim: A health claim where emerging scientific evidence suggests the claim may be valid, but the evidence is not strong enough to meet the standard necessary to be a health claim; must be pre-approved by FDA.

Raw Agricultural Commodity: Any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form before marketing.

Real Property: Land and anything growing on, attached to, or erected upon it, excluding anything that may be severed without injury to the land.

Requirements Contract: A contract in which a buyer promises to buy and a seller promises to supply all the goods or services that a buyer needs during a specified period. The quantity term is measured by the buyer's requirements.

Respondeat Superior: In tort law, the doctrine holding an employer or principal liable for an employee's or agent's wrongful acts committed within the scope of the employment or agency.

Retailers' Occupation Tax: A tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption.

Sales Tax: A combination of occupation taxes (imposed on a business' receipts from the sale of goods used or consumed) and use taxes (imposed on consumers that purchase items for personal use or consumption from a business).

Seasonal Agricultural Worker: An individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence-

1. When employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or
2. when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.

Setback: The distance a facility must be from property lines or neighboring residences.

Sole Proprietorship: A business owned and operated by one individual.

Statute: a federal or state written law enacted by the Congress or state legislature, respectively. Local statutes or laws are usually called "ordinances." Regulations, rulings, opinions, executive orders and proclamations are not statutes.

Tangible Personal Property: A term describing personal property that can be physically relocated. The opposite of real property, in a sense, as real property is immovable.

Technical Bulletins: Non-binding guidance documents published by agencies that facilitate consistent interpretation and application of the regulations issued by the agency.

Three-Tier Distribution System: In the alcohol supply chain, a system that requires manufacturers to sell with distributors, who sell with retailers, who then may sell the product to the end consumer.

Tort: An injury or harm to another person or person's property that the law recognizes as a basis for a lawsuit.

Trade Dress: A design, packaging, or other element of appearance that is both nonfunctional and distinctive.

Trademark: An identification used to distinguish goods and services from those manufactured or sold by others – it is the symbol that customers use to identify a product and equate with goodwill.

Trade Name: A name used to identify a person's business or vocation (see also ASSUMED NAME).

Trade Secret: Information companies make an effort to keep secret in order to give them an economic advantage over their competitors

Use Tax: A privilege tax imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer.

Veterinary Biologics: Products of biological origin that are used to diagnose and treat animal diseases.